

Testimony of James O. Whitman, Yale Law School

I am grateful and honored for the invitation to speak today, on a subject that should concern, and indeed trouble, all Americans.

There was a time when America was a beacon for punishment reformers all over the western world. During the early years of the Republic, numerous foreign visitors came to study the new American punishment practices, which were deemed to mark a great advance. Tocqueville, the most famous of those visitors, was confident that America would always be a model of mildness in criminal punishment: A country with truly free and democratic traditions, he believed, must necessarily be a country committed to humane values in its criminal justice.

Yet today, for those who do not know it, the situation is reversed. The United States is regarded by other countries as something close to a pariah. By contrast with other advanced countries, our country is indeed extraordinarily harsh. We have uniquely long sentences. We stand out for our willingness to ascribe criminal responsibility even to minors and the mentally deranged. We suffer from disturbingly degrading prison conditions, and more. How did this happen? Why was Tocqueville so wrong? Have we somehow come to misunderstand the proper goals of punishment?

At first glance, it may seem that we are only doing what is necessary. To begin with, we have higher rates of violent crime than other countries do. This has arguably driven us to crack down especially hard, hunting for ever tougher methods of deterrence and incapacitation. But let us not exaggerate the persuasiveness of that explanation for our harshness. America's relatively high rates of violence cannot be the whole story. After all, we do not limit our harshness to violent offenders. Indeed, one of the features that sets American justice most strikingly apart is the rate at which we incarcerate non-violent offenders. Other advanced countries avoid incarcerating the non-violent, most especially in cases involving victimless offenses. These other countries embrace deterrence and incapacitation too. But they take it to be an elementary truth that the decision to incarcerate is a weighty and fearsome one, and that lengthy sentences are only appropriate in the case of offenders who pose a clear threat of repeated violence.

What about retribution? Surely part of the answer is that Americans feel an unusually strong attachment to the values of retribution? After all, it is hard for Americans to accept any system in which people do not pay for what they have done. This is not only true of criminal law. It is also true of the social welfare state. Unlike the Europeans, we resist policies that do not put a strong emphasis on personal responsibility. Yet we should hesitate before we declare that our system is harsh because we alone take retribution seriously. Other countries pursue retribution too. But they take it to be an elementary truth that a proper system of retribution must include principles of proportionality. When one says that offenders must pay for what they have done, one means that they must pay fittingly and proportionately. Yet here again, American punishment is unique among western systems for the weakness of its proportionality jurisprudence. We don't just make people pay. We make them pay at staggering rates.

Nor does it end there. Americans accept norms of degradation in punishment that have been widely rejected in the rest of the Western world. In other parts of the West, accused persons are not shown to the press in shackles. In other parts of the West,

prisoners do not wear degrading prison uniforms, and they are not housed behind barred or glass doors that deprive them of all privacy. In other parts of the West, shaming penalties are regarded as obvious violations of human dignity. In countries like Germany, prisoners even get the benefit of ordinary labor law in their prison employment. Does that mean that other countries do not pursue the classic goals of punishment? By no means. Nothing in the theory of incapacitation suggests that offenders should be treated in the degrading way American law treats them. Nor does anything in the theory of retribution. Only a strained and merciless version of deterrence could possibly justify such measures.

No, it is not that we alone believe in incapacitation, deterrence or retribution. Something more is going on in our system. There is a spirit of fierceness in American punishment that simply cannot be captured by any sensible account of those familiar goals of punishment.

So why is American punishment so harsh? The answer must begin by acknowledging that criminal punishment is a volatile, and always potentially savage, form of human action. When we punish people, we often fly off the handle—we often lose control of our emotions in ways that have little to do with sober ideas of deterrence, incapacitation or retribution. This is especially so because of the universal human tendency to look upon criminal offenders with fear and disgust. As Jeremy Bentham put it, “legislators and men in general are naturally inclined to excessive harshness, since ‘want of compassion for individuals who are represented as dangerous and vile, pushes them onward to an undue severity.’” Bentham was right: Instead of thinking soberly about the goals of punishment, we often react differently. We often just yield to our hatred, and our angry contempt, for offenders. We often treat them, not as fellow human beings, but as vermin to be crushed.

This is a very great danger, of which other western countries are deeply aware. It is for that very reason that other countries resist punishment practices that symbolically treat offenders as anything less than human beings and fellow citizens. It is for that very reason that Germany and France have tried to eliminate practices like prison uniforms, barred doors and shackles. It is for that very reason that they long ago abolished shaming penalties. Such practices are thought to contribute to a barbaric spirit of degradation in punishment. Before the criminal justice system can attain a proper level of civilization, lawyers in these countries believe, we must civilize ourselves. We must overcome the sort of unreasoning, primitive fears and hatreds that lurk in all of us.

Ideas like that are absent in the United States. Indeed, many of our practices can only be understood as furthering an unacknowledged “goal,” different from the standard goals that we customarily enumerate. They can only be understood as furthering the goal of degrading offenders. At the same time, criminal punishment is the subject of political campaigning in our country. Elsewhere, criminal justice officials have managed to keep better control over the system. This matters a great deal, because professionals tend to have a much more measured and humane attitude toward offenders than ordinary voters do. For better or for worse, ordinary voters react to criminals with a panic and disgust that will always encourage degrading and harsh punishment.

I believe that the ultimate explanation for American harshness lies here. We have not grasped a basic imperative of civilization: the imperative of maintaining minimum standards of dignity and respect in punishment. America is not more harsh because we

have a better understanding of the demands of the standard goals of punishment. It is more harsh, first and foremost, because we have made less progress in overcoming the inevitable tendencies toward degradation and savagery that other countries have worked to combat. The best solution to this problem is one that requires some courage: The best solution is to take policy-making in criminal justice out of the democratic process, to the extent possible—ideally through more deeply constitutionalizing the law of punishment. Failing that, it is essential that professionals join together in the struggle to plead for a more humane punishment system—a system that acknowledges the risks of degradation, a system that is dedicated in a meaningful way to the sober pursuit of deterrence, incapacitation and retribution as the only proper goals of punishment.

