Globalized Penal Populism and its Countermeasures

Why Are American Penal Policies so Harsh?

Michael Tonry
Sonosky Professor of Law and Public Policy and Director,
Institute on Crime and Public Policy, University of Minnesota

Abstract

None of the conventional explanations of why American penal policies are so harsh are persuasive. Rising crime rates, increased public anxiety about crime, and cynical electoral politics cannot be the answers. Nor can various "conditions of late modernity" such as the limited capacities of governments to affect crime rates, increasing population diversity and "the criminology of the other," increased vulnerability of privileged segments of the population to victimization by crime, and increased insecurities associated with globalization and rapid social change. They characterized every developed country in much of the period 1975-2000 and most did not adopt drastically harsher policies. Nor are such amorphous and over-generalized notions as "populist punitiveness," "penal populism," and neo-liberalism of much use.

Some things do have explanatory power cross-nationally. Moderate penal policies and low imprisonment rates are associated with low levels of income inequality, high levels of trust and legitimacy, strong welfare states, professionalized as opposed to politicized criminal justice systems, and consensual rather than conflictual political cultures. For each of those factors, the United States falls at the wrong end of the distribution. The question is, Why?

Answers must be sought in distinctive features of national history and culture. Four stand out: the "paranoid style" in American politics, a Manichaeian moralism associated with fundamentalist religious views, the obsolescence of the American constitution and a political culture that allows raw public emotion to drive governmental policies, and the history of race relations in America.

Key words: comparative penal policy, political paranoia, protestant fundamentalism

The United States is the only Western country that retains the death penalty. It has the world's highest imprisonment rate, exceeding 750 per 100,000 residents, and the developed world's harshest criminal punishments short of death, life sentences without the possibility of parole (LWOPs). Unlike most European countries and Canada, it refuses to acknowledge the moral force of international human rights conventions and declarations, or to incorporate them into its laws. Fifty years ago, United States governments were world leaders in promoting the creation and implementation of human rights conventions, the imprisonment rate was in line with those of other Western democracies, capital punishment was falling into disuse, and the U.S. Supreme
Court was acknowledged throughout the world for its extension of procedural human rights protections to criminal suspects.

Something went terribly wrong. In the simplest sense, we know what happened and why. Between 1975 and 1995, American policymakers enacted a wide range of laws that were meant to increase the severity of criminal punishments and practitioners applied those laws. These included three-strikes-and-you’re-out laws requiring minimum 25-year sentences; mandatory minimum sentence laws requiring 10-, 20-, and 30-year sentences for drug, firearms, and violent offenses; LWOPs; laws permitting prosecutions of tens of thousands of children as adults; and laws extending the reach of capital punishment.

What we don’t know is why American policymakers, nearly alone among leaders of Western governments, chose to enact such harsh policies and laws, and no one has yet offered a convincing explanation. None of the answers commonly offered provides much illumination.

Crime rates and trends are not the answer. Crime rate trends were much the same throughout the Western world after 1970—rises through the early 1990s and declines since (e.g., van Dijk, van Kesteren, and Smit, 2007). Imprisonment rates and penal policies however have differed enormously. In the United States, crime rates have fallen steadily since 1991 and imprisonment rates have risen every year, more than doubling since 1991 and increasing by more than five times since 1973 (Tonry, 2004).

Nor is public opinion the answer. In the English-speaking countries at least, penal policies and imprisonment rates vary enormously but public opinion is much the same. Majorities of the public believe crime rates are rising when they are falling. Large majorities believe judges are too lenient, on the basis of mistaken beliefs about the severity of punishments. The sentences citizens say they believe are appropriate are typically less severe than the sentences judges actually impose. When citizens are asked whether they prefer more punitive policies or increased investment in rehabilitative programs, majorities usually prefer the latter (Roberts et al., 2002).

Three sets of more complicated answers have been offered that attempt to explain why countries’ penal policies take the forms they do. The first, the most influential and elegant, is set out in David Garland’s The Culture of Control (2001) in which he attributes toughened penal policies in England and America to conditions of “late modernity.” These include the limited capacities of governments to affect crime rates, increasing population diversity and “the criminology of the other,” increased vulnerability of privileged segments of the population to victimization by crime, and increased insecurities associated with globalization and rapid social change. The result, he suggests, is a proliferation of expressive policies meant more to show that government is doing something, to reassure the public, and to aid politicians’ efforts to win re-election, than to reduce crime.
The insuperable difficulty for Garland's analysis is that, if it is right, it should explain why all Western countries have experienced steeply rising imprisonment rates and steadily harshening penal policies. All the developments he describes happened everywhere. Imprisonment rate and policy trends, however, diverged dramatically. Imprisonment rates can be used to make the point. Crime rates rose steeply in most Western countries between 1970 and 1995 and only in a few did policymakers enact policies intended to make punishments harsher and, as a result, imprisonment rates higher. In the face of similar crime rate trends, imprisonment rates increased five- and six-fold in the United States and the Netherlands after 1973 and doubled in England and Spain after 1993, but declined by half in Finland, held steady in most other countries, and zigzagged in France and Italy.

