

Michigan Law Review

Volume 103 | Issue 6

2005

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Recommended Citation

Nora V. Demleitner, *Is There a Future for Leniency in the U.S. Criminal Justice System?*, 103 MICH. L. REV. 1231 (2005).

Available at: <https://repository.law.umich.edu/mlr/vol103/iss6/6>

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IS THERE A FUTURE FOR LENIENCY IN THE U.S. CRIMINAL JUSTICE SYSTEM?

*Nora V. Demleitner**

HARSH JUSTICE: CRIMINAL PUNISHMENT AND THE WIDENING DIVIDE BETWEEN AMERICA AND EUROPE. By *James Q. Whitman*. New York: Oxford University Press, 2003. Pp. viii, 311. \$39.95.

The spring 2004 release of the gruesome pictures of sexual humiliation and torture at Abu Ghraib prison outside of Baghdad revealed how some U.S. troops, intelligence officers, and private contractors treated Iraqi prisoners taken during and after the war. High-ranking government officials may have condoned, if not encouraged, the abuses. Only reluctantly have they agreed to extend protections customarily accorded civilians and military fighters during a war to individuals detained in Iraq and Afghanistan.¹

As Congressional investigations appear to have stalled, military inquiries have been manifold but resultless. Only a handful of low-ranking soldiers have been court-martialed, and a few have received relatively minor penalties. The public outcry has subsided, and no further charges or operational changes can be expected.

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1. Seymour M. Hersh, *The Gray Zone*, NEW YORKER, posted May 15, 2004, at http://www.newyorker.com/fact/content/?040524fa_fact; Seymour M. Hersh, *Torture at Abu Ghraib*, NEW YORKER, posted Apr. 30, 2004, at http://www.newyorker.com/fact/content/?040510fa_fact.

The latest memorandum issued by the Department of Justice has disavowed earlier memoranda that appeared to condone torturous conduct and develop legal excuses and justifications for it. See U.S. DEPT OF JUSTICE, OFFICE OF LEGAL COUNSEL, MEMORANDUM FOR DEPUTY ATTORNEY GENERAL JAMES B. COMEY (Dec. 30, 2004), at <http://www.usdoj.gov/ofc/dagmemo.pdf>. However, the Bush administration continues to deny prisoner of war status and the protections of the Geneva Conventions to individuals held in Guantánamo and undisclosed locations around the world.

Similar allegations of prisoner maltreatment and torture have been raised against British soldiers, some of whom have been court-martialed. In contrast to the reaction in the United States, the allegations appear to have triggered a broad discussion about the war in the British public. Severin Carrell & Raymond Whitaker, *Special Report: British Abuse Trial*, INDEPENDENT SUNDAY (London), Jan. 23, 2005, at 10.

At least two of the soldiers charged in the scandal had been prison guards in their civilian lives.² The methods they used at Abu Ghraib, which focused on humiliating the prisoners and inflicting emotional and physical pain, were the same as those employed in our prisons and immigration detention facilities at home. In late November 2004, the Department of Homeland Security ordered the Passaic County Jail and other facilities holding immigrant detainees to stop using dogs around them.³ The pictures of Abu Ghraib's snarling dogs burst into one's mind. To make matters worse, in both cases torturous tactics were employed against individuals not convicted of any offense. Many of the victims had been the targets of mandatory detention policies applicable to certain immigrants or of misunderstandings and baseless denunciations during the war.

Policies involving torture and abuse of those unfortunate enough to be caught in the U.S. criminal justice system or its equivalent abroad apparently will only change upon publicity and substantial public pressure. The latter has been virtually absent with regard to detainees held outside the continental United States. Accountability remains low. Contrast this with the following two torture scandals that have rocked Germany in recent years.

The first involved the former police vice-president of Frankfurt, Wolfgang Daschner. In October 2002, the Frankfurt police had arrested Magnus Gäfgen, who was accused of kidnapping an eleven-year-old boy. Daschner allegedly ordered that Gäfgen be threatened with physical torture to save the child. Gäfgen admitted that the boy was already dead, and the threatened torture never occurred. Even though it took a few months until investigations of Daschner started, he was removed from his post and has been prosecuted.⁴ Government

2. Judith Greene, *From Abu Ghraib to America: Examining our harsh prison culture*, 4 IDEAS FOR AN OPEN SOCIETY 1, 4, Oct. 2004, at http://www.soros.org/resources/articles_publications/publications/ideas_20041004/optimized1.pdf.

3. See National Public Radio, *Jailed Immigrants Allege Abuse: Government Halts Use of Dogs Around Detainees*, ALL THINGS CONSIDERED, Nov. 30, 2004, [hereinafter NPR 1], at <http://www.npr.org/templates/story/story.php?storyId=4173030>. The order resulted apparently from a series on National Public Radio detailing the abuse of immigrants detained at Passaic County's jail. See National Public Radio, *Jailed Immigrants Allege Abuse* (pts. 1 & 2), ALL THINGS CONSIDERED, Nov. 17 & 18, 2004, [hereinafter NPR 2] (describing Daniel Zwerdling's two-part investigation into prison abuse allegations), at <http://www.npr.org/templates/story/story.php?storyId=4170152> and <http://www.npr.org/templates/story/story.php?storyId=4173701>.

4. Jürgen Dahlkamp et al., "*Machen Sie das!*", DER SPIEGEL, Nov. 15, 2004, at 42. Daschner was convicted but received only a warning and the threat of a fine if he were to commit another offense within the next twelve months. The German public would have preferred an acquittal. See Detlef Esslinger, *Mildes Urteil im Folter-Prozess*, SÜDDEUTSCHE ZEITUNG, Dec. 20, 2004, at www.sueddeutsche.de/deutschland/artikel/87/45042/; Detlef Esslinger, *Haltung bewahren*, SÜDDEUTSCHE ZEITUNG, Dec. 20, 2004, at www.sueddeutsche.de/deutschland/artikel/84/45039/.

officials, including the police, condemned the actions and vowed that torture would remain unlawful under all circumstances.

Even more highly publicized have been recent allegations of abuses and even torture within the German military. During training sessions, draftees and professional soldiers have been seriously injured, including through electroshocks, and have suffered substantial trauma.⁵ Criminal investigations have been started, and the abuses have reinvigorated the debate about the draft in Germany.

As these cases indicate, the governmental responses to allegations of torture in the United States differ dramatically from those in Germany. In Germany, a public debate has surrounded the two cases, which have led to substantial investigations and ultimately criminal prosecutions. The government has frequently reasserted that, except in the most dire emergency, torture is impermissible and that even the threat of torture cannot be condoned.⁶ In the United States, however, the torture debate has quickly subsided with no substantial changes resulting from the events.⁷ Neither the abuses at Abu Ghraib nor continuing allegations about abuses at Guantánamo have brought about a heartfelt disavowal of methods of torture.⁸

What may explain these differences? Are they solely a function of the current political powers in place, or do they rather reflect a dramatically different attitude toward the treatment of individuals? James Q. Whitman's *Harsh Justice: Criminal Punishment and the Widening Divide between America and Europe*⁹ sees divergent punishment practices in Germany and France on the one hand and the

5. See, e.g., "Geiselaft"-Affäre — Bundeswehr-Übung: Schläge für Soldaten, FRANKFURTER ALLGEMEINE, Dec. 2, 2004, at <http://www.faz.net/s/Rub28FC768942F34C5B8297CC6E16FFC8B4/Doc~EBD5D7D24C5DD41619A15CB2CC9EF7F38~ATpl~Ecommon~Scontent.html>; *Struck berichtet über zehn Mißhandlungsfälle*, FRANKFURTER ALLGEMEINE, Dec. 1, 2004, at <http://www.faz.net/s/Rub28FC768942F34C5B8297CC6E16FFC8B4/Doc~E9BB0D5856B5347A388780438D52BD913~ATpl~Ecommon~Scontent.html>.

6. See, e.g., *CDU-Politiker gegen Folter*, Frankfurter Allgemeine Zeitung (FAZ), Feb. 27, 2003, at www.faz.net; Hans Holzhaider & Joachim Käppner, *Staatsanwälte klagen Polizisten wegen Folterdrohung an*, Sueddeutsche Zeitung, Feb. 20, 2004, at www.sueddeutsche.de/panorama/artikel/149/27122/print.html. Upon being charged, the police vice-president was immediately removed from his position; the police union agreed with the charge while another police organization expressed hope that the court would find an excusable emergency situation, especially since the accused himself had noted the threat in the file. *Id.* But see *Koch äußert Verständnis für Gewaltandrohung*, Frankfurter Allgemeine Zeitung (FAZ), Feb. 22, 2003, at www.fax.net (governor of a German state states that he understands why threat was uttered).

7. During the presidential contest leading up to the 2004 election, both candidates barely mentioned Abu Ghraib or discussed the use of torture. See, e.g., Frank Rich, *On Television, Torture Takes a Holiday*, N.Y. TIMES, Jan. 23, 2005, § 2, at 1.

8. See, e.g., Editorial, *The System Endures*, WASH. POST, Dec. 5, 2004, at B6.

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United States on the other as a reflection of long-standing historical differences.¹⁰ His outstanding comparative account is required reading for anyone interested in penal practices in any of these countries, especially the United States. It can help explain the growth of the penal industrial complex in the United States and its increasing harshness. Not surprisingly, those attitudes explain the country's acquiescence in, if not approval of, torturous conduct toward prisoners and alleged insurgents and terrorists, which has been condemned by some of the United States' closest allies.

In a thoroughly researched book that draws on a wide variety of sources from all three countries, Whitman presents innumerable fascinating details about the historical development of sentencing at home and abroad and debunks a variety of myths in doing so. His excellent overall knowledge of sentencing developments on both sides of the Atlantic merges with his deep insights into other cultural, political, and legal traditions, especially in the areas of privacy and insult.

Whitman asserts that traditions of status and of state authority help explain the development of punishment practices. Social and political hierarchies have led to mild punishments in Europe while a weak state and egalitarianism have caused more degrading and harsh punishment in the United States. In France and Germany, the forms of punishment and types of treatment reserved for high-status individuals in the eighteenth and nineteenth centuries have been expanded to cover all criminal offenders. In contrast, low-status treatment, akin to the status of slaves, has become the norm for all criminals in the United States.

In his account, Whitman takes issue with sociological analysis. He notes that punishment practices in the United States have proven Emile Durkheim, one of the nineteenth century's foremost sociologists, wrong. Durkheim had hypothesized that contracts would replace status. As a result, punishment would turn milder.¹¹ False, according to Whitman. Even though contracts have changed human relations, they have not replaced status, as Durkheim had predicted. Status, and especially its distribution, remains crucial, Whitman notes. In the United States, the tide has turned against high-status treatment; in Continental Europe, "[there has] been a revolution in favor of social honor, in favor of generalizing high status" (p. 196). Whitman

10. Throughout the book Whitman refers to the United States as "America," terminology casually used here as well as in Europe.

11. See, e.g., EMILE DURKHEIM, *THE DIVISION OF LABOR IN SOCIETY* 44 (1984); Emile Durkheim, *Two Laws of Penal Evolution*, in *THE RADICAL SOCIOLOGY OF DURKHEIM AND MAUSS* 21 (Mike Gane ed., 1992).

ascribes this development largely to the fact that the United States has never treated high-status persons as criminals (p. 197).

Part I of this Review will provide an overview of Whitman's book, his underlying assumptions, and analysis. Part II analyzes one of the most important and thought-provoking questions arising from Whitman's work: How do the current approaches to punishment fit with notions of democracy? Part III critiques Whitman's work for failing to explain sufficiently the reasons for the harshness disparity that began in the 1970s and has developed between France and Germany on the one hand and the United States on the other. If history is destiny, how can one account for the largely parallel trajectories until the early 1970s? In the end, Whitman's account may have erred by attempting a single explanation for a multifaceted issue. Despite their initial appeal, such theories "have a poor track record."¹² Finally, Part IV will explore the meaning of select themes for the future of leniency and harshness on both sides of the Atlantic.

I. JAMES Q. WHITMAN'S *HARSH JUSTICE*

Harsh Justice contrasts harshness and degradation with mercy and dignity. While the former are increasingly associated with criminal punishment in the United States, the latter characterize sentencing in Europe. Since Whitman lays out the major themes of his work and summarizes his thesis in the Introduction, for the time-pressed reader those fifteen pages provide a cogent analysis.

Somewhat surprisingly, Whitman situates *Harsh Justice* as a unique way of looking at punishment in the United States by strongly rejecting current (and past) sociological accounts of punishment as insufficiently comparative. Such accounts, to Whitman, are flawed as they overlook the crucial role status plays — a role only comparative analysis can reveal.

A. *Status: Crucial but Undefined*

According to Whitman, to punish a person means to treat her as inferior (p. 21); to degrade her means that punishment has become pleasurable and status elevating (p. 23). While punishment occurs in all three countries Whitman discusses, only in the United States has it turned into permanent degradation.

12. Gregg Easterbrook, *There Goes the Neighborhood*, N.Y. TIMES, Jan. 30, 2005, § 7 (Book Review), at 10 (critiquing Jared Diamond's book, *Collapase*, for presenting a single-explanation theory with regard to the comparative rise of Europe).

