Fatalism and Indifference—The Influence of the Frontier on American Criminal Justice
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Abstract

American criminal laws and criminal justice systems are harsher, more punitive, more afflicted by racial disparities and injustices, more indifferent to suffering, and less respectful of human dignity than those of other Western countries. The explanations usually offered—rising crime rates in the 1970s and 1980s, public anger and anxiety, crime control politics, neoliberal economic and social policies—are fundamentally incomplete. The deeper explanations are four features of American history and culture that shaped values, attitudes, and beliefs and produced a political culture in which suffering is fatalistically accepted and policy makers are largely indifferent to individual injustices. The four elements are the history of American race relations, the evolution of Protestant fundamentalism, local election of judges and prosecutors, and the continuing influence of political and social values that emerged during three centuries of western expansion. The last, encapsulated in Frederick Jackson Turner’s “frontier thesis,” is interwoven with the other three. Together, they explain long-term characteristics of American criminal justice and the extraordinary severity of penal policies and practices since the 1970s.

Clichéd though the contrast may be, there is substance to the view that meeting basic human needs is widely seen in Western Europe as a fundamental responsibility of government, but not so in the United States. Demonstrative litanies could be long, but universal health care, universal state-provided preschool, extended paid maternity leave, free or nearly free university education, and
ubiquitous social (in US terms, “public”) housing in Europe and their absence from the United States provide compelling evidence. Comparisons of criminal justice policies, practices, programs, and populations demonstrate comparable or greater differences.

Two often overlooked features of American political and popular culture—fatalism and indifference—are at play. So are the histories of American race relations, Protestant fundamentalism, and the nineteenth century shift from central appointment to local election of judges and prosecutors.

American fatalism accepts the personal disappointments, misfortunes, and tragedies of others as inevitable, maybe necessary, sometimes deserved, elements of human life. Its origins can be found in the three centuries of migration across the North American continent that were celebrated in Frederick Jackson Turner’s “frontier thesis.” It dominated historical scholarship for a half century and remains influential today. Turner observed,

American development has exhibited not merely advance along a single line, but a return to primitive conditions on a continually advancing frontier line, and a new development for that area. American social development has been continually beginning over again on the frontier. This perennial rebirth, this fluidity of American life, this expansion westward with its new opportunities, its continuous touch with the simplicity of primitive society, furnish the forces dominating American character. (Turner 1893, p. 220)

The frontier experience, he said, shaped American democratic values, fostering individualism, self-sufficiency, localism, anti-intellectualism, tax resistance, and resentment of outsiders. Turner and his legions of twentieth century followers emphasized the energy, entrepreneurism, and determination of settlers facing and overcoming dangers, and celebrated their successes in overcoming the wilderness, establishing livelihoods, and building communities. They paid little attention to the uncounted numbers who died from disease, starvation, and violence, whose farms failed, who were defrauded or bankrupted, or who otherwise failed to achieve their ambitions. One among many later critics of the frontier thesis’s Pollyannaism observed, “Thousands of people helped conquer the frontier, but thousands more were conquered by it…. [G]rim realities turned their daydreams into nightmares” (Fife 1966, p. 285).

A fatalistic acceptance of personal hardship and misery exists in contemporary American politics, social welfare policy, and economic policy generally and in relation to the criminal justice system. The brutalizing experiences and damaged

1 Quotations from Turner are from original publications. The major writings have been many times reprinted (e.g., Faragher 1998).
lives of minority, deeply disadvantaged, and mentally ill defendants and offenders, and insensitive assembly line treatment of almost all, may at times be regretted, but in the main are accepted as how things are. Neither sympathy nor empathy are powerful motivators in contemporary American police departments, prosecutors’ offices, courts, or correctional systems.

Fatalism and indifference overlap but are different. Human beings are hard wired with a degree of fatalism concerning things that cannot be changed or avoided. Death and taxes, our fatalism tells us, can be delayed but not escaped. We know that bad stuff happens in everyday lives and is part of the human condition. Auto accidents, airplane crashes, and devastating diseases cripple and kill people. We regret everyday hardships and try in both our personal lives and in public policies to minimize their incidence and ravages.

Indifference is knowing that bad things happen, and not caring, or not caring enough to struggle to avoid them. Examples in American public policy outside the criminal justice system abound. Consider just one: medical care. Tens of millions of people lack medical insurance or coverage, which inevitably—that is, foreseeably, predictably, in some peoples’ minds acceptably—means avoidable diseases, deaths, and shortened lives. Until President Barak Obama’s programs forbade denial of insurance coverage for preexisting conditions, medical crises meant financial disaster for the uninsured, and loss of future coverage for the insured. As I write, many millions of poor people are denied health care coverage because their states’ leaders, for partisan and ideological reasons, refuse to accept federal Medicaid funds to alleviate suffering and save lives.

Comparable indifference permeates American criminal justice. Many policy makers and practitioners know but seemingly don’t care about the destructive effects of choices they make. When in 1986, the US Congress enacted the “100-to-1 law” punishing sales of crack cocaine as severely as powder cocaine sales one hundred times larger, anyone paying attention knew that poor minority kids would bear the law’s brunt. By 1990, 83 percent of federal prisoners serving time for crack sales were African American, most in their teens and twenties\(^2\) (McDonald and Carlson 1993). When California in 1994 enacted a three-strikes law that applied to many misdemeanors and any third felony, however trivial, anyone paying attention knew that thousands of people would receive 25-year or life sentences for minor crimes. When more than half the states enacted “truth in

\(^2\) This finding is so stunning that I quote the key passage: “The main reason that blacks' sentences were longer than whites' [in federal prisons] during the period from January 1989 to June 1990 was that 83 percent of all Federal offenders convicted of trafficking in crack cocaine in guideline cases were black, and the average sentence imposed for crack trafficking was twice as long as for trafficking in powdered cocaine” (McDonald and Carlson 1993, p. 1).
sentencing” laws, and others abolished parole release, in a country that lacks systems of appellate sentence review,3 hundreds of thousands of people were doomed to spend much or all of their lives behind bars serving unjustly long sentences. To people sentenced under these laws and those who love them, each case is a calamity and a tragedy. Many who promoted and defended them just didn’t think or worry much about it. For US Attorney General Edwin Meese, the federal 100-to-1 law was no problem—people could avoid it by not selling crack, he blithely observed, ignoring the complicated realities of the lives of poor kids and other people. “Then let them eat cake,” Marie-Antoinette similarly said, when told that the poor of Paris were starving for lack of bread.

Indifference and fatalism are different. Frontier settlers were no doubt saddened by friends’ and neighbors’ personal hardships and tragedies, and ready to lend a hand when a house burned down, a barn needed raising, cattle were stolen, starvation threatened, or parents of young children died, even if tragedies and failures were inevitable. These crises were understood, though, to be unavoidable if unwanted consequences of western expansion. Turner and his followers stressed the successes and glossed the failures. They looked at the big picture, they might have said, just as defenders of excesses and inhumanities in the American criminal justice system today might say, “Maintaining public order and preventing crime is a complicated business; you can’t make omelets without breaking eggs.”

There is no single reason why indifference to the suffering of others characterizes American political culture in so many realms—social welfare, mental health, medical care, education, criminal justice. Natural limits of human empathy and the complexity of difficult problems no doubt play roles, but those realities affect every society and every country4. Among developed Western countries, American public policies on most subjects compare poorly. Criminal justice policies and practices in the United States are, as I show below, conspicuously less humane and less respectful of human dignity than those elsewhere.5

3 Only a handful of states with sentencing guidelines systems have even modest systems of appellate sentence review; unjustly long prison sentences are irremediable if truth in sentencing laws apply (26 states) or parole release has been abolished, except when political lightning strikes and a governor or the US president authorizes a pardon, commutation, or other form clemency. Appeals of sentences are commonplace in every other Western country (Tonry 2016a).

4 So does recognition that laissez-faire economics and neoliberal economic policies produce winners and losers. Here too the US is an outlier in not establishing social welfare programs that satisfy the basic human needs—health care, childcare, education, housing, an adequate basic income—of all citizens but especially of those who cannot compete successfully. My aim is to explain the human and moral deficiencies of American criminal justice systems. Much of that explanation most likely also applies to social welfare policies and programs generally.

