The Case for Penal Modernism: Beyond Utility and Desert

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Abstract

Our literature uniformly describes American criminal law as the product of a great clash between utility and desert. In the mid-twentieth century, the literature explains, utilitarianism dominated in American criminal law, in the form of what is sometimes called penal modernism, which emphasized incapacitation and rehabilitation. Beginning in the 1970s, however, America witnessed a revolt against penal modernism, as retributivists demanded a criminal law that respected the central importance of blame.

That account of American criminal law is repeated so often and so confidently that it may seem obviously true. Yet this article argues that it is wrong, in ways that have led to deep misconceptions about criminal law. The clash between retributivism and penal modernism is not in fact a clash between utility and desert, but a clash between two different understandings of the place of blame in criminal law. Penal modernists were the great advocates of individualization: they argued, not that blame has no place in criminal law, but that we must blame offenders not offenses. Correctly understood, penal modernist individualization represents a serious challenge to retributivist approaches, and offers the foundation for a different and healthier moral attitude toward the criminal law.

“The truth is, the whole damn thing is full of moral and ethical issues.”

Herbert Wechsler

Introduction

Four decades ago, American criminal law witnessed a great revolt against what is sometimes called “penal modernism.” The penal modernist movement advocated a variety of sophisticated penological approaches to punishment, all of which involved the “individualization” of punishment. The function of the criminal justice system, in the view of modernist thinkers like Zebulon Brockway, Raymond Saleilles and Franz von Liszt, was to tailor punishment to the individual person, rehabilitating those offenders who could be rehabilitated, while incapacitating those who were dangerous for as long as necessary. To that end, the penal modernists insisted on indeterminate sentences: offenders were to be

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2 For a transatlantic survey, see now Michele Pifferi, Individualization of Punishment and the Rule of Law: Reshaping Legality in the United States and Europe Between the 19th and the 20th Century, 52 Am. J. Legal Hist. 325 (2012), and the more thorough presentation of his research in Michele Pifferi, L’Individualizzazione della Pena: Difesa Sociale e Crisi della Legalità Penale tra Otto e Novecento (2013).
incarcerated for relatively open-ended stretches, with their progress periodically reviewed by trained prison officials and parole boards.

The penal modernist approach to punishment spread throughout the advanced industrial world in the mid-twentieth century. As David Garland has observed, it fit comfortably within the social welfare state policies that established themselves in the same period. Social welfare policies viewed the poor and disadvantaged, not as people able to shoulder full responsibility for their own welfare, but as dependents in need of some government intervention; and they expanded the range and nature of government programs well beyond those of the classic liberal night-watchman state. In effect modernist punishment had the same attitude toward its charges: it treated offenders as particularly problematic welfare-state clients, in need of particularly aggressive intervention, informed by modern techniques of individualized social work as well as modern techniques of social control and incapacitation.

The high era of penal modernism, in the middle decades of the twentieth century, was an age of penology triumphant, which saw widespread faith in the scientific promise of rehabilitation, and in the scientific promise of predictions of dangerousness as well. To be sure, there were rumblings of dissent. Counterculture novels of the 1960s like Anthony Burgess’s *A Clockwork Orange* and Ken Kesey’s *One Flew Over the Cuckoo’s Nest* satirized the sort of “treatment” provided by penal modernist corrections; and so did the Broadway musical *West Side Story*. Some professionals worried that the “therapy” given to offenders might degenerate into a punitive sham, while others saw a danger of arbitrariness in indeterminate sentencing. The philosopher H.L.A. Hart expressed cautious fear that penal modernism had strayed too far from concern with the morality of punishment. Nevertheless, the penal modernist orthodoxy did not seem vulnerable to serious challenge. Scholars, judges and social scientists alike expressed confidence that criminal punishment had transcended the primitive practices of the past, evolving, in the standard jargon of the day, into a modern science of “corrections.”

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4 See the discussion and citations in Francis Allen, *The Decline of the Rehabilitative Ideal* 7 (1981).
6 Ken Kesey, *One Flew Over the Cuckoo’s Nest* (1962).
In particular, scholars and courts believed that criminal justice had evolved beyond the approach that had dominated in the nineteenth century, retributivism.\footnote{Williams v. New York, 337 U.S. 241, 248 (1949) (“Retribution is no longer the dominant objective of the criminal law.”).} Penal modernists had little patience for the classic retributivist conception of justice.\footnote{E.g., Barbara Wootton, Crime and the Criminal Law (1963); cf. H.L.A. Hart, Punishment and Responsibility: Essays in the Philosophy of Law 181-83 (1968), for an effort to defend “the principle of responsibility even when retributive and denunciatory ideas of punishment are dead.”} According to that classic conception the task of the law was to punish wicked acts: every time a given wicked act was committed, the law was to inflict a proportionate painful sanction, treating all individual offenders exactly alike.\footnote{See infra text accompanying notes 148-53.} To modernist ears, the notion that criminal law involved punishing wicked acts smacked of a kind of superstition. Concepts like “wicked act” and “retribution” had no place in a modern science of punishment at all. The idea that particular crimes could be matched to particular painful punishments had an especially superstitious air: it was a relic of the eye-for-an-eye, tooth-for-a-tooth attitudes of the distant human past. Retributivism, in the words of Justice Jackson, was a product of a primitive belief that justice was about “retaliation and vengeance”;\footnote{Morrissette v. United States, 342 U.S. 246, 251 (1952).} and it seemed clearly destined for the ash heap of history. As Hart memorably wrote, lawyers in the age of penal modernism deemed the retributivist idea of justice simply “a piece of moral alchemy, in which the combination of the two evils of moral wickedness and suffering are transmuted into good.”\footnote{Hart, supra note 12, at 234-35.}

By the 1970s, however, as the social welfare state began to fall into political disrepute in America, penal modernism began to fall into disrepute as well. Beginning in the late 1960s, tough-on-crime politics grew more and more prominent on the American scene, as politicians attacked penal modernist justice for “coddling criminals.”\footnote{E.g., Kurt Anderson, What Are Prisons For? No Longer Rehabilitation, but to Punish—and Lock the Worst Away, Time Mag., Sept. 13, 1982, at 41; Law Should Quit Coddling Criminals, Milwaukee J., Jan. 12, 1986, at 6, col. 1.} Over the following decades, criminal justice scholars began to change their tune as well, advocating a revival of the retributivism that penal modernists had treated so dismissively. Critics voiced particular skepticism about penal modernist techniques of rehabilitation, which were widely declared to be a failure—both ineffective as a matter of policy and inattentive to the imperatives of just desert.\footnote{Allen, supra note 4, at 6; Alan Dershowitz, Background Paper, in Fair and Certain Punishment: Report of the Twentieth Century Fund Task Force on Criminal Sentencing 98 (1976); Andrew von Hirsch, Past or Future Crimes: Deservedness and Dangerousness in the Sentencing of Criminals 9-12 (1985); Michelle Phelps, Rehabilitation in the Punitive Era: The Gap between Rhetoric and Reality in U.S. Prison Programs, 54 Law & Soc’y Rev. 33 (2011).} Penal modernist policies, the critics argued, were the product of a dubious and disreputable style of utilitarianism, founded in value-deaf tech-
nocratic assessments of dangerousness and susceptibility to rehabilitation: they were about what was merely “expedient,”18 treating offenders as pure objects, to be handled in whatever manner best served the ends of social policy. By contrast, retributivism rightly put the accent on blame and desert, restoring the “morally correct” to its place at the heart of the criminal justice system.19

Blame and desert were indeed the order of the day. Offenders, insisted critics on both the left and right, were not maladjusted welfare clients in need of individualized intervention by trained social workers and corrections officials. They were responsible moral agents who had chosen to commit a bad act, for which society should condemn them.20 The job of the state was not to engage in “corrections,” but to see to it that criminals suffered proportionate punishment for their freely chosen wicked acts, according to the principles of retributivism.21 As Alan Dershowitz declared in 1975, expressing the widely held reformist convictions of the time, America needed a revolution that would dethrone penal modernism and return to “the age-old notion of ‘natural justice’—that the punishment should fit the crime.”22

The great neo-retributivist revolt against penal modernism of the 1970s and 1980s has shaped our understanding of American criminal law ever since. Today all of our standard discussions of criminal law frame the dominant issue in the way it was framed in those years by the neo-retributivist reformers: they frame it as the conflict between *utility* and *desert*—as the conflict between, on the one hand, a penal modernist criminal law rooted in technocratic consequentialism, and on the other hand, a retributivist criminal law rooted in blame.23 All law students who take the required course in criminal law are taught that the subject turns on the clash between utilitarian and deontological approaches.24 The same is true of our political debates, which continue to ask Americans whether they prefer

18 David Garland, Punishment and Modern Society 186 (1990); see also the fuller discussion in Section II below.
19 Id. For a fuller survey and citations to the literature, beginning especially with the seminal article of Herbert Morris, Persons and Punishment, 52 The Monist 475 (1968), see Russell Christopher, Deterring Retributivism: The Injustice of “Just” Punishment, 96 Nw. U.L. Rev. 843 (2002).
20 Wayne LaFave, Criminal Law 35-36 (5th ed. 2010).
23 See infra text accompanying notes 34-40.
a rehabilitationist, social welfare state order, or a retributivist order that does not hesitate to blame offenders for their free choice to commit a criminal act.25

That account of the conflict between the two approaches—as the epic conflict between utility and desert, a conflict over the soul of American criminal law—is repeated so frequently and so confidently that it may seem obviously true. Yet it is my purpose in this article to show that it is deeply misguided. This article aims to rehabilitate penal modernism. Properly interpreted, penal modernism, I intend to show, was a much subtler and more compelling body of thought than the neo-retributivists were prepared to admit—a body of thought that deserves much more serious attention than scholars give it today. In particular, penal modernism was founded on a subtle and compelling account of the role of blame and desert in the criminal law—an account of the role of blame and desert that can help guide us toward a more decent approach to criminal justice.

The proposition that penal modernism was concerned with blame and desert, let alone that it had something subtle and compelling to say on the subject, will seem improbable, even bizarre, to most of my readers. Our literature uniformly starts from the opposite proposition. Yet it is so. It is true enough that policy-makers in the penal modernist era often spoke the language of utilitarianism, and sometimes did so in morally tone-deaf ways.26 Nevertheless the best penal modernist scholars, judges and other criminal justice officials were always much more thoughtful than that. While the penal modernists rejected retributivist theories of blame, they had their own alternative theories, which were intended to provide a secure moral foundation for the practices of both rehabilitation and incapacitation, and which contributed to the making of a criminal justice system that was much more humane than the one we live with now. As Herbert Wechsler, chief draftsman of the Model Penal Code and one of the great figures of the penal modernist era, observed, it is simply an “error” to assume “that if you state your objectives in non-retributive terms, you don’t have any moral or ethical questions to face.” “The truth is,” declared Wechsler, “the whole damn thing is full of moral and ethical issues.”27 The key to appreciating penal modernism lies in grasping those “moral and ethical issues”; and we cannot do that until we move beyond the distorted account of modernism with which the neo-retributivists (like the counter-culture novelists of the 1960s, and too many historians of criminal law28) have saddled us.

There is a conflict between retributivism and penal modernism, but properly understood it is not the conflict between utility and desert. Instead, it is a conflict over a fundamental question about the nature of blame: it is conflict over whether the law blames persons or blames acts.

25 Here though there is, it is important to note, a slow and (from the point of view of this author) encouraging shift underway toward accepting at least some measure of rehabilitationism “where appropriate.” See Republican Party Platform 2012 (http://www.ontheissues.org/celeb/Republican_Party_Crime.htm).

26 See infra text accompanying notes 68-71.

27 Wechsler, supra note 1, at 109-10.

28 E.g., Pifferi, supra note 2; see, however, his discussion of Saleilles, id. at 368.
Penal modernism was not just a scientistic movement that glorified technocratic penology. It was also a jurisprudential movement, whose great aim was to introduce individualization into criminal law; and penal modernist individualization was very much founded on a conception of blame. That conception of blame revolved around the inner struggles of the judge saddled with the obligation of imposing punishment: what the penal modernists held was that a just judge, faced with a living defendant, can never in good conscience restrict himself to considering only the particular act with which that defendant is charged. Our sense of justice demands that we blame bad persons, not bad acts: it requires us to “individualize,” assessing the entire life-course of the offender, and not just the particular act with which he happens to be charged.