Finnish policymakers chose to make that country's penal policies less harsh and to reduce its imprisonment rates. Canada, and most European countries—the rest of Scandinavia, Belgium, France, Italy, Germany, Austria—did not adopt harsh new policies and in diverse ways worked to keep their imprisonment rates stable. Only in a few Western countries—England, Portugal, Spain, New Zealand—and only after crime rates began to fall in the 1990s did imprisonment rates rise significantly, but to levels at their peaks less than one-fourth the current American rate. (Tonry, 2004, chap. 5; Tonry, 2007).

Michael Cavadino and James Dignan (2005) offer a second analytical framework. A three part typology (technically four, but one contains only a single country, Japan) is used to link imprisonment trends and penal policy differences with systems of political economy. Neo-liberal states (e.g., England, New Zealand, the United States) are said to have the harshest policies and social democratic corporatist states (e.g., Scandinavia) to have the least, with conservative corporatist states (e.g., Germany, France) falling in between.

This analysis makes sense only, sort of, early in the 21st century. There are at least three kinds of anomalies their framework cannot explain. First, even in 2005, some countries did not fit their categories. The Netherlands then had the highest imprisonment rate in Western Europe except for England and Wales, but was not counted as “neo-liberal” while Australia which had a rate only slightly higher than German's was counted as neo-liberal. Second, countries excluded from the analysis defied the categories. Canada by all accounts should be included among the English-speaking neo-liberals but its imprisonment rate has held steady around 100 per 100,000 population for a half century, so it should have been classified among the conservative corporatists with France and Germany. Spain and Portugal, also excluded, have had among the highest imprisonment rates in Europe since the mid-1990s and no one would classify them as neo-liberal states. Third, the typology falls apart if it is applied to other periods. In 1970, for example, the Dutch imprisonment rate was the lowest among the developed countries and the U.S. rate was in the mainstream. The Finnish was the highest. That would have made the Finns neo-liberal, the Americans conservative corporatists, and the Dutch, quite properly, social democrats (for illustra-
tive figures from other periods, see Tonry and Bijleveld, 2007, table 2).

A third set of analyses attempts to explain penal policies in terms of such things as income inequality, citizens’ perceptions of the legitimacy of governmental institutions, citizens’ trust in each other and in government, the strength of the welfare state, and the structure of government (Downes and Hansen, 2006; Lappi-Seppälä, 2007, 2008; Di Tella and Dubra, 2008). All these things seem to matter. Moderate penal policies and low imprisonment rates are associated with low levels of income inequality, high levels of trust and legitimacy, strong welfare states, professionalized as opposed to politicized criminal justice systems, and consensual rather than conflictual political cultures (Tonry, 2007).

Even that analysis, however, does not explain American developments. For each of those factors, the United States falls at the wrong end, the end associated with more punitive policies and practices, but that’s the beginning not the end of the search for explanations. The question is, Why is the United States at the wrong end of every distribution?

Explanations for America’s (and any other country’s) penal policies must be sought in distinctive features of national history and culture. Four stand out. Two—the paranoid style in American politics and a Manichean moralism associated with fundamentalist religious views—are recurring cultural characteristics of American society. The third is the obsolescence of the American constitution and a political culture that allows raw public emotion to drive governmental policies. The fourth, aggravated by the first three, is the distinctive history of race relations in America. They are discussed in that order.

Political Paranoia

Richard Hofstadter, the great mid-twentieth-century American historian, described “the paranoid style” as a recurring characteristic of American politics. What is deeply disapproved is seen as evil or immoral and few means are off limits in pursuit of its eradication. Distinguishing clinical definitions of paranoia from the paranoid style in politics, Hofstadter wrote:

“[T]he clinical paranoid sees the hostile and conspiratorial world in which he feels himself to be living as directed specifically against him; whereas the spokesman of the paranoid style finds it directed against a nation, a culture, a way of life whose fate affects not him alone but millions of others….His sense that his political passions are unselfish and patriotic, in fact, goes far to intensify his feelings of righteousness and his moral indignation.” (Hofstadter, 1965:4; emph. orig.)

American political paranoia waxes and wanes and finds different targets at different times. It manifests itself on the Left and the Right, though in recent decades mostly on the right. In the
twentieth century it waxed three times. The first was in the 1920s and 1930s, and was exemplified by Prohibition, the Red Scares of the 1920s, and the xenophobia of the entire period. It wound down only when the onset of World War II gave people more important things to worry about.

The second was in the late 1940s and 1950s and is exemplified by Senator Joseph McCarthy, the House Un-American Activities Committee, and the John Birch Society. It waned only when the optimism and idealism of the 1960s temporarily pushed it aside.