5 If you doubt or question that generalization, spend a couple of days observing the operation of criminal courts in any large American city, or read Courtroom 302 by Steve Bogira (2005), still the best and most comprehensive participant observation account of the operation of American criminal courts (in this case, a felony court in Chicago). Tom Wolfe in Bonfire of the Vanities (1987) provides a remarkably similar fictional account—
Fatalism and indifference permeate American criminal law and justice. My aim is to show that many of their characteristics are attributable to legacies of frontier values and the frontier experience interacting with race relations, Protestant fundamentalism, and politicization of criminal justice systems. This essay has six sections. The first lays out the main argument. The second describes fundamental differences between the criminal laws and justice systems of the United States and other Western countries. The differences are enormous. The third, to set the American experience in perspective, summarizes the scholarly literature that attempts to explain why countries’ criminal laws and punishment practices differ. Conclusions have converged, with differences in emphasis, on the proposition that explanations must be sought in distinctive national histories and cultures. The fourth section more fully introduces William Jackson Turner and fleshes out the frontier thesis, with one difference; I add fatalistic acceptance of human suffering to the “frontier values” he identified. The fifth sketches the histories of localization and politicization of American criminal justice systems, of fundamentalist strands of evangelical Protestantism, and of American race relations. The three interacted to shape criminal justice systems and practices and contributed to the punitive explosion since the 1970s; fundamentalist Protestantism was less important in shaping institutions, though it influenced their operation, but has contributed heavily to punitive developments since the 1970s.

I. Why Are American Criminal Law and Justice So Different?

An anthropologist from Aldebran, closely but unobtrusively studying Earth’s legal systems, would have difficulty understanding or explaining American criminal law and justice. Seen from a distance, American systems resemble those in other Western countries—detailed criminal codes; specialized judges, prosecutors, and defense lawyers; elaborate adjudication procedures and processes; penalties ranging from fines through imprisonment. Up close, they are vastly different. Principal differences include American retention of the death penalty, politicization of the criminal law, election of prosecutors and judges, plea bargaining as the overwhelmingly predominant way to resolve cases, prosecution and punishment of teenagers as if they are adults, and the Western world’s harshest punishments and highest imprisonment rate.

My explanation for those differences centers on Frederick Jackson Turner’s “frontier thesis” that three centuries of western expansion produced social and political values—individualism, democratic localism, resentment of taxation and

based on extensive observations and interviews—of the operation of Brooklyn’s criminal courts. The Collapse of American Criminal Justice (2011) by the late Harvard Law School professor William J. Stuntz, an unusually comprehensive and thoughtful overview, warrants reading and rereading.
outside authority, anti-intellectualism, xenophobia—which, he and his followers wrote, characterized American history and society (Hofstadter 1949, 1968a). Turner was easily the most influential American historian in the first half of the twentieth century. The values he identified remain important and influential—contemporary red and blue politics (Bazzi, Fiszbein, and Gebresilasse 2017) and the emergence of “white nationalism” (Cullen, Butler, and Graham 2021) make that clear—and shape contemporary attitudes toward the criminal law and its enforcement. The frontier thesis focused on settlers who “won” the West and “tamed” the wilderness; prosperity, new towns, new industries, and a continent-wide country demonstrated their success. Little attention was paid by Jackson and his followers, however, to aspiring settlers who failed and died, to Native Americans and Spanish speakers who were displaced, or to African Americans and Chinese who were abused and exploited. Their miseries and tragedies were not unknown but were implicitly treated as something unavoidable, perhaps regrettable, but a necessary cost of progress. Comparable fatalism characterizes American criminal justice systems. Routine injustices, racial and ethnic disparities, and grotesquely severe punishments are commonplace, as I show in section II, but are accepted as in the nature of things, as unpleasant but essentially necessary effects of efforts to maintain order, prevent crime, and punish wrongdoers.

The frontier experience interacted with political localism, Protestant fundamentalism, and race relations. It catalyzed a unique feature of American government—local, partisan election of most prosecutors and judges—that fundamentally shapes contemporary criminal law enforcement and justice system operations. Eighteenth and early nineteenth century prosecutors and judges were appointed by governors and legislatures. In the middle third of the nineteenth century, primarily in emerging frontier states, local politicians successfully promoted constitutional shifts toward direct local election of justice system officials. Their rationales—promotion of local interests and beliefs, resentment of outside authorities and influence—reflected core frontier values (Ellis 2012; Shugerman 2012).

The frontier experience shaped evangelical and fundamentalist Protestantism. The most influential historical work in the early twentieth century on the history of

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6 Here is Richard Hostadter’s (1949, p. 434) summary “The lack of binding tradition and organized constraints promoted a distinctively American passion for individual freedom, antipathy to direct control from outside, aggressive self-interest, and intolerance of education and administrative experience.”

7 Historians of religion distinguish between evangelical Christians and fundamentalists, a subset. Fundamentalists since the emergence of Jerry Falwell’s “Moral Majority” in the 1970s have been influential proponents of harsh contemporary crime policies (Ammerman 1991; Green 2007; Griffith 2021). Many evangelical Protestants are more compassionate (e.g., Snyder 2001). That is why in the text I refer to “fundamentalist” rather than “evangelical” Protestants. Failure to make that distinction (and between African American and White

Electronic copy available at: https://ssrn.com/abstract=3936107
religion in America, Peter G. Mode’s *The Frontier Spirit in American Christianity* (1923), declares in its preface, “[I]n the career of our nation, frontier reactions and influences supply the only true understanding to the course of events” (p. ix). The first chapter concludes, “The Americanizing of Christianity has been the process by which it has been *frontierized*” (p. 14; emphasis in original). John Boles (1993, p. 209), a preeminent scholar of frontier revivalism, observed that Mode’s and William Warren Sweet’s (1950) “interpretation that the churches that best adapted to the frontier were destined to be most influential in America, and that the successful adaptations largely characterized subsequent church development, dominated American religious historiography so completely for almost a half century that the arguments often were taken for granted.”

Protestant churches moved west with the settlers, but gradually, as early as the eighteenth century and throughout the nineteenth, many lost or diluted their connections to established east coast denominations. Fissures reflected frontier impatience with hierarchies, seminaries, liturgies, and educated clergy. Frontier churches were typically evangelical, autonomous, locally run, and anti-intellectual. Most had little use for formal theological education; feeling called was considered enough to qualify a clergyman. Frontier churches’ most distinctive features were emphases on personal salvation, revivalism, personal morality, and service to parishioners. Many exemplified the most parochial values Turner identified, including resentment of central authority, anti-intellectualism, intolerance, and xenophobia. The dominant values were often judgmental and moralistic, unsympathetic to sinners and outsiders. This summary of ignobility does not mean the frontier churches performed no useful functions. They fostered a sense of community for their members, prescribed and monitored moral behavior, and provided aid when tragedies and crises occurred in members’ lives (Mode 1923; Miyakawa 1964; Boles 1993).

The frontier experience did not create racial and ethnic hierarchies and injustices but reified and exacerbated them. African Americans were present throughout the American states and territories, including in the continually moving frontiers. They were by the nineteenth century increasingly excluded from participation in established “White” churches on the frontier and almost everywhere else and formed their own (Sweet 1950, chap. XVII). African American ranch hands worked in the western territories and states; segregated troops fought in the “Indian wars.” As a group, African Americans were largely excluded from local politics...
and the sense of community, behavioral norms, and mutual aid church and community members provided to one another.

Native Americans and Spanish speakers in the Southwest were simply in the way, impediments to settlers’ hopes and aspirations. The settlers’ interests were what mattered. They wanted land and personal security. Native Americans and inconvenient Spanish speakers had to leave, with encouragement by the army if need be including, in retrospect ironically, African American soldiers. Chinese immigrants were expendable tools used in building transcontinental railroads and providing menial services⁸.

All these phenomena, patterns, and problems interacted and festered. Think, for example, about the interplay between nativism and fatalism. Turner sometimes spoke nostalgically about childhood visits to Native American settlements near Portage, Wisconsin, where he grew up, but expressed no doubts about the “need” to relocate tribal Americans. Or think about interactions among racial enmity, political localism, and religious intolerance. Settlers’ racial attitudes and moral presuppositions would usually have been shared by locally elected judges and prosecutors and reflected in their actions and decisions. It is unlikely that intolerant Whites-only Protestant churches often provided sanctuary or solace to troubled African Americans, Native Americans, Chinese, or Spanish speakers. Their problems were their own and none of local politics, local churches, or the legal system were likely to attempt or provide solutions. No doubt as happens in every deeply unjust society, many individuals were troubled by abuse and displacement of Native Americans and the social and political isolation of African Americans, Spanish speakers, and Chinese workers, but what could they do? Larger political, economic, and social forces were at work.

II. How Different Are American Criminal Law and Justice?

That there are fundamental differences between American systems and those of other Western countries is unarguable⁹. Some differences are widely known: the

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⁸ Hofstadter (1968a): “While Turner was moved, and rightly so, by a feeling for the achievement of America, he had little countervailing response to the shame of it—to such aspects of Western development as riotous land speculation, vigilantism, the ruthless despoiling of the continent, the arrogance of Western expansion, the pathetic tale of the Indians, anti-Mexican and anti-Chinese nativism, the crudeness, even the near-savagery, to which men were reduced on some portions of the frontier.”