What the penal modernists promoted, in other words, was the same jurisprudential doctrine that the contemporary American Supreme Court has laid down in the most highly charged corner of the criminal law, death penalty jurisprudence. The Court has held that in capital cases true justice requires that we be “sensible to the uniqueness of the individual,” handing down individualized sentences rather than inflicting the same penalty on every person who commits the same act. That is why we convene the jury for a death penalty phase. When it comes to putting offenders to death, we feel we must hear the widest range of evidence about the character of the defendant, considering “the character and record of the individual offender”; conscience demands that we fit the punishment to the person, not just to the crime. As the Court has declared most recently in *Miller v. Alabama*, there is a “requirement of individualized sentencing for defendants facing the most serious penalties.”

Penal modernism, properly interpreted, stands for a stronger version of the same jurisprudential proposition: it stands for the proposition that conscientious judging means being “sensible to the uniqueness of the individual,” not just in death penalty cases, but in every instance. When we face the fearsome prospect of imposing criminal punishment, the modernists held, our conscience, our sense of justice, requires us to consider the whole person, not just the particular act charged. That implies that the individualizing approach of the penalty phase in capital cases should be extended throughout all of criminal law.

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32 This article thus agrees with the broad drift of Rachel Barkow, *The Court of Life and Death: The Two Tracks of Constitutional Sentencing Law and the Case for Uniformity*, 107 Mich. L. Rev. 1145 (2009), but my emphasis is entirely on individualization, discussed id. at 1153-55, rather than on the broader proposition that oversight of the sentencing process is required. Barkow’s argument is an argument in favor of appellate review; mine is an argument in the legal realist mode about the jurisprudential limits on the forms of adjudication.
A just system punishes persons, not acts; and it must do so because the conscience of the judge requires it. Those are the core claims of penal modernism as this article presents it. They are certainly contestable claims, and there are times when penal modernism (like retributivism) has lent itself to ugly policies. It is not my intention to deny that penal modernism has sometimes strayed down dubious paths, or that some penal modernists surrendered to the lure of technocratic utilitarianism. Nevertheless I intend to present the best and most morally attractive account of penal modernist teachings. We will not appreciate the drama of the conflict that has shaped contemporary American law unless we see penal modernism in its best light; seen in its best light, it represents a much deeper moral and jurisprudential challenge to retributivism than our standard textbooks acknowledge.

This article begins in Section I by presenting an overview of the state of our literature, with its misguided focus on the clash between utility and desert. Section II then offers a basic account of the place of blame in modernist individualization. Section III replies to three critiques of penal modernism: first, that it is a theory that treats offenders simply as blameless victims of social deprivation; second, that it encourages judicial arbitrariness; and third, that it would tolerate policies of mindless preventive detention. Section IV discusses particular topics in the theory of punishment and substantive criminal law: first, the modernist contrast, on its face somewhat disturbing, between the “opportunity offender” and the “habitual offender”; second, the law of complicity; and third, the law of attempts. Penal modernism, this Section shows, offers not just a theory of punishment, but also a provocative and fertile theory of substantive criminal law. Section V turns to comparative criminal procedure, offering a penal modernist analysis of the divergent forms of trial used in the common law and continental traditions. In particular, it argues that common law criminal procedure fails to serve the ends of justice in ways that reflect the wisdom of the penal modernist approach, and that illustrate the practical dangers that attend any attempt to make retributivist ideals a reality. A Conclusion, emphasizing the deep link between the attack on penal modernism and the broader attack on the values of the social welfare state, follows.

I. Beyond Utility and Desert

Our basic texts uniformly describe the conflict between retributivism and its penal modernist competitor in terms of two dichotomies: utility versus desert, and, closely related to it, forward-looking versus backward-looking. All standard accounts begin by explaining that retributivism is the approach to punishment founded in desert. “A retributivist,” as Kent Greenawalt explains, “claims that punishment is justified because people deserve it.” The desert-orientation of retributivism is always contrasted with the supposedly utilitarian or consequentialist orientation of other approaches, most particularly the penal modernism.

33 A fuller account would add a third claim: The conscientious punishment of persons rather than acts requires us to transcend the conception of punishment as pain. This article is not the place to explore that admittedly central aspect of penal modernism, however.

ism that dominated in American criminal law until the mid-1970s. Indeed it is the proudest boast of the neo-retributivist revolution to have reestablished blame as the foundation of the criminal law, in place of the supposedly amoral technocratic utilitarianism of the penal modernists.35

Retributivism is also commonly characterized as backward-looking where its utilitarian competitors are forward-looking. John Rawls gave the foundational statement of this contrast in his seminal 1955 essay, “Two Concepts of Rules.” Utilitarianism, he explained there, rests “on the principle that bygones are bygones and that only future consequences are relevant to present decisions.”36 Retributivism, by contrast, is said to assign blame on account of past wrongdoing: “Retributivism,” as Michael Moore explains, “stands in stark contrast to utilitarian views that justify punishment of past offenses by the greater good of preventing future offenses.”37 “[T]he core retributive thought,” as R.A. Duff puts it, is “that what gives criminal punishment its meaning and the core of its normative justification is its relationship, not to any contingent future benefits that it might bring, but to the past crime for which it is imposed.”38 The forward-looking view, retributivists often assert, makes it all too easy for utilitarians to embrace programs of preventive detention deeply inconsistent with the values of liberty.39

These ways of describing the basic stakes in punishment policy are inculcated in every standard criminal law casebook.40 Yet they shed at best skewed light on the key issues in the conflict between retributivism and penal modernism that has shaped American law over the last forty years. Those key issues do not in fact involve the much-bruited dichotomies between utility and desert and between forward-looking and backward-looking punishment. (Indeed both retributivism and penal modernism can be analyzed in both desert-based and utilitarian terms. 41) Instead they involve a different, and very fundamental, dichotomy in the analysis of criminal law: the dichotomy between non-individualizing and individualizing approaches—between a criminal law focused on acts and a criminal law focused on persons, between an offense-oriented criminal law, and an offender-oriented criminal law—between what German scholars call a “Tatstrafrecht” and a “Täterstrafrecht.”

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35 See infra text accompanying notes 68, 83-86.
39 See the critical discussion of this idea, with further citations, in Guyora Binder & Nicholas Smith, Framed: Utilitarianism and the Punishment of the Innocent, 32 Rutgers L.J. 115 (2000).
40 See the sources cited supra note 24.
41 For retributivism: Stephen Garvey, Lifting the Veil on Punishment, 7 Buff. Crim. L. Rev. 443 (2004); Mitchel Berman, Punishment and Justification, 118 Ethics 258 (2008); and in a different register the well-known work of Paul H. Robinson & John M. Darley, The Utility of Desert, 91 Nw. U.L. Rev. 453 (1997). The place of blame and desert in penal modernism is of course the theme of this article.
Retributivism is, first and foremost, a non-individualizing, act-oriented theory of criminal law. It is the core claim of retributivists that the criminal law should be in the business of evaluating and punishing wicked acts, and punishing those acts with more or less the same measure of pain regardless of which individual committed them. Retributivism, as legal historians know, is a theory of punishment powerfully shaped by the Pauline theological tradition, and like Saint Paul retributivists hold that we should punish sins, not sinners. Correspondingly, almost all Anglo-Americans think of criminal punishment in the way H.L.A. Hart does, as the punishment of offenses, not offenders: “[T]he conduct to be punished must be a species of voluntary moral wrongdoing, and the severity of the punishment must be proportionate to the wickedness of the offense.” Or as Rawls put it, “[i]t is morally fitting that a person who does wrong should suffer in proportion to his wrongdoing. That a criminal should be punished follows from his guilt, and the severity of the appropriate punishment depends on the depravity of his act.” By contrast, penal modernism, with its insistent focus on individualization, is first and foremost a person-oriented theory of criminal law: punishment, it holds, must be proportional, not to the degree of wickedness of the offense, but to the degree of wickedness of the offender. As the Supreme Court puts it in its death penalty jurisprudence, it must consider “the character and record of the individual offender.” Our task is to judge sinners, taking into account the larger course of their lives, their character and record, not just some particular sin they may have committed at some particular moment in time.

So should criminal law be concerned with punishing acts or persons, offenses or offenders, sins or sinners? It may seem self-evident to contemporary Americans that criminal law should be in the business of punishing depraved acts. We have been committed to that proposition for a generation. Indeed, the proposition that criminal law should focus on acts has Judeo-Christian roots that reach back for millennia. All of our criminal jurisprudence turns, at least on paper, on the punishment of an “actus reus,” an evil act; there is no doctrine of the homo malus, individuum malum or persona mala. Virtually all prohibitions in modern criminal codes (at least outside the peculiarly charged arena of homicide) purport to penalize the depravity of acts, not the depravity of actors. The very
idea that the criminal law should be in the business of hunting down bad people is likely to seem inherently sinister to contemporary Americans; while allowing judges to form individualized judgments is likely to strike them as deeply incompatible with the rule of law in a democratic society. Indeed, contemporary scholars like George Fletcher argue that the conceptualization of criminal law as a law of acts is an indispensable requirement—a “primary candidate for a universal principle of criminal liability.” Judge Gerard Lynch insists, similarly, that the only appropriate question should be whether the accused made “a free choice at a particular moment in time to commit an immoral act.” After all, if we are not punishing particular “immoral acts” committed at “a particular moment in time,” we must be engaged in some more disturbing exercise of governmental power, such as punishing mere thought crimes or status crimes, or yielding to the temptation to engage in preventive detention as, for example the Nazis did.

Yet there is nothing inevitable about the act-orientation in criminal law. It is perfectly possible to have a humane and decent criminal law dedicated to punishing bad people rather than punishing bad acts. In the words of a leading Supreme Court decision from the penal modernist era, it is perfectly possible to focus on the blameworthiness, not just of the particular act charged, but of the “past life, health, habits, conduct, and mental and moral propensities” of the offender. Even in contemporary American law it is a commonplace that justice officials like prosecutors must individualize, considering, in the words of the proposed American Bar Association Standards, “the particulars of the offender’s character or his situation”; and of course Supreme Court death penalty jurisprudence embraces the same proposition. In insisting that we should punish acts not persons, retributivists choose only one of two possible approaches to the business of criminal law.

And that choice is a problematic and contingent one—much more problematic and contingent than contemporary American retributivists are typically prepared to recognize. Some of the problems are problems in contemporary criminal law theory and philosophy. A sharp-eyed philosopher like Douglas Husak, for example, raises doubts about the cogency of our very conception of an “act.” Over the last forty years, moreover, a number of other contemporary philosophers have made the argument that a convincing philosophy of blame cannot be a philosophy of blame for particular acts. Instead, it must be a philosophy of blame for character—for the defects in character or virtue.

51 For discussion, see Christian Müller, Das Gewohnheitsverbrechergesetz vom 24. November 1933 (1997).
53 Standards for Criminal Justice: The Prosecution Function 3-5.6(d) (Proposed Revisions 2009).
revealed by the criminal act in question. The arguments of these “character theorists” have been energetically contested by the “choice theorists” who defend the orthodox view that blame is blame for criminal acts, to be punished in the same way whoever commits them. Nevertheless the fact remains that even within the community of contemporary Anglo-American philosophers there are doubts about whether the criminal law can really put all the focus on acts.

Meanwhile there are other, arguably deeper, problems as well—problems that have to do with a classic concern of jurisprudence, the conscience of the judge.

II. The Jurisprudence of Individualization

That classic concern lies at the heart of penal modernism. Penal modernism was a legal realist movement; indeed, it can rightly be described as the most successful and influential of the movements of the legal realist era. Like other legal realist movements it advocated the exploitation of modern social scientific practices and discoveries, most especially the practices and discoveries of penology and other behavioral sciences. But—again like many other legal realist movements—its claims were much more far-reaching and interesting than that. The prime focus of penal modernism, like the prime focus of so much legal realism, was on the practice of judging—on, in the stock legal realist phrase, the judge’s “sense of justice.”