The pictures documenting the abuse of Iraqi prisoners at Abu Ghraib are emblematic of degrading treatment.¹³ The degradation of others, not unlike torture, corrupts all of society. That lesson, however, the United States has yet to learn; instead, it appears to export degradation. But degradation does not have to come solely in the form of individual abuse. Whitman deems the layout of American prisons a form of systemic degradation that denies both individualism and privacy (pp. 59-62, 64-65).¹⁴ While Whitman does not suggest changes to American punishment practices, it is obvious that systemic degradation, rather than its individual instances, is much more difficult to attack, undermine, and destroy, in part because it has become a way of life.¹⁵

For Whitman, degrading punishment is closely related to “traditions and practices of social status” (p. 26). Paradigmatic examples of such punishment, which lead to a permanent denial of status, are deprivation of rank, especially in the military, and mutilation.¹⁶ Status abuse becomes more important when status hierarchies begin to change or collapse (p. 30), a development that may be emblematic of the United States. Unfortunately, this remains an intriguing but largely unexplored idea in *Harsh Justice*.

Whitman rejects the notion that all punishment necessarily amounts to status abuse, as he argues that status abuse is not a feature of punishment in Europe today. Quite to the contrary, “reverse status abuse” has occurred there which accords all offenders high-status treatment (p. 31).

Omitted in Whitman’s analysis of “status,” though, is a clear definition of the term — a glaring contrast given the lengths to which Whitman goes to define “harshness.”¹⁷ Who are high-status individuals in the United States today? Is status measured in terms of income, wealth, character, or employment? German definitions of status

13. The pictures remain available on the Internet. See, e.g., Wikipedia, *Abu Ghraib torture and prisoner abuse*, at http://en.wikipedia.org/wiki/Abu_Ghraib_prisoner_abuse (last visited Mar. 20, 2005).

14. See, e.g., Kate Murphy, *After Enron, a Sunless Year in a Tiny Cell*, N.Y. TIMES, June 20, 2004, § 3, at 5 (describing the prison conditions awaiting Lea Fastow, a former assistant treasurer of Enron and the wife of Andrew Fastow, one of the lead defendants in the case against Enron officials); Jamie Fellner, Human Rights Watch, *Prisoner Abuse: How Different are U.S. Prisons?* (May 14, 2004), at http://hrw.org/english/docs/2004/05/14/usdom8583_txt.htm.

15. Systemic inequalities have traditionally been difficult to abolish, in part because only few of those benefiting from the existing system have occasion to attack it. Specific examples are “separate but equal” and desegregation during the 1950s and 1960s, or the abolition of South Africa’s apartheid regime.

16. In modern times, mutilations are frequently used to permanently mark someone as an outcast by reminding her and society of an otherwise hidden degradation. See, e.g., Nicholas D. Kristof, *Dare We Call It Genocide?*, N.Y. TIMES, June 16, 2004, at A21.

17. See *infra* Part I.B.

appear to focus on the educational attainment and income of one's parents.¹⁸

Whitman notes the absence of "a proper correspondence between status, wealth, and respectful treatment" (p. 30) but does not further elucidate the content of the term "status." Nevertheless, recent prosecutions of those he would presumably consider high-status individuals support his point: Sol Wachtler, the former chief justice of the New York Court of Appeals; O.J. Simpson, football star and actor; Webster Hubbell, Associate Attorney General during the Clinton administration; Martha Stewart, the undisputed queen of good housekeeping; Kobe Bryant, professional basketball player; and Michael Jackson, the world-famous reclusive pop star. America seems to revel at the sight of corporate executives, such as Andrew Fastow and Dennis Koslowski, in handcuffs. Even though their wealth enabled all of these individuals to procure first-rate counsel, such legal assistance often could neither protect them from conviction nor shield them from degrading treatment such as the use of handcuffs or intrusive booking procedures. The message is clear: even the wealthy and famous cannot escape punishment and degradation.

In accordance with Durkheim's prediction, the punishment of such high-status offenders, if convicted, may "mobilize popular solidarity" (p. 44). It could help shore up an otherwise weak state and deny increasingly vast differences in wealth and status. As the gap between the super-wealthy and the average American has increased dramatically in the last few decades, the harsh and degrading treatment of the wealthy and famous upon their convictions appears to level the playing field and reaffirm the American dogma that all are treated alike. What does it mean to be treated equally — equally harshly?

B. *Defining Harshness*

Whitman entitles his book "*Harsh Justice*" (emphasis added), an indicator that his focus is on explaining punishment in the United States. In defining harshness, he focuses on harshness in criminalization, harshness in punishment, and available forms of mercy (p. 33). To bolster his hypothesis that the United States is uniquely harsh, Whitman harnesses a vast array of facts. Some of his analysis, however, appears to overstate his point.

18. See, e.g., *Deutschland besser, aber "ungerechter" bei Pisa*, FRANKFURTER ALLGEMEINE, Dec. 5, 2004, at <http://www.faz.net>.

1. Criminalization

Whitman defines criminalization to encompass conduct and certain groups of individuals (p. 33). Conduct criminalized in the United States includes high-level white collar offenses, terrorism-related crimes, and some sex or morals offenses (pp. 43-45). Since some sex offenses have been decriminalized,¹⁹ as described by Whitman, it might be more accurate to label the offenses that are being criminalized — marital rape, domestic violence, pornography, and stalking — crimes committed largely against women and children. In the wake of highly publicized acts of terrorism, terrorism-related crimes, such as money-laundering, increasingly have been criminalized. Criminalization in the United States implies the demonization of the offense and the offender. Even *mala prohibita* crimes are characterized as inherently evil to justify acting against them.

Europe, on the other hand, has decriminalized or even legalized an increasing number of morals offenses, such as prostitution and drug offenses. Most of us are familiar with the liberal Dutch policies pertaining to cannabis and the legalization of prostitution.²⁰ Americans, however, may be less familiar with the Swiss drug projects and the decriminalization of prostitution in Germany. It may be even harder for us to imagine a debate in the United States akin to the one recently held in Germany concerning the decriminalization of minor thefts. At the time, the Green Party, part of the ruling coalition government, proposed making minor thefts a mere civil violation rather than a criminal offense. While U.S. law recognizes civil sanctions for crimes, they have been in addition to, rather than as replacements of, criminal sanctions.²¹

19. See, e.g., *Lawrence v. Texas*, 539 U.S. 558 (2003) (striking down Texas statute making same-sex sodomy a criminal offense).

20. See, e.g., Netherlands Ministry of Foreign Affairs, *Q&A Drugs — 2003: A Guide to Dutch Policy*, at http://www.minbuza.nl/default.asp?CMS_TCP=tcpAsset&id=175A6D3F70164607A386D43B61DC135FX2X42819X14 (2003) (last visited Apr. 15, 2005); Netherlands Ministry of Foreign Affairs, *Dutch Policy on Prostitution: Questions and Answers* (2004), at http://www.minbuza.nl/default.asp?CMS_TCP=tcpAsset&id=DD4FBBCB6EE14102A58AAA13FEA22B43 (last visited Apr. 15, 2005). Even though the Netherlands has now legalized prostitution, Sweden has moved to criminalize it, for the client/customer only. Ministry of Industry, Employment, and Communications, *Fact Sheet: Prostitution and Trafficking in Women* (Oct. 2004), at <http://www.sweden.gov.se/content/1/c6/03/16/13/110ab985.pdf> (last visited Apr. 15, 2005). While this may counter the European trend, it fits with developments in the United States geared to the protection of women. Sweden, although known for its liberalism, has taken a harsher position against drug and sex offenses than many other European countries. See, e.g., Ingmarie Froman, *Sweden Mobilizes Against Drugs*, Jan. 16, 2004, at http://www.sweden.se/templates/cs/Article_7823.aspx (last visited Apr. 15, 2005).

21. Through the plea bargaining process civil sanctions may come to replace criminal penalties.

On the other hand, many actions criminalized in the United States for years have just recently been defined as crimes in Europe. For example, Europe has followed the American example with regards to the criminalization of white-collar offenses, according to Whitman, but usually without the imposition of severe punishment. This may change, though, as economic crimes of greater magnitude occur in Europe. European women's rights groups, many with international connections, have also advocated the criminalization of marital rape, prostitution, pornography, human trafficking, and domestic violence that are now being increasingly prosecuted and severely punished in the United States. Finally, as terrorism-related offenses become enshrined in international treaties, their prosecution becomes obligatory around the world.

It is the criminalization of classes of persons, such as minors, where Whitman sees a starker difference between Europe and the United States. While many Germans consider fourteen, the age of criminal liability in Germany, too high,²² almost no European would defend a life without parole sentence imposed on a twelve-year-old, as occurred in Florida.²³ The special treatment of juveniles and young adults, however, has come under attack in Germany as well. For example, Germany's opposition parties have proposed that *Sicherungsverwahrung*, a form of potentially indefinite civil commitment for sex offenders and a few other criminals, be extended even to those under eighteen years of age, effectively threatening them with a life sentence.²⁴

In his definition of criminalization, Whitman also includes harshness in grading, where the United States has taken the lead. Much of this is due to increased punishment for recidivists and for "crimes of the day" (pp. 56-57). Sanctions for sex offenders have increased throughout the 1990s, and in this decade;²⁵ crimes against

22. For a review of data and issues pertaining to the age of criminal liability, see Gregor Urbas, *The Age of Criminal Responsibility*, TRENDS & ISSUES IN CRIME & CRIM. JUST., (Australian Institute of Criminology, Canberra, Austl.), Nov. 2000, at <http://www.aic.gov.au/publications/tandi/ti181.pdf> (last visited Apr. 15, 2005).

23. See, e.g., Stephanie Simon, *New Plea Deal Could Free Boy Sentenced to Life for Murder*, L.A. TIMES, Dec. 27, 2003, at A15. Lionel Tate was released in January 2004 following an agreement between the prosecution and the defense that he would plead guilty to manslaughter. The plea agreement occurred after an appellate court threw out his murder conviction, which had led to an automatic life sentence. See, e.g., Duncan Campbell, *Parole for youth given life jail sentence*, GUARDIAN, Jan. 27, 2004, at 19.

24. Hans-Jörg Albrecht, *Security Gaps Responding to Dangerous Sex Offenders in the Federal Republic of Germany*, 16 FED. SENTENCING REP. 200, 206 (2004); Nora V. Demleitner, *Abusing State Power or Controlling Risk?: Sex Offender Commitment and Sicherungsverwahrung*, 30 FORDHAM URB. L.J. 1621 (2003).

25. The U.S. Sentencing Commission enhanced sentences for sex offenses multiple times, usually upon congressional demand. See, e.g., U.S. Sentencing Commission,

women are punished ever more severely. Many of these crimes are characterized as inherently evil, a function of lesser state power in the United States and the influence of Christian revival (p. 64). On the other hand, Europeans have downgraded many offenses, especially morals crimes, to *delits* or *Ordnungswidrigkeiten* or decriminalized them. This may be an overstated difference, though, as Europeans have also increasingly sanctioned sex offenders.²⁶

Inflexible doctrines of criminal liability and harshness in enforcement may also contribute to harshness in criminalization. Whitman notes no changes in doctrines of criminal liability in the United States or Europe. He omits the important doctrinal change that occurred with regard to the insanity defense, which Congress modified after John Hinckley attempted to assassinate President Reagan. Not only did Congress restrict the substantive defense, but it also put the burden on the defendant to show the existence of a mental disease or defect that made it impossible for him to appreciate the wrongness of his action.²⁷ Many states followed the federal model so as to make it more difficult for defendants to show insanity. Also, the Supreme Court has sanctioned a state's decision to remove intoxication as a defense even for purposeful offenses.²⁸ In Europe, on the other hand, "flexibility in doctrines of liability is gradually being replaced by flexibility in the application of punishment" (p. 84). Because of individualized punishment, doctrines of liability may be of lesser importance in determining mildness.

Somewhat surprisingly, Whitman offers no judgment how enforcement, his last component of criminalization, compares between the United States and Europe (p. 84). While he may be right that "[i]t is too empirically difficult to form any firm sense of how continental law should be measured by this category" (p. 84), one is left

Sentencing Federal Sexual Offenders: Protection of Children from Sexual Predators Act of 1998 (Feb. 14, 2000), at <http://www.ussc.gov/sexpred/sexpred.htm> (last visited Apr. 15, 2005). See also Feeney Amendment to the Prosecutorial Remedies and Other Tools to End the Exploitation of Children Today (PROTECT) Act, Pub. L. No. 108-21, 117 Stat. 650 (2003) (codified in scattered sections of 18 U.S.C. and 28 U.S.C.).

For changes to state sentencing guidelines, see, e.g., Richard S. Frase, *Sentencing Guidelines in Minnesota, 1978-2003*, 32 CRIME & JUST. 131, 163 (2005); David Boerner & Roxanne Lieb, *Sentencing Reform in the Other Washington*, 28 CRIME & JUST. 71 (2001). In addition, collateral sanctions have been substantially increased on sex offenders. Among the best known are sex offender notification and registration provisions and civil commitment for sex offenders. See, e.g., *Smith v. Doe I*, 538 U.S. 84 (2003); *Hendricks v. Kansas*, 521 U.S. 346 (1997).

26. See, e.g., Albrecht, *supra* note 24.

27. 18 U.S.C. § 17 (2004); see, e.g., Michael L. Perlin, *Unpacking the Myths: The Symbolism Mythology of Insanity Defense Jurisprudence*, 40 CASE W. RES. L. REV. 599, 631-40 (1990) (describing procedural and substantive shifts after Hinckley acquittal based on insanity).

28. *Montana v. Egelhoff*, 518 U.S. 37 (1996).

wondering whether there are not some ways to measure differences in enforcement. Anecdotally, American enforcement appears much harsher, especially in light of zero-tolerance policing initiatives and the "War on Drugs." Empirically, it might be possible to assess law-enforcement density as compared with population or focus on law-enforcement expenditure. While such measures would not be unassailable, they would provide some insight into enforcement harshness. Many researchers indicate that enforcement of the laws, rather than the criminal justice doctrine itself, accounts for the harshness in America's punishment and its racial imbalance. Because of that reality, it seems curious that Whitman would dismiss this factor so cursorily and casually.

