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Response

Whitman's Two Modes of Justice and the Rationales of Punishment

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Jim Whitman's splendid essay contrasts two different ways of doing criminal justice, the continental and the common law way. More concretely, he argues that the manner in which the contrast is typically drawn, adversarial versus inquisitorial, truth-seeking versus rights-protecting, actually doesn't capture the essence of what is going on.[1] The essence of what is going on is best captured, he argues, by the contrast he draws between the presumption of innocence and the presumption of mercy.[2]

What he means by presumption of innocence is best conveyed through the sorts of incidents reported to have occurred in France and Germany that shock Americans because they appear inconsistent with that presumption: the extensive examination of Amanda Knox's course of life long before her alleged homicide as part of an assessment of her guilt;[3] the casual wiretapping of conversations between French President Sarkozy and his lawyer;[4] the use of computer malware to infiltrate suspects' email;[5] defamation suits by the police against the understandably distressed parents of a suspect, as in the Amanda Knox case;[6] admitting evidence that is barred from being used to prove guilt by the backdoor of combining the

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1. James Q. Whitman, *Presumption of Innocence or Presumption of Mercy?: Weighing Two Western Modes of Justice*, 94 TEXAS L. REV. 933, 947–48 (2016).
2. *Id.* at 948–49.
3. *Id.* at 939, 972–74.
4. *Id.* at 938.
5. *Id.* at 938–39.
6. *Id.* at 939.

guilt and sentencing phases of a trial;[7] and keeping defense counsel from aggressively challenging the prosecution's witnesses.[8] In other words, whereas the American system erects a high presumption against conviction and makes the task of convicting someone a veritable obstacle course, the European system makes it a gentle, easily traversable slalom—for the prosecutor that is. These are the kinds of things the presumption of innocence is meant to forestall.

What Whitman means by the presumption of mercy is perhaps best conveyed by a list he offers in his book *Harsh Justice*,[9] which I found offers useful background for understanding the thesis of this essay. One legal system, he points out, might be deemed harsher than another for a variety of reasons, in a variety of ways:[10] because it criminalizes a wider range of conduct[11] (nonpayment of child support, tax evasion, failure to comply with nitpicky campaign donation reporting requirements); because it subjects a wider range of persons to punishment[12] (minors, the demented, the retarded); because of the way it grades crimes[13] (making most offenses felonies rather than mere misdemeanors, or the equivalent of parking violations); because it has inflexible liability doctrines[14] (rigid sentencing guidelines); because it is enforced especially aggressively[15] (high incarceration rates); because punishment is particularly harsh[16] (capital punishment, long sentences, listing in public offender registries); because it rarely dispenses pardons;[17] and a few others.[18] On virtually all of these dimensions the American system is less merciful than the European.[19] (Whitman's use of this particular variant of the notion of mercy is mildly non-standard because it does not refer to someone being let off short of receiving the punishment he deserves.) In other words, the European system has a presumption for milder treatment of guilty. We don't have that. That's the presumption of mercy he is talking about.

Along the way of establishing this contrast, he makes a series of quite striking non-obvious observations about the way each system works only

7. *Id.* at 940–43.

8. *Id.* at 942.

9. JAMES Q. WHITMAN, HARSH JUSTICE: CRIMINAL PUNISHMENT AND THE WIDENING DIVIDE BETWEEN AMERICA AND EUROPE 32–39 (2003).

10. *Id.* at 964–65.

11. *Id.* at 965.

12. *Id.* at 966.

13. *Id.*

14. *Id.* at 967.

15. *Id.*

16. *Id.*

17. *Id.* at 967–68.

18. *See id.* at 968–71 (describing characteristics of legal systems in terms of the mildness of respectful treatment afforded to offenders and the effect of a pardon).

19. *Id.* at 969–70.

indirectly tied to the overall thesis but interesting in their own right. Such as (1) that the adversarial/inquisitorial difference between the two systems mirrors our more general wariness of governmental intervention;[20] (2) that despite the focus on innocence the American system probably convicts more innocents than the European system;[21] (3) that the inquisitorial structure of the European system, which resembles an auditing regimen, by its very nature ends up accounting for the lesser prominence of plea-bargains in that system;[22] (4) that for all its concern with prejudicial evidence, the American system might well end up being more prejudicial to the defendant because it keeps out a lot of character evidence favorable to a defendant that would come in under the European system;[23] (5) that there is a much wider variety of punishment options than is customarily recognized under the American system;[24] (6) that the informality we abhor about European procedures should be compared to the informality inherent in a system with unconstrained jury decision making;[25] (7) that the greater harshness of the American system is not particularly related to our higher rate of violence because many of its features are not really designed to deal with violent criminals, e.g., the network of offenses aggressively targeting non-violent behavior.[26]

At a gut level I find myself in enormous agreement with Whitman. I find it easiest to agree with the descriptive part of his thesis about where the essential contrast between the two systems resides. I would be inclined to qualify it slightly. It seems to me that the ubiquity of strict liability offenses and of the possibility of infractions more generally results in a level of discretion on the part of prosecutors that comes close at times to nullifying the presumption of innocence. Innocence just doesn't mean very much if it is enough to prove your guilt to show that you have engaged in conduct that is morally unobjectionable and was unintentional to boot but happens to have been criminalized mostly for administrative reasons.