The third, still ongoing, dates from the early 1980s and is exemplified by recent decades' wars on drugs, crime, welfare recipients, and illegal immigrants, and since 2001 by the American "war against terror."

Here is how Hofstadter described the political paranoid:

"[T]he paranoid is a militant leader. He does not see social conflict as something to be mediated and compromised, in the way of the working politician. Since what is at stake is always a conflict between absolute good and absolute evil, the quality needed is not a willingness to compromise but the will to fight things out to the finish. Nothing but complete victory will do." (p. 31)

Every political battle is crucial, Hofstadter observed. The enemies of morality, of what philosophers call The Good, will fight until they win a complete victory: "The central image [held by practitioners of the paranoid style] is that of a vast and sinister conspiracy, a gigantic yet subtle machinery of influence set in motion to undermine and destroy a way of life" (p. 29).

The rabid right wing of the Republican Party deserves most of the blame for the impoverishment of American criminal justice policy since the 1970s and the diminution of human rights values in it. I can remember as a boy in the 1950s trying to understand billboards along highways that said, "Impeach Earl Warren." They were placed alongside American highways by the John Birch Society. U.S. Supreme Court Chief Justice Earl Warren's impeccable offenses, I much later came to understand, related to Brown v. Board of Education, 347 U.S. 483 (1954), the Supreme Court's landmark decision declaring that segregated schools were unconstitutional, and the court's early halting efforts to strengthen the procedural protections afforded criminal defendants.

In the 1950s, the John Birch Society was widely seen as a radical fringe group. By the 1960s many of its views had been adopted by the 1964 Republican presidential candidate Barry Goldwater and the (then) far right wing of the Republican Party.
By the 1970s the paranoid political view became mainstream Republican rhetoric. The John Birch Society’s effort to impugn the integrity of the courts and to reduce their legitimacy in the eyes of the American people has remained a prevailing theme of the American right wing, with pernicious effects.

One consequence has been the declining legitimacy of the courts and the legal system in the eyes of the American public, as the John Birch Society and its successors wanted. “Impeach Earl Warren” was followed by forty years of attacks on “activist” and “lenient” and “liberal” judges who were said to be frustrating the will of the people. There is a certain oddness about this inasmuch as conservative Republican presidents have appointed most sitting federal judges, and Democratic president Bill Clinton never fought very hard to appoint moderate and liberal judges, but even in 2008 Republican presidential aspirants’ speeches regularly decried “activist” liberal judges.

Activist conservative judges, however, with little-to-no public outcry, have weakened procedural protections accorded criminal suspects, weakened convicted offenders’ appeal rights, and speeded up executions. And the Congress, in the name of reining in activist judges, has enacted laws making it almost impossible for prisoners to file effective lawsuits alleging unconstitutional prison conditions and making it much more difficult to file appeals.

Why would Americans tolerate such illiberal policies? Partly it is because 50 years of conservative politicians’ efforts to delegitimate judges have sunken in. And partly it is because many judges and prosecutors in the United States are blatantly political. Prosecutors are elected in openly partisan and political elections. Many judges run for office spending campaign funds donated by lawyers who practice before them, and most of the rest are appointed in partisan political ways. It doesn’t take a great deal of cynicism for Americans to believe that what prosecutors and judges do is often influenced by their political self-interest and the possible effects of their decisions on future electoral prospects.

**Protestant Fundamentalism and Intolerance**

Although several of the original American colonies were established by people fleeing religious intolerance—the Puritans in Massachusetts Bay, the Quakers in Pennsylvania, and the nonconformists in Rhode Island are the classic examples—within half a century people were being killed for religious reasons. Kai Erickson’s *Wayward Pilgrims* (1966) is most famous for its accounts of the Salem witch trials but it also describes the gradual descent into intolerance in Massachusetts that led to the maiming and execution of Quaker and other proselytizing missionaries.

A sizable historical literature on nineteenth century America recounts recurring episodes of religion-based intolerance (e.g., Myers, 1943; Davis, 1960). Usually these were related to the status anxieties and xenophobia of established groups triggered by the in-migration of new ethnic
groups, often bringing their own religions and religious world views. The temperance movements in the middle and again in the late nineteenth century, for example, usually involved status conflicts between abstemious descendants of protestant settlers from the United Kingdom and newly arrived more bibulous Catholics from Ireland, Italy, and Eastern Europe (Gusfield, 1963). Moralistic crusades against alcohol served as devices for expressing disapproval and social distance from newcomers that was sometimes unacknowledged or unrecognized by the prohibitionists themselves. In much the same way, moralistic crusades against drugs and crime in our time have provided devices for fundamentalist Protestants to express disapproval and social distance from American blacks. The Republicans' southern strategy with its race-coded emphasis on states' rights, crime, and welfare was a deliberate appeal to the resentments and status anxieties of southern and working class whites (Phillips, 1969, 1991; Edsall and Edsall, 1991).