2. *Harshness of Punishment*

Whitman highlights three different forms of harshness of punishment: in the law, its application, and its inflexibility (p. 35). Penalty provisions threatening long prison terms for drug offenders and recidivists, including non-violent criminals, have led to an unprecedented growth in the prison population (pp. 56-58). Imprisonment itself has become noticeably harsher, often reverting to nineteenth-century practices, and new, particularly degrading penalties, such as public shaming, have been introduced.²⁹ The latter was initially designed as a reintegrative practice and used in Native communities in Australia and Canada.³⁰ As currently practiced in the United States, however, shaming has become degrading, exclusionary, and stigmatizing rather than reaffirming of membership in society.³¹

Even though many European countries have increased sentences in the last few years, especially for sex offenders, they started from milder punishments, which means that the overall sentences are substantially lesser even today. In addition, neither sentencing judges nor legislatures have been as inventive as Americans with regard to the development of new sanctions.

Most Americans get their information about prisons from movies, many of which display rampant violence, male-on-male rape, and the

29. See, e.g., Note, *Shame, Stigma and Crime: Evaluating the Efficacy of Shaming Sanctions in Criminal Law*, 116 HARV. L. REV. 2186 (2003). Shaming practices are frequently inventions of the sentencing judge. See, e.g., *People v. Meyer*, 680 N.E.2d 315 (Ill. 1997).

30. See generally JOHN BRAITHWAITE, *CRIME, SHAME AND REINTEGRATION* (1989).

31. See, e.g., Toni Massaro, *Shame, Culture, and American Criminal Law*, 89 MICH. L. REV. 1880 (1991); James Q. Whitman, *What Is Wrong with Inflicting Shame Sanctions?*, 107 YALE L.J. 1055 (1998). But see Dan M. Kahan, *What Do Alternative Sanctions Mean?*, 63 U. CHI. L. REV. 591 (1996).

dominance of racially exclusive gangs.³² As Whitman notes, prison conditions have generally improved during the last few decades, in part because of reforms instituted during the 1960s and 1970s, and also because many prisons have been built relatively recently due to the increase in prison-bound offenders. Nevertheless, the reality of imprisonment is not pleasant.

Unless prodded by major negative headlines, neither the judiciary nor legislatures have taken the initiative on prison reforms.³³ It has taken the events of Abu Ghraib to focus attention on prison conditions at home. Sexual degradation, human rights groups tell us, is not uncommon in U.S. prisons, with much of it conducted with the permission, if not active encouragement, of prison guards and administration.³⁴ That two of the people accused of abuses at Abu Ghraib are former prison guards should trouble us,³⁵ but should not be surprising as U.S. prisons report frequent abuses, often due to untrained guards who are unable to deal with prison inmates.³⁶

In contrast, European prison guards are civil servants who have to undergo substantial job training. Prison conditions have substantially improved in Europe, which may help explain the shock Europeans displayed about the events at Abu Ghraib. Some of the differences, however, may be overstated, as Whitman admits. Conditions in French and Italian pre-trial facilities are gruesome.³⁷

With the support of domestic and regional courts, Europeans continue to improve prison conditions. This is true even for pre-trial detention, the dark side of incarceration in Europe. On the other hand, European prisons face the same problems as those in the United

32. See, e.g., *AMERICAN HISTORY X* (New Line Cinema 1998).

33. See, e.g., Brenda V. Smith, *Watching You, Watching Me*, 15 *YALE J.L. & FEMINISM* 225 (2003) (detailing reports by watchdog organizations and government agencies as well as judicial decisions documenting abuses in prisons); Martin A. Geer, *Protection of Female Prisoners: Dissolving Standards of Decency*, 2 *MARGINS* 175 (2002).

34. Congressional legislation aimed at studying rape in prison aims at one scintillating area of abuse. Prison Rape Elimination Act of 2003, 42 U.S.C. §§ 15601-07 (2005).

35. Fellner, *supra* note 14.

36. For a description of the daily work of prison guards, see generally TED CONOVER, *NEWJACK: GUARDING SING SING* (2000). Abuse reports spiked after the terrorist attacks of September 11, 2001. Many of those incarcerated in the wake of those attacks have documented substantial abuse on the part of their jailers. Abuse has also been reported from private prisons and from immigration detention facilities. See, e.g., NPR 2, *supra* note 3.

Some of the individuals sent to Iraq to rebuild the prison system there have had disciplinary complaints and actions against them in the United States. See, e.g., Fox Butterfield, *Mistreatment of Prisoners Is Called Routine in U.S.*, N.Y. TIMES, May 8, 2004, at A11.

37. See, e.g., Joachim Rogge, *Pfahls' Leiden in 'La Santé'*, SCHWABACHER TAGBLATT, Aug. 3, 2004, at 5; INT'L HELSINKI FED'N FOR HUMAN RIGHTS, 2004 IHF ANNUAL REPORT ON HUMAN RIGHTS: ITALY, at http://www.ihf-hr.org/documents/doc_summary.php?sec_id=3&d_id=3860 (last visited June 23, 2004).

States concerning racism and the overrepresentation of ethnic and national minorities.³⁸ Both may lead to the abuse of minority groups in prisons, especially when these groups are demonized by the larger society.

In discussing the harshness of sanctions, Whitman points to the development of alternative punishments (p. 62). While they appear to introduce a touch of mildness, this is only the case when they are imposed instead of a prison sentence rather than replacing a less harsh sentence.³⁹ Instead of imposing a term of probation, as would have occurred in the past, judges now may sentence an offender to a panoply of measures, including, for example, community service and drug treatment. Such “net widening” often leads the offender to end up in prison because he violates some additional alternative sanction.⁴⁰

Most important in the development of harsher punishment may be the acceptance of determinate sentencing, the proliferation of mandatory minimums, pp. 53-55, and, unmentioned by Whitman but nevertheless crucial, the criminalization of technical parole violations. Determinate sentencing in the federal system demonstrates Whitman’s point. Prescribed penalty ranges have cabined judicial discretion. As of April 30, 2003, federal district court judges have been further restricted in their ability to display mildness in punishment and individualize sentences. In an effort to decrease downward departures, i.e., the imposition of a lesser sentence than otherwise prescribed by the federal sentencing guidelines, Congressional legislation in the form of the so-called Feeney Amendment has required appellate courts to apply a *de novo* review standard and directed the Commission to develop restrictions on downward departures. Even after the Feeney Amendment, nothing prevents judges from imposing a higher sentence than recommended. Only a few of them, however, are likely

38. See, e.g., 21 CRIME & JUST. (1997).

Whitman’s assertion that in the United States “deportable aliens are kept in special camps,” p. 79, is incorrect. Many of them are held in prison facilities, together with convicted offenders. The same holds true for asylum seekers of all ages. Inna Nazaroza, Comment, *Alienating “Human” from “Right”: U.S. and UK Non-Compliance with Asylum Obligations Under International Human Rights Law*, 25 FORDHAM INT’L L.J. 1335, 1384 & n.250 (2002). The special camps in which asylum seekers in Germany are held are unpleasant but offer substantially more freedom than a prison. For a critique of Germany’s immigration detention facilities, see Amnesty International, Annual Report 2001, at <http://web.amnesty.org/web/ar2001.nsf/webeurcountries/GERMANY?OpenDocument> (last visited Apr. 15, 2005).

39. See, e.g., Wayne N. Renke, *Sensible Justice: Alternatives to Prison*, 37 ALTA. L. REV. 823, 838-39 (1999) (book review).

40. See, e.g., Michael Tonry, *Intermediate Sanctions in Sentencing Reform*, 2 U. CHI. L. SCH. ROUNDTABLE 391, 398-400 (1995).

to do so,⁴¹ as many judges consider mandatory minimums and guideline sentences too high.⁴²

In January 2005, the Supreme Court issued an opinion that may bring to a head the power struggle between Congress and the judiciary over sentencing.⁴³ The Court declared the federal guidelines unconstitutional, excised a few provisions, and held the rest to be merely advisory. So far, the responses of lower courts have varied. While some have found the guidelines strong indicators of the sentences they should impose, others have resorted to the language of the Sentencing Reform Act, rather than specific guideline provisions, for guidance.⁴⁴ Congress is expected to respond with legislation in the course of 2005. Whether the Court's declaration will lead to harsher or more lenient sentencing remains an open question. Congressional action may indicate whether at least the federal system will remain among the most punitive sentencing regimes in the world.

These developments in the federal courts mirror a larger, long-standing debate between those favoring individual treatment of criminal offenders and those opting for equality.⁴⁵ Even though individualization is considered a panacea by many critics of the U.S. sentencing regime,⁴⁶ Whitman notes that individualization does not unfailingly lead to mildness.⁴⁷ Nevertheless, the equal treatment currently accorded criminal offenders, especially in the federal courts, has been one of unmitigated harshness which developed out of an alliance of liberals who advocated greater social equality (and mildness) and conservatives who deemed determinate sentences an opportunity for harsher and longer sentences. The first U.S.

41. U.S. SENTENCING COMM'N, SOURCEBOOK OF FEDERAL SENTENCING STATISTICS 51 fig.G (Sept. 30, 2002) (showing that upward departures have decreased dramatically since the early 1990s and now make up only about 0.8 % of the cases sentenced annually), available at <http://www.ussc.gov/ANNRPT/2002/fig-g.pdf> (last visited Mar. 20, 2005).

42. U.S. SENTENCING COMM'N, SURVEY OF ARTICLE III JUDGES SUMMARY REPORT (Dec. 2, 2002), at <http://www.ussc.gov/judsurv/jsurvey02.pdf>.

43. *United States v. Booker*, 125 S. Ct. 738 (2005).

44. See generally *Nora V. Demleitner et al.*, 2005 INTERIM SUPPLEMENT: THE BLAKELY/BOOKER REVOLUTION (2005), at <http://www.sentbook.com>.

45. See *Booker*, 125 S. Ct. at 748-51 (Stevens, J., merits majority) (highlighting jury fact-finding); 759, 761 (Breyer, J., remedial majority) (focusing on Congressional intent to abolish unwarranted disparity and create uniformity) (dialogue between the Stevens majority opinion and the Breyer dissent). The debate goes back to the beginning of modern reforms of the penal system. Italy's foremost penologist, Cesare Beccaria, was among the first to outline a regime based on equality and devoid of unwarranted disparity (p. 50).

46. See, e.g., KATE STITH & JOSÉ A. CABRANES, FEAR OF JUDGING: SENTENCING GUIDELINES IN THE FEDERAL COURTS (1998).

47. P. 52. Judge Frankel's account of federal sentencing prior to the advent of the U.S. Sentencing Guidelines should also serve as a caution to those who would like to reinstitute indeterminate sentencing. MARVIN E. FRANKEL, CRIMINAL SENTENCES: LAW WITHOUT ORDER (1973).

Sentencing Commission and its successors frequently chose punitive options when an alternative was available. Historically, Congressional involvement has further increased the harshness of sentences, largely through mandatory minimum sentences.⁴⁸

While Whitman refers to state experiences in endnotes, much of his account is based on the federal sentencing guidelines. State sentencing guidelines, however, are often more flexible and less harsh than the federal guidelines.⁴⁹ Nevertheless, even in states with indeterminate sentencing regimes and parole options, offenders are usually released after having served longer periods in prisons than in the past, often because of federal financial incentives⁵⁰ and legislative enactments of mandatory minimum sentences. Additionally, in some states, most importantly California, even technical parole violations can lead to an almost immediate return to prison. For that reason, over one third of California's prison inmates are parole violators.⁵¹

The same groups that have been targeted in the United States in the last few decades have also been subjected to harsher punishment in Europe: "violent offenders, terrorists, certain sex offenders, drug dealers" (p. 71). In the United States, however, property offenders remain a substantial group — almost one third — of those incarcerated,⁵² and are often subject to substantial sentence enhancements, such as California's three-strikes law. The most important difference, though, is that Europeans have mitigated their penal harshness through individualized sentences that can draw on a host of alternative sanctions. Despite some public doubts, resocialization remains a crucial goal of European sentencing — an aspiration anchored in Constitutions and international and regional treaties.

3. *Mildness*

Finally, Whitman contrasts elements of penal harshness with two forms of mildness: respectful treatment and pardons (p. 36). Respect is

48. See, e.g., David Yellen, *What Juvenile Court Abolitionists Can Learn from the Failures of Sentencing Reform*, 1996 WIS. L. REV. 577, 588-89.

49. See, e.g., Ronald F. Wright, *Counting the Cost of Sentencing in North Carolina 1980-2000*, 29 CRIME & JUST. 39 (2002).

50. See 42 U.S.C. § 13704 (2005) (so-called "85% law" providing for incentive grants to states incarcerating violent felons for 85% of the time sentenced).

51. See TIMOTHY A. HUGHES ET AL., BUREAU OF JUSTICE STATISTICS, TRENDS IN PAROLE SUPERVISION, 1990-2000, at 13 (2001).

52. BUREAU OF JUSTICE STATISTICS, PRISON STATISTICS, at <http://www.ojp.usdoj.gov/bjs/prisons.htm> (last modified Dec. 28, 2004).

rarely accorded criminal offenders in the United States. Prison uniforms and the absence of privacy are hallmarks of the degradation of prison inmates.⁵³ Because of the remote location of prisons and the limited information flow between the inside and the outside world, however, the general population knows little about the daily degradations that take place in the name of the people. Rarely do pictures or films reveal the whole reality. The pictures of Guantánamo detainees in orange jumpsuits and shackles have provided such an unusual occasion and have indelibly burned themselves in the world's memory. The decline of sealing records and expungements, together with publicly accessible databases of sex offenders and others, continue the degradation beyond the endpoint of a criminal justice sanction. They make the full rehabilitation of ex-offenders impossible — their criminal records follow the offenders for the rest of their lives.