The situation is more complicated with his normative claim. To be sure, at a gut level, he has me almost sold on the proposition that I should prefer to find myself subject to the European rather than the American system. The difficulty is that I find it harder to justify that intuition once I try to be more systematic about it and evaluate the two systems from certain standard global perspectives.

One such global perspective is consequentialism.[27] Consequentialism

20. *See id.* at 952–55.
21. *Id.* at 956–57.
22. *Id.* at 974–75.
23. *Id.* at 970–72.
24. *See id.* at 979–80.
25. *See id.* at 951–52.
26. *See id.* At 980.
27. *Consequentialism*, Stanford Encyclopedia of Philosophy,

comes in many familiar and not so familiar stripes, the most prominent being traditional utilitarianism and welfare economics, similar but not quite the same thing.[28] From a consequentialist point of view, none of the various kinds of harshness of the American system are particularly disturbing—that it criminalizes a wider range of conduct, that it subjects a wider range of persons to punishment, that it grades most crimes as felonies, that it has draconian, rigid sentencing guidelines, that it incarcerates a lot of people, that it is stingy with pardons, all those dimensions of harshness listed in Whitman's book. And its emphasis on sorting the innocent from the guilty also seems pretty consonant with the consequentialist objective, although maybe overdone. In the American system's harshness seems quite felicitous from a consequentialist point of view because it achieves a maximum of deterrence with a minimum of enforcement costs, at least when compared to a system that seeks to achieve the same level of deterrence by punishing more people but more leniently.

To be sure, the consequentialist approach is subject to familiar objections, based on examples such as the lynching or carving up of innocents to save greater numbers of innocents.[29] But it has also been subject to further recent bolstering at the hands for instance of Kaplow and Shavell who made salient something people had realized but not fully focused on before; namely that if one rejects a consequentialist theory of law, one is committed to the possibility that under the right circumstances one should prefer an outcome in which everyone is worse off to one in which everyone is better off.[30] And any approach that even harbors the possibility of such an outcome, i.e., a violation of the Pareto criterion, they argue surely should be rejected even in circumstances in which it does not do that.[31] That's what consistency and intellectual honesty would seem to require.

Now what Whitman suggests in his book—he does not touch on it in his essay—is that consequentialism is just the wrong tool to use to think about punishment, because it manifestly is not designed to deal with fine-grained distinctions we care about a lot such as which punishments are too inhumane to be tolerated and many other details of the punitive process.[32]

http://plato.stanford.edu/entries/consequentialism/ [https://perma.cc/BZU2-HY2W] ("Consequentialism, as its name suggests, is the view that normative properties depend only on consequences.").

28. Eyal Zamir & Barak Medina, *Law, Morality, and Economics: Integrating Moral Constraints with Economic Analysis of Law*, 96 CAL L. REV. 323, 329 (2008).

29. Leo Katz, *A Look at Tort Law with Criminal Law Blinders*, 76 B.U. L. REV. 307, 308 (1996).

30. Louis Kaplow and Steven Shavell, *Fairness Versus Welfare*, 114 HARV. L. REV 961, 1061–64 (2001).

31. *Id.* at 1062.

32. *See* WHITMAN, *supra* note 9, at 38–39 (discussing the difficulty of creating a justice system based on any one goal).

A fair point, to which the consequentialist however would insistently reply that the fact that these matters are irrelevant to a consequentialist doesn't show that consequentialism is unsuited to deal with them. Rather it shows that they ultimately don't matter.

A second global standard is retributivism.[33] Now most criminal law theorists are not consequentialists. Retributivists is what they would describe themselves as.[34] But even from a retributivist perspective many of the dimensions of harshness of the American system are not especially worrisome, although some are, such as the inordinate length of sentences and the range of unobjectionable conduct that is being criminalized. But there the retributivist would say the problem has nothing to do with the presumption of innocence, or even with lack of mercifulness. He would simply say that to the extent that we punish what does not deserve to be punished and punish what deserves to be punished disproportionately we are acting wrongly, and that needs to be fixed. If more of that happens here than under the European system then more of that needs to be fixed here. Period. The presumption of innocence, or for that matter the presumption of mercy, would not really figure in his analysis.