The same pattern existed in earlier times. David Garland (2005) has demonstrated that the peak period of lynchings in America, 1890-1930, was in significant part the product of status anxieties of southern white protestants. In the 1920s, the Ku Klux Klan defined itself primarily as a campaign to preserve Christian values: “The Klan drew heavily on white evangelical protestants for its mass membership, and evangelical clergy were disproportionately prominent among the leadership” (Wald and Calhoun-Brown, 2007:208).

When Hofstadter wrote in the 1960s, it was apparent that the rapidly expanding and beginning-to-be-prosperous fundamentalist protestant groups made up one important strand of the paranoid style of his era. He observed that “most prophetic of the future of the right wing was [McCarthy's] strong appeal for fundamentalist oriented protestants” (p. 70).

In our time, it is clear that some (though definitely not all) fundamentalist and evangelical groups are among the strongest proponents of the paranoid style of contemporary politics concerning issues ranging from opposition to abortion and gay rights to support for capital punishment and severe criminal justice policies. The notion that these are issues of good and evil, of absolute right and absolute wrong, helps explain the religious right's fervor and its intolerance. When added to recent decades' resurgence of the paranoid style in American politics, it is small wonder that the interests of people seen as enemies or threats typically receive short shrift.

Taken together, these things make the success of the southern strategy, and its effects on crime control policy and black Americans, more understandable. The civil rights movement produced status anxieties among white southern Protestants, worried about their traditional higher status than that of blacks, and among working class white voters, worried about their own status and about economic threats newly empowered blacks might pose. Since politicians after 1970 no longer could openly appeal to anti-black sentiments, they used code words, one of which was crime. The wars on drugs and crime rapidly expanded, as politicians kept their promises. Since it was disproportionally black people who went to prison, white voters felt able comfortably to
pay that price, especially since it perpetuated the economic and social tradition of white dominance over a socially disorganized black underclass.

The sizable political science and religion literatures on religion and politics in the United States are silent, except in passing, on the influence of protestant fundamentalism on American crime policy generally. They focus on abortion, women's and gay rights, and separation of church and state. None of the major recent works includes the terms “crime” or capital punishment in its index (e.g., Layman, 2001; Green, 2007). The leading work, however, Religion and Politics in the United States (Wald and Calhoun-Brown, 2007), though its index ignores the subject, explains how and why protestant fundamentalism has shaped American crime control and punishment policies for three decades. Whereas mainstream protestants espouse a commitment to social welfare consonant with their belief in “a warm, caring god,” the fundamentalist “image of a cold and authoritative deity lends support to government’s role in securing order and property” (p. 121). Fundamentalists are “characterized by a quest for certainty, exclusiveness, and unambiguous boundaries,” and attempt “to chart a morally black and white path out of the gray zones of intimidating cultural and religious complexity” (Nagata, 2001:481). Pat Robertson's Christian Coalition in its 1995 Contract with the American Family accordingly called for increased penalties for convicted criminals (Wald and Calhoun-Brown, 2007:351). Bennett, Dilulio, and Walters (1966) is the fullest elaboration of fundamentalist crime control policy analysis in the academic world.

The near absence of crime control and punishment from the politics and religion literature is odd. The nexus seems self-evident. The Republican resurgence of the past 40 years is attributable in large part to the Southern Strategy and its focus on the “wedge issues” of crime, welfare, and affirmative action (Edsall and Edsall, 1991). The political influence of the religious right on Republican politics is well-known (e.g., Green 2007). As one major literature review on fundamentalism and conservative politics observed, “[T]he religious right holds something like a veto power in the Republican Party” (Woodberry and Smith, 1998:48).

The criminology literature, by contrast, though small, has ferreted out the connection. Unnever, Cullen, and Applegate's examination of attitudes toward capital punishment concludes that those fundamentalists “who have a rigid and moralistic approach to religion and who imagine God as a dispassionate figure who dispenses justice are more likely to harbor punitive sentiments toward offenders” (2005:304). A slight but fascinating article based on a representative survey of Oklahoma City residents showed that protestant conservatives viewed nearly all crimes as “very wrong” and thus did not differentiate among them in seriousness terms (Curry, 1996:462). This finding goes a long way toward explaining why traditional ideas about proportionality in punishment are irreconcilable with many modern sentencing laws.
Constitutional Structure\(^2\)

Hofstadter observed that “[i]t can be argued, of course, that certain features of our history have given the paranoid style more scope and force among us than it has had in many other countries of the western world” (1965:7). The obsolescence of American constitutional arrangements is one of the most important of those explanatory features. Those arrangements provide little insulation from the influence of paranoid politics when it arises.

Major elements of the U.S. constitutional system are obsolete, designed to address eighteenth not twentieth or twenty-first century problems, and they make the United States almost uniquely vulnerable to the policy excesses associated with the paranoid style and religious fundamentalism.