⁹ This section contains many generalizations about the criminal laws and criminal justice system institutions, practices, and policies of the United States and other Western countries. Very few of those generalizations are likely to be contested or significantly qualified by informed specialists whether scholars or practitioners. Rather than add footnotes, or citations to pertinent sources, to nearly every sentence, this bibliographical note will have to suffice. I have surveyed most of the relevant literatures in Tonry (2007, 2016b, 2020) and more narrowly on prosecution (Tonry 2012), sentencing laws and practices (Tonry 2016a), and juvenile justice (Doob and Tonry 2004; Tonry and Doob 2004; Tonry and Chambers 2011). No authority is needed concerning capital punishment; no other Western country allows it. Data on American imprisonment rates and
only use of capital punishment; the Western world’s highest imprisonment rate and harshest punishments; and gross racial and ethnic differences in policing, prosecution, and punishment.

Other differences are well-known among specialists but probably not by many other people. These include primary reliance on assembly-line case processing rather than something more personal and individualized; resolution of 95–99 percent of cases by negotiated guilty pleas rather than by judges and juries; and generally, but especially for serious crimes, displacement of impartial sentencing judges in recent decades by elected, politically motivated prosecutors.

Still more differences are only vaguely understood except by practitioners and academic observers. One is that many teenagers are charged, prosecuted, and punished as if they are adults rather than in special courts under laws tailored for young people. A second is a plethora of statutes in every state and the federal system—mandatory minimum sentence, three strikes and you’re out, “truth in sentencing,” “dangerous offender,” and life without parole laws—that compel judges to impose drastically harsh sentences irrespective of the circumstances of particular crimes or of individuals who are convicted. A third is that prosecutors have sole discretion to decide whether prosecutions are initiated and whether the harshest laws are invoked; recent notorious but unprosecuted killings by police officers make those powers clear. A fourth is that American criminal laws often require convictions of people who are morally innocent or who, though guilty of something, are convicted and punished for more serious offenses than they committed (Robinson 2011; LaFave 2017); non-lawyers may find an explanation helpful. I provide illustrations in a footnote10.

Patterns (e.g., Carson 2020) and sentencing patterns (e.g., Reaves 2013) are available from the U.S. Bureau of Justice Statistics and can be compared with data on imprisonment rates globally in the frequently updated World Prison Brief (e.g., Walmsley 2018, 12th ed.) and on European imprisonment rates and patterns and sentencing patterns in the regularly updated European Sourcebook of Crime and Criminal Justice Statistics (Aebi et al. 2021, 6th ed.).

10 An example of innocence: defendants who honestly but unreasonably believed their actions were justifiable, for example, that they acted in self-defense or defense of someone else, are not entitled to an acquittal in most American jurisdictions. They are in other Western countries. Here are three examples of laws permitting convictions for more serious crimes than defendants meant to commit. First, under American felony-murder doctrines, once common but long ago abandoned in other Common Law countries including England and Wales, people who committed, and intended only to commit, a burglary, robbery, sexual assault, or even unlawful possession of a firearm, can be convicted of murder if a death results, no matter how unexpectedly or unforeseeably. In other countries, an intention to kill or extreme recklessness as to the death must be proven. In the most extreme cases, people have been vicariously convicted of murder when a police officer or victim kills a co-felon. Second, under “strict liability” doctrines, assaults of law enforcement officers are often punished much more severely than are otherwise identical assaults, even if the defendant did not know and had no way of knowing the victim was a law enforcement officer. Third, under complicity and conspiracy doctrines, defendants can be convicted of offenses committed by co-offenders even when the defendant did not know about, approve, or want the co-offender to commit that or any equivalent offense. Many people serving sentences of life without parole (and lesser sentences)
The US is an extreme outlier among Western countries in all these respects. Elsewhere, judges and prosecutors are career civil servants; prosecutors are often members of the judiciary and subject to the judge’s ethical obligation to do justice in every case. Plea negotiation is rare, especially for serious cases; serious white collar crimes are an occasional exception. A guilty plea is not enough for a conviction. A judge must meaningfully review and determine the facts; sometimes the judge independently decides the charges are more serious than can be justified, occasionally that they are not serious enough. Sentencing decisions are made by judges; prosecutors typically play small or no roles except concerning minor cases that they divert from the legal system. Small percentages of convicted people receive prison sentences. There are no laws authorizing capital punishment or mandating decades-long prison terms. In most Western countries, sentences of life without parole do not exist. Imprisonment rates in other Western countries range between one tenth (60 per 100,000 population) and one fifth (140) of recent American rates (650 in 2020; it peaked at 763 in 2007). Prosecution of children as adults is legally impossible in most Western countries and rare in the others. Criminal laws condition convictions on proof of the offender’s personal—not vicarious or imputed—moral wrongdoing for the crimes with which they are charged.

Why American criminal law and justice are in almost every way much harsher than other countries’ laws and practices is seldom asked. The American penchant for capital punishment receives some attention; the imprisonment rate and severe sentencing laws a bit more. Little attention is paid to other distinctive practices, such as assembly line case processing, ubiquitous plea bargaining, election of judges and prosecutors, and uniquely punitive policies for young offenders. Most American practitioners and scholars take the system for granted; it is all they have ever known. Outsiders more often notice and decry excesses, but they too take things for granted: that’s just how the Americans do it.

What needs explanation is not particular practices but American criminal law and justice entire. This is a different exercise than summarizing the histories of courts or prosecution or sentencing. Blow-by-blow accounts exist of the development of those institutions over the past two centuries but not of the social forces that shaped them. My aim is to sketch the contours of those underlying forces. First

for murder, for example, themselves killed no one, nor meant to, but were convicted of and punished for killings committed by others. This describes many people sentenced to life or life without parole for offenses that occurred before they were 18.

11 When that happens cases are continued, for reasons of procedural fairness, so the defendant’s lawyer can contest the more serious charge in a subsequent hearing (e.g., Asp 2012).

12 In some countries, e.g., Germany, most 19- and 20-year-olds convicted in adult courts are sentenced as if they were juveniles (Doob and Tonry 2004).
though, a summary of current knowledge on why countries have distinctive criminal justice policies may be helpful to people who are unfamiliar with other countries’ laws and policies.

III. Why Are Countries’ Penal Policies Different?

Punishment policies and practices, like the weather, vary widely between places and over time. Most people see nothing mysterious about either phenomenon though both are occasionally volatile. The weather can be imperfectly predicted but not controlled. It varies in the short term with the time of year, geography, and atmospheric conditions, and is gradually changing because of human activity. Sometimes perturbations—hurricanes, tornadoes, droughts, floods—abruptly change things but pre-existing patterns resume.

Differences in punishment policies and practices likewise may appear to be natural phenomena that can change in response to perturbations such as fluctuations in crime rates and patterns or economic downturns, but usually do not. This can be seen over extended periods in many countries that experienced dramatic rises and falls in crime rates in the twentieth century, repeated economic disruptions, and fundamental social and demographic changes. Imprisonment rates, a crude but readily available measure of punishment severity, were stable in the US from 1930 to 1970 (100-120 per 100,000 residents13) through the Depression, World War II, the Korean War, and the prosperous years of the 1950s and 1960s (Blumstein and Cohen 1973). Rates have fluctuated in narrow bands since the 1960s in Canada (90-110), Germany (80-100), and Scandinavia except Finland (60-80), and in Finland since 1990 (Tonry 2004).

Policies and practices, though often broadly stable in one place or period, differ significantly between places. Few people with any knowledge of the subject are surprised that punishments are often harsher in rural areas than in cities and almost invariably harsher in English-speaking countries than in Scandinavia or German-speaking countries, or in Eastern European than in Western European countries. Historians, political scientists, and both professional and pop sociologists, offer plausible explanations.

The United States and, much less infamously, the Netherlands experienced steep increases in imprisonment in recent decades14. The US peaked in 2007 at 763 per

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13 This American rate is for state and federal prisoners; it omits local jail inmates who today and historically constitute a quarter to a third of all prisoners, making the 1930-1970 average total rate 125 to 160. Reasonably reliable annual jail data are available only beginning in the 1980s.