What the modernists held was this: no matter how attractive the act-orientation may seem in the abstract, judges find themselves, in jurisprudential practice, incapable of judging acts rather than judging persons. General prohibitions can certainly be framed in the language of retributivism; the law can certainly speak only of actus reus and mens rea in abstract terms. Nevertheless, any judge faced with a particular living individual inevitably perceives differences in both dangerousness and what we may call “deservingness” that are not captured by the general prohibition. “Statutes,” as Raymond Saleilles put it in his seminal late nineteenth-century text, The Individualization of Punishment, “operate on abstract entities; only judges operate on realities.”

And any judge encountering the “realities,” the modernists held, must inevitably feel an instinctive and unconquerable need to individualize—a need to be, in the words of our death penalty jurisprudence, “sensible to the uniqueness of the individual.” Jerome Frank offered a classic legal realist account of the impact of the realities on the judicial sense of justice in 1948. The abstract prohibitions of the statute, Frank explained, could never capture the nuances of the individual case:


56 Extensive discussion and citations in Tadros, supra note 55, at 44-70.

57 For an elegant statement, see Eugene Rostow, American Legal Realism and the Sense of the Profession, 34 Rocky Mt. L. Rev. 123, 135 (1962).

58 Raymond Saleilles, L’individualisation de la peine 200 (1898) (“[L]a loi n’opère que sur des entités abstraites, seul le juge opère sur des réalités.”); cf. Liszt, supra note 45, at 126.
Many of our existing substantive legal rules call for the neglect of the unique features of individual lawsuits, a neglect which often deeply offends the “sense of justice.” Rules of that sort, which, were they applied as they are theoretically supposed to be, would yield results felt to be unjust, lead to oblique ways of circumventing the rules—general verdicts by juries, or decisions by trial judges unaccompanied by findings of fact, or the twisting of such findings so that they misreport the “facts.” In other words, the discretion which such rules purport to exclude is shifted, in a concealed manner, to some other component of the decisional process. Since the desire for individualization is obviously irrepressible and since these oblique methods of achieving it are disingenuous and otherwise undesirable, a wiser course would be to revise many of such rigid rules so that they will permit open-and-above-board discretion.59

Frank’s argument here was, it hardly needs to be said, not a utilitarian one. He let fall not a word about policy benefits or social defense. His argument was an argument about what “offends the ‘sense of justice,’” about what leads to “results felt to be unjust.” It was an argument about the inner struggles that accompany the act of judging—and about the inevitability that the legal system will individualize regardless of the formal rules.

What gave this argument its force was Frank’s insistence on rigorously regarding the problems of justice from the perspective of the judge. The act-orientation of retributivism assumes, as it were, the perspective of the victim, who is ordinarily exposed only to the one act of victimization that he suffers. Frank’s judge, by contrast, is exposed to a whole person, seeing before him, not just the record of one “free choice at a particular moment in time to commit an immoral act,”60 but the larger record of a human life. Confronted with that larger record, the judge, Frank argued, is psychologically incapable of focusing only on the act charged. Frank cast his psychological argument in Freudian language that now seems outdated, of course, and even a shade comical, with its invocation of “irrepressible” “desire.” Nevertheless it is well worth observing that his psychological theory was very close in spirit to the contemporary psychological work of Janice Nadler and Mary-Hunter McDonnell. Nadler and McDonnell argue that human psychology is such that when we learn enough information about the life of the accused, we always feel compelled to assess the life of the wrongdoer rather than just the wrong.61 Penal modernists like Frank took much the same view of the psychology of judging.

And when penal modernists mounted their arguments, they presented them as arguments about the sense of justice—about the nature of blame. Even in their most scientistic moments, the advocates of individualization were always careful to maintain that their ultimate concerns were with dynamics of doing justice. We may take as an example the legal realist philosopher Morris Cohen, writing in 1940:

Dominated by the reaction against the abstractness of the classical emphasis on equality and influenced by the prevailing tendency to think of crime as a disease, the idea has re-


60 Lynch, supra note 50, at 936.

cently spread that in punishment we should pay more attention to the individual criminal rather than to the abstract crime. Just as medicine is turning from specific remedies, the same for everybody, to greater emphasis on individual diagnosis and treatment, so penologists are urging that since no given punishment has the same effect on different individuals, it would be more humane as well as realistic to make the punishment fit the criminal rather than the crime. While this theory has elements of novelty in its formulation and application, it is not altogether new in principle. Theoretically, it is but a re-assertion of the old idea of equity (epieikia) as the correction of the undue rigor of the law, a corrective to the injustice which results from the fact that the abstract rule cannot take into account all the specific circumstances that are relevant to the case.62

Some of my readers will undoubtedly sneer at this passage. Cohen’s effort to assimilate punishment to medical treatment may well sound like a formula for “couddling criminals.” It may sound sinister, too: after all, it was the medicalization of punishment that Burgess and Kesey satirized in Clockwork Orange and Cuckoo’s Nest; and it was the medicalization of punishment that led Justice Marshall to decry “the hanging of a new sign—reading ‘hospital’—over one wing of the jailhouse” in 1968.63 Certainly Cohen did not put the accent on retributivist blame. Nevertheless, individualization of the kind preached by Cohen and Frank was never intended to jettison blame from the criminal law. It was intended to shift the accent in blame, away from the supposed objective blameworthiness of the offense committed, and toward the psychic complexities that attend the act of judicial blaming. As criminologist Sheldon Glueck of Harvard explained in 1958, the aim of the movement was to obtain “a more efficient and just system of sentencing.”64 The point was to “give the legally-trained judge a realistic education in the relevancy of the behavioral disciplines to the carrying out of the mandates of justice,”65 and thus to permit Aristotelian ideals of equity to penetrate the law: “In this way, the judge can be aided in assuming the noble role of social physician that Aristotle, over two thousand years ago, had in mind.”66

So said Glueck. Still, my readers may sneer. The fact that modernists thought they were serving the ends of justice does not prove that they succeeded in doing so. Cohen may have believed he was advocating a more “humane” and equitable system; Glueck may have seen “nobility” in his enterprise; but it may nevertheless be the case that penal modernism went wrong in practice. We all know that self-described “scientists” sometimes do hubristic and destructive things. Deploying the techniques of psychology and penology—for example, deploying devices like the predictive tables that Glueck and his wife Eleanor diligently generated67—carries obvious risks. “Scientific approaches to crime,” in the words of historian Martin Wiener, undeniably sometimes “[lead] gradually

65 Id. at 476.
66 Id.
to a subtle weakening of moral judgment of the individual.”68 Indeed thoughtful observers of the penal modernist era knew as much, and acknowledged it frankly. Glueck himself spoke forcefully of the risks of discriminatory sentencing.69 Henry Hart, his colleague at Harvard, deplored the tendency of some judges to refuse to pass moral judgment on defendants.70 Wechsler worried about colleagues who could not see past “the goal of prevention.”71

But to focus only on the risks of penal modernism is to miss the power of its claims. Penal modernists knew perfectly well that individualization carried risks, but the burden of their argument was that there was no morally justifiable alternative. The sense of justice required individualization; anything else would lead to “results felt to be unjust.” Repressing the felt need to tailor punishment to the individual would simply give rise to worse systemic harms, as Frank argued. The only ethical approach was to acknowledge the necessity of individualization while facing its admitted dangers forthrightly.

This was not a callow or foolish claim about criminal justice, and it continues to deserve our serious attention. Its abiding power is probably best illustrated for contemporary Americans by a few moments’ reflection on our death penalty jurisprudence. Why, after all, has individualization re-emerged in the death penalty jurisprudence of the Supreme Court, even as neo-retributivism has reshaped so much of the rest of the criminal law? The best answer is an answer in the spirit of Frank. It is an answer about conscience. The death penalty seems to us so frightening and awful that we feel we cannot in good conscience impose it without considering the whole life-course of the offender, taking in a full range of evidence extending far beyond the question of the offender’s guilt for the particular act charged. We sense that anything else would risk “results felt to be unjust.” We recognize that no decent human being can sentence a fellow human being to die without reflecting on the course of that person’s life. Conscience demands more of us than that.

If we bear in mind the fright and awe that we feel when contemplating the death penalty, we can appreciate the power of the case for penal modernism: what the modernists held, in effect, is that all serious criminal punishments are frightening and awful, which means that conscientious judges must always consider the entire life-course of the offender before them.72 What the modernists in effect held, as I would reformulate it, is

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69 Id. passim.
71 Wechsler, supra note 1, at 109-10.
72 It is important to recognize that the Supreme Court has in effect gestured in the direction of the possibility of extending death penalty jurisprudence, if only vaguely. The Court tells us that “individualized sentencing” is required “for defendants facing the most serious penalties.” Miller v. Alabama, 132 S. Ct. 2455, 2460 (2012). What the Court thereby establishes is of necessity something of an open-ended standard, since its requirement of individualization depends on which penalties count as “the most serious.” So which are those? In contemporary America, we regard only the death penalty, and perhaps life imprisonment without possibility of parole, as “the most serious penalties.” Yet that attitude is characteristic of our
that criminal law must be law of conscience. The sense of justice that makes us feel that we cannot put a person to death without considering “the character and record of the individual offender”73 is the sense of justice that must guide us throughout criminal law.

It is important to emphasize that the operation of the sense of justice, as modernists described it, was not all about forward-looking prediction. To be sure, penal modernists like Glueck did aim at refined methods of prediction. But the larger individualizing act of weighing the whole life of the offender also necessarily involved, as the Supreme Court said at the height of the penal modernist era, a ***retrospective*** judgment of the offender’s “past life, health, habits, conduct, and mental and moral propensities.”74 Of course it is true that penal modernism used the past partly as a guide to the future, and that penal modernists were proud of their willingness to consider the future as well as the past in sentencing.75 But there has always been much more to individualization than prediction.

The aim of the modernists, properly and sympathetically understood, was never to convert the law into a chilling predictive science of the ***Minority Report*** type.76 Their aim was to expose the fundamental fallacy in the retributivist claim made most recently by Professor Kimberly Kessler Ferzan. Ferzan denies that a just criminal law could be based on making fine distinctions between the blameworthiness of persons rather than the blameworthiness of acts. She gives the example of theft: “To put the matter bluntly,” she writes, “one act of theft makes you a thief”77—or, as R.A. Duff puts it, making similar argumentative use of italics, “to act thus is to be dishonest.”78 Not so, the modernists insisted; at least not so when seen through the eyes of the judge. In jurisprudential practice what judges always perceive is, not a uniform blameworthy act called theft, but an indefinite variety of thieves, like the good thief and the bad thief who hung on either side of Christ. (Indeed the case that inspired late nineteenth-century individualization involved a celebrated theft: it was a case decided by the “good judge” Paul Magnaud in industrial northeastern France in the 1890s, who stirred a healthy public controversy by refusing to permit the conviction for theft of a poor woman who had stolen a loaf of bread in order

distinctively American late twentieth-century harshness. In most other advanced countries, any substantial term of incarceration is regarded as a profoundly serious penalty, and for that reason the questions of conscience that haunt our death penalty litigation are regarded as haunting the adjudication of all major offenses. If our attitude toward what counts as “serious punishment” were to shift, one can imagine that our sense of the dictates of conscience, and our jurisprudence, might shift as well. If we thought of, say, eight years in prison as a very, very long term—as most of our peer countries in the OECD do—we might view the task of conscientious judging differently.

75 E.g., Liszt, supra note 45.
76 Minority Report (Dreamworks 2002).
to feed her starving child and mother.\textsuperscript{79}) To be sure, from the perspective of the victim who is exposed only to a single act of theft, there is no doubt that that act is the act of a “thief.” But from the perspective of the judge, the problem is more challenging than that: full encounters with human “realities” always compel us to look beyond any one single act. In the famous phrase of Henry Fielding, novelist, veteran criminal judge of the mid-eighteenth century, and, as it were, penal modernist \textit{avant la lettre}, “A single bad act no more constitutes a villain in life than a single bad part on the stage.”\textsuperscript{80} There is no fixed means of measurement when it comes to the wickedness of acts; once we are made aware of individual differences we cannot escape the sense that we must individualize. As a result, in any truly just legal order there will be as many kinds of justice as there are offenders.