Europe presents a diametrically opposite picture. The law of dignity — a blend of “entitlement in the modern social state . . . [and] much older ideas of personal honor,” p. 85 — has been extended to all members of society, including prisoners.⁵⁴ Civil death no longer exists in Europe as all offenders, including prison inmates, remain integrated in all aspects of society (pp. 85-86). This is exemplified in that all offenders maintain their voting rights, including those imprisoned (p. 86). Contrast this with the U.S. practice which denies the franchise to all those imprisoned — unless detained in Maine or Vermont — and to many ex-offenders.⁵⁵ Strikingly, disenfranchisement is a prevalent practice that has been constitutionally sanctioned,⁵⁶ a fact that makes it difficult to attack the practice through constitutional litigation.

In addition, U.S. law mandates a deprivation of welfare benefits for certain drug offenders, which is inconceivable in Europe.⁵⁷ Germany, as Whitman notes, guarantees inmates upon release access to unemployment benefits, a practice that facilitates reintegration. The lack of welfare benefits upon release has posed serious problems for released prison inmates in the United States. Many are ineligible for

53. In so-called “super-max” prisons, degradation has been taken a step further so that some courts have found a special liberty interest in not being transferred to such a facility. See *Austin v. Wilkinson*, 372 F.3d 346 (6th Cir.), cert. granted, 125 S. Ct. 686 (2004).

54. P. 85. Whitman refers on more than one occasion to the fact that German prison guards must address prisoners in the formal “Sie.” Curiously, especially among younger Germans it has become prevalent to address even mere acquaintances with the informal “Du.” *Id.*

55. See, e.g., JAMIE FELLNER & MARC MAUER, *LOSING THE VOTE* (1998); Nora V. Demleitner, *Continuing Payment on One's Debt to Society*, 84 MINN. L. REV. 753 (2000). For more information and updates on felon disenfranchisement, see www.sentencingproject.org (last visited Mar. 20, 2005).

56. *Richardson v. Ramirez*, 418 U.S. 24 (1974).

57. See, e.g., Nora V. Demleitner, “Collateral Damage”: *No Re-entry for Drug Offenders*, 47 VILL. L. REV. 1027 (2002).

benefits; for others, the application process is difficult to navigate; some cannot wait until approval goes through. The reentry movement, which is designed to facilitate the return of prison inmates into society, has begun to address reintegration problems. The movement, however, is not focused on restoring, let alone retaining, the inherent dignity of ex-offenders but largely addresses the problem as one of fiscal prudence, safety, and protection from recidivism.⁵⁸ Any assistance granted offenders must be justified on these grounds to be considered politically feasible. Arguments for greater leniency are therefore dramatically different between the two continents.

In the United States presidential and gubernatorial pardons have decreased substantially in the last few decades despite a growing prison population.⁵⁹ Amnesties for criminal offenders are virtually unimaginable,⁶⁰ though they occur regularly in Europe. Underlying these distinctions in terms of mercy are different views of individualization and discretion. These debates merged in the criticism of Governor Ryan's commutation of the sentences of all death row inmates in Illinois. He was attacked for an abuse of discretion, increasingly an attack levied against all pardons in the United States.⁶¹ The currently low number of pardons in the United States, however,

58. See, e.g., JEREMY TRAVIS ET AL., *FROM PRISON TO HOME: THE DIMENSIONS AND CONSEQUENCES OF PRISONER REENTRY* (2001). For further information on the reentry movement, see, for example, <http://www.sentencingproject.org> (last visited Mar. 20, 2005) and <http://www.urbaninstitute.org> (last visited Mar. 20, 2005).

59. Margaret Colgate Love, *Fear and Forgiving: Rule and Discretion in the Theory and Practice of Pardoning*, 13 FED. SENTENCING REP. 25 (2001); Charles Shanor & Marc Miller, *Pardon Us: Systematic Presidential Pardons*, 13 FED. SENTENCING REP. 139 (2001).

60. Shanor & Miller, *supra* note 59 (indicating the rarity of amnesty, many of which have focused on war-related conduct).

The debate about an amnesty for undocumented immigrants is instructive. The first such amnesty in 1986 was accompanied by statutory changes threatening criminal enforcement against the employers of undocumented immigrants. Immigration Reform and Control Act (IRCA) §§ 101(a), 201, 302, 8 U.S.C. §§ 1324a, 1255a, 1159-60 (1988) (providing for imposition of sanctions on employers who employ undocumented labor as well as amnesty and special agricultural worker programs). The current debate about an amnesty contains a sub-debate about rewarding "criminals," for example, undocumented migrants, which would be even more pronounced in case of an amnesty for "real criminals." See, e.g., Mark Krikorian, *Amnesty, Again — This Country Should Have Learned, Apparently It Has Not*, NAT'L REV., Jan. 26, 2004, at <http://www.cis.org/articles/2004/markoped012604.html> (last visited Apr. 15, 2005).

61. See, e.g., David A. Wallace, *Dead Men Walking — An Abuse of Executive Clemency Power in Illinois*, 29 DAYTON L. REV. 279 (2004). The pardons issued by President Clinton during the waning days of his presidency further undermined the process and general acceptance of pardons. See, e.g., Margaret Colgate Love, *The Pardon Paradox: Lessons of Clinton's Last Pardons*, 31 CAP. U. L. REV. 185 (2003); Daniel T. Kobil, *Should Clemency Decisions be Subject to a Reasons Requirement?*, 13 FED. SENTENCING REP. 150 (2000/2001).

may suggest incorrectly that pardons have always been rare. Historically, pardons were prevalent and usually undisputed.⁶²

Once Whitman has determined that the United States is substantially more punitive than France and Germany, the question arises “why”? All of these countries are liberal Western democracies, welfare states, at least to some extent, infused by civil rights and human rights norms. In Whitman’s view, historical attitudes about status explain the differences.

B. *High-Status and Low-Status Punishments*

In contrast to many other commentators, Whitman rejects the claim that racism explains America’s trend toward harshness. He views the increasing punishment of all juveniles, irrespective of race,⁶³ and of high-status offenders as proof that racism cannot be the sole cause of harshness.

Whitman views American status egalitarianism as a leading reason for harshness. The highlight of the book may be the historical analysis Whitman presents to make his case. During the eighteenth and nineteenth centuries, sanctions in Europe distinguished between punishments inflicted on the aristocracy and political prisoners versus those imposed on ordinary criminals. Beginning over one hundred years ago, European punishments once reserved solely for the elite began to be extended to ordinary offenders, so that today all offenders are treated like high-status criminals. This means that all of them are accorded respect and dignity. In the United States, in contrast, all offenders — high- and low-status — are punished severely and degraded.

Even in antiquity, punishment implied a loss of honor, a practice continued throughout the centuries. High-status imprisonment in Europe, however, had different origins. It derived from clerical conventions and the practice of holding high-status individuals captive for ransom in fortresses (pp. 105-07). These habits guaranteed high-status prisoners special treatment when incarcerated (p. 107).

While the mode of extending privileged treatment has differed slightly between France and Germany (p. 108), the result has been the same. Today all inmates are accorded high-status treatment which was once reserved to “aristocrats and the like” (p. 108). Whitman traces in

62. See, e.g., George Lardner, Jr. & Margaret Colgate Love, *Mandatory Sentences and Presidential Mercy: The Role of Judges in Pardon Cases, 1790-1850*, 16 FED. SENTENCING REP. 212 (2004) (describing numerous presidential pardons in the early days of the Republic).

63. Even though this may be true technically, minority children are more frequently saddled with serious juvenile records and are more often transferred into the adult system. See, e.g., Barry C. Feld, *Juvenile and Criminal Justice Systems’ Responses to Youth Violence*, 24 CRIME & JUST. 189 (1998).

detail the changes in France and in Germany, reaching back to the Code Penal of 1791 and the Napoleonic Code of 1810 in France and the Criminal Code of 1890 in Germany.

The Napoleonic Code established the distinction between criminal offenses and offenses considered less than a crime — *delits* and *contraventions* (p. 117) — creating a path that has led France away from increasing criminalization. In his fascinating historical account, Whitman traces the different categories of offenders who were accorded high-status treatment in France during the nineteenth and early twentieth centuries. The privilege was extended from aristocrats to duelists, political dissenters, and debtors in the nineteenth century, and ultimately to all in the 1980s. Interestingly, recent prison reform in France “was bound up closely with the problem of political prisoners” (p. 129) which ultimately led to the treatment of all prisoners “as political, as rebels against the established order” (p. 133). Whether the threat of terrorism in Europe will lead to the development of another tier of imprisonment with fewer benefits or reinvigorate calls for the special treatment of political prisoners is open to question. Since today’s terrorists often differ in ethnic origin, religion, and sometimes citizenship from the population of the country where they commit offenses, the former may be more likely. Germany treated even members of its domestic terrorist groups who committed high-profile violent crime during the 1970s and 1980s substantially more harshly than most other murderers.

In Germany high-status treatment was accorded to prisoners of “good character,” which marked the beginning of the individualization of punishment (p. 132). In the nineteenth century the distinction in character was reflected in the types of confinements available — dishonorable prison (*Zuchthaus*), regular prison (*Gefängnis*), and non-dishonoring fortress confinement (*Festungshaftung*), which was reserved for those who committed crimes of honor.⁶⁴ German law began to develop the doctrine of extenuating circumstances and to individualize punishment, largely as a consequence of the focus on the offender’s moral character and intention.

Even though Nazi “justice” was characterized by the harsh treatment of political prisoners — a previously privileged group — and of habitual offenders, its main concepts otherwise did not vary much from earlier practices. After World War II, German law reacted against the preceding harshness but, at their core, earlier practices continued — the extension of “high-status, ‘honorable’ treatment to

64. As Whitman points out, like many right-wing politicians of his time, Adolf Hitler was sentenced to *Festungshaftung* in 1923 following an attempted putsch. However, he failed to afford his political opponents similar benefits. See generally INGO MUELLER, NAZI JUSTICE: THE COURTS OF THE THIRD REICH (1991).

all” (p. 141). So Whitman could assert that “in the world of European dignity, there is much more continuity with the fascist period than most Europeans have been ready to acknowledge” (p. 150).

One of the great contributions of *Harsh Justice* is its debunking of the myth that the mildness in Continental punishment is solely a reaction to the harshness of fascism and Nazism. He sees current punishment practices as deeply grounded in Europe’s past and the impact of Nazism and fascism as more ambiguous than previously assumed.

Whitman asserts that “American criminal justice displays a resistance to considering the very personhood of offenders” (p. 9), which also plays out in its reluctance to consider individual characteristics at sentencing. According to Whitman, two hundred years ago, the United States discarded high-status treatment in its criminal justice system so as to “generalize norms of low-status treatment” (p. 11).

Whitman’s account traces low status in the Anglo-American world back to Medieval practices. By the mid-eighteenth century low-status penalties had declined in England, and respect for persons was less important than on the Continent (p. 153), possibly due to a less entrenched status hierarchy. With the routinization of the pardon process by the late eighteenth century, low-status offenders benefited as much as others. England had abolished status differentiation much earlier than the Continent.

This attitude was replicated in the American colonies, though status differentiation did not vanish entirely. Pardons, for example, appeared to be granted largely to high-status individuals.⁶⁵ This became a cause for attack on executive clemency during the nineteenth century. Even though most of American sentencing practice remained discretionary throughout that century, high-status punishments began to decline, as deterrence principles came to dominate. U.S. law focused on procedural protections for those accused of criminal offenses rather than on the abolition of low-status penalties. Whitman notes that by the mid-1860s “the status of prisoners came . . . to be explicitly assimilated to that of slaves” (p. 173). This led to low-status punishment for all, and imprisonment became a low-status penalty, with its practices — corporal punishment and forced labor — largely akin to slavery. The denial of political rights to many criminal offenders was the logical consequence of such treatment. And as Whitman notes so chillingly, “nobody was troubled by the symbolic declaration that prisoners should have the status of slaves; they remained untroubled by it for a century; and it can be said

65. *But see* Lardner & Love, *supra* note 62, at 214-16 (describing numerous judicially supported or initiated pardons that benefited lower class individuals). In some cases, judges denied their support for pardon requests to well-connected individuals. *Id.* at 215-26.

that, by the 1980s, they were untroubled by it once again” (p. 177). How could this be true at two historically so different times?

C. *Comparative Harshness and Low-Status Punishments Explained*

The reason the U.S. criminal justice system “show[s] less respect for persons than the continental systems” (p. 42), according to Whitman, is due to America’s “comparatively strong commitment to formal equality” (p. 42), which characterizes sentencing practices and doctrines of liability, ultimately leading to low-status punishments for all. Concepts of “[d]ignity” and “degradation” as such fall on deaf ears in American legal culture . . .” (p. 190), however. This contrasts sharply with the European attempt to “generaliz[e] honor to all” (p. 192). There, the striving for equality is a “yearning for ‘aristocratic equality’” (p. 192), while America instead has adopted a low-status egalitarianism.

As Whitman notes, the exercise of mercy reinforces status differences, as only the superior can grant mercy. More importantly, mercy recognizes individual differences, while the lack thereof indicates formal equality. As the United States has rejected such status and individual differences, Europe has formalized grace and made it routine to protect social and formal equality.