14 The Netherlands has been known since the 1950s for its mild and rational criminal justice policies and restraint in use of imprisonment. Its imprisonment rates in the 1950s were the lowest in the Western world (30-40 per 100,000) and are again in the 2020s (Downes 1988; Aebi et al. 2021). In between, beginning in the 1990s, the rate increased almost inadvertently and without law and order becoming a major political issue. Realization that the imprisonment
100,000 population, the Netherlands in 2007 at 140. Other countries including Italy, Spain, and Portugal experienced sizable fluctuations in the 1990s and early 2000s (but never above 200). A few countries, most starkly England and Wales and New Zealand, had broadly stable rates through the 1990s and then experienced step increases to significantly higher persisting plateaus. Finland deliberately reduced its imprisonment rate from nearly 200 per 100,000 in the 1940s and early 1950s to 60 in 1990 (Lappi-Seppälä 2007), around which it has since narrowly fluctuated.

Those differences exist and changes occurred for one overriding reason: policy makers and practitioners wished it so. Successive Finnish governments worked over four decades to reduce use of imprisonment despite starkly rising crime rates in the 1970s and 1980s. Other Scandinavian, Canadian, and German governments sought throughout the last half century to minimize use of imprisonment. American governments in the 1970s-1990s, and less dramatically English and New Zealand governments in the 1990s and 2000s, chose to make punishments markedly more severe and to increase use of imprisonment.

No American or international scholarly literature before the 1990s attempted to explain why countries have distinctive punishment policies and practices15. In twentieth century America before the 1960s, preoccupying crime problems emerged and reemerged — alcohol prohibition, organized crime, sexual predation, drug epidemics, gangs—and provoked public concern and governmental responses, but the character and operations of the criminal justice system changed relatively little. Topical problems and new laws they precipitated were dealt with as they appeared and folded into business as usual. Imprisonment rates were broadly stable from the 1930s through the early 1970s, declining somewhat in the 1960s and early 1970s. That changed after “crime in the streets” became a partisan political issue in the 1964 presidential election and has remained one ever since, not least in the 2020 presidential election. Elsewhere I document the changes in laws, policies, and practices that generated the five-fold increase in American imprisonment rates after 1973 (Tonry 2016b). By the 1980s, imprisonment rates in the US had increased three-fold since 1973, to levels then unprecedented in the US or any other Western country. People elsewhere began to worry that America’s then present might become their future. On both sides of the Atlantic, efforts were

15 Lacey, Soskice, and Hope (2018, p. 196), in the most exhaustive survey of the literature observe, “The notion that there might be something of a general explanatory nature to be said about what determines penal policy in different contexts remained, for much of the twentieth century, unexplored.”
made on to understand what was happening and why (e.g., Finnish Ministry of Justice 1997).

Some early explanations of American developments were pedestrian. Others were plausible but in retrospect fundamentally incomplete. Conservative American politicians and social scientists characterized the changes as rational policy responses to rising crime rates (e.g., Bennett, Walters, and DiIulio 1993). English scholar Anthony Bottoms (1995) influentially argued that policy makers responded to the “populist punitiveness” of citizens troubled by rising crime rates. Scottish sociologist David Garland (1996, 2001) observed that social and economic changes of the late twentieth century, including rising crime rates, engendered existential uncertainties that governments struggled to ameliorate. No credible tools were available to alter the effects of globalization, neoliberal economic policies, increasing population mobility and diversity, or fundamental social changes. Governments sought instead, Garland argued, to maintain legitimacy by adopting severe, facially plausible, crime control policies even if they were suspected or known to be ineffective.

New Zealander John Pratt (e.g., 2007), building on Bottoms’s ideas, wrote extensively about “penal populism.” Jonathan Simon (2007) argued that American politicians used harsh crime policies to win elections that empowered them to pursue other goals they cared more about. British scholars Michael Cavadino and James Dignan (2005) and, more subtly, Nicola Lacey (2008) argued that repressive crime policies are collateral damage from the spread of neoliberal economic and social policies.

The limits of these analyses became clear when a comparative literature developed. If severe policies and practices and high imprisonment rates are products of rising crime rates, fearful and angry publics, neoliberalism, or, as Bottoms put it, “conditions of late modernity,” they should have characterized all Western countries in the late twentieth century. They didn’t.

Background circumstances were much the same everywhere. Crime rates moved in parallel in Western countries for 50 years, rising sharply from the late 1960s to various dates in the 1990s, and falling sharply since then (Tonry 2014). Angry publics, pusillanimous politicians, existential angst, economic turbulence, high population mobility, neoliberalism, and rapid social change affected all Western countries. Penal policies and imprisonment rates, however differed, and differ, enormously. In the face of tripling crime rates between 970 and 1990, for example, the American imprisonment rate tripled, the German, Scandinavian, Canadian, and English rates changed little, the French rate zigzagged, and the Finnish rate fell by two-thirds (Tonry 2004). Go figure.
I observed in 2001, when the international literature was in its earliest days, that the “best explanations remain parochially national and cultural” (Tonry 2001, p. 518). That is still true. Changes in crime rates, population composition, and social and economic conditions are important, but their implications for criminal justice policies and practices vary widely between countries. This became clear when Finnish scholar Tapio Lappi-Seppälä (2008) began publishing work on correlates of national imprisonment rates. Drawing on a wide range of comparative and international sources (World Values Surveys; World Bank, OECD, United Nations, World Health Organization, Council of Europe, and other comparative data sets), he showed that a small number of variables are strongly associated with moderate penal policies and low imprisonment rates: low income inequality, high social welfare spending, high levels of citizens’ trust in one another, high levels of government legitimacy in citizens’ eyes. At about the same time I showed that moderation is also associated with consensus rather than conflict political systems, high levels of confidence in expert knowledge, and nonpartisan selection instead of election and political appointment of judges and prosecutors (Tonry 2007). Lappi-Seppälä’s and my analyses identify much the same sets of countries with moderate and immoderate policies and practices.

Country characteristics can thus provide plausible explanations of why countries have distinctive policies and practices, but that leaves the deeper question of why countries have particular characteristics. Only knowledge of national histories and cultures can help us understand why English-speaking and Eastern European countries have conflict political systems and most Western European countries have consensus systems, why expert knowledge is valued in some places and derided in others, why prosecutors and judges are insulated from partisan politics and public emotion in other developed Western countries but elected in the United States, and why levels of trust in fellow citizens, governmental legitimacy, income inequality, and welfare spending vary widely. David Garland (2018, 2020) and Nicola Lacey (Lacey, Soskice, and Hope 2018), authors of the most searching and informed recent surveys of the subject, both offering political economy explanations of American developments, at least partly agree. Understanding of a country’s penal policies and practices requires understanding of the country’s history and culture. General theories aren’t enough.

IV. The Frontier Thesis

16 Consensus systems (e.g., most of Western Europe) are characterized by proportional legislative representation, multi-member electoral districts, and coalition governments. Major policy changes occur slowly and deliberately because they must be negotiated within coalitions and parties often reappear in successive coalitions. Conflict systems (e.g., the US, the UK) have first-past-the-post elections, single-member electoral districts, and single-party governments that often make major controversial changes quickly (Lijphart 1984, 1999).
Frederick Jackson Turner’s frontier thesis was first offered in “The Significance of the Frontier in American History,” a lecture presented at an American Historical Association meeting during the Columbian World Exposition in Chicago in 1893\(^{17}\). The talk was little noticed or much praised at the time. One attendee reported that “The audience reacted with the bored indifference normally shown to a young instructor from a backwater college reading his first professional paper…. Discussion was totally lacking” (Billington 1973, p. 129). Most young academics presenting their early papers know what that feels like. The published version, however, in *The Report of the American Historical Association* for 1893, was many times reprinted. Charles A. Beard, Turner’s principal rival for intellectual influence among early twentieth century historians, wrote that the 1893 essay had “a more profound influence on thought about American history than any other essay or volume ever written on the subject” (1938, p. 61). A 1942 survey of American historians by Yale’s George W. Pierson concluded that “defenders of the thesis still far outnumbered the detractors” (Nash 1991, pp. 46-47). Richard Hofstadter, America’s most influential mid-twentieth century historian, in 1968 called Turner’s essay “the most famous and influential paper in the history of American historical writing” (1968b, p. 3). When the American Historical Association asked its Executive Committee “to name the six greatest historians in the nation’s history, Turner was … ranked first by every member” (Billington 1973, pp. 420-21). The editors of a festschrift honoring Yale’s Howard R. Lamar, the late twentieth century’s most influential Western historian, quoted Turner, “American history has been in large degree the history of the colonization of the Great West,” and observed: “We see no reason to modify that sentence…. We believe that one cannot understand the modern United States without coming to terms with its western past” (Cronon, Miles, and Gitlin 1992, p. 6). The frontier thesis had legs.