III. What Penal Modernism Does Not Stand for: Social Determinism, Judicial Arbitrariness, Preventive Detention of the Innocent

In a moment I will offer some examples of penal modernist analysis in substantive criminal law and procedure. But first, it is important to say a word about its place in the traditions of the social welfare state, and to counter three of the criticisms that were leveled against it as faith in the social welfare state faded. In particular, it is important to counter the charges that penal modernism was a theory of social determinism, that it encouraged judicial arbitrariness, and that it lent itself to programs of preventive detention.

Penal modernism rose and fell with the social welfare state. This is not because it was a theory of social justice or of the redistribution of wealth. It was not. Penal modernism rose and fell with the social welfare state because its jurisprudential orientation aligned it with the law of the social welfare state more broadly. Like other bodies of social welfare state law, penal modernism took a fundamentally paternalistic view of its subjects, and put great faith in the judgment of trained professionals. As Jerome Hall observed in 1971, in the waning days of the Great Society, the criminal law of his modernist day resembled anti-poverty law and anti-discrimination law, because all of these kinds of law aimed to permit open-ended professional assessments of the social needs of particular individuals:

There are parallels between the necessary participation of private individuals in poverty programs and the assistance rendered by private individuals and agencies to convicts after their discharge from penal institutions. There are parallels between the individualization of treatment incorporated into the criminal law by probation, parole, pre-sentence hearings and the like, and the flexibility of procedures incorporated in the administration of laws proscribing discrimination, such as the requirement of informal hearings and recommendations as prerequisites to enforcement in the courts.\textsuperscript{81}

\textsuperscript{79} See Marie-Anne Frison-Roche, Le modèle du bon juge Magnaud, in De Code en Code 335-42 (2009); and for the controversy, see Mohamed Sadoun, Paul Magnaud ou le bon juge au service du pot de terre 53-114 (2011). The case was the \textit{fin de siècle} French version of a chestnut discussed by moralists for centuries, of course. Of course, the problem in the case can also be analyzed, as we commonly do in contemporary law, through the lens of the law of necessity—that is, by focusing on the objective wickedness of the act, rather than on the conscience of the judge.

\textsuperscript{80} Henry Fielding, The History of Tom Jones 286 (John Bender & Simon Stern eds., 1996) (1749).

\textsuperscript{81} Jerome Hall, Justice in the 20th Century, 59 Cal. L. Rev. 752, 767 (1971).
All of these areas of social welfare state law vested their trust in assessments made by trained government officials. All of them were dedicated to investigating the deservingness and the needs of their clients. And all of them took a fundamentally paternalistic attitude, declining to hold those clients to the standards of personal responsibility that have come to dominate in criminal law as in the rest of our law since the 1970s.

But if penal modernism was akin to these other bodies of law, does that mean that it treated offenders as mere victims of social deprivation, immune to blame for their freely chosen acts? That charge is a familiar one today, and it was already familiar in the 1950s. It is the charge that was set to deathless vaudeville music by Stephen Sondheim and Leonard Bernstein in *West Side Story*, with its chorus of gang members:

Gee, Officer Krupke, we’re very upset;
We never had the love that ev’ry child oughta get.
We ain’t no delinquents,
We’re misunderstood.
Deep down inside us there is good

And of course its penal modernist judge:

Officer Krupke, you’re really a square;
This boy don’t need a judge, he needs an analyst’s care!
It’s just his neurosis that oughta be curbed.
He’s psychologic’ly disturbed!

Gang-Member Chorus: We’re disturbed

Not to mention its penal modernist shrink:

Officer Krupke, you’re really a slob.
This boy don’t need a doctor, just a good honest job.
Society’s played him a terrible trick,
And sociologic’ly he’s sick!

Gang-Member Chorus: We are sick

The same charge is made in more serious tones today, notably in the work of Michael Moore, who asks his readers to submit to a “thought experiment”: imagine an offender guilty of a truly heinous offense—a horrifically brutal rape, or the cruel killing of a child before the eyes of its mother. Imagine, Moore continues, that that offender has subsequently, through some accident or through modern manipulative scientific techniques, been rendered harmless, so that he poses no future danger. Are you willing, Moore asks, that the offender should escape punishment for his past offense, even though he poses no future danger? Are you willing, to put it a bit differently, to accept values like those of the

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83 Bernstein & Sondheim, supra note 7, Act I, Scene 2, at 114.

84 Id. at 115.

85 Id. at 116.
“treatment” of offenders satirized in Burgess’s Clockwork Orange? Are you willing to accept a system of justice that simply tinkers penologically with the “psychologically disturbed” and “sociologically sick” and then sends them on their way? If not, he argues, you must be committed to retributivism, and indeed to the view that we have a moral obligation to impose retributive punishment. You must be an opponent of penal modernism.

Yet no penal modernist ever held that offenders who had committed heinous offenses should escape punishment. No penal modernist ever believed that criminal offenders were simply socially deprived clients of the welfare state. The penal modernist claim is not that we never blame. It is that we blame offenders, not offenses. It is that we individualize. Of course we concern ourselves with the offense charged as we consider the life of the offender before us; of course we feel the horror in a horrific act. Of course we understand that punishment is in order. The penal modernist claim is only that, even in the most horrific cases, when we engage in the act of judging, it is the person that we must judge, not just the act.

Nor was it by any means the aim of penal modernism to show that there is no such thing as free will, or that our acts are so socially determined that we cannot be blamed. To be sure, some modernists did express disdain for the ideology of the free will. But most modernists were not philosophy professors, and they never mounted any grand arguments about free will and determinism. Most modernists were professors of law, and their arguments were arguments about jurisprudence—about the dynamics of the act of judging. They focused on the sense of justice of the judge in the particular institutional setting of the trial, offering an essentially role-bound, situational account of how judges can impose punishment in good conscience. It should be obvious that judges can reach their decisions in good conscience without recourse to any grand theory of the free will. To be sure, some judges may occasionally feel called upon to reflect on deeper philosophical problems; but the vast majority will be able to ignore them, and still sleep easy.

And what matters most is that the judge should sleep easy. Here it is essential to put paid to a second familiar canard—the charge that the penal modernist approach is a formula for arbitrary sentencing. Like other legal realist movements, penal modernism may seem vulnerable to the charge that it reduces judging to arbitrary “feeling”—to, in the famous phrase, “what the judge ate for breakfast.” Kate Stith and Judge José Cabranes reject that charge, and rightly so. It is certainly true that the practice of indeterminate

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87 E.g., Saleilles, supra note 58, at 62-69.

88 It is important to emphasize that a theory of jurisprudence of the modernist kind need not be founded on any philosophical account of the free will. Thus while I agree with the drift, and admire the ambition, of Barbara Fried’s recent attack on the culture of blame, I think she is mistaken to debate philosophers on their own ground. Barbara Fried, Beyond Blame, (https://www.bostonreview.net/forum/barbara-fried-beyond-blame-moral-responsibility-philosophy-law). There is no need to fight a philosophical fight in order to make this jurisprudential point.

sentencing did raise concerns about sentencing disparities, which the modernists addressed openly and sometimes anxiously.\(^{90}\) (Wechsler in particular believed that the dangers of arbitrariness could only be met through a firm commitment to mandatory maxima.\(^{91}\) Nevertheless, even at its worst, penal modernism was never a theory that encouraged pure arbitrariness. Its theory is a theory of the sense of justice. It puts the accent, not on what the judge ate for breakfast—not, that is, on sources of feelings irrelevant to the concerns of justice—but indeed on whether the judge will be able to sleep easily at night—on questions of conscience integral to the problem of how officials can put the ideals of justice into practice. \textit{Qua} theory of conscience, penal modernism is largely a theory of what the judge \textit{cannot} do, and in that sense it implies limits on punishment of a kind that are notably absent from the retributivist practice that has established itself in the contemporary United States.

In particular, penal modernism implies limits because it is in part a theory of deservingness—of the reasons not to punish particular individuals harshly. In this respect, it is important to see, its claims are not quite the same as the claims of contemporary “character” theorists. Character theorists argue that we blame bad persons for their badness. Penal modernism, by contrast, is not a just a theory of blame for badness. It also holds that we must look beyond the criminality of the defendant. Some of what the penal modernist judge considers must certainly involve the moral blameworthiness of character. But some will inevitably involve questions of individual predicament that do not bear directly on the act with which the offender is charged—questions not just of desert, but of deservingness. It is of course precisely because penal modernists left room for questions of deservingness that they faced the charge in the 1960s and 1970s that they were soft on crime.

If we understand the penal modernist focus on deservingness, we can also see the fallacy in one of the prime arguments that neo-retributivists mounted against penal modernism. The neo-retributivists of the 1970s and 1980s insisted that penal modernism lent itself to excessive punishment. Here they started from horror stories from the penal modernist era. In particular, they frequently cited \textit{In re Lynch}, a California case involving an indeterminate sentence imposed on an offender, John Lynch, who had only two indecent exposure convictions.\(^{92}\) Lynch was to be confined until such time as officials deemed him “cured”; and in an early 1970s sensitive to the threat of sexual oppression, his case seemed a crying instance of injustice. Only a shift to sentencing proportionate to wickedness, advocates of retributivism insisted, would end the tragedy of the excessive punishment of offenders like John Lynch. And such tragedies, they implied, were commonplace: indeterminate sentencing, Jessica Mitford explained in her ironically titled 1973 reformist tract, \textit{Kind and Usual Punishment}, resulted in “much longer sentences for most

\(^{90}\) See id.


\(^{92}\) In re Lynch, 8 Cal. 3d 410 (1972).
prisoners than would normally be imposed.” 93 “Judges and parole boards,” asserted a typical article, “tend to overpredict dangerousness, thus unjustifiably confining many non-dangerous individuals.” 94 Marvin Frankel, author of a particularly influential 1972 book, made the same argument. 95 So did Dershowitz: “[I]ndeterminate sentences and longer terms often are found together.” 96 By contrast with penal modernism, determinate sentencing would bring measured punishment, in both senses of the word “measured.” The central ambition of retributivism, after all, was to create a system in which punishment was proportionate to the evil of the act committed. Accordingly a strict act-orientation, the retributivists argued, could be expected to lead to milder sentencing.

Four decades of American history have proven that argument wrong—the age of neo-retributivism has turned out to be an age of soaring punitiveness in America 97—and if we give a fair hearing to the claims of penal modernism we can perhaps see why. The penal modernists certainly did understand that a fuller view of the life of the defendant would sometimes allow the judge to perceive elements of dangerousness that would not otherwise come to the fore; there is no doubt that one of the lessons of penal modernism is that the law must concern itself centrally with dangerousness (a proposition with which some of our finest contemporary minds in criminal law agree 98 ). After all, the conscientious judge must regard himself as a representative, and guardian, of the interests of society, and therefore must take into consideration questions of dangerousness. But if penal modernists understood that it would be wrong to ignore questions of dangerousness, they also understood that a fuller view of the life of the defendant would sometimes bring deservingness to the fore as well. They held that considerations of conscience compel the judge to be “sensible to the uniqueness of the individual” 99 in ways that would necessarily militate against harsh punishment, since conscientious judges would always hesitate before surrendering to the impulse to punish the person before them. In the language of the Model Penal Code, leading American document of the penal modernist era, they recognized the act of judging must always aim in part “to safeguard offenders against excessive,

95 Marvin E. Frankel, Criminal Sentences: Law Without Order 100 (1972).
disproportionate or arbitrary punishment.” There was never any systematic bias toward harshness in the penal modernist regime, while the historical record of the retributivist revival suggests clearly enough the truth in the observation made by Sanford Kadish in 1999: that “displacement of reform and correction by severe retributive punishment” resulted in a “skyrocketing of prison populations.”

Lastly, it is important to emphasize that the penal modernist challenge is not vulnerable to the objection that retributivism most often makes against utilitarian approaches. That objection is that utilitarianism would permit the preventive detention of persons who have not yet committed any bad act. If the job of the criminal justice system is simply to safeguard society from dangerous persons, then officials can, and perhaps must, act before those dangerous persons do the damage they threaten to do. Yet any such state practice, retributivists hold, is manifestly unacceptable.