Extreme politicization of criminal justice policy is directly related to whether prosecutors and judges are selected politically or meritocratically, whether they are career professionals or political opportunists, and whether political and constitutional conventions allow elected politicians to participate in decision-making about individual cases. These three factors fundamentally differentiate the United States from most other Western countries, and they result from the obsolescence of U.S. constitutions. Almost nowhere in Western Europe, Canada, or Australia are judges or prosecutors politically selected (Tonry, 2007).

The American constitution dates from the late eighteenth century, reflects eighteenth-century ideas, and was written to address problems of that era. These were the colonists’ major objections to British rule: governance by a distant Parliament; capricious actions by a distant government’s imperious local representatives; the inability of citizens to seek redress for grievances. The principal solutions in the constitution centered on respect for individual liberty and insulation of citizens from the power of an overweening government. Protection of individual liberty was addressed by adoption of the Bill of Rights creating fundamental personal rights (speech, religion, redress for grievances) and entitlements (jury trials, no unreasonable searches and seizures, representation by counsel).

Protection from an overweening government was sought in two ways. First, complicated systems of checks and balances were created to fragment governmental power, principally by creating a strong horizontal separation of powers among the three branches of the federal government, and by a vertical differentiation of the spheres of interest of the federal and the state governments (which in turn had their own systems of horizontal and vertical separations of powers). Second, provisions in the federal constitution calling for frequent elections to the House of Representatives (two years) and presidency (four years), and in state constitutions for frequent elections at county levels for state legislators, judges, and prosecutors, were meant to push major elections to local levels, at short intervals, and thereby make officials accountable to local opinion.
The results more than 200 years later include in many states partisan elections of judges and prosecutors who run for office on the basis of emotive appeals to the electorate. If the public is anxious about crime or angry at criminals, or if particular cases become notorious, there is nothing to stop prosecutors from seeking personal political benefit by posturing before public opinion or handling cases in particular ways only because they have become notorious. Because local prosecutors are accountable through elections, and are in the executive branch of government, the U.S. Supreme Court has held that their discretionary decisions are effectively immune from judicial review (allegations of corruption are the principal exception; Bordenkircher v. Hayes, 434 U.S. 357 [1982]). Judges also are elected in most states and know that decisions that are highly unpopular with much of the public can lead to their defeat. Most chief prosecutors and many judges aspire to be elected or appointed to higher political or judicial office, which means that they must be concerned about controversies that might diminish their future professional prospects, and are no doubt sometimes tempted to deal with a particular case in a particular way to curry popular approbation or avoid popular condemnation. And, if criminal justice issues are openly politicized and polemicized in local elections of judges and prosecutors, it is not surprising that candidates for state and federal legislatures and governor and president do likewise.

American constitutional arrangements place the United States at one end of a continuum distinguishing consensual from conflictual political systems. This distinction is commonly made in comparative political science (e.g., Lijphart, 1999). Consensual political systems are usually characterized by more than two major political parties, coalition governments, proportional representation, and multi-seat electoral districts. Major policy decisions are based on broad consultation within the coalition government and outside it. Even after elections resulting in changes of government, major policy decisions are seldom altered abruptly. This is partly because a new coalition government is likely to contain parties from the old coalition, and partly because parties newly in power are likely to have been involved in development of policies of the former government.

Conflictual political systems are typically characterized by two major parties, single-party governments, first-past-the-post electoral systems, and single-member districts. The effect of these characteristics is that elections are winner-take-all events. Out-of-power parties often define their positions in opposition to those of the government of the day and, not having played a major role in developing existing policies, have no particular reason to maintain them. Dramatic changes in policy direction are much more common in conflictual than in consensual systems, partly because parties newly elected to power have based their platforms on opposition to existing policies and feel under an obligation to change them.

The United States is the paradigm case of a conflictual system (Lijphart, 1999). Most European constitutions by contrast took shape in the twentieth century and were designed for pluralistic societies and in ways that assured broad-based political representation. They in effect diffused
rather than concentrated political power and provided for parliamentary representation of any party receiving votes above a designated minimum, often five percent.

No other Western country has a constitution primarily designed to address political problems of the eighteenth century. All include entrenched bills of rights. Most were designed to address the challenges of pluralistic societies and call for electoral systems of proportional representation. Most are generally governed by multi-party coalitions. All EU countries and Canada regard the European Convention of Human Rights as part of their national constitutional law and most countries in Europe accept decisions of the European Court of Human Rights as binding and self-executing. No major English-speaking or Western European country but Switzerland has popular elections for prosecutors and none hold popular elections for judges. The constitutional features of American government make the United States uniquely susceptible to the wholesale politicization of criminal justice policy.

The structure of American government was meant to tie officials closely to community needs and beliefs, and democratic ideology celebrated the importance and influence of public opinion, even if it was ill-informed, mercurial, or mean-spirited. Constitutional draftsmen worried about the dangers of mobocracy but, with local notable exceptions, the problem did not fully take shape until late in the twentieth century when ubiquitous electronic and broadcast media meant that detailed reports of horrible incidents anywhere, and ensuing emotionalism, could sweep across an entire continent.