Few specialists would quarrel much with intellectual historian Gerald Nash’s description in *Creating the West: Historical Interpretations, 1980-1990* of four stages of reaction to the frontier thesis: overwhelming deference through the 1920s, sustained and respectful but often critical attention through the 1940s,

\(^{17}\)The literature on Turner and the frontier thesis is enormous. I offer here only a sketch. Anyone interested in learning more could not go wrong by starting with Richard Hofstadter’s (1949, 1968a) two assessments. There have been two major biographies (Billington 1973; Bogue 1998) and many biographical articles. Gerald Nash (1991) provides a comprehensive intellectual history of the changing reception over time of Turner’s ideas. Richard White (1988) offers a short biography and a lengthy but selected bibliography through 1987. Many of Turner’s writings originally appeared in specialist, now fugitive, journals. He collected and reprinted what he believed to be the most important (Turner 1920), most of which are also reprinted in Faragher’s more accessible 1998 collection (and in many other places). Colleagues assembled a posthumous collection of early writings, some of which are not easily available elsewhere (Turner 1938). Richard Hofstadter and Seymour Martin Lipset (1968) reprint many of the most influential classic critiques of the frontier thesis.
qualified endorsement through the 1960s, and devastating criticism through 1990. Turner and his followers celebrated white American and European settlers who “tamed” the wilderness and “won” the West. This is no longer a widely shared conception among historians of what happened as the title of Patricia Limerick’s influential critical retelling of the story, *The Legacy of Conquest* (1987), attests. Much of the criticism centered on the absence from Turner’s and his followers’ accounts of women18, Native Americans, African Americans, and Spanish speakers and inattention to environmental issues.

Nash, though distancing himself from what he described as overheated critiques of Turner and his ideas in the 1970s and 1980s, observed that most specialists no longer believed that “The frontier … had a positive influence on American society but … [was instead] the instigator of violence, anti-intellectualism, racism, sexism, and environmental desecration” (1991, p. 99). Turner, his writings, and his thesis have nonetheless not disappeared. Articles and books since 1990 have continuously wrestled with his ideas, sometimes approvingly and respectfully (e.g., among many recent others: Massip [2012]; Altenbrand and Young [2014] Bazzi, Fiszbein, and Gebresilasse [2017]).

Turner stated and restated the thesis many times19. A particularly full iteration appeared in 1920:

What has been distinctive and valuable in America’s contribution to the human spirit has been due to this nation’s peculiar experience in extending its type of frontier into new regions; and in creating peaceful societies with new ideals in the successive vast and differing geographic provinces which together make up the United States. Directly or indirectly these experiences shaped the life of the Eastern as well as the Western states …. This experience has been fundamental in the economic, social, and political characteristics of the American people and in their conceptions of their destiny. (Turner 1920, preface).

Turner believed those characteristics and conceptions, and the democratic and cultural values they shaped, were by-products of the settlement experience. “The aim of history,” he observed in 1891, “is to know the elements of the present by understanding what came into the present from the past” (Turner 1891, p. 230). In the 1893 lecture, he elaborated on the most pertinent parts of that past:

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18 The only mention of women in “The Significance of the Frontier in American History” is that Davey Crockett’s wife was a descendant of Daniel Boone.

19 Richard Hofstadter (1968a, pp. 121-22) quotes eleven illustrative statements and restatements over 30 years. Hofstadter’s (1949) first major writing on Turner is a kind but devastating critique. His last (1968a, p. 159), also kind, also critical, nonetheless observes that with some modifications “much of the Turner thesis can be salvaged.”
Behind institutions, behind constitutional forms and modifications, lie the vital forces that call these organs into life and shape them to meet changing conditions. The peculiarity of American institutions is, the fact that they have been compelled to adapt themselves to the changes of an expanding people—to the changes involved in crossing a continent, in winning a wilderness, and in developing at each area of this progress out of the primitive economic and political conditions of the frontier into the complexity of city life (Turner 1893, p. 199).

Turner’s story began with an inhospitable wilderness:

> The frontier is the line of most rapid and effective Americanization. The wilderness masters the colonist. It finds him a European in dress, industries, tools, modes of travel, and thought. It takes him from the railroad car and puts him in the birch canoe. It strips off the garments of civilization and arrays him in the hunting shirt and the moccasin. It puts him in the log cabin of the Cherokee and Iroquois and runs an Indian palisade around him. Before long he has gone to planting Indian corn and plowing with a sharp stick…. In short, at the frontier the environment is at first too strong for the man. He must accept the conditions which it furnishes, or perish …. Little by little he transforms the wilderness; but the outcome is not the old Europe …. The fact is, that here is a new product that is American. (Turner 1893, p. 201)

In language that would no doubt be different if written today—by all accounts he was generous, modest, and considerate—Turner described a recurring process:

> From west to east we find the record of social evolution. It begins with the Indian and the hunter; it goes on to tell of the disintegration of savagery by the entrance of the trader, the pathfinder of civilization; we read the annals of the pastoral stage in ranch life; the exploitation of the soil by the raising of unrotated crops of corn and wheat in sparsely settled farming communities; the intensive culture of the denser farm settlement; and finally the manufacturing organization with city and factory. (Turner 1893, p. 207)

Turner and his early followers did not discuss the fatalism I emphasized in the introduction and section I. They celebrated the winners but gave little attention to the losers, the people who died en route or from disease or starvation or crime, whose farms and businesses failed, or who were bankrupted or defrauded. They were simply the inevitable if regrettable downside, people who took big risks, rolled the dice, and lost. By the 1920s, others began to notice. Ole Rolvaag, in his epic 1927 novel of frontier life, *Giants in the Earth*, declared that “it was not man who subdued the wilderness environment…. Rather, the environment crushed the human spirit, and robbed individuals of what civilization they had brought with...
them. The frontier was not a hopeful place, but one of suffering and death” (quoted in Nash 1991, pp. 25-26). The then young, later celebrated, historian Henry Steele Commager observed that “the western movement ceases to be the victim of romance and becomes a great … spiritual adventure. It ceases to be the proud epic of man’s conquest of earth and becomes the tragedy of earth’s humbling of man” (1927, p. 324).

The frontier legacy thus, inevitably, including for Turner, is mixed. He and his followers described, and celebrated, a distinctive set of American social and political values—local democracy, egalitarianism, individualism, self-sufficiency—and regretted the anti-intellectualism, intolerance, nativism, and xenophobia that came with them. Later critics despaired the experiences of Native Americans and members of other ethnic groups and the human miseries, including among settlers, that were also at the heart of the frontier experience. Acceptance of those injustices and miseries at the time, and inattention to them then and now in the mythology of the American West, make up what I have called fatalism.

V. Four Causal Forces

Turner’s writings contain few mentions of race, ethnicity, elections, the criminal justice system, or religion. On some subjects, for example, concerning elections and the criminal justice system, he apparently wrote nothing20. The indices to the major biographies, each a career pinnacle for a leading Western historian (Billington 1973; Bogue 1998), contain no listings for courts, crime, criminal law, judges, prosecutors, or elections, and precious few—always referring to brief textual asides—for churches, denominations, religion, race, ethnicity, or “American Indians.” Turner, however, was far from alone in his inattention. Historians of the American West began paying serious attention to most of these subjects, and to women and the environment, only in the 1950s and 1960s (Limerick 1987; Nash 1991, chap. 2).

Put elected local officials, punitive moralism, and racial and ethnic animus together and outsiders were and are in trouble. If local people feared Native Americans, disdained African Americans, Jews, Catholics, and Spanish speakers, and resented outsiders, nothing existed to protect the outsiders except the consciences of elected judges and prosecutors whose values will often have been shaped in that community. That’s why Harper Lee’s To Kill A Mockingbird is so galvanizing an

20 “Apparently” because I’ve no idea what might be found in the Huntington Library’s extensive archives of his unpublished writings, correspondence, annotated bibliographies, and class notes. Many, however, who have written about Turner including his biographers and Gerald Nash have extensively consulted the archives and not mentioned work on these subjects.
account of small-town America; powerless and ostracized people seldom had determined champions.

Fast forward to the twenty-first century. All three underlying forces retain their power and influence. Elected prosecutors and judges have enormous power and autonomy, race and ethnic relations are tenser than they have been since the 1960s and 1970s, and the judgmental moralism of fundamentalist Protestantism remains influential. In the following subsections I discuss the historical literatures, though only briefly.

A. Criminal Law Politicization

“Politicization” of the criminal law can be understood in two ways. The more common refers to the salience of crime and punishment as partisan political issues. Few informed people would disagree that they became more salient when Republican candidate Barry Goldwater focused his 1964 presidential campaign on “crime in the streets.” Repackaged as “tough on crime,” the subject reverberated until the early 1990s when candidate, later President, Bill Clinton stalemated it by resolving never to let Republicans get to his right on crime21. Politicization in this first sense is not uniquely American though it has been uniquely virulent in the United States22.

