Penal Modernism in Theory and Practice

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Abstract

This paper develops three observations triggered by Whitman’s account of penal modernism; all relate to criminal law in the context of American politics and criminal justice. One suggests why “judicial conscience,” which Whitman describes as playing a central role in penal modernism, may be more problematic in the U.S. than Europe. The second speculates that certain barriers to penal modernism in U.S. political and legal culture are less significant than they seem. Finally, I question the extent to which retributivism displaced penal modernism and suggest a lesson this may hold about criminal law theory in the political and policymaking arena.

I. Introduction

James Whitman’s characteristically insightful paper persuasively recovers a picture of penal modernism that corrects distortions from decades of retributivist critique.¹ Penal modernism, he reminds us, was not simply an approach to criminal justice that gave judges unfettered sentencing discretion because of their “widespread faith in the scientific promise of rehabilitation” and confidence in making reliable “predictions of dangerousness” among individual offenders. Penal modernism was not predominantly utilitarian, as the Model Penal Code—a signature product of penal modernism—confirms. The MPC made moral culpability a consistent requirement for all crimes. The MPC’s sentencing code, which embraced judicial discretion, rested on that antecedent commitment. Modernists were committed to moral desert as the basis for criminal censure.

Beyond this, Whitman’s most trenchant insights relate to the differences between penal modernism and the retributivism that succeeded it beginning in the 1970s. Both make blameworthiness a prerequisite for punishment. But modernists insisted that justice requires more individualization among offenders than retributivists endorse. They sought, broadly speaking, to judge actors rather than merely criminal acts. Retributivists, by contrast, limit most consideration to the offense rather than the offender. Moreover, Whitman tells us, modernism relied on “judicial conscience” to guide the discretion that is essential to its fine-grained approach for moral desert and just punishment. Modernism and retributivism are divided on a choice about how much to individualize criminal judgments with offender-specific information, and about how much we can trust government officials to make such judgments.

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While I suspect some retributivists disagree, Whitman’s account seems entirely convincing to me. In what follows, I develop three observations triggered by his account of penal modernism. Each relates to criminal law theory in the context of American politics and criminal justice. The first suggests why “judicial conscience” may be more problematic in the U.S. than Europe. The second speculates that some hurdles that Whitman identifies for penal modernism, specific to U.S. political and legal culture, may be less significant than they seem. A final point assesses the degree to which retributivism displaced penal modernism and suggests a lesson this may hold about criminal law theory in politics and policymaking.

II. Discretion in America

The embrace of official discretion, required for individualized justice, was a challenge and vulnerability for penal modernism; Whitman makes clear that modernists themselves recognized this. The more that law gives judges (or any officials) discretion, the more real or apparent variation we will see not only across cases, but across judges. That inconsistency is fodder for critics. One modernist response to this criticism entailed simply a defense of the core premise of penal modernism: differences among judgments for the same offense are legitimate when based on morally relevant offender characteristics. Retributivists reject many offender-based distinctions, and they have the advantage that the consistency on modernist criteria is apparent only to those with sufficiently fine-grained knowledge of each case.

Beyond that, inconsistency occurs because, as modernists recognized, discretion will inevitably be misused—from bias, incompetence, or otherwise—as myriad judges decide myriad cases. Modernism had to defend this inherent weakness as the lesser evil compared to its alternative (dominant in much American sentencing law since the 1980s): determinate rules that disregard morally necessary distinctions among cases.

Finally, seeming variation in outcomes under modernist criminal justice arises also from the nature of “judicial conscience,” through which modernist discretion is exercised. Consider two judges who share the modernists’ commitment to desert-based sentencing and are each faced with the job of sentencing for identical offenses committed by similar offenders. Even if all judges sentenced on legitimate modernist criteria without bias or error, outcomes over time will surely vary among comparable cases. That, too, is just the nature of things when multiple decision makers, competently and in good faith, exercise wide discretion under a relatively vague standard. The problem is not bias or error but the relative indeterminacy of what judicial conscience dictates in particular cases. Or—much the same thing—reasonable minds will disagree about how to translate a principle of moral desert into the specific terms of a penal sentence. Retributivists face the same prob-

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2 Id. at 153-54 & 175 (quoting Jerome Frank); id. at 158, 172; see also id. at 175-77 (describing how judges have discretion in guilt-phase trials to allow offender information).
lem. But because they determine desert on more limited criteria defined mostly by substantive criminal law, they can embrace determinate sentencing as a solution that settles disagreements about what moral desert requires in particular cases.

The indeterminacy of judicial conscience probably helps to explain why, as Whitman describes, penal modernism has enjoyed more sustained support in Europe compared to the United States. American modernists faced the hurdle of American pluralism. The legal and moral culture that informs judicial conscience is more likely to have a consistent meaning across judges in a nation with greater political and cultural homogeneity. A widely shared notion of what judicial conscience requires is more likely as well within legal and judicial institutions that foster consistent professional norms throughout the judiciary. The United States has greater diversity in all those respects than most European nations; as a result, it is likely to display greater differences in the outcomes that different judges believe accord with conscience. Greater religious, ethnic, and regional diversity give rise to greater political, cultural, and moral diversity. The fragmentation of U.S. criminal justice systems, which follows from American federalism and preference for locally based government, accommodates rather than ameliorates that diversity. On top of that, the less insular, bureaucratic structure of the American judiciary (dominated by elected or politically appointed judges, often without life tenure) is a weaker institutional setting than in many European justice systems for fostering a consistency of judicial conscience. In light of all that, modernism’s long dominance in the U.S. seems a notable achievement, probably attributable in good part to the compelling arguments for it that Whitman recovers.