The reinforcement of status differences through pardons explains why Americans have consistently opposed pardons, even though they were frequently used throughout the eighteenth century, largely to manage prisons, and did not begin to decline until the early twentieth century with the onset of parole and probation. The use of the pardon violated the popular belief in egalitarian treatment, with many fearing the process would be abused to benefit the wealthy and well-connected.⁶⁶

Different degrees of egalitarianism are not the only distinguishing factor in explaining American harshness. Whitman points to the impact a strong state may have through “the exercise of systematic mercy and the tendency toward bureaucratization.”⁶⁷ Contrary to U.S. beliefs, a strong, rather than a weak state, may bring about mildness in punishment. This may not be as surprising as it first appears. A strong

66. P. 12. The same ideological argument cannot be levied against immigration amnesties. The prime beneficiaries, however, are alleged to be large corporations and other employers — the wealthy and politically well-connected.

67. Whitman is not the first to focus on Europe’s bureaucratization as a means to milder punishment. “It may be possible that low imprisonment rates in many European nations may be a consequence of bureaucratic traditions and corporatist political arrangements that have insulated public officials from public demands for punishment during eras of disruption . . .” Rick Ruddell, *Social disruption, state priorities, and minority threat*, 7 PUNISHMENT & SOC’Y 7, 21 (2005).

state, unchallenged in its legitimacy, may be able to afford mildness.⁶⁸ Pardons and amnesties demonstrate this, as they are “a tradition of the paternalistic exercise of state sovereignty” (p. 143).

Strong states may also be more likely to imprison high-status offenders, which would explain their more frequent application of mercy. In the United States nineteenth-century prisons rarely housed high-status inmates, in contrast to their Continental counterparts. This fact, together with the lack of a strong ideological belief that high-status inmates do not “‘deserve’ punishment” (p. 179), did not allow for a two-track treatment of high- and low-status individuals or the development of separate forms of punishment. It is unlikely, however, that the increasing incarceration of high-status offenders today will change their treatment. Egalitarian norms lead to their dehumanization prior to incarceration, making any treatment that befalls them appear justified.

Whitman does not project his conclusions too far into the future. The increasing weakness of the state, however, may lead to further harshness in punishment. As many sociologists have argued, the modern state increasingly loses its power as it outsources many of its primary functions to private industry.⁶⁹ This is not a development unique to the United States, but may be more pronounced here.⁷⁰ In addition, the nation-state concept has come under attack from the outside through globalization and international organizations.⁷¹

68. Weak states may use amnesties to buy favor from the families of inmates, or for other political reasons. Their amnesties tend to be restricted to those convicted of criminal offenses rather than political prisoners. See, e.g., John F. Burns, *Threats and Responses: The Great Escapes*, N.Y. TIMES, Oct. 21, 2002, at A1 (discussing meaning and impact of mass release of Iraqi prisoners by Saddam Hussein's regime only months before the U.S. attack on Iraq).

69. See, e.g., Deborah Avant, *Think Again: Mercenaries, Foreign Policy* (July/Aug. 2004), at http://www.foreignpolicy.com/story/cms.php?story_id=2577&page=0&PHPSESSID=f36a201d3fe0844d7e91e41d9c2e8c6b (last visited Apr. 15, 2005) (discussing impact of private mercenaries on state power). Many Americans may have been surprised to learn that during the Iraq war and the occupation even military support functions, including interrogations and security for political appointees, have been outsourced to private companies. No longer is even the state's most cherished power — war-making — its monopoly. *Id.*

In the criminal justice arena law-enforcement has been privatized through the use of private protection agencies. More discussed, though, has been the privatization of prisons, creating a prison complex, which is frequently mentioned together with the military-industrial complex in its economic importance and political power. See, e.g., Clifford J. Rosky, *Force, Inc.: The Privatization of Punishment, Policing, and Military Force in Liberal States*, 36 CONN. L. REV. 879 (2004).

70. The Thatcher government in Great Britain adopted the same philosophy which may have led to greater privatization and a weaker state there than on the Continent. See, e.g., Cosmo Graham, *Privatization — The United Kingdom Experience*, 21 BROOKLYN J. INT'L L. 185 (1995).

71. See generally, Peter J. Spiro, *New Sovereignists*, 79 FOREIGN AFF. 9, 12 (Nov.-Dec. 2000); Peter J. Spiro, *New Global Communities: Nongovernmental Organizations In International Decision-Making Institutions*, 18 WASH. Q. 45 (1994); Paul Wapner, *Politics*

Behind Whitman's analysis seem to lurk larger questions about the practice of democracy in the United States. He notes that, in the United States, punishment practices are determined in election campaigns (p. 15). This distinguishes the process from European countries where largely civil servants exercise bureaucratic control over the punishment process.⁷² Even though Whitman does not appear to allow for this possibility, this distinction may be more determinative than the existence of a history of status difference. Bureaucratic inertia may explain the European reluctance to adopt harsher penal measures despite outside pressures.

As Whitman points to the "intimate nexus between the politics of mass mobilization . . . and the making of harshness in criminal punishment," he challenges "any of us who like to think of ourselves as committed to the values of democracy" (p. 15). His book succeeds in raising a larger question about the value and role of democratic decisionmaking. In light of his concern about harshness, the focus should be on the impact of the American model of democracy on penal laws and enforcement.

Whitman's book provides a novel and insightful historical account of the differences in harshness. It challenges the assumptions of modern sociologists, human rights activists, and criminal justice scholars. At the same time, though, it raises a host of questions about the accuracy of its analysis. Granted that, where does one go from here, assuming one is unwilling to accept Whitman's defeatist attitude that harshness in American punishment will not change?

II. DEMOCRACY, EGALITARIANISM, AND PUNISHMENT

Whitman's account raises larger questions about punishment in a democracy. May America's form of democracy be directly tied to a harsher penalty regime? Some American commentators have argued that Europe's abolition of the death penalty was elite-driven and therefore thwarts democratic desires.⁷³ They view American punishment as reflective of the popular will. It is more likely, however, that democratic excesses have contributed to our harshness in

Beyond The State: Environmental Activism and World Civic Politics, 47 WORLD POL. 311 (1995).

72. Similar examples from other areas of government abound. See, e.g., Matthew L. Wald, *Transportation Board Member Leaves Post With a Warning*, N.Y. TIMES, June 20, 2004, at 27 (warning about loss of expertise on National Transportation Safety Board).

73. Cf. Nora V. Demleitner, *The Death Penalty in the United States: Following the European Lead?*, 81 OR. L. REV. 131, 134 (2002); Samuel R. Gross, *The Romance of Revenge: Capital Punishment in America*, 13 STUD. L. POL. & SOC'Y 71, 88 (1993); Carol S. Steiker, *Capital Punishment and American Exceptionalism*, 81 OR. L. REV. 97, 119-20 (2002) (discussing hypothesis that death penalty in United States is a function of populism).

punishment as law-and-order politicians have (ab)used crime policies.⁷⁴ Whitman presumably does not disagree, but views harshness as resulting from “the consequences of formal equality . . . as instituted in a democratic society” (p. 55). This, however, appears to be an overstatement as many ideological proponents of determinate sentencing have also championed leniency. Most importantly, the claim to formal equality has repeatedly been honored in its breach, often on race-based grounds.

A. *The Distortions of Law-and-Order Politics*

The use of crime in political discourse is a relatively recent phenomenon in the United States that can be traced back to the early 1960s when Republican politicians appropriated the law-and-order discourse. It was not until the 1970s that crime became a regular election-campaign feature.⁷⁵ In the political campaigns of 2000, 2002, and 2004, crime decreased in importance.⁷⁶ The decline of crime as a crucial campaign topic may lead to a decline in punitiveness, as legislatures can pass less punitive measures without an immediate backlash.

A particularly striking example of political excess may have been California’s three-strikes law, passed in a state notorious for its referenda, the prime example of direct democracy.⁷⁷ On the other hand, California’s voters have also displayed particular leniency. In 2000 they mandated treatment, rather than incarceration, for all non-violent offenders convicted of drug possession for personal use.⁷⁸ They also legalized marijuana use for medicinal purposes.⁷⁹ These examples

74. See, e.g., KATHERINE BECKETT, *MAKING CRIME PAY: LAW AND ORDER IN CONTEMPORARY AMERICAN POLITICS* (1997) (detailing impact of law-and-order politicians on changes in crime policy); CHANGING ATTITUDES TO PUNISHMENT: PUBLIC OPINION, CRIME & JUSTICE (Julian V. Roberts & Mike Hough eds., 2002) (detailing public opinion on specific sentencing issues).

75. Most notorious may be the Bush campaign’s use of the image of Willie Horton, a convicted rapist and murder who, while on a furlough, killed again, in the 1988 election.

76. For a discussion of the use of crime in political discourse, see generally Beckett, *supra* note 74; TED GEST, *CRIME & POLITICS: BIG GOVERNMENT’S ERRATIC CAMPAIGN FOR LAW AND ORDER* (2001).

77. See generally FRANKLIN E. ZIMRING ET AL., *PUNISHMENT AND DEMOCRACY: THREE STRIKES AND YOU’RE OUT IN CALIFORNIA* (2001).

78. *Proposition 36*, in CALIFORNIA OFFICIAL VOTER INFORMATION GUIDE: GENERAL ELECTION, Nov. 7, 2000, at 66, (proposing amendments to CAL. PENAL CODE §§ 1210-.1, 3063.1 and CAL. HEALTH & SAFETY CODE DIVISION 10.8), available at http://holmes.uchastings.edu/ballot_pdf/2000g.pdf (last visited Mar. 20, 2005); see also Michael Vitiello, *Punishment and Democracy: A Hard Look at Three Strikes’ Overblown Promises*, 90 CAL. L. REV. 257 (2002) (reviewing ZIMRING ET AL., *supra* note 77).

79. See, e.g., CAL. HEALTH & SAFETY CODE § 11362.5 (West Supp. 2005); see also ARIZ. REV. STAT. ANN. §§ 13-3412, 13-3412.01 (West 2001 & West Supp. 2004). These

show that the electorate is able to dispense mildness, at least in some situations.

Detailed opinion polls indicate that the public is less punitive than politicians appear to assume. Once confronted with specific offender accounts, most individuals would impose lesser sentences than those currently mandated.⁸⁰ Some jurors have indicated shock about the sentences that were ultimately imposed in the cases on which they sat; other juries are known to have nullified convictions because of their disagreement with the potential sentence exposure.⁸¹ It is therefore untrue to view America's harshness as embodied in its populace, though the population may be less lenient than that in Western Europe. It is equally likely, however, that America's politicians, either out of conviction or political calculation, have used crime and penal harshness as wedge issues to reinforce public fears, especially those of a race-based nature.⁸²

It is not political rhetoric alone that has contributed to the harshness of punishment. Our particular form of media-moderated politics may have contributed as well, as law-and-order politicians have begun to summarize their agendas in soundbites. National programming has made victims and offenders household names from coast to coast. The memories of these victims continue to live on as national legislation that has been named after them.⁸³ In addition, TV shows such as "Cops" have contributed to the view of criminal offenders as less than human, as deserving of any degradation that would befall them. As some have argued, in common law systems generally, "ideas about punitive criminal justice are more readily diffused and accepted... through the media and political institutions."⁸⁴

To the extent that Europe's political and media landscape become more Americanized, similar developments are conceivable. Not unlike the reaction to serious crimes in the United States, recent sexually

pieces of legislation, displaying surprising leniency, show the success of liberal lobbying organizations, some of which invested substantial amounts of money in these campaigns.

80. See, e.g., JULIAN V. ROBERTS ET AL., *PENAL POPULISM AND PUBLIC OPINION: LESSONS FROM FIVE COUNTRIES* (2003).

81. Paul Butler, *Racially Based Jury Nullification: Black Power in the Criminal Justice System*, 105 *YALE L. J.* 677, 678 (1995).

82. See *Perspectives*, *NEWSWEEK*, Dec. 13, 1993, at 17 (quoting the Reverend Jesse Jackson indicating his perception of crime as disproportionately committed by young black men).

83. See, e.g., Nora V. Demleitner, *First Peoples, First Principles: The Sentencing Commission's Obligation to Reject False Images of Criminal Offenders*, 87 *IOWA L. REV.* 563 (2002).

84. Ruddell, *supra* note 67, at 21.

motivated killings of children in Germany have caused an increase in sentences for sex offenders. Increasingly, punishment issues have become part of German election campaigns, particularly when they concern sex offenders, juvenile criminals, and non-citizen offenders — groups that have also attracted punitive reactions in the United States.⁸⁵ Sex crimes in neighboring countries, such as the Dutroux case in Belgium, have also increased fear. That case involved a convicted rapist who abducted, raped and killed a number of young girls. For years the police were unable to clear the cases, and high-level bungling led to suspicions that the police and politicians may have been involved in the crimes and their cover-ups.⁸⁶ The more crime plays a role in European political debate, the more Europe's politics situation may come to resemble that in the United States.

So far, elite policymakers in Europe have prevented the reinstatement of harsh punishments. Even though substantial numbers of Europeans, for example, would welcome the return of the death penalty,⁸⁷ most mainstream political parties have not embraced such calls. Quite to the contrary, all Council of Europe member states — with the exception of Monaco and Russia — have ratified Protocol Six of the European Convention of Human Rights, which prohibits the death penalty except in times of war or public emergency.⁸⁸ Thirty member states have ratified Protocol 13, which abolishes capital punishment under all circumstances.⁸⁹

85. See, e.g., Hans-Jörg Albrecht, *supra* note 24, at 202-03 (2004).

86. See, e.g., *Dutroux Gets Life for Child Murders*, AUSTRALIAN, June 23, 2004, at 9; see also John Lichfield, *I Had to Kill Twice a Year, Says Self-Confessed Hunter of Virgins*, INDEPENDENT, July 8, 2004 (discussing arrest of rapist/killer who had managed to operate in the French-Belgium border area for decades without being caught).