Politicization in the second sense of selecting judges and prosecutors in partisan elections, and thus entangling them in local politics, is uniquely American. Judges and prosecutors in a few Swiss cantons are elected, but the elections are resolutely nonpartisan. If the frontier experience shaped American democratic and social values, locally elected officials cannot have escaped their influence.

The stories with prosecutors and judges are much the same; prosecutorial elections emerged in the wake of a movement for judicial elections23. Before 1832, when

21 To which the 1994 federal three strikes and “truth in sentencing” laws are attributable; likewise authorization of capital punishment for 58 additional offenses (Windlesham 1998; Gest 2003).

22 Politicization in this sense is rare in continental Western Europe, but has recurred in England and Wales, Australia, New Zealand, and parts of eastern Europe since the 1990s, and during the Conservative administration of Stephen Harper in Canada in 2006-2015. Other Western countries, however, do not have broad-based mandatory minimum sentence, three-strikes, or truth in sentencing laws (Webster and Doob 2016; Tonry 2016a).

23 Developments concerning election of judges and prosecutors diverged after the late nineteenth century. In many states judicial elections were at least nominally non-partisan and until the 1990s prevailing standards of judicial ethics forbade discussion during campaigns of legal issues that might come before a court. Concerns over judicial independence have regularly recurred, leading to proposals and laws concerning nonpartisan merit selection of judges and systems in which judges run for retention, but not against an opponent. Many states have made changes, sometimes several times (Hannsen 2004; Shugerman 2012; Kritzer 2016). The situation with prosecutors is different. Proposals for fundamental changes have regularly been made since the 1920s but have always been successfully resisted (Sklansky 2018). In 2021, local prosecutors continue to be elected in 45 states; in most of the
Mississippi amended its constitution, local prosecutors and judges were everywhere appointed by governors or legislatures. Twenty-nine states shifted to election of local judges between 1832 and 1861 (Shugerman 2012, appendix A). Thirty states switched to prosecutorial elections by 1877 (Ellis 2012, appendix). Constitutions of most states admitted to the Union since 1877 provided for election of both judges and prosecutors.

Two principal reasons are usually given (Berkson 1980; Hall 1983; Shugerman 2012). The first was to reduce the influence of partisan state-level politicians over selection of local officials. Appointments previously had been made by governors and legislatures, following the colonial pattern in which Crown authorities made appointments or asserted rights to approve or disapprove them. After the United States became independent, appointments were inevitably influenced by state-level politics. Whigs or Democrats could appoint protégés or party members in Republican counties, or vice versa, something local politicians not surprisingly resented. In practice, the change shifted partisan influence and patronage from state to county levels; local politicians decided who was nominated and who was elected (Shugerman 2012).

The second rationale was to make judges and prosecutors “independent.” The issue loomed especially large concerning judicial elections. Just as colonists resented judges appointed by and answerable to the Crown, small-town Americans wanted judges to be insulated from influence by powerful economic interests and state-level politicians. Economic crises in the 1840s and 1850s brought these issues to a head. Debtors wanted and needed loose money and generous credit. Creditors and lenders wanted tight money and effective remedies for non-payment. Legislatures, again not surprisingly, paid more attention to creditors and enacted laws they promoted. Debtors hated those laws and wanted them declared unconstitutional which, Shugerman (2012) shows, happened increasingly often as local judicial elections became the norm.

Judicial independence proved, however, to be a two-edged sword. Local judges could try to protect local interests by striking down state laws, but they were also expected to promote or reflect local interests, attitudes, and values. If local values included anti-intellectualism, resentment of outsiders, and racial, ethnic, or religious prejudice, local judges and prosecutors were no less likely than anyone else to be affected by them. Judges and prosecutors with high ethical standards and beliefs in justice, fairness, and equality no doubt try always to listen to their better angels, but many do not fit that description. Some are ideologues. Some allow others they are appointed by elected state attorneys general (Alaska, Connecticut, Delaware, New Jersey, Rhode Island).
personal and political considerations to influence them. Some are invidiously discriminatory. Some don’t recognize prejudice, parochialism, or ethnocentrism, and unconsciously reflect them.

Therein lies the heart of the problem, especially concerning prosecutors. Most prosecutors, and many scholars, believe that prosecutors should respect and reflect local values and beliefs. Ronald Wright (2012, p. 211), the preeminent scholar of the subject, observes: “In a democratic society, residents expect prosecutors to make choices consistent with their own values and priorities…. Localism is a natural consequence of tight popular control over criminal justice in a pluralistic democracy.”

That belief, together with the American prosecutor’s status as a democratically elected official in the executive branch of government and largely immune from judicial oversight, gives prosecutors’ free rein. Robert Jackson (1940, p. 3), then Attorney General of the United States and later an Associate Justice of the US Supreme Court, famously warned that “[t]he prosecutor has more control over life, liberty, and reputation than any other person in America.”

Judges and scholars for a century have recognized and bemoaned the prosecutor’s remarkable power, autonomy, and abusive behaviors. The indictment includes excessive adversary aggressiveness, severity, rigidity, withholding of evidence, coercive plea negotiation practices, and political and pretextual prosecutions (Wright 2017; Sklansky 2018). Economist John Pfaff (2017) concludes that the enormous increase in imprisonment rates in recent decades is largely attributable to changes in prosecutorial behavior. Enactment of mandatory minimum sentence, three-strikes, truth in sentencing, and life without parole laws in the 1980s and 1990s increased prosecutorial power. Threats to charge people under those laws give prosecutors overwhelming leverage in plea bargaining. The late Harvard Law School professor William Stuntz observed in 2011 that “outside the plea bargaining process” prosecutors’ threats to file any of those charges “would be deemed extortionate” (2011, p. 260). For all those reasons, and because of their extreme and continuing reluctance to prosecute police officers who kill civilians, prosecutorial power has recently attracted renewed attention.

24 Federal Court of Appeals judge Gerald Lynch (2003, pp. 1403–4) observed that “The prosecutor, rather than a judge or jury, is the central adjudicator of facts (as well as replacing the judge as arbiter of most legal issues and of the appropriate sentence to be imposed). Potential defenses are presented by the defendant and his counsel not in a court, but to a prosecutor, who assesses their factual accuracy and likely persuasiveness to a hypothetical judge or jury, and then decides the charge of which the defendant should be adjudged guilty. Mitigating information, similarly, is argued not to the judge, but to the prosecutor, who decides what sentence the defendant should be given in exchange for his plea.”
Many judges and prosecutors insist their decisions are not affected by political considerations, but research findings convincingly demonstrate otherwise. One study concludes that prosecutors take more cases to trial during election years—to attract media coverage and affirm their toughness—than in other years (Bandyopadhyay and McCannon 2014). A second finds that fewer cases are dismissed in election years (Dyke 2007). A third shows that prosecutors pursue more aggressive legal strategies during election years, even though that results in larger numbers of reversals on appeal (McCannon 2013).

Likewise for judges. Gordon and Huber (2007, pp. 121–27) found that Kansas judges facing contested reelection campaigns more often imposed prison sentences, and for longer, than judges facing retention elections without opponents. Pennsylvania (Huber and Gordon 2004) and Washington state (Berdejó and Yuchtman 2013) studies found that judges’ sentences became tougher when reelection campaigns loomed. During election years, trial judges in Alabama became more likely to override jury decisions for life imprisonment and impose the death penalty instead (Berry 2015). A 50-state analysis of the effects of judicial elections on whether prison sentences are imposed found that judges “engage in more punitive decision making when [they] face strong electoral competition” (Munir 2020, p. 39).

I have had many conversations with state trial judges who admit, usually ruefully, that they give defendants fewer breaks in reelection years. A Minnesota judge, full of regret, described a young African American whose probation he had recently revoked when a probation officer in a warrantless search found a dusty, long unused gun high on a closet shelf in his apartment. Ordinarily, the judge said, he would simply have accepted the young man’s claim that the gun was his father’s and that he didn’t know it was there. That would have been that. Up for reelection, the judge felt he couldn’t take the risk of ignoring illegal possession of a firearm by a convicted felon.

The two forms of politicization interact. Law and order politics led to enactment of unprecedentedly severe sentencing laws. Crime control issues often arise in local elections. Elected judges and prosecutors often feel they must continually look over their shoulders lest they create political or media problems for themselves. They also often believe that they must also take account of local values, attitudes, and opinions.

Here’s the takeaway. Locally elected judges and prosecutors, but especially prosecutors, often reflect widely held views in their communities; they, and some observers, think that’s a good thing. To the extent that those views are based on racial and ethnic stereotypes, consciously or unconsciously biased, unforgiving, or
vindictive, prosecutors’ behavior is likely also to be. Some judges are wilfully or idiosyncratically ideological or political. Others are captives of local subcultures. People charged and convicted of crimes are affected by both forms of American politicization. Our settler ancestors cannot have foreseen where their quest for judicial and prosecutorial independence would lead. It’s not a good place.