Retributivism has its own share of familiar weaknesses, notably that judgments of just desert are notoriously vague and vacillating.[35] But also that it has a certain flavor of irrationality surrounding it, for exactly the reasons Kaplow and Shavell identified.[36] If we all had to decide on a regime that minimized our chances of falling victim to either the injustice of a criminal attack or the injustice of an unjust conviction, we would surely opt for the consequentialist, not the retributivist regime. To be sure, there are answers to these charges but none that are irresistibly compelling.

Finally there is a vantage point of a more unusual sort that makes it especially difficult to be too critical of American harshness. It is based on

33. *Retributive Justice*, Stanford Encyclopedia of Philosophy, http://plato.stanford.edu/entries/justice-retributive/ [https://perma.cc/V4ER-WXR8] ("The concept of retributive justice has been used in a variety of ways, but it is best understood as that form of justice committed to the following three principles: (1) that those who commit certain kinds of wrongful acts, paradigmatically serious crimes, morally deserve to suffer a proportionate punishment; (2) that it is intrinsically morally good—good without reference to any other goods that might arise—if some legitimate punisher gives them the punishment they deserve; and (3) that it is morally impermissible intentionally to punish the innocent or to inflict disproportionately large punishments on wrongdoers.").

34. *See* Stuart P. Green, *Why It's a Crime to Tear the Tag Off a Mattress: Overcriminalization and the Moral Content of Regulatory Offenses*, 46 EMORY L.J. 1533, 1552 n.51 ("Most criminal law scholars, including most overcriminalization critics, subscribe to a theory that mixes retributive and preventative . . . goals.").

35. *See, e.g.*, Carol S. Steiker, *Can/Should We Purge Evil Through Capital Punishment? Matthew H. Kramer: The Ethics of Capital Punishment: A Philosophical Investigation of Evil and Its Consequences. Oxford University Press, New York, 2011*, 9 CRIM.. L. & PHIL. 367, 375 (2015) (responding to the argument that "retributivism relies on the vague concept of desert").

36. *See supra* notes 29–30 and accompanying text.

an argument by Lawrence Alexander developed among other places in a remarkable essay called *The Doomsday Machine: Proportionality, Punishment and Prevention*.[37] Alexander asks us to imagine an example commonly used by retributivists to illustrate disproportionate punishment, namely the practice of hanging pickpockets.[38] Then he asks us to think of a:

> super-sophisticated satellite that can detect all criminal acts and determine the mental state of the actors . . . If the satellite finds that the actor knew his act was a crime, that he had no recognized excuse or justification for committing it, that he was not acting in the heat of passion or under duress, and that he was not too young, enfeebled, mentally unbalanced, and so forth to be deemed without capacity to commit a crime, the satellite immediately . . . zaps him with a disintegration ray.[39]

Such a "Doomsday Machine", as he calls it, would be the more radical and extensive version of a legal regime that punished pickpockets with hanging. At first glance such a system seems intolerable. Next, however, Alexander asks us to consider some other scenarios: for instance one involving

> a man [who] keeps moat to protect his castle (or an electric fence to protect his house), and he receives a letter from someone who says that the first time the castle (house) is deserted he will attempt to enter it; and because he cannot swim (is not shockproof), his death will be on the owner's hands if the moat is not drained (the current not turned off). Is there a duty to drain the moat (shut off the current) in order to avoid excessive punishment? And what if one hides his jewels on top of an unscalable cliff after having been told by a thief that the latter would attempt to climb it if the jewels were placed there?
>
> I might go on in my hypotheticals to drag out vicious dogs, crocodiles, and spring guns to protect persons from petty crimes, and pit these devices against petty criminals, whose common denominator is that they all know of the certain consequences of their acts . . . .[40]

Isn't this like a doomsday machine? And what if the American system were to be viewed like that?

Now what about one's abiding intuition that one surely would prefer to live in a regime that follows the presumption of mercy rather than the presumption of innocence? Isn't that an appealing global standard of sorts? Here is what makes me distrustful of it—an example I have used elsewhere to illustrate the difficulties with allowing our preferences to be our guide. I imagine a system in which we offer all criminals the option to shorten their

37. Lawrence Alexander, *The Doomsday Machine: Proportionality, Punishment and Prevention*, 63 THE MONIST 199 (1980).

38. *Id.* at 209.

39. *Id.*

40. *Id.* at 210.

sentence by opting for a short stint of torture.[41] Would we let them? I am quite sure we wouldn't. And therein lies the challenge for those intuitions.

I am left then with a meta-puzzle about Whitman's essay. Why is it so easy to sympathize and endorse its overall tenor at an intuitive level, but once we try to evaluate and compare the two systems by going to various standard issue general criteria it is so hard to vindicate that intuition? I honestly don't know. It's one of the questions I'd ask you to consider.

41. LEO KATZ, WHY THE LAW IS SO PERVERSE 41–42 (2011).