Race

The history of race relations in America is the fourth explanation. American political culture has still not come to grips with the legacy of slavery. I used to get a bit impatient with people who seemed to me to see the half-empty glass of enduring injustice rather than the half-full one of American racial progress but two things I’ve learned convince me that I was wrong. The first was working recently on an update of *Malign Neglect*, a book I long ago wrote on race, crime, and punishment in America. The second is slowly growing appreciation of the work of the Berkeley sociologist Loïc Wacquant on the history of race relations in the United States.

*Malign Neglect* first. In that book, I tried to unravel the reasons why black Americans were so much likelier than whites to be arrested, convicted, imprisoned, and executed. I documented racial trends in crime, victimization, and punishment in the United States over an extended period.

Here is what I learned. First, though blacks had for a century been more likely to be held in prison than whites, racial disparities began to rise in the 1960s and then shot up to all-time highs in the 1980s: blacks by then were half of American prisoners, though only 12 percent of the U.S.
population, and had an imprisonment rate seven times higher than the white rate. Second, blacks were much more likely than whites to be arrested for the “imprisonable” offenses of robbery, rape, aggravated assault, and homicide. Victimization data on victims’ descriptions of assailants and police data on victim and offender characteristics in homicide cases suggested that the racial offending patterns shown in arrest data for serious crimes were not far off from reality. Third, however, critically, there had been no significant shifts in racial patterns in arrests for a quarter century, and involvement in serious violent crime could not explain why black imprisonment rates had risen so rapidly. Fourth, the principal driver of the increase was imprisonment for drug crimes and policymakers knew or should have known that the enemy foot soldiers in the war on drugs would be young, disadvantaged, inner-city members of American minority groups. That seemed to me then and seems to me now a profoundly unwise and immoral exercise of governmental power (Tonry, 2005).

In updating analyses in that book, we learned three important things that provided one bit of good news and two of terrible news. The good news is that patterns of racial involvement in serious crime as shown in arrest data have changed. The percentages of people arrested for aggravated assault, robbery, rape, and homicide who are black have been declining, and were in 2006 much lower than in 1985. One might hope, and expect, that racial disparities in imprisonment would have fallen commensurately.

The two bits of terrible news. The first is that blacks continue to make up about half of the prison population, and about the same percentage of Death Row inmates as in the 1980s. The chance that a black American is in prison in 2007 remains six-to-seven times higher than the chance that a white American is in prison. The declining involvement of blacks in serious violent crime has had no effect on racial disparities in prison.

The second is that malign neglect of the interests of black Americans continues to drive American crime policies. Racial disparities in imprisonment continue to be driven by policy choices that were known, or should have been known, disproportionately to affect disadvantaged black Americans. In no significant respect have American drug policies changed since the 1980s—a federal law punishing crack cocaine offenses, mostly committed by blacks, as severely as powder cocaine offenses, mostly committed by whites, involving quantities 100 times larger is the symbol of that—and they continue grossly disproportionately to ensnare young black and increasingly young Hispanic Americans. And American policies toughening penalties for violent crime have had the same effect. If the conditions of life faced by disadvantaged minority youth make them disproportionately likely to be involved in violent crime, then policies making punishments for violent crime enormously harsher will disproportionately affect them, and they have.

Loïc Wacquant’s work explains how that could happen. American cultural practices and legal institutions have operated to maintain American patterns of racial dominance and hierarchy for
two centuries, he argues, and contemporary drug and crime policies perform that function today. Until the Civil War, slavery assured white domination. Within 30 years after the war, the set of practices and legal forms of discrimination known as “Jim Crow” laws restored white domination of blacks. After the “Great Migration” in the nineteen teens and twenties, when millions of blacks moved from south to north to escape Jim Crow, the big city ghettos and housing discrimination kept blacks in their subordinate place. And when deindustrialization and the flight of jobs to the suburbs left disadvantaged blacks marooned in the urban ghettos, the modern wars on drugs and crime took over (Wacquant, 2002a, 2002b).

The litany of disparate treatment of blacks by the criminal justice system is familiar but stunning nonetheless and it only starts with a 7-to-1 racial difference in imprisonment rates. The Bureau of Justice Statistics (2003) has estimated that 32 percent of black males born in 2001 will spend some time confined in a state or federal prison, and that figure ignores jails which process many more inmates each year than prisons do. BJS has also estimated that nearly a third of black men in their twenties on any given day are in prison or jail, or on probation or parole.

Wacquant’s argument is a functionalist one, about what criminal justice policies and practices do, rather than a political one about what those practices and policies are intended to do. Thought of that way, thinking of what the machinery of the criminal justice system produces, it is hard not to see that it produces devastatingly reduced life chances for black Americans. If its aims were to reduce black men’s chances of earning a decent living, or being successfully married and a good father, or being socialized into pro-social values, it is hard to see how the criminal justice system could do those things better. There has to be a reason why the criminal justice system treats American blacks so badly, why its foreseeable disparate impacts on blacks and whites are disregarded, and Wacquant’s analysis provides a better explanation than any other that has been offered.