But properly understood, penal modernism does not commit the law to any such practice. The modernist theory is a theory of blaming just as classical retributivism is a theory of blaming. In fact, like classical retributivism, it is, in an important sense, a theory of blaming for past acts. After all, as Peter Arenella has argued, there is no means of judging persons except by considering the acts that are evidence of their character. If penal modernism were a purely utilitarian theory, perhaps it might be used to justify preventive detention. But it is a theory of conscience, and as a matter of conscience we cannot condemn those who have committed no bad act. Conscientious judges must have some reason to condemn the offender before them. Correspondingly, no thoughtful penal modernist has ever held that individuals may be confined before they have committed, and been duly convicted for committing, a criminal offense—though as we shall see momentarily, the penal modernist tendency is to define criminal offenses differently, and much more loosely, than retributivists would. The difference between the modernist view and the classical retributivist view is not about whether we will consider past acts, but about two other questions: first, whether acts themselves call for blame, or whether they are instead evidence of blameworthiness; second, how wide a range of acts we must consider in order to arrive at a justified judgment of blame. Modernists hold that we will not satisfy our

100 Model Penal Code § 1.02(2)(c). But see the revisions of the neo-retributivist era: Model Penal Code Sentencing § 1.02(2)(a) (approved July 2007) (requiring that punishment be “within a range of severity proportionate to the gravity of offenses, the harms done to crime victims, and the blameworthiness of offenders”).

101 Kadish, supra note 97, at 946.

102 Binder & Smith, supra note 39.


104 Contemporary retributivists find it strikingly hard to maintain that view, however. Recognizing that some larger account of the offender’s past criminality must somehow bear on sentencing, they strain to find ways to bring in a wider view of the past. See von Hirsch, supra note 21, at 85, and his reformulation in von Hirsch, supra note 17, at 78-85; Youngjae Lee, Recidivism as Omission: A Relational Account, 87 Tex. L. Rev. 571 (2009); Youngjae Lee, Repeat Offenders and the Question of Desert, in Previous Convictions at Sentencing: Theoretical and Applied Perspectives 49 (Julian V. Roberts & Andrew von Hirsch eds., 2010).
sense of justice unless we consider the evidence of many acts, good and bad, in the offender’s past, in order to arrive at a larger individualized portrait.

IV. Penal Modernist Analysis: Opportunity Offenders, Accomplices, Attempts

A few examples may help to exemplify the penal modernist style of analysis in sentencing and substantive criminal law, and to illustrate some of the dangers of penal modernism and retributivism both. I start with two from the classic penal modernist literature: first, Liszt’s distinction between the “opportunity offender” and the “habitual offender,” and second, Hermann Kantorowicz’s analysis of the law of complicity. I then turn to an American example, the treatment of the law of attempts in the Model Penal Code. In the next section, I turn to a tougher topic, the modernist analysis of criminal procedure.

I begin with Liszt’s contrast between the “opportunity offender” and the “habitual offender,” which exercised a great influence on twentieth-century sentencing practices. When Liszt began his work on criminal law in the late nineteenth century, all western criminal codes were strongly retributivist in orientation: they all held that all offenders who committed a given prohibited act—say, an act of theft—should suffer the same punishment, with the measure of punishment fixed by the wickedness of the act. Liszt set out to show the error in that view. Some offenders, Liszt argued, act impulsively, seizing an opportunity that presents itself without committing themselves to any regular pattern of offending. These sorts of “opportunity” offenders—say, the customer who impulsively takes a bit of cash from an open till when the clerk is looking the other way—seem intuitively to be candidates for a different kind of punishment from offenders who dedicate themselves to a repeated practice of crime. This is of course partly true for reasons having to do with prospective specific deterrence. A little bit of punishment will go a long way in deterring the opportunity offender—or, if you prefer, morally educating him. But the issues are by no means all about prediction or prospective deterrence. They also are inevitably about the blameworthiness of an entire life. When we consider the larger course of the offender’s life—his “past life, conduct, and mental and moral propensities,” his role in family, work and so on, we do not perceive him simply as a “criminal.” We instinctively reject Ferzan’s dictum that “one act of theft makes you a thief.”105 We view the offender’s lapse as a lapse, of the kind all human beings may sometimes experience. We judge the opportunity offender differently, qua person, than we judge the offender with a confirmed criminal disposition—the “habitual offender” in Liszt’s typically late-

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105 Ferzan, supra note 77, at 444.
nineteenth-century formulation—and we feel a deep moral uneasiness about punishing the two types of offender in the same way.

Now, it would be wrong to minimize the potential dangers in Liszt’s approach. The individualization he preaches necessarily depends on some measure of judicial discretion, and all discretion harbors the danger of invidious discrimination. Most importantly the concept “habitual offender” has unquestionably lent itself to ugly practices, both in Nazi Germany and in modern America. If we are going to use ideas like “habitual offender,” we must find ways to curb their potential abuse.

Nevertheless, it is essential to see that Liszt’s approach was not simply some attempt to justify sinister programs of preventive detention. On the contrary, his primary impulse was to leave room for the judge to find some individual offenders less culpable—to allow the judge’s sense of justice to work on behalf of the “opportunity offender.” In this, his claims were typical of penal modernism. The lessons of penal modernism are lessons of conscience; they are largely about what the judge can not do; and correspondingly penal modernism is frequently a forgiving doctrine. That is part of the reason why criminal punishment in continental Europe, where penal modernist punishment practices retain much more vigor, has proven so much milder than criminal punishment in America, and part of the reason why American punishment too was so much milder in the penal modernist era before the 1970s. Not least, it is part of why the political critics of penal modernism were so ready to denounce it for coddling criminals. Penal modernism was never just about locking away dangerous offenders, treated as animals. It was about making complex judgments of blame in what was often a (politically controversial) forgiving way—politically controversial because instead of taking the point of view of the victim, acquainted only with the offender’s single act, it took the point of view of the judge, perforce acquainted with the offender’s whole past life and future prospects.

The America of the era of neo-rettributivism does not come off well by comparison. To say it once more, the age of neo-rettributivism has proven to be an age of unparalleled harshness in American criminal justice. The truth is that we have found no way, in the neo-rettributivist era, to curb the abuses of three-strikes-and-you’re-out and other habitual offender legislation. Decisions like *Ewing v. California* have failed completely to identify a proportionality calculus that can “safeguard offenders against excessive, disproportionate or arbitrary punishment.” The contemporary focus on acts,

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106 E.g., Alfred Bozi, Bekämpfung des Gewohnheitsverbrechens (1895); R. Günther, Über Behandlung und Unterbringung der irre Verbrecher passim (1893); H. Appelius, Die bedingte Verurteilung und die anderen Ersatzmittel für kurzezeitige Freiheitsstrafen 22, 29, 74, 75, 76 & 107 (1890); Carl Stooss, Die Berufs- und Gewohnheitsverbrecher, 6 Zeitschrift für Schweizer Strafrecht/Revue pénale suisse 84 (1893).

107 Franz von Liszt, Kriminalpolitische Aufgaben, in 1 Strafrechtliche Vorträge und Aufsätze 290, 347 (1905) (1882); Richard Wetzell, From Retributive Justice to Social Defense, in Germany at the Fin de Siècle: Culture, Politics, and Ideas 59 (Suzanne Marchand & David Lindenfeld eds., 2004).


109 Model Penal Code § 1.02(2)(c).
despite the hopes and beliefs of the neo-retributivists that it would lead only to punishments of “moderate severity,” has not established a norm of meaningful proportionality.

Nor is there anything surprising in this failure of retributivist proportionality in the post-penal-modernist age. Penal modernism always required a consideration of a balance of considerations, for and against the offender, in the process of “individualization.” It was always designed to require consideration of deservingness as well as dangerousness. By contrast, the neo-retributivist revolt in favor of blame left no room to weigh any factor that might count in favor of the defendant. Neo-retributivists speak purely the language of blame, and the effect of their work has been to undermine any approach, like Liszt’s, that counseled forgiveness for the deserving offender.

Liszt’s theory of the “opportunity offender” was a theory of sentencing, and sentencing inevitably formed much of the focus of penal modernism. Nevertheless there was more to penal modernism than that. There were also penal modernist theories of substantive criminal law, to which I now turn, beginning with Hermann Kantorowicz’s account of the law of complicity, first in a seminal 1911 article and then in his 1933 monograph Tat und Schuld (Act and Guilt).

Kantorowicz, a student of Liszt’s and one of the intellectual colossi at the origins of legal realism, was not an advocate of value-deaf technocratic penological approaches to dangerousness. Quite the contrary: Kantorowicz insisted vehemently that the criminal law must be based purely on a logic of blaming. (Indeed, he was sometimes a man who could seem obsessively committed to the logic of blaming.) But he also insisted that the logic of blaming could not be just a logic of blameworthy acts. His analysis of the law of complicity is a prime example.

The act-orientation, Kantorowicz argued, leads us into hopeless conundra in the law of complicity. The traditional law of complicity depends on the idea of a kind of contagious guilt: it depends on the idea that we can ascribe responsibility for a depraved act


11 In particular, that has been the effect of their work on the practice of penology. The neo-retributivists succeeded in discrediting rehabilitation. But rehabilitation was only one side of the penal modernist coin. Penal modernists also advocated scientific techniques for the prediction of dangerousness, and those techniques have only grown in importance—indeed grown immensely. See Malcolm Feeley & Jonathan Simon, The New Penology: Notes on the Emerging Strategy of Corrections and Its Implications, 30 Criminology 449 (1992); Bernard Harcourt, Against Prediction: Profiling, Policing, and Punishing in an Actuarial Age (2007); Paul Robinson, Punishing Dangerousness: Cloaking Preventive Detention as Criminal Justice, 114 Harv. L. Rev. 1429 (2001); Stanley Cohen, Visions of Social Control: Crime, Punishment and Classification (1985). The revolution against penal modernism was a revolt that pushed penology away from rehabilitation and toward dangerousness.

12 Hermann Kantorowicz, Der Strafgesetzentwurf und die Wissenschaft, 7 Monatsschrift für Kriminalpsychologie und Strafrechtsreform 257 (1910/1911).

13 Hermann Kantorowicz, Tat und Schuld (1933).

14 See in particular his very strange effort to do a technical blame analysis of the war guilt for World War I. Hermann Kantorowicz, Gutachten zur Kriegsschuldfrage 1914: Aus dem Nachlass (Immanuel Geiss ed., 1967).
committed by one person (the principal) to another person (the accomplice). Yet there is no intelligible way of doing that. The very idea that we can ascribe responsibility for one agent’s act to another agent is a piece of metaphysical nonsense—as though the stain of blame for a particular act could be mystically passed from person to person.115 If we reflect honestly on our intuitions, we must acknowledge that the real questions are questions about offenders, not offenses—questions about whether we deem the defendant to be a blameworthy accomplice, independently of what some other offender may have done.116 It is mumbo-jumbo to say that the accomplice is liable for the blameworthiness of the act of the principal. At the same time, there is no hope that we can clearly define something that would count as “the” act of complicity. Many different forms of conduct can constitute complicity. Accordingly, the only realistic approach is to leave the definition of what counts as complicity open-ended, asking ourselves after the fact whether the accomplice acted in some way that seems to us blameworthy.117 Put more strongly (perhaps more strongly that Kantorowicz himself was quite prepared to put it), the right approach is to ask ourselves whether, all things considered, we regard the accomplice as a bad person, and then impose a sentence that depends on how bad a person we find him to be.

That may sound a bit unsettling, and it is true that Kantorowicz’s theory, like Liszt’s, could potentially lend itself to disturbing practices. Law that is on the lookout for bad persons threatens to become lawless law. Indeed, approaches like Kantorowicz’s, which have grown in importance in German thought since his time, seem to critics to represent a significant threat to legality in a liberal order.118 Is it really appropriate to convict people because they have done something bad, without measuring their liability by the depravity of some *actus* that was actually committed, and that was clearly criminalized in advance? To be sure, Kantorowicz did not propose to eliminate the act requirement entirely: an individual convicted of complicity on his theory had to have engaged in some kind of blameworthy conduct, and the principal too had to have committed some kind of bad act. Nevertheless nothing in his theory required a scrupulous judicial determination that a precise particular depraved act had been committed in a precise particular depraved way, justifying a precise particular ascription of blame. If the system leaves the definition of a criminal act so loose, what is to keep the exercise of state power within limits?

