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BOOK REVIEW

A Clash of Penal Cultures?

THINKING ABOUT CRIME: SENSE AND SENSIBILITY IN AMERICAN PENAL CULTURE. By Michael H. Tonry. Oxford and New York, Oxford University Press, 2004. Pp. x, 260. \$30.00 (cloth).

Reviewed by Tatjana Hörnle†

Michael Tonry's book contains a compelling appeal to revise developments in American penal practice which he diagnoses as being blatantly wrong. He starts with the description of a punishment system that "no one would knowingly have chosen, but that we do not know how to change" (3) and of the reasons leading to the current state of affairs. The facts Tonry summarizes are shocking: today, imprisonment rates in the U.S. are enormous (more than 700 per 100,000 residents). They far exceed the numbers in other Western countries (from 50 to 150 per 100,000 residents)—a rather new development as until the early 1970s imprisonment rates on both sides of the Atlantic were comparable (30-32). Especially grim is the number of young black men who are either imprisoned or under supervision by the criminal justice system: one third of this group (3). Analyzing why imprisonment rates rocketed like they did in the U.S. within the past thirty years, Tonry refutes explanations which connect them simply to rises in crime rates. Several arguments count against such a straightforward, one-dimensional relationship. Firstly, a comparison of increasing crime rates in different Western countries (especially for violent crimes between 1960 and 1990) shows that this is a universal phenomenon; however, the sharp rise of imprisonment is to be found uniquely in

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the U.S. Secondly, imprisonment rates continued to rise in the U.S. even after crime rates were beginning to fall from the 1990s on (27-34). The author also expresses scepticism about another simplistic explanation, blaming the public's demands for harsher sanctions as the single factor behind the deplorable imprisonment rates. Public opinion, he claims, is not the single cause for politicians' decisions; more important is the reverse sequence: when politicians focus on crime issues, public anxiety is enhanced (34). Tonry describes political strategies targeting black offenders to exploit racial stereotypes held by white working class voters (38-41) and the increasing distrust towards the government and disinterest in political agendas which lead to the exaggerated relevance of single-issue campaigns (41-46).

Penal policy trends are, as Tonry convincingly argues, shaped by what he refers to as sensibilities (a central notion in his book), the "Zeitgeist" of a certain era which influences people's perceptions and beliefs. He also argues that shifts in sensibilities occur in regular cycles (63-84). The notion of cyclic changes in sensibilities remains somewhat hazy as it invites the question: what factors propel them? Obviously, it would not do to draw a parallel to cycles found in nature like ebb and flow. If sensibilities would necessarily and always follow neat cycles, it remains open why for example the attitudes towards drug use in Germany remain fairly stable over time (disapproval by the majority, but no passionate damnation). To paint a full picture why today there are such remarkable differences between the U.S. and Europe, the traditional puritan zealot rejection of physical pleasures could play a role. Maybe recurring periods of increased intolerance depend on underlying, more persistent currents which can be temporarily suppressed but are forceful enough to reappear occasionally or regularly.

However, Tonry's major line of thought that sensibilities do shape attitudes towards drug use and crime and that they can undergo considerable changes is beyond dispute. It is also certain that short term moral panics

occur (he lists several examples in ch. 4), starting with specific troubling events and leading to strong emotional responses prompting political actions. In the analytical section of the book Tonry also depicts interactions between cycles of intolerance and crime rates (ch. 5). Using data comparing different policy approaches in the U.S. and in other countries, he rejects claims that sinking crime rates since the 1990s are due to more punitive policies. Harsh crime control strategies are not to be explained as means to lower crime rates. Rather, such criminal policy changes (like measures against drug use) reflect previous changes in attitudes, and the harshest measures are introduced at a time when the underlying social problem (crime, drug use) is already diminishing.

The effects of changing penal sensibilities in the U.S. can not only be shown by pointing to the horrendous imprisonment rates but also with respect to specific legal provisions. Under the headings "Formerly Unthinkable Policies" (ch. 6, 141) and "Unthought Thoughts" (ch. 7, 169), Tonry describes how shifts in penal sensibilities manifest themselves not only in sentencing guidelines, but also in proposals made by legal scholars and in the way researchers frame their research subjects. Scandalous are sentencing provisions like the three-strikes-and-you-are-out rules, other mandatory minimum requirements, and manifestly unjust rules for drug offenses (for example the federal 100-to-1 rule for crack compared to powder cocaine). Increasing penalties because of additional crimes after acquittal for these charges (as the real offense sentencing provisions of the federal sentencing guidelines demand) or punishing young persons more seriously than elderly offenders (as sentencing guidelines in Virginia order) are more examples of contemporary U.S. criminal policies (146-56). How quickly and radically paradigms guiding the way practitioners and legal theorists think about sentencing have changed Tonry (176-86) shows by pointing to the American Law Institute's (ALI) proceedings when the Model Penal Code was drafted. Few decades ago the mainstream approach to sentencing as represented by the