87. See, e.g., Joshua Micah Marshall, *Death in Venice: Europe's Death-Penalty Elitism*, *The New Republic*, July 31, 2000, at 12. Opinion polls taken after violent crimes against young children are committed, in particular reflect such tendencies.

88. Protocol No. 6 to the Convention for the Protection of Human Rights and Fundamental Freedoms concerning the abolition of the death penalty as amended by Protocol No. 11 (Strasbourg 1983), entered into force March 1, 1985, at <http://conventions.coe.int/treaty/en/Treaties/Html/114.htm> (last visited Apr. 16, 2005). For a list of signatures and ratifications, see <http://conventions.coe.int/Treaty/Commun/ChercheSig.asp?NT=114&CM=8&DF=16/04/05&CL=ENG> (last visited Apr. 16, 2005). To become a member of the Council of Europe, states are now required to sign on to Protocol Six. The European Union, which requires Council membership before it entertains membership applications, exerted substantial pressure on Turkey to relinquish use of the death penalty, and ratify Protocol 6. Turkish Embassy, *Update on the International Human Rights Instruments which Turkey has recently Ratified or Signed*, at <http://www.turkishembassy.com/II/O/InternationalHumanRightsUpdate.htm> (last visited Apr. 15, 2005); European Union, The Council, *EU Policy on the Death Penalty, Declaration by the Presidency on Behalf of the European Union to Mark the Entry into Force of Protocol No. 13 to the European Convention on Human Rights, Concerning the Abolition of the Death Penalty in all Circumstances*, July 14, 2003, 11249/03 (Presse 204), P 83/03.

89. Protocol No. 13 to the Convention for the Protection of Human Rights and Fundamental Freedoms, concerning the abolition of the death penalty in all circumstances (Vilnius 2002), entered into force July 1, 2003, at <http://conventions.coe.int/treaty/en/>

Even though the desire for punitiveness in the United States and Europe may not be as diametrically different as current penal policies indicate, the types of discourse diverge dramatically. In the United States, arguments pertaining to the inherent dignity or human rights of individual offenders have fallen on deaf ears, and the law frequently affirms this attitude. In Germany, by contrast, even some particularly heinous offenders have been successful in asserting dignity rights, but not necessarily in obtaining relief. Any successful claim for prisoners or criminal defendants in the United States has been group-specific. Felon voting rights, for example, have become a viable political issue due to their racial impact rather than any democratic deficit that is inherent in disenfranchisement.⁹⁰ Awareness of sexual abuse in prisons was initially focused on abuses perpetrated against women rather than men. Because of these strategies, successes have often been piecemeal, and large offender groups have not been covered.⁹¹ These interest-group focused campaigns, while sometimes successful, frequently obscure larger dignity or rights-based arguments. Interestingly, some of the race-based argumentation has been exported to France and Germany, where it is aimed at protecting immigrant groups and religious or racial minorities.

B. *Sentencing Commissions and the Courts: Protectors Against Democratic Excesses?*

Neither governmental bureaucracies nor the courts have been effective bulwarks against the march to harsher penalties. States have put sentencing commissions in place to provide some insulation for sentencing decisions. Their technical expertise and statistical projections have stopped much ill-advised and harsh legislation. In most states, for example, sentencing commissions are legislatively mandated to provide prison-cost projections before new imprisonment measures can be enacted.⁹² Much punitive legislation has been stopped

Treaties/Html/187.htm (last visited Apr. 16, 2005). For a list of signatures and ratifications, see <http://conventions.coe.int/Treaty/Commun/ChercheSig.asp?NT=187&CM=8&DF=16/04/05&CL=ENG> (last visited Apr. 16, 2005).

90. See, e.g., FELLNER & MAUER, *supra* note 55. Recent litigation involving claims of racial disparity in the criminal justice system, which has led to racially disparate disenfranchisement includes *Farrakhan v. Washington*, 259 F.3d 1116 (9th Cir. 2004), and *Johnson v. Governor of Florida*, 353 F.3d 1287 (11th Cir. 2003), *reh'g en banc granted*, 377 F.3d 1163 (11th Cir. 2004).

91. Among such groups are sex offenders, violent offenders, and, increasingly, alleged terrorists.

92. See, e.g., NORA V. DEMLEITNER ET AL., *SENTENCING LAW AND POLICY: CASES, STATUTES, AND GUIDELINES* 482 (2004); Michael Tonry, *Sentencing Guidelines and Their Effects*, in *THE SENTENCING COMMISSION AND ITS GUIDELINES* 16, 19 (Andrew von Hirsch et al. eds., 1987) (describing how Minnesota's Sentencing Commission interpreted statute so

once its cost became obvious.⁹³ On the other hand, sentencing commissions have proven ineffective when faced with highly charged demands for sentence enhancements, especially those involving crimes against children.⁹⁴

The federal sentencing commission might befall an even crueler fate. It seems to have become increasingly emasculated, relied upon only when it proposes sentence enhancements but not decreases. Its decline in political clout appears traceable to a proposal that would have abolished the disparity in sentencing for power-cocaine offenses versus crack-cocaine offenses.⁹⁵ After Congress voted down the change — a first since the Commission came into existence — its political power declined.⁹⁶ The Feeney Amendment, passed in April 2003 as part of the PROTECT Act, without Commission input, has proven a further watershed event for the Commission.⁹⁷ For the first time, Congress directly legislated into the guidelines without consulting the Commission or asking for its input — a development unimaginable in Europe where expert bodies are regularly relied upon, as Whitman notes (p. 199-201). The fate of the U.S. Sentencing Commission has become yet more ambiguous in the wake of the Supreme Court's decision in *Booker*, which declared the federal sentencing guidelines unconstitutional. Some surgical strikes allowed the Court to excise only select statutory provisions and declare the remaining guidelines advisory and non-binding.⁹⁸ How the Commission will fare in Congressional attempts to reshape the guidelines remains to be seen. However, in light of its weakened status, it is not expected to be a major player in federal sentencing reform. This contrasts with the state systems where commissions have played an active role in changing existing sentencing regimes in the

that Commission has to take prison resources into “substantial consideration” in developing guidelines).

93. See, e.g., Rachel E. Barkow, *Administering Crime*, 52 UCLA L. Rev. 715, 719-20 (2005).

94. See Ann Wall, *Sexual Offenses in Minnesota: Recent Changes to Sentencing and Post-Sentencing Provisions*, 10 FED. SENTENCING REP. 79 (1997); cf. Michael Tonry, *Sentencing Commissions and Their Guidelines*, 17 CRIME AND JUST. 137, 175-76 (1993) (describing political pressure exerted on state sentencing commissions). Sentencing commissions generally do not address death-penalty-related questions.

95. See U.S. SENTENCING COMM'N, SPECIAL REPORT TO CONGRESS: COCAINE AND FEDERAL SENTENCING POLICY (1995).

96. See, e.g., Barkow, *supra* note 93, at 767-69.

97. *Prosecutorial Remedies and Other Tools to End the Exploitation of Children Today (PROTECT) Act of 2003*, Pub. L. No. 108-21, 117 Stat. 650. See Barkow, *supra* note 93, at 770.

98. *United States v. Booker*, 125 S. Ct. 738 (2005).

wake of the Supreme Court's earlier decision in *Blakely* which held Washington's sentencing guidelines unconstitutional.⁹⁹

In a democracy, protection of minority groups is often left to the judiciary. However, in the last two decades neither federal nor state courts have been effective or vocal champions of offender rights. Even in earlier decades, when they enhanced procedural rights for criminal defendants, they rarely protected them against excessive sentences.¹⁰⁰ In recent years, only some state and federal courts have interpreted laws so as to allow for the increased exercise of leniency.¹⁰¹ Such protections usually come in the form of procedural guarantees rather than successful federal constitutional challenges prohibiting particular sentences.¹⁰² After all, federal courts have rejected a narrow proportionality principle as inherent in the Eighth Amendment.¹⁰³ Because of the general inhospitability of courts to the protection of offenders against excessive sanctions, advocates have turned to the courts with requests for the protection of specific groups — racial minorities or women caught in the criminal justice system. Their success has been mixed but has not led to greater review of the sanctioning regime or the application of punishment.

It is unclear what role German courts will play in the future protection of select offender groups, especially in the continuing debate about sex-offender sentencing. Sanctions imposed on sex offenders have increased substantially over the last few years, and German states have given their judiciaries newly expanded powers to impose non-proportionate sentences for incapacitation purposes.¹⁰⁴ A recent decision by the German Constitutional Court struck down the state statutes which increased the options for and length of *Sicherungsverwahrung* for sex offenders. At the same time, however, a majority of the judges allowed the continued detention of all those held in *Sicherungsverwahrung* who should have been released as a

99. *Blakely v. Washington*, 124 S. Ct. 2531 (2004).

100. Darryl K. Brown, *Reform of Criminal Procedure in the States: The Warren Court, Criminal Procedure Reform, and Retributive Punishment*, 59 WASH. & LEE L. REV. 1411 (2002) (arguing that the Warren Court's criminal procedure reform helped to usher in a highly punitive sanctioning regime). *But see Coker v. Georgia*, 433 U.S. 584 (1977) (striking down the death sentence for rape of an adult woman as violative of the Eighth Amendment).

101. *See, e.g., People v. Super. Ct. of San Diego County*, 917 P.2d 628 (Cal. 1996).

102. *See generally*, Brown, *supra* note 100.

103. P. 57; *Lockyer v. Andrade*, 538 U.S. 63 (2003); *Ewing v. California*, 538 U.S. 11 (2003) (rejecting Eighth Amendment challenge to California's three-strikes law for non-violent property offenders); *Harmelin v. Michigan*, 501 U.S. 957 (1991) (holding that mandatory life-without-parole sentence for non-violent drug offense does not violate the Eighth Amendment).

104. Albrecht, *supra* note 24, at 202-05.

consequence of the decision until the federal parliament could pass legislation that would allow for such detention.¹⁰⁵ In addition, the Court upheld a retroactive abolition of the ten-year limit on the first-time imposition of *Sicherungsverwahrung* to allow the state to detain some offenders forever, a previously non-existing option.¹⁰⁶ None of this legislation was animated by offenders who committed further offenses upon release from *Sicherungsverwahrung*, but rather by the possibility of such an occurrence. This development is particularly jarring as many commentators had expected the abolition of *Sicherungsverwahrung* rather than its rejuvenation.¹⁰⁷

Only the European Court of Human Rights may stall possible European tendencies toward increased harshness. Even though it has been criticized for being too far removed from local concerns, including crime, its remoteness may make it particularly suited as the guardian of mild punishment in Europe.

III. THE UNEXPLAINED GAP

Most accounts of the differences between the U.S. and European criminal justice systems have focused on the late 1960s and 1970s as watershed moments.¹⁰⁸ Whitman, however, gives short shrift to a period in U.S. history which, comparatively speaking, was in many respects less punitive than today. Throughout the twentieth century, an indeterminate sentencing regime that matched offender and offense governed. In the early 1970s, all mandatory sentences were abolished in the federal system.¹⁰⁹ Use of the death penalty appeared

105. BVerfG, 2 BvR 834/02 vom 10.2.2004, Absatz-Nr. (1-210), available at http://www.bverfg.de/entscheidungen/rs20040210_2bvr083402.html (last visited Mar. 20, 2005). The German parliament passed legislation virtually identical to the struck-down state statutes within the time limit set by the Constitutional Court. This legislation will be constitutional since it does not violate the federal-state competency rules which were the basis for the Court's decision.

106. BVerfG, 2 BvR 2029/01 vom 5.2.2004, Absatz-Nr. (1-202), available at http://www.bverfg.de/entscheidungen/rs20040205_2bvr202901.html (last visited Mar. 20, 2005); see also Albrecht, *supra* note 24; Frieder Dünkel & Dirk van Zyl Smit, *Preventive Detention of Dangerous Offenders Re-examined: A Comment on Two Decisions of the German Federal Constitutional Court*, 5 GERMAN L.J. 620 (2004), available in two parts at <http://www.germanlawjournal.com/article.php?id=453> and <http://www.germanlawjournal.com/article.php?id=454> (last visited Nov. 15, 2004). For a general discussion of *Sicherungsverwahrung*, see Demleitner, *supra* note 24.

107. See, e.g., Jörg Kinzig, *Die Sicherungsverwahrung: bewährt oder obsolet?*, 30 ZEITSCHRIFT FÜR RECHTSPOLITIK 99, 99 (1997).

108. See, e.g., Thomas Weigend, *Fines Reduce Use of Prison Sentences in Germany*, in INTERMEDIATE SANCTIONS IN OVERCROWDED TIMES 43 (Michael Tonry & Kate Hamilton eds., 1995).

109. See, e.g., U.S. SENTENCING COMM'N, SPECIAL REPORT TO THE CONGRESS: MANDATORY MINIMUM PENALTIES IN THE FEDERAL CRIMINAL JUSTICE SYSTEM 6 (1991).

to die a slow death.¹¹⁰ Throughout the 1950s and the 1960s collateral sanctions decreased in number and scope. No longer were prison inmates automatically divorced; no longer were they prohibited from entering into contracts.¹¹¹ While U.S. and European sentencing practices appear to have taken a parallel path during those decades, they took widely divergent routes during the last thirty years.