Yet here again we must understand that Kantorowicz was not aiming to justify the unbounded exercise of state power. On the contrary, his doctrine, like Liszt’s, was designed to leave room for the conscience of the judge to work mild results where

115 Kantorowicz, supra note 112, at 307 (“ein Rest scholastischer Hypostatisierungen”).
116 E.g., id. at 162 (for “akzessorische Täterschaft”).
117 Kantorowicz, supra note 113, at 103-04.
118 See James G. Stewart, Complicity, in The Oxford Handbook of Criminal Law 534 (Markus D. Dubber & Tatjana Hörnle eds., 2014), for these attacks on modern theories of unitary culpability.
appropriate. Kantorowicz (who was after all himself a prominent victim of the Nazis\textsuperscript{119}) was not trying to justify the erection of preventive detention camps. His purpose was to guarantee that accomplices got their just deserts; he believed that accomplices sometimes deserved more blame than implied by the act committed by the principal, but also sometimes less;\textsuperscript{120} his aim was to permit consideration of both dangerousness \textit{and} deservingness. His expectation was that the sense of justice of the judge would suffice to keep the exercise of state power within limits. There is a bulwark of freedom in Kantorowicz’s teaching, and that bulwark of freedom is the conscience of government officials.

Now, making the conscience of government officials the bulwark of freedom will sound risible to many Americans; and it is impossible not to remark on an ugly irony in Kantorowicz’s biography: his modernist theory was the very sort of theory that his persecutors the Nazis embraced.\textsuperscript{121} Nazi jurists too advocated penal modernism,\textsuperscript{122} and it is certainly true that in a setting like Nazi Germany, the conscience of government officials turned out to be no bulwark at all. But despite that irony it is not fair to tar Kantorowicz’s theory by association with Nazism. Not all the world is Nazi Germany. Sometimes government officials do behave courageously and conscientiously; and here again it bears emphasizing that contemporary continental Europe, where penal modernism lives on in a world of civilized bureaucratic values, boasts far milder punishment than the United States. Yes, things can go wrong when government officials go wrong. But the burden of the penal modernist claim is that we have no choice but to trust in government officials if we want to do true justice in the individual case. Despite the risks, there is no morally justifiable alternative.

In any case, Kantorowicz’s ideas, and the ideas that have since pushed his style of reasoning forward, deserve respectful doctrinal attention: they really do promise to resolve what are desperate doctrinal problems in the law of complicity. Kantorowicz’s theory of complicity was an effort to cut the Gordian Knot on a topic whose puzzles continue to plague criminal law scholars, and whose importance continues to grow in an age when international criminal law faces the challenge of group atrocities,\textsuperscript{123} while domestic criminal law faces challenges like those of the sale of firearms to mass killers.\textsuperscript{124} Contemporary scholars do indeed find it impossible to agree on how to fit complicity into a criminal law

\textsuperscript{119} For the details, see Karlheinz Muscheler, Hermann Ulrich Kantorowicz: Eine Biographie (1984).
\textsuperscript{120} For purposes of economy, I leave aside here the critical question of whether it necessarily makes sense to distinguish between accomplices and principals in the first place.
\textsuperscript{121} Especially Bernd Rüthers, Die unbegrenzte Auslegung (7th ed. 2012).
\textsuperscript{122} For critical reflections, see Wolfgang Naucke, NS-Strafrecht: Perversion oder Anwendungsfall moderner Kriminalpolitik?, 11 Rechtshistorisches Journal 279 (1992).
framed doctrinally around individual responsibility for a carefully defined \textit{actus reus} committed with the appropriate \textit{mens rea}.

In response to these difficulties, the modernist approach tells us that the familiar \textit{actus reus/mens rea} culpability framework is less important than we suppose. There is no need to focus fetishistically on the depravity of the \textit{actus} of the principal—the group atrocity, the shooting, or whatever it is that the principal(s) may have done—in order to ascribe criminal guilt to the accomplice. The key is that we sentence the accomplice in accordance with his just deserts. Consider the most pressing contemporary example: what shall we do with the nineteen-year-old Balkan soldier who is involved in a massacre? Efforts to make doctrinal room for all of the factors that seem intuitively relevant to his individual responsibility—his youth, the threats he may have faced from his commanders and fellows, and so on—seem hopeless under traditional analysis. It might indeed be wiser simply to convict him without focusing too much on the details of the blameworthy acts committed, then move on to sentencing. The logic of sentencing is by its nature suppler than the logic of culpability. To put it in common law terms, it may make good sense to de-emphasize the guilt phase, putting the focus instead on the sentencing phase.

The influence of the ideas of Kantorowicz and other scholars of similar views was strong in the mid-twentieth century. (In America in particular, we can trace a network of influence that connects Kantorowicz with figures like Karl Llewellyn, Jerome Michael and Wechsler.) Accordingly penal modernist teachings made themselves felt on the Model Penal Code. Indeed the influence of penal modernism on the Code shows in its very title. That title, as Markus Dubber has recently emphasized, is the “Model Penal and Correctional Code”; the MPC too put much of the focus on sentencing; and the penal modernist theory of corrections is fundamental to its structure. In the criminal law classroom today, we focus on the substantive provisions of the Code; but its substantive law is only half the Code loaf. The Code was also committed to penal modernist practices of individualization

\footnotesize{125}Christopher Kutz, Complicity: Ethics and Law for a Collective Age (2000).

\footnotesize{126}Sanford H. Kadish, Complicity, Cause and Blame: A Study in the Interpretation of Doctrine, 73 Cal. L. Rev. 329 (1985).

\footnotesize{127}See now the literature review in Stewart, supra note 118.

\footnotesize{128}Jain, supra note 123, at 833 & 848 on contemporary German practice; also Claus Roxin, Täterschaft und Tatherrschaft 451 (7th ed. 1999), and for the contrast with the common law, Fletcher, supra note 49, at 650-51.

\footnotesize{129}For the idea of the centrality of networks in the diffusion of legal ideas, see Maximo Langer, Revolution in Latin American Criminal Procedure: Diffusion of Legal Ideas from the Periphery, 55 Am. J. Comp. L. 617 (2007). It was Kantorowicz’s contacts with Karl Llewellyn and Columbia that led him to give his famous paper published as Hermann Kantorowicz, Some Rationalism about Realism, 43 Yale L.J. 1240 (1934), to Llewellyn’s seminar. For the influence in turn of Llewellyn and Michael on Wechsler, see Wechsler, supra note 1, at 38.

in sentencing, and those practices occupied a large part of the attentions of the drafters.\textsuperscript{131} On the substantive side as well the Code is meant to leave room for individualization. While it always tries to accommodate the older traditions of the common law, the Code is deeply penal modernist in conception; and we miss the significance of many of its provisions unless we recognize as much.

A straightforward example is found in its treatment of the law of attempts. The fundamental problem in the law of attempts is of course the absence of an \textit{actus reus}, an act of the kind that the act-orientation is supposed to penalize. If a just criminal law is supposed to punish wicked acts, how can we punish in the absence of a completed act? The basic problem in the law of attempts is thus closely akin to the basic problem in the law of complicity. In the contemporary classroom and contemporary literature, in both of which the influence of philosophy departments has grown so strong, scholars generally focus on philosophical puzzles about the doctrinal law of attempts that have little kinship with the jurisprudential reasoning of the penal modernists. Thus they ask whether a wicked \textit{mens rea} is sufficient to justify punishment, and if so whether we should compensate for the absence of a completed act by setting the standard of \textit{mens rea} as high as possible;\textsuperscript{132} whether the “moral luck” of a defendant in failing to complete an act should play any role;\textsuperscript{133} what we mean by “trying” in the philosophy of action;\textsuperscript{134} and more.\textsuperscript{135} All of these questions produce difficult, if consistently entertaining, philosophical brain-teasers. None of them have any place in the penal modernist approach.

The Model Penal and Correctional Code in particular aims, once again, to cut the Gordian Knot of the law of attempts by loosening the act requirement and shifting the focus to the particular role-dilemmas faced by judges, as well as by another class of actors, law-enforcement officers. If we see the problem of attempt from the perspective of these criminal justice officials, the philosophical puzzles that occupy most contemporary attention recede from view. Consider the penal modernist police officer on the beat. From his perspective it would be madness to require a completed act before an arrest could take place. No responsible officer can wait until an offender commits a prohibited act. The only role-appropriate action is to intervene from the moment the offender has taken what the Model Penal Code calls a “substantial step”—a substantial step that implies that the offender is a dangerous \textit{person} even if he has not yet completed any wicked \textit{act} at that “particular moment in time.”

\textsuperscript{131} See Dubber, The Model Penal Code, supra note 130.

\textsuperscript{132} For a rich discussion, see Duff, supra note 78.


\textsuperscript{134} Gideon Yaffe, Attempts (2010).

\textsuperscript{135} Again, see the wide-ranging treatment of Duff, supra note 78.
But if the police officer intervenes before the offender has completed a wicked act, does that mean that the offender cannot be punished? Of course not. Once an arrest is made, the offender can be expected to face the correctional process; and in that process the philosophical puzzles of the law of attempts seem, once again, remote. From the point of view of the penal modernist judge presiding over the correctional process, it does not matter that the officer on the street has intervened before an act has been completed. The judge’s correctional task is to consider the entire profile of the offender, and that offender’s success or failure in completing a particular act is of no great moment. As the Commentary to the Model Penal Code explains:

Conduct designed to cause or culminate in the commission of a crime obviously yields an indication that the actor is disposed toward such activity, not alone on this occasion but on others. There is a need, therefore, subject again to proper safeguards, for the legal basis on which the special danger that such individuals present may be assessed and dealt with. They must be made amenable to the corrective process that the law provides.\textsuperscript{136}

The point is to make relatively quick work of getting a conviction in the guilt phase, in order to make the offender “amenable to the corrective process” available at sentencing, where an individualized sentence can be imposed regardless of the particular course of events connected with the particular offense charged.

Is that approach acceptable? The contemporary literature presents the Code’s treatment of attempts in a way typical of the contemporary understanding of the clash between utility and desert. The Code’s approach, we are told, is purely “preventive” in orientation, outdated and “still savoring of 1960s positivism,” and belonging to the realm of “consequentialist reasons.”\textsuperscript{137} It is the product of a more or less value-void orientation toward utilitarian interventions against dangerousness. That is how the contemporary literature describes the Code’s approach to attempts, and it is probably how most criminal law professors teach it as well. Yet it is a thorough distortion. The Model Penal Code is intended to permit individualization—the same individualization whose centrality to just judgment the American Bar Association recognizes when it speaks of “the particulars of the offender’s character or his situation”;\textsuperscript{138} the same individualization the Supreme Court speaks of when it speaks of taking into account “the character and record of the individual offender.”\textsuperscript{139} It is fallacious nonsense to describe the Model Penal Code as dismissive of questions of blame and desert. “[T]he whole damn thing is full of moral and ethical issues.”\textsuperscript{140} Nobody ever suggested that the “corrective process” should focus purely on dangerousness; indeed, if the “corrective process” had been exclusively about dangerousness, the penal modernists would have been far less vulnerable to the political charge that

\textsuperscript{136} Commentary to Article 5 of American Law Institute, Model Penal Code 294 (1985).

\textsuperscript{137} Andrew Ashworth, Attempts, in The Oxford Handbook of Philosophy of Criminal Law 130 (John Deigh & David Dolinko eds., 2011).

\textsuperscript{138} Standards for Criminal Justice: The Prosecution Function 3-5.6(d) (Proposed Revisions 2009).


\textsuperscript{140} Wechsler, supra note 1, at 109-10.
they were coddling criminals. What is true is that the Code, like other products of the penal modernist era, tends to define offenses in a way sufficiently open-ended that the offender can be convicted and delivered up to the sentencing process, with all of its suppleness and complexity. The Code verges on creating the presumption of guilt that Herbert Packer identified in 1964 as characteristic of the “crime control” model in modern criminal justice.\textsuperscript{141} It does so because the moment of the adjudication of guilt for a particular act is not the moment when true individualizing justice is done. \textit{Let us define acts loosely, so that we can proceed to sentencing, where individualized justice is done!} That is the implicit slogan of penal modernism.