Wacquant is not alone in suggesting that American criminal justice practices operate to keep poor blacks in their places. Here is what Douglas Massey, author (with Nancy Denton) of American Apartheid, a widely praised and decidedly non-polemical account of housing discrimination, had to say in Categorically Unequal, his 2007 book on social stratification:

“Whether whites care to admit it or not, they have a selfish interest in maintaining the categorical mechanisms that perpetuate racial stratification. As a result, when pushed by the federal government to end overt discriminatory practices, they are likely to innovate new and more subtle ways to maintain their privileged position in society. If one discriminatory mechanism proves impossible to sustain, whites have an incentive to develop alternatives that may be associated only indirectly with race and are therefore not in obvious violation of civil rights law. The specific mechanisms by which racial stratification occurs can thus be expected to evolve over time…” (2007:54)
The “new emphasis on retribution and punishment was achieved…. through the deliberate racialization of crime and violence in public consciousness by political entrepreneurs…” (2007:94)

“As discrimination moved underground, new mechanisms for exclusion were built into the criminal justice system for Afro Americans…. (2007:251)

And, to complete this span of the political spectrum, here is what Glenn C. Loury, a conservative black economist and the author of The Anatomy of Racial Inequality (2002), had to say in introducing his 2007 Tanner Lectures at Stanford:

“[W]e have embraced what criminologist Michael Tonry (1995) calls a policy of ‘malign neglect,’ and in doing so we, as a society, have stumbled more or less wittingly into a God-awful cul de sac. I will claim that the connection of this apparatus to the history of racial degradation and subordination in our country (lynching, minstrelsy, segregation, ghettoization) is virtually self-evident, and that the racial subtext of our law and order political discourse over the last three decades has been palpable.” (Loury, 2007; references omitted)

“Once the racial hierarchy/status anxiety analysis that Wacquant, Massey, and Loury offer is recognized, much else falls into place. David Garland, in his writing on lynchings in America during the period 1890-1930 observes, “The penal excess of the lynching spectacle said things that a modernized legal process could not…. [I]t reestablished the correlative status of the troublesome black man, which was as nothing, with no rights, no protectors, no personal dignity, and no human worth.” (2005:817)

A considerable literature on racial differences in attitudes toward and opinions about crime control policy shows that whites have substantially harsher attitudes concerning punishment and greater confidence in the justice system and its practitioners than do blacks (e.g., Unnever, Cullen, and Lero-Jonson, 2008). Lawrence Bobo and Devon Johnson, concluding an extensive analysis of black/white differences in attitudes toward capital punishment and laws punishing crack cocaine traffickers (mostly black) much more harshly than powder cocaine traffickers (mostly white), observe:

“The most consistent predictor of criminal justice policy attitudes is, in fact, a form of racial prejudice. While white racial resentment does not ever explain a large share of the variation in any of the attitudes we have measured, it is the most consistently influential of the variables outside of race classification itself. This pattern … reinforces the claim … that one major function of the criminal justice system is the regulation and control of marginalized social groups such as African Americans.” (2004:171-72)
These sad patterns of racial insensitivity, however, make sense in light of the other three explanations. If crime and drugs are matters of good and evil, and criminals and drug users are evil, then there is little reason to expect sympathy or empathy toward them from the holders of those views. People on death row or serving sentences of life without the possibility of parole or decades-long prison terms deserve what they get, and once they get it there is no reason to consider them further. And Wacquant’s analysis may help make it clear how and why the race card was played, as Hofstadter more than forty years ago described. Although, he observed, Republicans historically had sympathy with plight of U.S. blacks in the south, “by adopting the ‘southern strategy,’ the Goldwater men abandoned this inheritance. They committed themselves not merely to a drive for a core of Southern states in the electoral college but to a strategic counterpart in the North which required a search for racist votes. They thought they saw a good mass issue in the white backlash which they could indirectly exploit by talking of violence on the streets, crime, juvenile delinquency, and the dangers faced by our mothers and daughters” (Hofstadter, 1965:99).

Kevin Phillips, the author of The Emerging Republican Majority (1969), which laid out the program for the “southern strategy,” has long since recanted (1991) and condemned the conscious effort to use crime and violence as code words for race. Harry Denton, chairman of the Republican National Committee in the 1970s, a principal implementer of the southern strategy, as long ago as 1980 recanted and expressed his regret (his New York Times obituary quotes from an interview in the eighties in which he expressed regret for anything he did “that stood in the way of black people.” [Stout, 2007]).

Despite the recantings, racial disparities in American prisons are as bad as they have ever been, and nearly all the laws and policies that created them remain in effect. The moralism and intolerance of both the paranoid style of right-wing politics and religious fundamentalism supported development of America’s extraordinarily severe crime control policies. Once the politics got rolling, American constitutional arrangements presented few impediments, and insensitivity to the interests of black Americans made their formidable human costs both tolerable and ignorable.