Whitman writes that, in response to prison riots in the late 1960s and attacks on rehabilitation and individualized sentencing on both sides of the Atlantic, Europe strengthened its mild tendencies, or as he notes so pungently, "Europe moved to the left" (p. 193). The United States, however, returned to retributivism, "closely associated both with populist justice and with deep-seated Christian sentiment" (p. 194), and "to formal equality that reflected a deep . . . distrust of status differentiation" (p. 193). Whitman argues that all countries found refuge in "older historical patterns" tied to social status (p. 194) with the lack of individualization in sentencing and the absence of executive clemency becoming the hallmarks of the late twentieth-century American criminal justice system. Is this what happened, or did other events lead these countries to part ways? Is it not possible that Whitman's account may overlook other issues, or overplay his emphasis on status?¹¹² Does status really play the dominant role he ascribes? And even if it does, what triggered this reversion to past practices?

A. *The Role of Race and Immigration in Status Analysis*

Because degradation is the typical response to criminals, as Whitman claims, the Continental experience, rather than the American one, is unusual. Degradation may be crucial in "affirming that some persons stand on a higher rung than others" (p. 198). What types of societies may be in particular need of such assurances? They may be most important in a country that declares itself classless, where virtually everyone considers herself a member of the middle class.

How does an American assert her status? Is education, wealth, income, or some other characteristic crucial? Since status seems such

110. See, e.g., FRANKLIN E. ZIMRING & GORDON HAWKINS, *CAPITAL PUNISHMENT AND THE AMERICAN AGENDA* 37 (1986); Jeffrey L. Kirchmeier, *Another Place Beyond Here: The Death Penalty Moratorium Movement in the United States*, 73 U. Colo. L. Rev. 1, 15 (2002); Demleitner, *supra* note 73, at 135.

111. See, e.g., Nora V. Demleitner, *Preventing Internal Exile: The Need for Restrictions on Collateral Sentencing Consequences*, 11 STAN. L. & POL'Y REV. 153, 154 (1999).

112. Among the intriguing and so far unexplored potential differences is the impact Freudian psychology has had on the development of American criminal law and in particular the MODEL PENAL CODE. See Deborah W. Denno, *Criminal Law in a Post-Freudian World*, 2005 U. Ill. L. Rev. (forthcoming).

an amorphous concept in the United States, with everyone counting herself in the middle, it may be particularly important to determine who is at the top and the bottom.

Many societies have clearly delineated status hierarchies, often connected to long-standing traditions and family relationships. Countries with a strong tradition of immigration may have difficulty developing such concepts. As immigration allows American society to remake itself and redefine its status hierarchy, it may be particularly important — for newcomers and “natives” — to define a low-status group, a group that cannot reinvent itself. It may be that the historical reality of immigrant groups moving into the mainstream society and adopting the American creed necessitates a permanent underclass.

For many decades African Americans served this need.¹¹³ This may have changed, however, with the civil rights legislation of the 1960s that was designed to lift African Americans out of their low-status position. The legal changes at the time gave African Americans the opportunity to move out of their position at the bottom of the social ladder. As a result, there might have been an ever more urgent need to stigmatize another group, perhaps closely tracking but not identical with a certain racial group. This non-identity makes the continued stigmatization of offenders more easily possible, as racial groups rather than offender groups are protected against discrimination.

During the 1960s, race-based immigration restrictions were lifted,¹¹⁴ causing a substantial increase in immigration during the 1980s and 1990s.¹¹⁵ As American society became again more fluid, it lacked a group clearly designed as a scapegoat. At the same time, the growing unease about the substantial societal upheaval of the 1960s and early 1970s might have increased the need for such a scapegoat. With ethnic and racial groups no longer an appropriate target, criminals may have filled the void. Punitive sentencing strategies exploited their new vulnerability, helped by media conglomerates whose ratings depended ever more on racy news coverage.

Are similar developments likely to occur in Europe? Even though more stable societies have permanent low-status groups, recent immigration, combined with media needs and exploitative political

113. See generally Manning Marable, *Race, Reform and Rebellion* (2d ed. 1991); George Paul, *A Tribute to John P. Frank: John Frank and the "Law Professors' Brief,"* 35 ARIZ. ST. L.J. 241, 246 (2003). Even immigrant groups often arrived with or quickly adopted the belief that African Americans constituted the underclass.

114. Immigration and Nationality Act of 1965, Pub. L. No. 89-236, 1965 U.S.C.C.A.N. (79 Stat. 911) 883 (abolishing race-based quotas).

115. See, e.g., Bill Ong Hing, *Beyond the Rhetoric of Assimilation and Cultural Pluralism: Addressing the Tension of Separatism and Conflict in an Immigration-Driven Multiracial Society*, 81 CAL. L. REV. 863, 865 (1993). For a discussion of Asian exclusion laws, see Gabriel J. Chin, *Segregation's Last Stronghold: Race Discrimination and the Constitutional Law of Immigration*, 46 UCLA Rev. 1 (1998).

strategies, may make increasingly strict sentencing policies likely. Some of this appears to be occurring already. France, for example, has adopted the U.S. approach of heavy-handed prosecution of lower-level offenses, leading to a twenty-percent rise in the French prison population since 2001.¹¹⁶ While verbal attacks on immigrants are discouraged in Europe, the creation of a connection between immigration and crime has caused parliaments to impose heavier sanctions. Europe, however, has a long way to go to reach America's punitiveness, since its penalty ranges start from a much lower level. Nevertheless, some of the developments in Europe may foreshadow a growing punitiveness, although couched in different rhetoric than in the United States.¹¹⁷

Even though Whitman declares not to focus on racism in his analysis, he cannot help but discuss race in his account of status. His book would have benefited, however, from a deeper reflection of the role race, ethnicity, and immigration status play in his overall theory, especially in light of the current racial and ethnic makeup of the group most affected by America's punitiveness.

B. *Notable Omissions: Crime Rates, Religion, and Racism*

In his Introduction, Whitman notes that he will not address certain distinctive aspects of American culture, including patterns of violence, its Christian tradition, and racism. Instead, he focuses on "American patterns of egalitarian social status and on American patterns of resistance to state power" (p. 6; emphasis removed), which he ultimately ties to some of the issues he purports to exclude from in-depth analysis. Whitman's exclusion of these three crucial cultural differences from deeper discussion is noteworthy and distinguishes his book from other (sociological) analyses on the market. He may go too far, however, ultimately avoiding some issues that could undermine his theory or at least call it into question.

First, a number of sophisticated statistical studies have shattered the myth that the United States and European countries have dramatically different crime rates. A number of European countries have higher property crime rates than the United States.¹¹⁸

116. See Craig S. Smith, *Islam in Jail: Europe's Neglect Breeds Angry Radicals*, N.Y. TIMES, Dec. 8, 2004, at A3.

117. See also Ruddell, *supra* note 67, at 22 (calling for more research into the connection between multiculturalism, diversity, and social control).

118. See, e.g., FRANKLIN E. ZIMRING & GORDON HAWKINS, CRIME IS NOT THE PROBLEM: LETHAL VIOLENCE IN AMERICA 1-20 (1997) (documenting similar property crime rates but indicating substantially higher homicide rate in the United States). But see Charles H. Logan & John J. DiIulio, Jr., *Ten Deadly Myths About Crime and*

Nevertheless, punishment for such offenses is dramatically harsher in the United States. One-fifth of state prison inmates in the United States today are property offenders.¹¹⁹ Whether the high incarceration rate of property offenders in the United States serves as a deterrent remains disputed and has to await further analysis.¹²⁰

Violent crime rates also are not much different,¹²¹ with the exception of rape and crimes committed with a firearm. The access to firearms is much more limited in Western Europe, including Great Britain, which decreases the likelihood of some violent offenses.¹²² Why rape rates are dramatically higher in the United States remains unexplained.

Even though the crime rates may not explain sentencing differences, the perception of crime may. With small exceptions, Europeans tend to be less afraid of violent crime than Americans, especially in large cities. This may be a function of media accounts. In the United States, local crime has been made into national news through the media. Even though the crime rate decreased in the last decade, many Americans continued to believe throughout the late 1990s that crime was on the rise.¹²³ Despite the creation of the European Union and the lifting of border controls in the Schengen countries,¹²⁴ Europe's nations have retained a national view which makes them deem crimes committed in another member state foreign events. This lessens the likelihood that legislative strategies will be developed in response to a crime committed in another country.¹²⁵

Punishment in the U.S., in CRIMINAL JUSTICE? THE LEGAL SYSTEM VERSUS INDIVIDUAL RESPONSIBILITY 156, 172 (Robert James Bidinotto ed., 1994).

119. BUREAU OF JUSTICE STATISTICS, CRIMINAL OFFENDERS STATISTICS, at <http://www.ojp.usdoj.gov/bjs/crimoff.htm#inmates> (last modified Dec. 28, 2004).

120. See, e.g., Paul G. Cassell, *Too Severe?: A Defense of the Federal Sentencing Guidelines (and a Critique of Federal Mandatory Minimums)*, 56 STAN. L. REV. 1017, 1030 (2004).

121. In some cases, the definition of an offense as a property or a violent crime may differ. Most U.S. jurisdictions, for example, consider burglary a violent offense.

122. See, e.g., Anthony Gallia, "Your Weapons, You Will Not Need Them.": *Comment on the Supreme Court's Sixty-Year Silence on the Right to Keep and Bear Arms*, 33 AKRON L. REV. 131, 153-55 (1999) (discussing gun control laws in a number of countries).

123. See generally Sara Sun Beale, *Rethinking Federal Criminal Law: What's Law Got To Do With It? The Political, Social, Psychological and Other Non-Legal Factors Influencing the Development of (Federal) Criminal Law*, 1 BUFF. CRIM L. REV. 23 (1997).

124. Fifteen European countries are parties to the Schengen Agreement which abolished internal border checks at common borders. See, e.g., Deutsches Auswärtiges Amt, *The Schengen Agreement and the Convention Implementing the Schengen Agreement*, at http://www.auswaertiges-amt.de/www/en/willkommen/einreisebestimmungen/schengen_html (last modified July 2003).

125. Sentencing changes are more likely when crimes are committed in border regions or when those committed in one E.U. member state parallel those in another member state. The latter led to increasing restrictions on sex offenders in Germany, when the Dutreux case in Belgium, which included the kidnapping, rapes and murder of a number of young girls,

Second, “some distinctively fierce American Christian beliefs” (p. 6) also contribute to the growing divide between Western Europe and the United States. While Americans often appear to sneer at an increasingly nonreligious Europe, most Europeans do not seem to consider the decline of organized religion problematic. Many there view America’s religious fervor as dangerous in the current political climate, and as a threat to democracy and human rights. To what extent, however, humanist beliefs may temper criminal punishment and the “eye for an eye” philosophy may dominate U.S. thinking remain unexplored in this volume. Some organized religion may play a more important role than currently admitted in the retention of a punitive regime. Its emphasis on individual fallibility rather than societal injustices, for example, tends to blame the offender for his misdeeds rather than attempt to restructure society. Therefore, any full account of America’s punitiveness needs to focus not only on possible theological underpinnings of the current regime, but also on practical support for it.

Third, even though U.S. racism plays only a minor role in Whitman’s book, it is palpable in his account of social status. As Whitman states correctly, penal harshness is not restricted to racial minorities, though they may suffer most from it when one considers their disproportionate representation in prison and the large numbers of racial minorities with criminal records. The current focus on high-status offenders, most of whom are white, indicates that penal harshness is not restricted to the most disempowered.¹²⁶ Nevertheless, enforcement continues to target the poor and minorities, especially in the “War on Drugs,” which is responsible for the high rate of African-American prison inmates.¹²⁷

In his comparison between Europe and America, Whitman notes that Europe experiences its share of racism, with its prisons increasingly filled with non-citizens and racial minorities.¹²⁸ Since many of Europe’s racial minorities are relatively recent additions to the country, however, the problem is different from the one

occurred around the same time as two child rape-murders in Germany. Albrecht, *supra* note 24, at 202.

126. See, e.g., U.S. SENTENCING COMM’N, REPORT TO THE CONGRESS: INCREASED PENALTIES UNDER THE SARBANES-OXLEY ACT OF 2002 (Jan. 2003), at http://www.ussc.gov/r_congress/S-Oreport.pdf.

127. Jeffrey Fagan et al., *Reciprocal Effects of Crime and Incarceration in New York City Neighborhoods*, 30 FORDHAM URB. L.J. 1551 (2003).

128. Pp. 79-80. See, e.g., Hans-Jörg Albrecht, *Ethnic Minorities, Crime, and Criminal Justice in Germany*, in ETHNICITY, CRIME, AND IMMIGRATION: COMPARATIVE AND CROSS-NATIONAL PERSPECTIVES 31 (Michael Tonry ed., 1997); Pierre Tournier, *Nationality, Crime, and Criminal Justice in France*, in ETHNICITY, CRIME, AND IMMIGRATION, *supra*, at 523.

experienced in the United States. Many of Europe's prison inmates are first- or second-generation immigrants who have been insufficiently integrated in countries that have often made them feel as outsiders. French immigrants hail largely from France's former colonies in North Africa; German immigrants, on the other hand, tend to consist of former *Guestworkers* and their families from Italy, Greece, Spain, and Turkey, along with more recent immigrants from Eastern Europe and the former Soviet Republics who can demonstrate German ancestry. While the treatment of some of these groups may be compared to the treatment of Mexican and Asian immigrants in the United States, they do not share the long history of slavery that African Americans in this country have experienced. For that reason, racism may take different forms — and different solutions — on both sides of the Atlantic.