members of the ALI (no mandatory minimums, almost unlimited discretion for judges) was entirely different from contemporary approaches. The willingness to denounce the heritage of the Enlightenment found in recent work in penal theory is disturbing (although such proposals are made by single writers and do not seem to be dominant in the U.S. literature). Tonry cites Dan Kahan's suggestion that the ex post facto principle should be reconsidered and the same author's proposal not to treat convicted offenders decently but to emphasize the degrading and repulsive features of criminal punishment (156-59, 144-45).

In the last part of *Thinking about Crime*, Tonry shifts from description to prescription. What should be done to come back to sensible criminal policy? How could the present situation be ameliorated for those serving disproportionately long imprisonment terms because of their bad luck to be sentenced in the period of harsh policies? Obviously, the first step has to be what Tonry calls "ethical introspection" (200-04).

The factors leading to disproportionate sentencing strategies have to be disclosed, mainly the blameworthiness of politicians who either get carried away by a prevailing punitive mood or consciously and cynically ignore the additional suffering of powerless convicts to ensure their own political success. This is not a rational crime control strategy but serves expressive functions. Reflection and the willingness to control anger and the resulting increased intolerance are necessary. A strength of Tonry's argument is that it does not presuppose a firm commitment to desert theory in sentencing (and thus opens the argument to a wider circle of people). Even somebody who believes in consequentialism must agree that criminal policy based on moral panics fuelled by anger is irrational, ineffective, and needs to be addressed.

The second and most important step towards more sensibility would be to think about institutional changes. The proposals Tonry makes in this section are most interesting. He suggests to overhaul the institutional organization of the American criminal justice system and to

revise central features according to the model common in Continental Europe. Judges and prosecutors should be career civil servants who get appointed rather than obtain their office through elections (206-10). His analysis can hardly be challenged: judges and prosecutors who depend on votes to gain and hold their office cannot insulate themselves from short-term public opinions. Even those who manage to hold some distance from the penal sensibilities prevailing in their time can hardly afford alienating those on whom they depend for their position and income. Career civil servants are less influenced by short-term moral panics and political pressures and less prone to self-interested considerations. They are also to a stronger degree tied into a specific network of professional attitudes and professional ethics, which is more resilient to shifts in penal sensibilities. As Tonry is of course aware that his fellow Americans will hardly be willing to easily embrace such a far-reaching reorganization of the criminal justice system, he also proposes a more realistic alternative, namely to depoliticize decisions by delegating them to specialized administrative agencies whose task it would be to create sentencing rules and to decide about parole and pardon (210-13).

Besides long-term structural and institutional rearrangements aiming to better insulate criminal justice decisions against demands for harshness, Tonry recommends more immediate measures against sentences out of proportion to the crimes committed: laws authorizing corrections officials or administrative bodies to award early release on the basis of generalized criteria; repeal of all three-strikes and mandatory-minimum laws or at least the addition of clauses giving judges discretion not to apply them; general reconsideration of sentencing guidelines; sentencing laws with sunset clauses providing automatic expiration after ten years; and increased consideration to the costs sentencing legislation will cause (215-27). He ends his list with the suggestions that sentencing legislation should include impact analyses projecting differential effects for disadvantaged groups (women,

ethnic groups) and that penal practices should be examined whether they exacerbate disparities affecting minorities.

The very last points Tonry makes about the protection of minorities seems the most debatable. Certainly a sentencing system does not have to ensure that both sexes or ethnic groups are equally burdened with time in prison. If women or some ethnic groups (let's say Korean immigrants) are underrepresented and the whole picture thus distorted, so be it. To be fair, that is not Tonry's point: he wants to ensure that those who frequently have to endure worse conditions within society (mostly black and Hispanic offenders) do not have to suffer further disadvantages. As far as this means not to discriminate against minorities by unfair sentencing rules (like the 100-to-1 rule for crack vs. powder cocaine), he undoubtedly is right. But the matter is one of fairness: it is impossible to sustain that crack distribution causes a hundred times more harm. If, however, a sentencing provision duly reflects harm and culpability, it is difficult to challenge it for its de facto negative impact on an ethnic group. It seems odd to choose the criminal justice system to compensate for disadvantages and neglect from which some minorities suffer—other branches of state organization are more appropriate for that task.