Now, all of that may, once again, sound sinister. It is obvious that the penal modernist approach vests a great deal of trust in the discretion of both cops and judges, and there are certainly Americans who will find that trust too risky in an egalitarian society. In the last analysis, penal modernism is big government philosophy. It is big government philosophy in the sense that it leaves matters to the judgment of government professionals, judges among them. It is big government philosophy because it insists on taking the perspective of conscientious government actors, rather than the perspective of the aggrieved victim. Many Americans will rebel against it for that reason. My aim for the moment is not to prove that Americans who react that way are necessarily wrong. My aim is only to push us to understand the true nature of the debate between retributivism and penal modernism. The conflict is not between one approach founded in morally aware desert and another founded in soulless technocratic utility. The conflict is over the question of whether we can, or indeed \textit{must}, trust law enforcement personnel to blame offenders rather than offenses—whether we can allow the conscience of government officials to be the bulwark of liberty. The real question is whether we ought to have a criminal justice system that adopts the perspective of the conscientious criminal justice professional when ascribing blame, or a system that adopts the perspective of the aggrieved victim.

\section*{V. Penal Modernism and Trial Procedure}

With its focus on the dynamics and psychology of judging, penal modernism lends itself naturally to the study of criminal procedure. Despite that, the classic penal modernist literature had little to say about procedural issues. The focus of classic penal modernism was always on the theory of sentencing, and to some extent on substantive criminal law. This modernist neglect of procedure is a real pity: the dilemmas of judging work themselves out differently in different procedural contexts, and it can be quite revealing to trace those differences as we weigh the relative merits of the act-orientation and the person-orientation. To illustrate how, I now turn to a neglected topic in comparative criminal procedure, the differing procedural structures of the common law and the continental tradition.

\footnote{141}{Herbert Packer, Two Models of the Criminal Process, 113 U. Pa. L. Rev. 1 (1964).}
Just as theories of substantive criminal law may be either act-oriented or person-oriented, so too may trial procedures. The classic example of an act-oriented trial procedure is the guilt phase of the common law, which emerged in its modern form in the mid-nineteenth century. In principle, the common law of evidence excludes from the guilt phase all consideration of the larger life-circumstances of the defendant, all issues involving “past life, health, habits, conduct, and mental and moral propensities.” Instead, it permits in principle only a strict consideration of actus reus and mens rea, of the question of whether the accused has engaged in an act of “voluntary moral wrongdoing”—whether, in the words of Judge Lynch, the defendant made “a free choice at a particular moment in time to commit an immoral act.”142 Questions about the larger course of the defendant’s life are supposed to be left for a separate proceeding, the sentencing phase, during which the court may consider other “sentencing factors,” including prior criminal history and other evidence of dangerousness and deservingness. The classic common law guilt phase is thus intended to represent the procedural instantiation of the retributivist approach; correspondingly, as we have seen, penal modernist theory can be understood as downplaying the importance of the guilt phase in favor of a focus on the sentencing phase.

By contrast, continental criminal trials make no distinction between guilt and sentencing phases. The judges and lay assessors or jurors who deliberate in a continental trial are charged with determining both guilt and sentence, to be delivered in a simultaneous single judgment. To be sure, the continental tradition holds that guilt must be found before sentence is passed: in principle, the judges and jurors in a continental trial are required to make a determination of guilt before they begin to consider an appropriate sentence. Nevertheless, because there is no procedural bifurcation of the trial into two phases, the continental law of proof does not take the trouble to segregate the presentation of evidence of guilt from the presentation of “sentencing factors.” Evidence of both kinds is promiscuously mixed in the same proceeding.143

As a result, continental trials have the look of a much more person-oriented proceeding than does the common law guilt phase: before guilt is formally ascertained, the professional and lay personnel who make up a continental bench are exposed to an extensive portrait of the individual offender. They receive testimony from experts who give the equivalent of a pre-sentence report, reviewing not only the criminal history of the defendant but also a range of other facts and opinions collected from those who know the defendant. Those facts and opinions are presented in pure hearsay form to the court. This extensive hearsay presentation of what Americans would view as “sentencing factors” permits, and indeed effectively encourages, consideration of a larger conspectus of the life of the accused before the court has made any formal determination of guilt for the act charged.

142 Lynch, supra note 50, at 936.

These continental practices seem deeply shocking to observers from the common law world. (I have shown my law students films of continental trials, and I can testify to the shock they feel.) How, American lawyers ask, can those judges and jurors possibly ignore all the information about the offender to which they have been exposed in court? To common law eyes, the theoretical injunction that continental judges and jurors should determine guilt before sentence seems little more than a hypocritical sham. It astounds common lawyers, in particular, to learn that continental courts could hear a recitation of the prior criminal history of the accused before turning directly to the question of whether he has committed the act charged.\footnote{Personal communication from George Fletcher, expressing his own shock. This is particularly striking considering Fletcher’s stature as an American student of German doctrine: the depth of his respect for German substantive criminal law is matched by the depth of his distrust of German trial procedure.} What, common lawyers ask, could be more unfair? Shocking indeed from the common law point of view. Yet it is important to parse carefully the shock common lawyers feel when exposed to the person-oriented criminal procedure of the continent. Our common law shock reflects the truth in the claims of penal modernism. The fundamental claim of the penal modernists is, once again, much like the claim of psychologists Nadler and McDonnell.\footnote{Supra text accompanying note 61.} It is a claim about the psychology of justice. Once we are exposed to information about the whole life-course of the defendant, the penal modernists hold, we cannot suppress or ignore that knowledge. Once we have encountered Saleilles’s “realities” about the offender, our sense of justice compels us to consider the whole person, not just the particular act charged; we feel the irrepressible desire to individualize. Common lawyers feel shock at the conduct of a continental trial because they accept the truth of that psychological proposition. They believe that it is impossible for us to focus purely on the offense—to be obedient to “the age-old notion of ‘natural justice’ that the punishment should fit the crime”—unless we are prevented from acquiring too much knowledge about the offender.

The implication is that true retributivism requires a procedure that creates, as it were, a veil of ignorance—a procedure like the common law guilt phase. From the vantage point of a lawyer accustomed to the guilt phase, the continental trial violates that requirement: it makes no effort to create a veil of ignorance, no effort to screen judges from knowledge of the life-course of the offender. Yes, the continental judges and jurors are directed to make an act-based determination of guilt for the offense charged before they pass to considerations of the person who is to be sentenced. But we all understand that knowledge of the person cannot be suppressed. We all understand the truth of the penal modernist psychology. In the stock phrase of the American law of evidence, we all know that the bell, once rung, cannot be unrung: once the judges know about the person, they can never succeed in thinking only about the act. Saint Paul’s God may be capable of judging in that way, but human beings are not.\footnote{Though see the important observations of David Sklansky, Evidentiary Instructions and the Jury as Other, 65 Stan. L. Rev. 407 (2013).}
By contrast, the common law guilt phase, the prime procedural instantiation of act-oriented retributivism, represents a systematic, indeed almost heroic, effort to guarantee procedurally that the bell is never rung. It is intended to allow an epistemologically watertight consideration of the act alone, of a kind that only common law jury trial allows. Because the jury can be shielded from any and all pieces of information—if necessary simply by herding the jurors repeatedly out of the courtroom—the guilt phase seems to offer an authentic solution to the epistemological challenge of considering only acts and not persons.

The first lesson that comparative criminal procedure teaches Americans is thus that our very commitment to the act-oriented common law guilt phase demonstrates, paradoxically enough, our belief in the basic truth of the claims of penal modernism. Retributivism can only be realized in practice if we take desperate procedural measures to avoid the psychological traps laid for us by our sense of justice. But the penal modernist analysis of criminal procedure cannot stop there. Penal modernism is a variety of legal realism, and like other varieties of legal realism it carries the implication that our formal commitments are difficult or impossible to realize in practice. I quote Frank once again:

> [T]he discretion which such rules [in this case the rules of evidence] purport to exclude is shifted, in a concealed manner, to some other component of the decisional process. Since the desire for individualization is obviously irrepressible and since these oblique methods of achieving it are disingenuous and otherwise undesirable, a wiser course would be to revise many of such rigid rules so that they will permit open-and-above-board discretion.147

“Rigid rules” like the rules of evidence cannot succeed. They simply put pressure on the system to permit the “irrepressible” “desire” for individualization, in Frank’s Freudian language, to express itself in some other way. The implication is that a thoughtful penal modernist analysis of common law criminal procedure should suggest skepticism about whether the desperate procedural measure that is the guilt phase can really work.

And just such skepticism is what penal modernism suggests once we take a closer look at the workings of the guilt phase. The fundamental claim of penal modernism is that the pressure to consider the individual person is too strong to resist—that, as in American death penalty jurisprudence, we will always feel the compulsion to be “sensible to the uniqueness of the individual,” allowing considerations of dangerousness and deservingness to color our judgment. Historical experience suggests that exactly those sorts of pressures tend to undermine the common law guilt phase, despite its high retributivist ambitions. A century and a half of common law criminal procedure has demonstrated that it is exceedingly difficult to maintain a watertight epistemological seal around the guilt phase.

147 Frank, supra note 59, at 952-53.
phase. In practice, the pressure to consider information about the individual life of the accused is extraordinarily powerful—so powerful that that information inevitably leaks in.

The difficulties have to do in part with the sheer challenge of creating an institutional culture of ignorance. The guilt phase, as it evolved in the nineteenth century, presents a strange spectacle. At the center of the guilt phase we find twelve jurors, who are kept systematically ignorant about facts that every other official actor present in the courtroom knows. Those jurors cannot fail to be aware that there are facts about which they are being deliberately kept in ignorance. At times they are removed from the room to keep their ignorance intact—and that is enough in itself to make them speculate about what they are missing. Even if they are never removed from the courtroom, though, it must be the case that they sense that there is more to say about the defendant than they are being permitted to learn. It is impossible that their suspicions should not sometimes be suspicious about the dangerousness of the defendant, especially since defendants in an American trial, unlike defendants in a continental trial, almost never take the stand. The trial judge is of course expected to give the jury instructions that will alleviate the resulting danger of prejudice; but it is hard to find an observer who believes that those instructions are reliably efficacious.

The principal dangers, however, lie elsewhere. The principal dangers have to do, not with what the jurors do not learn, but with what they do learn. There is one fact about the defendant from knowledge of which the jurors can never be shielded: his race. Even if the defendant does not speak, race speaks for itself. Moreover, there is great pressure to allow information about the defendant, and most especially information about the defendant’s dangerousness, to leak into the guilt phase. If the defendant is in fact a dangerous person, the prosecutor and the judge have reasons to desire that the jurors be exposed to information about his dangerousness. After all, if the jurors acquit, there will be no sentencing phase, and thus no opportunity to deal with his dangerousness. No conscientious judge wants to see an offender he knows to be dangerous go free; judges are servants and guardians of society, and they must (and should) always worry in part about dangerousness. Yet the structure of the bifurcated common law trial creates a one-way ratchet: if there is no conviction for the act charged, there will be no opportunity for the judge to deal with a defendant known to be dangerous. That prospect cannot fail to influence the discretion of judges. When judges make their evidentiary rulings, they make them with knowledge of the sentencing factors—with knowledge they are dealing with a dangerous offender. Judge Marvin Frankel described the resulting pressures: when it comes to individuals we suspect to be dangerous, “it is easy to err on the side of overcaution.”

It is indeed. Frankel made this observation only with regard to indeterminate sentencing; but of course it applies to every exercise of judicial discretion.


149 For the state of the law see generally McCormick on Evidence §§ 186-195 (7th ed. 2013).

150 Frankel, supra note 95, at 100.
And judges have plenty of opportunity to exercise discretion during the guilt phase. It is a fundamental fact about the law of evidence that it has never succeeded in engineering the pristine act-orientation it was intended to engineer. Already in the mid-nineteenth century, evidentiary subterfuges developed that allowed character and other prior history evidence to seep in at trial, and the subterfuges have since proliferated. As a result, there are numerous evidentiary tactics by which jurors can be exposed to damning information about the defendant; and the discretion of the trial judge in making evidentiary rules is very liberal. A judge who has any conscientious concern about the dangerousness of the defendant has the doctrinal opportunity and the moral incentive to allow ugly information to come before the jurors. Not every judge may do so, of course; and judges who do, have an obligation to unring the bell by giving jurors limiting instructions. Sometimes the guilt phase must work as designed. Nevertheless, what matters is that the structures of the bifurcated trial are biased toward letting damning information in, since if there is no conviction there will be no chance to consider the sentencing facts.