B. Protestant Fundamentalism

Fundamentalist Protestants hold especially punitive views concerning punishment whether the subject is the death penalty, harsh sentencing laws, or corporal punishment in schools (Grasmick, Davenport, Chamlin, and Bursik 1992; Grasmick, Cochran, Bursik, and Kimpel 1993; Stack 2003; Unnever, Cullen, and Applegate 2005; Unnever and Cullen 2006, 2010). Hairs are empirically split to try to establish whether those views reflect beliefs in “transcendent evil,” crime as sin, a masculine image of God, or biblical literalism (Baker and Booth 2016). Disaggregated analyses show that the relationship between fundamentalism and punitiveness is stronger among White than African American fundamentalists, southern than non-southern fundamentalists, and fundamentalists who attend church services seldom compared with those who attend often (Seto and Said 2020). Taking all that into account, there is overwhelming evidence than fundamentalist Christians, especially White fundamentalist Protestants, harbor more punitive attitudes toward crime and criminals than do non-fundamentalists.

Protestant moralism is nothing new, but it has played a major role in supporting harsh public policies principally since the 1980s. The Puritans in Massachusetts Bay Colony, looking admiringly at Calvin’s intolerant sixteenth century Geneva, established civil law based explicitly on biblical principles in 1620. The red “A” for adultery branded on Hester Prynne’s forehead in Nathaniel Hawthorne’s The Scarlet Letter is the timeless symbol. Evangelical and fundamentalist Protestantism emerged from eighteenth and nineteenth century frontier revivalism and the splintering of the established East Coast denominations (Sweet 1950; Mijakawa 1968). During most periods in American history, fundamentalist moralism played out primarily in private lives, but sometimes—during the Temperance era and the “wars on drugs” of the late twentieth century, and generally since the 1970s—has powerfully influenced criminal justice policies and practices.

In Religion and Politics in the United States, Wald and Calhoun-Brown (2007) explain why Protestant fundamentalism is so unforgiving. Catholics and mainstream Protestants, they write, typically espouse commitment to social welfare approaches to dealing with crime because of belief in “a warm, caring god,” but
the fundamentalist “image of a cold and authoritative deity lends support to
government’s role in securing order and property” (p. 121).

Richard Snyder, a former dean at New York Theological Seminary, and a liberal
evangelical Protestant, explains it this way: “If we believe that all persons are
essentially corrupt save for the extraordinary intervention of God’s grace in their
lives, it is a simple step to think that those who are poor, or sick, or in trouble with
the law, or different from us in any way are somehow evil. The redeemed are
God’s children; the unrepentant are children of Satan” (2001, p. 14).

Historical and contemporary scholarly writing about the role of Protestant
fundamentalism in shaping criminal justice policy is sparse. The principal
exception, Aaron Griffith’s God’s Law and Order—The Politics of Punishment in
Evangelical America (2020), is an intellectual and political history of evolving
“evangelical” attitudes toward crime and punishment since the early twentieth
century. Then as now and in between there were wide splits between evangelicals
who thought sympathetically of offenders as wrongdoers who should be treated
with compassion and helped to repent and reform and others who saw offenders as
reprobates who deserved to suffer condign punishment. Since the 1970s, the two
positions have respectively been epitomized by Charles Colson and the soul-saving
Prison Fellowship he established in 1976 after experiencing imprisonment
firsthand, and by Jerry Falwell and the punitive Moral Majority he established in
1979. As recently as the 1950s, the social welfare orientation was predominant.

Griffith describes two critical developments. The first was Evangelist Billy
Graham’s endorsement of Richard Nixon for president in 1968 (in the 1950s,
Graham had been in the social welfare and reform camp) and endorsement of his
“law and order” platform. A corner was turned after which fundamentalist
Protestants increasingly supported harsh drug and crime policies. The second was
the initiation of a decades-long campaign by Jerry Falwell and the Moral Majority
at federal, state, and local levels to support “tough” sentencing laws and oppose
liberal candidates, especially for local judgeships.

In Griffith’s account, support for punitive policies was a means and an end. It was
a means to mobilize political support and credibility for a conservative moral and
political agenda (abortion, “family values,” pornography, support for Israel, state
funding of religious activities) and an end of reversing the “worrying trend of state
withdrawal in the enforcement of the moral laws of America” (2020, p. 234). The
beat goes on. Griffith observes in his conclusion that the social welfare,

25 Except for the criminology literature, referred to in the opening paragraph of this subsection, which has
expired rapidly since the mid-1990s.
26 Griffith (2020, pp. 7-8) ducks “the seemingly endless interpretive debates about defining
evangelicalism,” writing that “I am usually, though not always, referring to white conservative Protestants.”
reformative wing of Protestant fundamentalism remains active in the US and globally but “white evangelicals have also retained their fervor for crime fighting, policing, and security” (p. 262).

C. Race Relations

Justice cannot be done in a few pages to so vast and complicated a subject as injustices done to African Americans by American criminal justice systems since the Civil War or before. Low points include greatly increased imprisonment of African Americans after the Civil War, especially in the former confederacy (Colvin 2000); leasing of convict, mostly African American, labor (Blackmon 2008); chain gangs (Childs 2015); lynchings (Garland 2005, 2010); southern prison farms (Murton 1976); and prison conditions especially in the South that shocked the consciences of the judges who presided over the first federal prisoners’ rights cases in the 1960s and 1970s (e.g., Hirschkop and Milleman 1969).

The litany goes on: an increase from 30 to 50 percent of African Americans among state and federal prisoners between the 1960s and 1990; wars on drugs that targeted African American heroin sellers in the 1970s and African American crack sellers in the 1980s and 1990s27; racial profiling targeting African Americans throughout the United States and Hispanics proximate to the Mexican border; federal court and ultimately US Supreme Court approval of explicit use of race and ethnicity in profiling (Johnson 2010); enactment in the 1980s and 1990s of unprecedentedly severe sentencing laws that targeted violent and drug crimes for which African Americans were disproportionately likely to be arrested (though in the case of drug crimes, not disproportionately likely to have committed); and widespread adoption of prediction instruments in courts and criminal justice agencies throughout the country that systematically treat African American defendants and offenders more harshly than whites (Tonry 1995, 2011, 2019).

Some of that has improved: disparities in imprisonment rates have slightly fallen (from a 7:1 to 5:1 African American/White difference); sentencing disparities have fallen, but persist at troubling levels; racial profiling by police has diminished, but continues; courts especially, and to lesser extents prosecutors’ offices, correctional agencies, and police, have wrestled with overt and implicit bias, diversified their

27 Stark racial contrasts exist between policy responses to the earlier heroin and crack epidemics and the twenty-first century methamphetamine and opioid epidemics. The earlier epidemics precipitated intense law enforcement and severe punishments; the later ones are addressed primarily with public health, medical, and communications methods. Nor have the later two precipitated anything comparable to the 100-to-1 laws and the mandatory minimum sentence laws for drug crimes enacted in the 1980s and 1990s. It can’t merely be coincidental that African American drug dealers symbolized the first two epidemics in political imagery and media stereotypes and that suffering White addicts symbolized the second two. Nor can it be coincidental that law enforcement and punishment strategies dealt much more severely with crack cocaine, symbolized by African American street-level dealers, than powder cocaine, symbolized by White members of the chattering classes.
cadres, and attempted to identify and eliminate or ameliorate racial and ethnic inequality in their operations.

Troubled race relations, however, remain an American dilemma that is hugely complicated by judgmental moralism associated with fundamentalist Protestantism, politicization of the criminal law in both senses, and frontier legacies, all contributing to the indifference to suffering emblematic of American criminal justice systems.

The fundamental moral cause of racial injustice in contemporary American criminal justice systems was the decision by Republican political strategists in the 1960s to use stereotypes of black criminals and proposals for tough crime policies as devices to appeal to White voters. Kevin Phillips wrote *The Emerging Republican Majority* (1969), the foundation of what became known as the Republican Southern Strategy to separate southern Whites from the Democratic Party. He observed that liberalism and Democrats “lost the support of poor whites” as the civil rights movement progressed: “The Negro socioeconomic revolution gave conservatism a degree of access to poor white support which it had not enjoyed since the somewhat comparable Reconstruction era” (1969, p. 206).

In the social turbulence associated with the 1960s in general, and the civil rights movement in particular, conservative Republican politicians saw an opportunity to appeal to White southern and working-class voters, a group that later became known as “Reagan Democrats.” Republicans focused on issues—states’ rights, crime, welfare fraud, busing, affirmative action—that served as proxies for race, “wedge issues” as they came to be known (Edsall and Edsall 1991).