The Future

What is distinctive about our time, compared with the 1950s and 1960s about which Hofstadter wrote, and compared with earlier periods of American history, is that the paranoid style of American politics moved from the fringes to the center and has for much of the past quarter century set the tone for American policies concerning internal and external enemies. The only way the paranoid style will lose its power is if Americans stop electing its practitioners and thus show that we have narrowed the boundaries of political permission within which government may operate. The answer thus to the question I asked at the outset, “Why Are American Penal Policies so Harsh?” is that majorities of American voters supported candidates who said
they would make them that harsh, and did.

After World War II, Europeans learned the dangers of the overweening state and the importance of protecting individuals from its power. That’s one reason why other western countries have abolished capital punishment and why they have not followed the American lead in adopting life without the possibility of parole, three-strikes laws, and prison sentences measured in decades, and why they refuse to treat children as if they were adults.

Winston Churchill (1910) nearly a century ago observed:
“The mood and temper of the public in regard to the treatment of crime and criminals is one of the most unfailing tests of any country. A calm, dispassionate recognition of the rights of the accused and even of the convicted criminal, ...tireless efforts towards the discovery of curative and re-generative processes; unfailing faith that there is a treasure, if you can only find it, in the heart of every man. These are the symbols which, in the treatment of crime and the criminal, mark and measure the stored-up strength of a nation, and are the sign and proof of the living virtue within it.”

Countries differ widely in how they respond to crime and criminals. We can learn much more about why they differ and maybe provide insights that will enable the United States better to mark its stored up strength and better to prove its living virtue.

Notes
1 In some ways, the Netherlands is an even more exceptional case than the United States. The Dutch imprisonment rate rose continuously from 1973 to 2004 by even more—in percentage not absolute terms—than American rates did, but without adopting harsher policies intended to make that happen (Tonry and Bijleveld 2007).
2 Discussion of the origins and precipitants of the constitutional structure of the United States are based on Mullet (1966) and Wood (1969).
3 This discussion is based on analyses reported in Tonry and Melewski (2008).
4 Bureau of Justice Statistics (BJS 2007) data for mid-year 2006 show that black men constituted 41 percent of male jail and prison inmates. The true figure in a country where skin color matters much more than ethnicity is 46 to 48 percent (because BJS a few years ago stopped counting black Hispanics as black and thereby reduced the black percentage by 10 to 12 percent; a quarter to a third of imprisoned Hispanics, who were 21 percent of male inmates, are dark-skinned). Forty-seven percent is to be sure less than 50 and is the result of the rapid increase in imprisonment of Hispanic people in recent years. There were more non-Hispanic blacks than non-Hispanic whites imprisoned in 2007.

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E-mail: tonry001@umn.edu
アメリカの刑事政策が峻厳な理由

マイケル・トンリー
ミネソタ大学犯罪及び公共政策研究所

アメリカの刑事政策がなぜ、これほど厳しいのかということに関し、従来なされてきた解説は、いずれも説得力に欠けている。犯罪率の上昇、犯罪に対する大衆の不安増大、選挙を第一に考える政界の利己主義は、どれもその答えとはなりえない。犯罪率に影響を及ぼす政府権限の制約、国民の多様化と「他者の犯罪学（他者の犯罪学）」、特権階層が犯罪被害者となる危険性の上昇、グローバリゼーションと急速な社会変化に伴う治安の悪化など、さまざまな「後期近代の状況」も同じく答えはならない。これらは1975年から2000年までのほぼ全期にわたって、どの先進国にもみられた特徴であり、にもかかわらず、そうした国々の大半は、極端なまでに政策を峻厳化させることはなかった。「大衆迎合的な厳罰性」「Penal Populism」といったあいまいで過度に一般化された概念や、実伝されているネオ・リベラリズムもやはり、答えではない。

複数の国に共通してみられ、説得力を持つ事象も確かにある。刑事政策が健全で、拘禁率が低い場合、そうした国では収入の格差が小さく、信頼関係と合法性が高度に保たれ、国家の福祉基盤も強く、刑事司法は政治化されたシステムと裏腹に専門化されており、政治文化は対立的ではなく、合意の下に成り立っている。これら要素のどれを取っても、アメリカという国は評価の低い方に位置づけられるのだが、問題はその理由である。

答えは、国家の歴史・文化という明確な特徴の中に求めるべきであろう。4つの際立った特徴が挙げられる。すなわち、アメリカ政治の「偏執狂的特徴」、原罪主義者の宗教観と結びついた二元論者の道德主義、アメリカ憲法の無用の長物化と、あからさま庶民感情が政策を動かす政治文化、そしてアメリカにおける人種関係の歴史である。

キーワード：比較刑事政策、政治的パラノイア、プロテスタント原理主義