That bias is moreover badly enhanced by a familiar rule of evidence: defendants who put their own character in issue by offering evidence of deservingness expose themselves to impeachment by the prosecution. This is a rule that notoriously discourages defendants from testifying on their own behalf. It is also a rule that guarantees once again that there is a systematic bias in favor of presenting evidence of dangerousness rather than evidence of deservingness.

In all of these respects, the common law guilt phase invented in the nineteenth century has proven a profoundly flawed procedural device. Rather than creating an epistemological shield that restricts jurors to considering only evidence of the act and not the person, it allows considerable information about the person to leak in. And the infor-

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151 Julius Stone, The Rule of Exclusion of Similar Fact Evidence: America, 51 Harv. L. Rev. 988, 1001-04 (1938) (reviewing nineteenth-century cases permitting the introduction of similar fact evidence); Sir James Fitzjames Stephen, A Digest of the Law of Evidence 111 (3d ed. 1877) (“In criminal proceedings, the fact that the person accused has a good character, is deemed to be relevant; but the fact that he has a bad character is deemed to be irrelevant, unless it is itself a fact in issue, or unless evidence has been given that he has a good character, in which case evidence that he has a bad character is admissible.”); 1 Simon Greenleaf, A Treatise on the Law of Evidence § 461, at 619 (3d ed. 1846) (character evidence may be presented to impeach witness’s testimony).

152 Uviller, supra note 148.

153 Fed. R. Evid. 404(a)(2)(A) (“defendant may offer evidence of the defendant’s pertinent trait, and if the evidence is admitted, the prosecutor may offer evidence to rebut it”).

154 John H. Blume, The Dilemma of the Criminal Defendant with a Prior Record: Lessons from the Wrongfully Convicted, 5 J. Empirical Legal Stud. 477 (2008) (finding from an empirical study of wrongly convicted defendants that the rule permitting impeachment of testifying defendants significantly discourages factually innocent defendants with a prior criminal record from testifying); Gordon Van Kessel, Quieting the Guilty and Acquitting the Innocent: A Close Look at a New Twist on the Right to Silence, 35 Ind. L. Rev. 925, 946-47 (2002) (“[O]ur rules of evidence operate to strongly discourage the defendant from taking the stand by saying to him, ‘If you testify, the jury will become aware of your felonious history, you may be prosecuted for perjury or your sentence[s] enhanced if you lie, and you will be cross-examined by an aggressive prosecutor; but if you remain silent, neither your past nor your present silence will be mentioned by the judge or prosecutor, and if you wish, the jury will be cautioned against drawing adverse inferences.’”).
information that it allows to leak in is overwhelmingly information of one kind: information about dangerousness, not deservingness. The guilty phase, rather than functioning as a form of purely act-oriented procedure, always threatens to degenerate into a biased presentation only of evidence of the person drawn from the dangerousness end of the spectrum.

The lesson is a legal realist one: no matter what our claims about the mandates of procedural doctrine, the realities have a different cast. Those who wish to invoke Freud alongside Frank and speak of the return of the repressed are welcome to do so.

Once we recognize the tendency of the common law guilty phase to create a biased picture of the offender’s dangerousness, continental procedure may seem to us less horrendous, and indeed in some ways, startlingly enough, more attractive than common law procedure. Outrageous though its promiscuous mixing of evidence may seem at first glance, at least the continental trial produces a relatively evenhanded and rounded portrait of the defendant. A continental trial makes it possible to consider the full spectrum of information about individual blameworthiness, including both dangerousness and deservingness. The de facto pre-sentence report that is presented at the opening of the continental trial presents all sorts of information about the person of the defendant, not just damning information. The straightforward person-orientation of continental procedure produces a more straightforward portrait of the person, arguably a fairer and more honest portrait than our flawed guilty phase. Of course there is discretion in a continental trial, but in Frank’s words it is “open-and-above-board discretion.”

My aim in offering these observations is, however, not to engage in boosterism for the continental tradition. The issues run deep and remain difficult, and the intuitive commitment of Americans to the common law approach is sure to remain strong. In any case thoroughgoing institutional reform is not an option in the American common law. Ours is a system, to borrow language from Max Weber, founded too much on traditional authority rather than on legal-rational authority. There is no possibility that we will depart from common law procedural practices. Even though those practices date only to the mid-nineteenth century, Americans are convinced that they are hallowed by many centuries of tradition, and that the Constitution established them as the foundation of our liberties in the 1780s. Nothing I can say in this article will alter that.

My only purpose is to plead that we focus on the right questions as we struggle with neo-retributivism. The real debate is not a debate over utility and desert. That is an utter red herring. The real debate is a debate over the act-orientation, toward which Americans feel such a strong intuitive commitment, and the person-orientation, which so often turns out to shape the practice of judging, even in the common law guilty phase. That is what we should be talking about.

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155 Frank, supra note 59, at 952-53.
Conclusion

We should be talking about individualization, not utility and desert. We live in an era of stunning American punitiveness, when even the Republican party is calling for a return to rehabilitation “where appropriate.” Yet we have lost sight of the great moral theory that aims to explain why what seems “appropriate” may also be what is most just. That theory is individualization, and its virtues and risks should be our topic from the first class in criminal law. The debate over utility and desert is an intrusion from the philosophy classroom, where Kant’s attack on Bentham and Rawls’s “Two Concepts of Rules” have done so much to shape the syllabus. When academic philosophers entered the criminal law classroom, they found it natural to keep asking the same questions that preoccupied them in their home departments. But it is by no means clear that those are the right questions for thoughtful lawyers, or more broadly thoughtful Americans.

The right questions are the questions that have imposed themselves in our death penalty jurisprudence: they are questions about how much justice requires us to individualize. Retributivism has no monopoly on the philosophy of blame. It simply asserts, in line with a very old tradition in western Judeo-Christian theology, that what we should blame are acts and not persons, sins and not sinners. There may well be a case to be made for that assertion; and that case is likely to seem especially strong in societies, like ours, in which a general cultural orientation toward the values of individual responsibility shapes popular intuitions. But it is an assertion over which there can be honest and far-reaching disagreement, and members of societies in which the commitment to the values of personal responsibility runs less deep are less likely to accept it. We must bear that in mind.

We must also bear in mind that conscience is what is at stake in criminal law. Doing law is about judging, and not just about moral philosophy. That means that we must always see the law, and most especially criminal law, with its severe punishments, through the lens of the judicial conscience. To be sure, we no longer put the emphasis on the psychology of the judge in the way that the penal modernists did. We have become too aware of a truth that perhaps ought to have struck them as well: most criminal matters are resolved through plea bargain, not through trial, which means that most judgments are effectively made by prosecutors, not by judges. Indeed, it is a commonplace that the determinate sentencing movement inspired by the neo-retributivists had the effect of shifting discretion from judges to prosecutors, who are today very often the true front-


157 Immanuel Kant, The Metaphysical Elements of Justice: Part I of The Metaphysics of Morals 138 (John Ladd trans., 1965) (“Judicial punishment can never be used merely as a means to promote some other good for the criminal himself or for civil society, but instead it must in all cases be imposed on him only on the ground that he has committed a crime . . . . He must first be found to be deserving of punishment before any consideration is given to the utility of this punishment for himself or for his fellow citizens.”). The original work is Immanuel Kant, Die Metaphysik der Sitten 331 (1793).

158 Rawls, supra note 36.
line officers in criminal adjudication. But the lessons of penal modernism apply to prosecutors as much as they do to judges: they are lessons that pertain to any criminal justice official with knowledge of the life of an individual and the responsibility for deciding that individual’s fate. The American Bar Association has recognized exactly that, with its proposed standards requiring prosecutors to consider “the particulars of the offender’s character or his situation.”

In any case, whether we focus on judges or on prosecutors, we must always keep our eyes on how justice officials encounter Saleilles’s “realities”: we must ask what it would mean to make our theories of justice work as living institutions. Retributivists in particular must be prepared to answer that question. Moore, one of the best minds at work in the neo-retributivist movement, has written that “[r]etributivism is truly a theory of justice such that, if it is true, we have an obligation to set up institutions so that retribution is achieved.” These are imposing words, but they mean little unless retributivists devote suitable attention to the institutional structures of the living criminal law, presided over by living officials.

Not least, we must remember that what we say about criminal law has implications that extend far beyond criminal law. It inevitably belongs to a larger debate about the values of our society. When criminal law theorists assert that justice means holding individuals responsible for their freely chosen acts, they are not just making an argument about the internal logic of criminal law. They are not just philosophizing about blame. They are making a claim with far-reaching social implications. The basic conceptual dichotomy, the dichotomy between a law of acts and a law of persons is one that we find in many areas of the law, not just criminal law; and it always lies at the heart of the question of whether we will treat personal responsibility as the primary value of social life. As Hall insisted, welfare-state justice is individualizing justice in all fields, not just in criminal law. Welfare-state justice is always paternalistic justice, suspicious of excessive emphasis on personal responsibility. It is precisely for that reason that the neo-retributivist revolution of the 1970s bore so close a conceptual kinship to the larger culture of attacks on the social welfare state that began in the same period.

That means that our arguments about criminal law are inescapably interventions in a larger public debate about the proper role of the state in everyday life. To decide for act-oriented retributivism in criminal law is not just to join one side in a high intellectual debate over criminal blame. It is to decide to advocate for one set of social values over another; and the decision is one with potent symbolic significance. As Durkheim rightly insisted, criminal law plays a uniquely salient symbolic role in the creation and reinforce-

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160 Standards for Criminal Justice: The Prosecution Function 3-5.6(d) (Proposed Revisions 2009).

161 Moore, supra note 37, at 182.

162 Hall, supra note 81, at 767.
ment of public values: when the criminal law declares that persons will be held personally responsible for their freely chosen acts, without regard to excuses founded in their life circumstances, it makes a statement that commands a special kind of public fascination and demands a special kind of political attention. Criminal punishment is dramatic and frightening; and that means that criminal law is uniquely well positioned to inspire a broader shift in the general order of values. The prominence of discussions of law and order in the 1970s attests to that special power: there is a reason why the great political assault on the programs of the Great Society began with tough-on-crime politics. As the Wall Street Journal announced in 1969, the assault on “liberal answers” on crime was only one front in a larger war on the “soft-headed” liberal policies of the Great Society era.163

We must not forget that history: discussions of high moral philosophy that pay no attention to the broader symbolic impact of the value choices made in criminal law inevitably obscure much of what matters most.

To argue for neo-retributivism is inevitably to argue, in practice, against the values of the social welfare state, much though we may hope to pretend otherwise. The champions of retributivism who came on the American scene in the 1970s and 1980s certainly often intended differently. They did not all think of themselves as foes of the social welfare state. Many of them would have rebelled at the idea that their movement had anything in common with the right-wing programs of the Reagan era, and some, like Moore, went out of their way to distinguish their attitude toward criminals from their attitude toward other welfare-state dependents.164 Nevertheless, it is a truth of intellectual history that we are often caught up in the mood of the age in ways that we do not fully grasp ourselves; and the view that retributivists promoted in criminal law fit unmistakably within the larger American cultural shift away from state paternalism and toward an ethic of personal responsibility.

The culture of personal responsibility is indeed what is ultimately at stake. The real conflict in criminal law is not between utility and desert. Every sensible participant on all sides is in favor of some mix of consequentialism and blame. The real conflict is the conflict between punishing offenders and punishing offenses. By its nature, the debate over that conflict is a debate over the place of criminal law in societies with and without social welfare state values, with and without trust in the conscience of government officials, with and without the fundamental commitment to personal responsibility. That is the debate we should be having in our criminal law classrooms, and in the law reviews, just as we have been having it in America at large for the last forty years.

163 Allan Otten, Politics and People: Converts Against Crime, Wall St. J., Nov. 26, 1969, at 22 (“[L]iberal answers [on crime], like most liberal answers, are extremely expensive” and liberal solutions are “soft-headed.”).

164 Moore, Law and Psychiatry, supra note 86, at 234-35.