

Behind bars

by [Mark Lewis Taylor](#) in the [June 28, 2003](#) issue

German and French prison rules require prisoners to be addressed respectfully as "Herr So-and-So" or "Monsieur So-and-So." Prisoners also receive good health care and even paid vacations. Why are such practices not only nearly nonexistent in the United States, but nearly inconceivable? Why are prisoners punished much more harshly in the U.S. than in Europe? James Q. Whitman, professor of comparative and foreign law at Yale University, devotes himself to answering such questions.

Whitman documents many ways in which U.S. prison systems are harsher than those of Europe. The U.S. criminalizes a larger number of moral offenses, subjects more classes of persons to criminal liability, and more frequently enforces standing laws. Mandatory prison sentences are longer, and punishments are less likely to be adjusted for mitigating circumstances. Whitman's many examples of America's extreme harshness confirm U.S. Supreme Court Justice Stevens's statement opposing a 1984 ruling against prisoner rights: "[This ruling] declares prisoners to be little more than chattels, a view I thought society had outgrown long ago."

We all have much at stake in understanding America's harsh justice. Since 1980, the population in U.S. jails and prisons has quadrupled, representing the largest and most rapid expansion of the prison population in world history. Most of the 2 million now incarcerated are nonviolent offenders. This high incarceration rate does considerable damage to American society as a whole. Some 500,000 people go into U.S. jails and prisons each year, while an estimated 600,000 come out annually, carrying the wounds inflicted in prison back into the larger society. One-and-a-half million U.S. children have a parent in prison.

One reason why we are so much harder on prisoners than Europeans are is that the U.S. has had a different way of understanding social status. Europe has a long history of maintaining high- and low-status positions in a social hierarchy. This has involved adjusting punishments according to the status of the one being punished.

In applying the death penalty, for example, beheading was a high-status punishment, hanging a low-status one. In imprisonment, high-status offenders

(Voltaire, and even Hitler, before he came to power) were confined with dignity, comforts and rights, while lower-class folk suffered overcrowding, neglect, flogging and worse. When movements for equality impacted punishment practices, Europeans tended to create fairness by "leveling up"--i.e., by bringing all punishment practices up to the level that historically had been allotted to privileged prisoners of high social status.

In contrast, Whitman claims, the U.S. since colonial times has displayed a pervasive resistance to high-status rank, and thus also to high-status privileges in punishment. The U.S. drive for fairness in punishing has tended toward a "leveling down," a generalizing of low-status punishments for all.

American harshness also grew out of Americans' negative views of state power, Whitman argues. In Europe the state and its bureaucracies often have led the way in "leveling up" punishment practices toward milder forms for all. U.S. popular suspicion of state power and distaste for bureaucracy tend to limit the state's power to mitigate harsh penal practices. Rather, U.S. punishment regimes often depend on popular democratic politics. "It is simply too easy for politicians to mobilize support by advocating harsh punishment for abstractly conceived 'criminals,'" Whitman states. That such harshness is an outgrowth of the American values of democracy and egalitarianism is "a painful American irony."

Though Whitman focuses on these two causes, the other determinants of our harshness in punishment cannot be ignored. In his introduction Whitman says that race and racism will be "put to one side" in his book, but he is forced to return to these issues repeatedly to clarify his argument. He stresses that Americans' historical identification of prisoners with slaves is "of central import" to the generalization of low-status treatment.

Harsh Justice cries out for further elaboration of the impact of slavery and racism on punishment. Slavery's baseness not only kept U.S. punishment practices tethered to low-status forms, but also pulled low-status punishment practices down still further, toward the kind of treatments meted out to slaves (forced labor, flogging, branding). As Whitman senses, but does not fully conceptualize, the politics of race (and, perhaps, also of labor) must be placed more to the center of accounts of our harshness.

The religious dimension of our punishment practices also needs to be explored, as Whitman's occasional comments on religion make clear. "Fierce American Christian beliefs often identify all social disorder as 'sin,' mitigating our ability to distinguish major from minor infractions, a necessary distinction for a more calibrated, less harsh, justice system," he notes.

Whitman also suggests that Christian practice can play a more positive role. It is Christian practices, he writes, that partly account for the "quasi-sacral monarchical traditions" that in Europe created a politics of grace that persists in the greater mildness of Europe's criminal-justice system. If America's harsh ways are ever to change, "our Christian tradition" would be the most likely source of mildness. Yet Whitman also registers an understandable reserve about the notion of a "Christianized America," and thus does not suggest how Christian traditions might create this mildness.

Whitman's study of social status, state power and punishment in Europe and America adds important pieces to the puzzle of American harshness. We must now integrate his claims with a consideration of the ways that status and power have been viciously marked in the U.S., especially in terms of race and class.