Whitman argues that racism is important only insofar as Europeans are able to identify with their low-status ancestors while Americans are unable to identify with slaves, who were at the bottom of society in the past (p. 198). Whether this difference is truly decisive remains to be tested. Moreover, it may not hold in a Europe that incarcerates non-citizens with whom the native population cannot or will not identify. All of these differences between Europe and the United States deserve further exploration in a historical and comparative manner. *Harsh Justice* has now set the standard for this type of exploration which may lead us to understand how countries that seem to have much in common have ever further divergent policies.

Comparative law frequently provides us a mirror for our society; it grants us insight not only into foreign legal systems and cultures but also into our own. Through comparisons we are frequently able to understand ourselves better. Whitman makes this point forcefully when he notes that comparative lawyers' "relative claims" in describing foreign systems allow for greater "understanding of human legal systems" (p. 17). Comparisons across borders may help us understand whether it is really America's history of status, egalitarianism and suspicion of state power that accounts for current punitive measures, or whether other factors have played a more determinative role. Whitman's account appears insufficient to determine what went awry in the last three decades — whether in Europe or the United States.

IV. WHAT DOES THE FUTURE HOLD?

Recent developments may change the trajectories of mildness and harshness in sentencing practices between the United States and Europe. America's "War on Terrorism" may deflect — or reinforce — its "War on Crime," while Europe's human rights norms may temper

potentially harsh tendencies. Ultimately, fiscal constraints, rather than ideology, may change the future of America's "harsh justice."

A. *Terrorism*

In the wake of the attacks of September 11, 2001, it appeared as if the harshness of the criminal justice apparatus would become focused on suspected terrorists. While some of this occurred, so far very few terrorist prosecutions have taken place. In at least one sentencing, even the federal district court judge deemed the sentence she imposed under the federal sentencing guidelines too harsh.¹²⁹

Shortly after 9/11 it became clear that suspected terrorists would not be the only targets of the anti-terror campaign. TV and print ads implied that drug users supported terrorism through their habit.¹³⁰ The campaign, however, was disbanded shortly after its start. Instead federal law enforcement has focused on the deportation of non-citizen offenders, whose criminal, rather than terrorist activity, has been portrayed as a threat to national security.¹³¹ Terrorism has been used as a foil for the prosecution and the deportation of non-citizen offenders whose criminal activity has been unrelated to terrorism.¹³² In France and Germany as well, legislation has been tightened to allow for the prosecution of suspected terrorists.¹³³ Unlike the United States though, it seems to have little effect on other criminal offenders.

Should further terrorist attacks occur in the United States, increasing penal harshness should be expected. This seems to be unrelated to concerns of status but driven by fear, a major ingredient in crime legislation. While status considerations may lower the threshold for penal harshness, fear, a primal urge, may be most important. Media and politicians can inform and harness such fears to create demands for the harsher treatment of criminal offenders. As

129. See Kevin Sack, *Chasing Terrorists or Fears?*, L.A. TIMES, Oct. 24, 2004, at A1 (noting Judge Brinkema's reaction to an eighty-five-year sentence she was forced to hand down for a non-violent, terrorism-related offense).

130. See, e.g., Nora V. Demleitner, "Collateral Damage": No Re-entry for Drug Offenders, 47 VILL. L. REV. 1027, 1027 (2002).

131. See, e.g., Operation Predator, at <http://www.ice.gov/graphics/predator/> (last modified Mar. 9, 2005); see also Nora V. Demleitner, *Misguided Prevention: The War on Terrorism as a War on Immigrant Offenders and Immigration Violators*, 40(6) CRIM. L. BULL. 550 (2004).

132. See generally, Demleitner, *supra* note 130.

133. See Eugenia Dumitriu, *The EU's Definition of Terrorism: The Council Framework Decision on Combating Terrorism*, 5 GERMAN L.J. (2004), (discussing EU Framework Decision which aims to unify European law on the prosecution of terrorism offenses), at <http://www.germanlawjournal.com/article.php?id=434> and <http://www.germanlawjournal.com/article.php?id=435> (last visited Apr. 16, 2005).

long as the offenders are perceived as foreign — either because of the acts they have committed or because of identifiable differences, such as race or religion — it is unlikely that mainstream American society will rise to their defense. As Arabs are not recognized officially as a different race, much of the debate has focused on the selective treatment of Muslims.¹³⁴ Any potential threat these individuals may pose has been used to justify their low-status treatment. Any indication of a possible threat gives rise to further fears on the public's part, justifying treatment that it would not condone under other circumstances. This may explain the public's limited outrage about and condemnation of internationally condemned methods used against alleged terrorists, including disappearances, targeted assassinations, and torture.

As mere suspects have been treated in this manner, the convicted can be subjected to yet further abuse, and any methods used against alleged terrorists will ultimately open the door to the further dehumanization of all offenders. To what extent the courts can serve as an effective bulwark against the tidal wave of fear, dehumanization, and abuse remains to be seen. While the threat of abuses exists on both sides of the Atlantic, the greater magnitude of fear of a future terrorist attack in the United States makes Americans more prone to commit abuses.

B. *Human Rights*

Surprisingly, Whitman mentions human rights only in passing in his discussion of dominant differences between the United States and Europe. Europeans have made their resistance to the death penalty an important issue in their relationship with the United States.¹³⁵ Many other harsh penal practices have triggered opposition, though most are less well-known in Europe.

Americans frequently portray their country as the protector of human rights. America's view of human rights, however, remains limited by domestic laws. The U.S. Constitution trumps modern human rights treaties, and the United States has often refused to sign on to regional or international human rights tribunals on constitutional grounds. Institutions outside the United States cannot

134. A religion- rather than race-based focus may be more useful as a law-enforcement tool as many of the suspected terrorists are not Arabs. Among them are Jose Padilla, the American citizen suspected of attempting to procure a dirty bomb, and Richard Reed, the so-called "shoe-bomber." At the same time the vast majority of Muslims are obviously not terrorists.

135. See generally Demleitner, *supra* note 73.

bind U.S. courts, though some have issued stunning rebukes of U.S. sentencing practices, especially in connection with the death penalty.¹³⁶

European countries, on the other hand, have been forced to increasingly subject their practices to control by the European Court of Human Rights.¹³⁷ In addition, Germany's and France's Constitutions are substantially more modern and their courts have drawn on non-national jurisprudence in evaluating sentencing practices. All of this has restricted the actions of European legislators.

While many Europeans tend to view some U.S. practices in the criminal justice arena as worthy of replication, such as zero-tolerance policing, increasingly U.S. punishment practices have come under attack. This is particularly true in the wake of the Abu Ghraib prison abuses. When the police vice-president in Frankfurt threatened a suspect with torture, Germany's government registered outrage, and initially the suspect's trial appeared endangered. This reaction was substantially different from that of the U.S. government, which took a much longer time to condemn the actions at Abu Ghraib and launch a large-scale investigation into abuses of detainees in Iraq and Afghanistan. Any investigation, however, appears stalled, and further abuse allegations have been met with resistance.

On a less dramatic level, in a 1974 opinion, the U.S. Supreme Court declared the denial of voting rights to convicted felons constitutional.¹³⁸ Even though the disenfranchisement of ex-offenders has decreased, the denial of the franchise remains widespread for prisoners. Only two states — Vermont and Maine — currently allow inmate voting. In contrast, in March 2004 the European Court of Human Rights (ECHR) declared a British law in violation of the First Protocol to the European Convention on Human Rights because it denied certain prisoners access to the ballot.¹³⁹ Increasingly, Constitutional courts around the world have found voting rights to be such an integral right in a democracy that it cannot be denied to felons because of their criminal record or their imprisonment.¹⁴⁰ Again, the United States may find itself in a minority position. Yet more

136. See, e.g., *id.*; WILLIAM A. SCHABAS, *THE DEATH PENALTY AS CRUEL TREATMENT AND TORTURE: CAPITAL PUNISHMENT CHALLENGED IN THE WORLD'S COURTS* (1996); see also *Concerning Avena and Other Mexican Nationals (Mex. v. U.S.)*, 2004 I.C.J. 128 (Mar. 31) (noting violation of the Vienna Consular Convention).

137. The European Court of Justice also functions as a control organ, though with only limited impact in the sentencing arena.

138. *Richardson v. Ramirez*, 418 U.S. 24 (1974).

139. *Hirst v. United Kingdom*, App. No. 74025/01, 38 Eur. H.R. Rep. 825 (2004).

140. See *Sauvé v. Canada*, [2002] 3 S.C.R. 519 (Can.); *Minister of Home Affairs v. NICRO*, 2004 (5) BCLR 445 (CC) (S. Afr.) (decision of the Constitutional Court of South Africa).

strikingly the ECHR decided the case on election rights grounds while current felon disenfranchisement issues are argued on racial grounds in the United States. This is indicative of the value felons are accorded in these societies.

America's apparent disregard of human rights constraints appear to be connected to the fact it considers human rights a set of laws that apply to others. In the United States, some of these laws are grouped as civil rights law, largely protecting the rights of racial minorities, women, and other groups considered worthy of such protections. Laws protecting the accused are considered part of criminal procedure; once a guilty verdict has occurred, individuals lose many rights and protections. No longer do they appear to be human.

C. Fiscal Restrictions, Reentry, and Risk Analysis

Pragmatic considerations may change America's infatuation with "harsh justice." While Whitman's account focuses to a large extent on the federal system — an emphasis explained by its symbolic value — he misses out on recent dramatic developments in the states.¹⁴¹

Driven by fiscal considerations, numerous states have developed strategies to avoid continued increases in their prison population.¹⁴² They have abolished mandatory minimums, opted for quicker release of prison inmates, and have reinstated parole. This is encouraging since when legislatures in the past have been required to make cuts in prison spending, they have chosen to reduce or eliminate "amenities" such as health care. Congress, on the other hand, continues its drive toward harsher sentencing practices.¹⁴³

Another means to decrease imprisonment has been risk analysis. The Virginia sentencing commission has been on the forefront of developing data that would allow judges to select low-level, non-violent offenders who could be diverted from imprisonment without increasing the risk to public safety.¹⁴⁴ It has also developed data to identify the most dangerous sex offenders.¹⁴⁵ For the group with the

141. See also Richard S. Frase, *Historical and Comparative Perspectives on the Exceptional Severity of Sentencing in the United States*, 36 GEO. WASH. INT'L L. REV. 227 (2004) (reviewing *Harsh Justice*).

142. For a comprehensive overview of the developments in the states, see VERA INSTITUTE OF JUSTICE, SENTENCING AND CORRECTIONS, at http://www.vera.org/section3/section3_1.asp (last modified Mar. 3, 2005).

143. See, e.g., Feeney Amendment to the Prosecutorial Remedies and Other Tools Against the Exploitation of Children Today ("PROTECT") Act of 2003, Pub. L. No. 108-21, § 401, 117 Stat. 650 (2003) (codified as amended in scattered sections of 18, 28, and 42 U.S.C.). See also *supra* note 25.

144. See, e.g., Richard P. Kern & Meredith Farrar-Owens, *Sentencing Guidelines with Integrated Offender Risk Assessment*, 16 FED. SENTENCING REP. 165, 165-66 (2004).

145. *Id.* at 166-68.

highest recidivism indicator, Virginia's sentencing guidelines allow for a substantial increase beyond the upper end of the guidelines.¹⁴⁶ Such risk-based assessments are not only cost-effective but may provide the basis for future sentencing developments. It is conceivable that this strategy becomes attractive to European sentencers as well. Germany's *Sicherungsverwahrung*, for example, is already based on risk assessment but of a less empirically-grounded type than the one now available in Virginia.¹⁴⁷ On the other hand, risk assessment may lead to the release of a larger number of low-level offenders into the community, allowing for decreasing imprisonment rates in U.S. states.

Many states have also taken an increasing interest in criminals after their release from prison. High recidivism rates and frequent parole failures make it costly for states to reincarcerate these individuals, often multiple times during their lives. Over one-third of all parolees return to prison, making them a substantial portion of the prison population. For this reason, many states have participated in reentry programs, which are designed to help released inmates readjust to society and prevent them from violating their parole and committing further offenses. The President and Congress have also shown some interest in reentry initiatives,¹⁴⁸ which have gathered support from all parts of the political spectrum as they draw on both liberal and conservative values.

How successful such initiatives prove will depend on the future financial condition of the states and on the influence prison lobbyists and the representatives of prison employees have on prison-related legislation. After all, decades of prison build-up have created an industry that relies, indeed depends on, the continued incarceration of hundreds of thousands of its fellow residents. In the end, economic pressures and incentives may overwhelm any perceived cultural distinctiveness.

V. CONCLUSION: "JUSTICE"

Whitman entitled his book "*Harsh Justice*" (emphasis added). While he does not assail the assumption that what the United States metes out as punishment is "just," his account raises the question whether "Harshness" would not have been a more appropriate title. Is the treatment of those labeled criminal offenders really just?

146. *Id.* at 166-68.

147. Albrecht, *supra* note 24, at 201-02.

148. See President George W. Bush, State of the Union Address (Jan. 20, 2004), at <http://www.whitehouse.gov/news/releases/2004/01/20040120-7.html>; Jennifer Leavitt, Note, *Walking a Tightrope: Balancing Competing Public Interests in the Employment of Criminal Offenders*, 34 CONN. L. REV. 1281 (2002) (discussing Second Chance legislation).

Chillingly, Whitman notes that because of the impact of grace, “there was a shade *more* of a drive toward dignity, and even mildness, in punishment in Nazi Germany, at least for ordinary criminals, than there is in America today” (p. 203). Does this not mean that there is no justice in today’s punishment practices?