Elaborating on the logic of the southern strategy in an interview published in the *New York Times* in 1970, Phillips observed:

> From now on, the Republicans are never going to get more than 10 to 20 percent of the Negro vote and they don’t need more than that . . . but Republicans would be shortsighted if they weakened enforcement of the Voting Rights Act. The more Negroes who register as Democrats in the South, the sooner the Negrophobe whites will quit the Democrats and become Republicans. That’s where the votes are. (Boyd 1970, p. 106)

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28 The scholarly, policy, popular, and journalistic literatures on the Republican Southern Strategy and its consequences generally are enormous. Maxwell and Shields (2019) offer the most comprehensive recent overview, arguing (and demonstrating with masses of public opinion and voting data) that it quickly and calculatedly broadened from race alone to encompass antifeminist appeals and central concerns of fundamentalist Protestants (e.g., abortion, constitutional church-and-state issues). They demonstrate, as the title of a 2016 *New Republic* article out it, “How the Southern Strategy Made Donald Trump Possible” (Heer 2016).
In a 1981 interview Lee Atwater, the first President Bush’s campaign strategist and developer of the Willie Horton ads used in the 1988 presidential campaign against Michael Dukakis, told a blunter story:

"<EXT>You start out in 1954 by saying, “Nigger, nigger, nigger.” By 1968 you can’t say “nigger”—that hurts you. Backfires. So you say stuff like forced busing, states’ rights and all that stuff. You’re getting so abstract now [that] you’re talking about cutting taxes, and all these things you’re talking about are totally economic things and a byproduct of them is [that] blacks get hurt worse than whites.

And subconsciously maybe that is part of it. I’m not saying that. But I’m saying that if it is getting that abstract, and that coded, that we are doing away with the racial problem one way or the other. You follow me—because obviously sitting around saying, “We want to cut this,” is much more abstract than even the busing thing, and a hell of a lot more abstract than “Nigger, nigger.” (quoted in Herbert 2005; Lamis 1999, p. 8).

The southern strategy, whether conceived narrowly in terms of race relations or broadly also to include anti-feminism and fundamentalist “faith” issues, is no longer acknowledged Republican Party policy (Maxfield and Shields 2019). It was not very different from Donald Trump’s race-based appeals to rural and working class Whites in the 2020 presidential election. The southern strategy achieved its short-term aim: winning elections. It led to enactment of remarkably severe laws. In the long term, the southern strategy shaped and reinforced negative White attitudes toward African Americans. As time passed, most Whites abandoned ideas about black racial inferiority but replaced them with racial resentments (Mendelberg 1991). Those resentments are a principal reason why so many Whites support drug and crime control policies that disproportionately damage African Americans and why Republican politicians are reluctant to risk alienating conservative Whites by repealing or substantially amending the severe sentencing laws of the 1980s and 1990s (Alexander 2010; Tonry 2011).

Circling back: the politics of race and crime has self-evident links to criminalization and Protestant fundamentalism. Many of the White southern voters targeted by the southern strategy and more recently the White rural and working class voters targeted by Republican candidates are Protestant fundamentalists. Many are resentful of African Americans, believe African Americans have unfairly benefited from government preferment and largesse, and believe African American bear personal moral responsibility for economic and social disadvantages in their
lives (Cullen, Butler, and Graham 2021). They also believe that offenders should be severely punished. Elected prosecutors and judges want their votes.

VI. The Big Picture
The story I have tried to tell may someday have a happy ending. American criminal justice systems may someday look like those of other Western countries and treat defendants and offenders compassionately, fairly, justly, and respectfully. Getting that to happen won’t be easy.

The politicization of criminal law and justice is at once the easiest and the hardest of the four underlying forces to address. It is easy because most of what needs doing is mechanical, institutional, and procedural. It is hard because of the enmeshment of the current system with deeply emotional issues of race, faith, and politics. In most other Western countries, judges and prosecutors are appointed and advance in their careers on meritocratic bases. Ethical norms forbid taking account of public, media, and political opinion in handling individual cases. Legislatures respect a separation of function between their responsibility to establish a framework for operation of the criminal law and practitioners’ responsibility to work within it, justly and sensitively, to resolve individual cases. None of that works perfectly, but the aspirations are clear and fallible human beings try to live up to them.

In nearly every respect—justice, fairness, legitimacy, accountability, transparency—those systems are incomparably preferable to American ones29. By all those criteria, the United States could do better. Replacement of the American system of elections with civil service careers for judges and prosecutors, development of robust systems of professional ethics, and renunciation by legislatures of their raw power to fine tune decisions in individual cases could, in theory, do the trick.

That agenda, easy to describe, faces seemingly insuperable obstacles. The first is that it would require fundamental changes in state and federal constitutions, something that is difficult to accomplish in most states and nearly impossible in the federal system. Given fear of the unknown, resistance by vested interests to

29 Two plausible criteria for comparison are absent: crime prevention effectiveness and cost. There is no reason to suppose continental European systems are less effective than those in the US but credible comparative estimates do not exist. Crime rates generally are not higher, and are often markedly lower, especially for serious violence and homicide. Concerning the costs of criminal justice system operations, no one to my knowledge has produced credible comparative estimates of that either. My strong belief is that Western European countries typically spend about as much per capita on policing as in the US, somewhat more on operation of court systems, and dramatically less on their correctional systems. Running community correctional systems may be more costly in countries with strong social welfare systems than in the US, but their costs are dwarfed by the cost of running prisons and jails. Reducing American incarceration rates from 600-700 per 100,000 population to somewhere in the Western European range—60 to 140—would save mountains of money.
change, widespread belief in “community control,” and the complexities of politics as usual, that would—an understatement—be formidably difficult.

The second fundamental obstacle is that the influence of the other three underlying forces—race relations, fundamentalist moralism, and frontier fatalism—would have to be overcome. That is not likely any time soon.

Race relations remain deeply troubled a century and a half after the end of the Civil War, despite sizable improvements in the aftermath of the civil rights movement. Racial and ethnic injustice, disparities, bias, and stereotyping are commonplace in the criminal justice system. Were that universally seen as morally intolerable, profiling would stop; laws, policies, and practices that produce unjust disparities would be repealed or replaced; and ambitious measures would be undertaken to remediate existing disparities, injustice, and unfairness. Fat chance. This can be contrasted with developments in recent decades concerning sexual violence and abuse and child sexual abuse. Advocates have insisted on removing institutional, procedural, and policy impediments to attacking those problems and neither public opinion nor politicians have stood in the way.

Existing racial tensions and Whites’ resentments make realization of a fundamental program to eliminate racial injustice in criminal law and justice unlikely.30 Here and there states and local jurisdictions have adopted half-measures including disparity audits, enactment of laws requiring racial disparity impact analyses, diversification of professional cadres, and training programs to sensitize officials to the power of stereotyping and implicit bias. Many officials are trying to ameliorate the effects of race and ethnicity in the parts of the justice system they can influence. Small, step-by-step improvements are good things, of course, as are efforts to improve the quality of justice in individual cases. Those things, though, cannot by themselves be enough.

The judgmental moralism of fundamentalist Protestantism presents problems nearly as large. If offenders are seen as sinners, reprobates, or self-indulgent hedonists who deserve to suffer, rather than as troubled human beings entitled to sympathy and understanding, prospects are not good for initiatives aimed at bringing compassion, rationality, and respect for human dignity into the justice system. That White fundamentalists often harbor racial resentments makes it harder. In contemporary American politics, concern for the views and votes of

30 A small but rigorous and consistent literature concludes that White resentment of African Americans underlies conservative support for harsh crime policies (Unnever and Cullen 2010; Brown and Socia 2017; Cullen, Butler, and Graham 2021). Brown and Socia (2017, p. 935): “Both racial resentment and animus toward the poor have been and remain powerful predictors of punitive American views in the twenty-first century, controlling for other factors.”
punitive moralists, especially in relation to violent offenders, has trumped all efforts to reduce punishment severity and prison populations.

The problems of race relations and punitive moralism have interacted with frontier fatalism and indifference. Higher African American than White involvement in violent crime is largely a product of the past history and contemporary experience of discrimination and unequal treatment that influence African Americans’ lives, but sometimes—people insensitive to racial injustice and punitive moralists might say—people’s lives just turn out badly. And if defendants or offenders are “sinners, reprobates, or self-indulgent hedonists,” the argument would continue, they deserve for that to happen, whatever their race or ethnicity.

Turner and his followers told the story of risk takers who made new lives, communities, and industries; crossed a continent; and developed a country. They wrote almost nothing about Native Americans, African Americans, and members of other minority groups, or settlers who failed. Many too many Americans are similarly oblivious to the manifest injustices of contemporary American criminal law and justice.

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