This minor doubt aside, Michael Tonry's volume offers valuable insights into the factors behind contemporary American penal policies. From the German perspective or a Continental European perspective, the most shocking developments described prompt the reader to ask: Are we witnessing a drifting apart of legal cultures within the Western world? Is this even a "clash of penal cultures"?

It would be too hasty to answer these questions straightforwardly with "yes." Some worrying developments are to be witnessed in Germany as well where criminal law legislation during the last years shows marks of shifts in penal sensibilities. For example, the range of preventive detention was steadily increased. Not only is pre-trial

detention on preventive grounds possible for many crimes,¹ but persons committing serious offenses with bad prognoses can—under some circumstances—be placed under preventive detention for the rest of their lives after they have served their sentence.² The parts in the German Criminal Code about preventive detention were expanded several times in the last ten years, following public discussion in the aftermath of serious crimes. Other “hot topics” which reappear regularly are child abuse and child pornography. There has been a steady stream of new amendments to the German Criminal Code which gradually expanded the prohibitions’ scope and the threat of sanctions. The results are sometimes odd. For example, it is now a crime to influence a child by using media with the intention to have sexual contacts with that child.³ The legislature wanted to target those using chat-rooms in the internet to get to know minors with sexual intentions. They get punished for the chat as such even if they do not come close to put their desire into effect. Also, those who use children’s books, cartoons, etc. to gain a child’s interest or sympathy get punished (however, it is safe to use candy: this does not fall under “media”). But despite all criticism the German legislature deserves for responding to changing penal sensibilities too quickly and not always drafting laws carefully, one must conclude that criminal policy remains within certain limits of rationality. Criminal sanctions completely out of proportion with the seriousness of the offense are not to be found in German legal sentencing provisions.

The answer to the questions above would be: Shifting sensibilities and moral panics are by no means exclusively American phenomena, and they do to a certain degree influence criminal policy in Germany. It would thus be too strong to talk of “clashing” penal cultures. But still, remarkable differences remain because the overall move towards more severe criminal punishment is much weaker

1. § 112a Strafprozessordnung [German Criminal Procedure Statute] [StPO].

2. § 66-66b Strafgesetzbuch [German Criminal Code] [StGB].

3. § 176 IV Nr. 3 StGB.

than in the U.S. The explanatory power of Tonry's story is substantial if one looks at it from a Continental European perspective. In Germany, the necessity to insulate decisions which profoundly affect the lives of those punished and their families from moral panics and shifted penal sensibilities is indeed, as Tonry describes it, better ingrained in organizational structures. The legislature leaves judges a wide scope to choose penalties, and the minimum sentences prescribed by the Criminal Code are low compared to American mandatory minimums. However, most "measures of insulation" are not based on conscious choices to organize state power in a more benign way. Some are consequences of general political developments which cannot be attributed to the foresight of individual policy makers. The still stronger standing of the two big political parties in Germany (Christian Democrats and Social Democrats) as platforms for a rather wide set of issues and goals buffers against single-issue movements. Pressure groups advocating for narrow topics do not get the attention in Germany as they do in the U.S. Ironically, some of the structures Tonry praises are side effects of developments which might be criticized for other reasons. If one sees democracy as a prime value of enlightened states, American political theorists can convincingly demand democratic choices in all branches of state administration including the criminal justice system and denounce judges-by-appointment as remnants of an antiquated authoritarian state. Historically, until the nineteenth century, judges were willing executives of absolute monarchs' will, and one might tell the story of elections versus appointments differently. It is, however, the merit of Tonry's account to draw attention to the unwanted but gloomy effects of direct democracy in the U.S. Also, the discretion the German legislature grants judges for sentencing decisions has been debated in sentencing theory as it can result in practices not commensurable with the principle of equality. Again, to entrust judges with the rules governing sentencing practice does not go back to principled reasoning. Discretion in

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sentencing historically was seen as the prerogative of the judiciary and has never been questioned seriously in the political arena in the twentieth century. The lack of enthusiasm for sentencing guidelines in Germany has more to do with respect for traditions and a generally higher trust in letting professionals do their business on their own than with the sound reasons Tonry gives us. Thus it would not be warranted to loudly praise German policy makers for a more thoughtful approach—the organizational structures which happen to buffer the criminal justice system to a certain degree against short-term moral panics and increased intolerance were not created for that purpose.