III. Modernism and Government Power

Beyond those challenges, Whitman suggests another reason for a particular American resistance to modernist criminal justice. Modernism is closely aligned with the ideology of the social welfare state. It trusts officials with great discretion—power—to individualize justice. In that respect it was a “big government” policy. Americans generally purport to be skeptical of government power. In the criminal justice context, that skepticism cuts against trust in judicial discretion (and trust in the discretion of the other officials who played big roles in modernist sentencing, parole boards). Moreover, Whitman notes, Americans are deeply invested in the model of the common law jury trial, which checks government authority in familiar ways. One of Whitman’s valuable insights describes how the trial does this in a less familiar way as well: the trial’s bifurcated structure, which separates liability from sentencing, serves to exclude most offender-specific information from judgments about guilt. That hinders the decision maker’s capacity to act on such information, at least until sentencing. (He also notes the ways that judges nonetheless use their discretion over trial evidence to admit some kinds of offender information, often to the defendant’s disadvantage.)

For a discussion of varieties of modernism, see Larry Alexander & Kimberly Kessler Ferzan, Crime and Culpability 7-17 (2009).
Whitman also acknowledges that “most criminal matters are resolved through plea bargain, . . . which means that most judgments are effectively made by prosecutors, not by judges,” especially after determinate sentencing shifted even more discretionary control from judges to prosecutors.\(^4\) Whitman notes this only to make the point that modernism’s lesson about judicial conscience applies to any official with discretion, prosecutors included. But American plea bargaining has broader implications as well. Its dominance shows us that Americans are neither wedded in practice to the common law trial nor to a criminal process that keeps offender information from the officials who can exercise discretion on the basis of it. (That is true even when, as is commonly the case, prosecutors do not get the same balanced picture of the offenders that judges should get in sentencing hearings.) Furthermore, American suspicion of government power is context-specific. If prevailing practices are any indication, Americans have become quite comfortable with officials having lots of power when they are prosecutors rather than judges.

The record of American criminal justice over last forty years does not suggest that the role of conscience-driven individualization has shifted benignly from judge to prosecutor. Whatever their good faith and professionalism, American prosecutors are in a different institutional position, with a different role and professional culture, than judges. That role and culture is adversarial and partisan (in the sense of being a competitive litigant) rather than bureaucratic or judicial. Minister-of-justice norms somewhat moderate that orientation. But those norms, which are always more challenging to sustain in adversarial systems than inquisitorial ones, are weaker in the U.S., where the institutional structures of prosecution agencies—more politically responsive, less politically insulated—often work at cross purposes.

**IV. Retributivism’s Triumph**

However we sort out the explanations for modernism’s demise, how thorough was retributivism’s triumph over it? Recall that modernism and retributivism share a foundational commitment to liability based on moral desert. One aspect of modernism that retributivists should embrace, then, is the MPC’s commitment to proof of culpability for every offense. The MPC sought to abolish strict criminal liability. This ambition, however, has turned out to be among the MPC’s greatest failures. Strict liability remains widespread in American (and English) criminal law.\(^5\) Even in states that enacted the MPC’s culpability rules, offenses with explicit strict liability components remain, and where they are absent

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\(^4\) Whitman, supra note 1, at 179.

courts continue to infer strict liability despite MPC-inspired state statutes that seem to dictate otherwise. Why is our retributivist era replete with strict liability?

One answer could lie in a debate about what constitutes sufficient culpability. The MPC embraces a strong view, shared by many English scholars, that seeks to keep liability and punishment in proportion to fault by requiring mens rea proof for each offense element. But an alternate, weaker view is that, once one is proven to have committed a culpable act (e.g., proof of mens rea for a conduct element of an offense), one is placed in a different normative position vis-à-vis the state’s authority to punish; one can be held strictly liable, and punished more severely, for unknown circumstances (such as a victim’s age) or unintended harms. The latter account is the more descriptively accurate for Anglo-American criminal law today. If retributivism characterizes contemporary criminal justice, it is only in this substantially weakened iteration.

A second answer—the better one in my view—is that much about contemporary criminal law and punishment is not retributivist. Penal modernism may have been vanquished, but retributivists can hardly claim triumph. Nor, I hope, would many want to. That would require endorsing strict liability for serious offenses, well described and criticized in Douglas Husak’s book *Overcriminalization*. It would require as well taking credit for America’s unprecedented incarceration rates over the last thirty years. Many retributivists, especially some prominent advocates in the 1970s, hoped that retributivism would restrain sentencing excesses they saw in the modernist regime. A proper focus on desert, many claimed, would prevent, rather than license, severe punishment policies.

Whitman implies, albeit only briefly in his conclusion, that retributivists own some responsibility for the prevailing state of affairs. Noting that many retributivists deny affinity with conservative criticisms of the welfare state, he observes nonetheless that they were “caught up in the mood of the age” and “retributivists promoted [a view] in criminal law [that] fit unmistakably with the larger American cultural shift away from state paternalism and toward an ethic of personal responsibility.” I am sure that is true for some retribu-

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6 Brown, supra note 5.

7 English scholars commonly refer to the Correspondence Principle, to describe liability and punishment held in proportion to fault by proof of mens rea for each offense element. See Andrew Ashworth, *Principles of Criminal Law* 76 (6th ed. 2007); Victor Tadros, *Criminal Responsibility* 93-97 (2005).


11 Whitman, supra note 1, at 181.
tivists (although who properly fits that label would be significant here); some endorse America’s punitive record of the last generation.

I am inclined, however, to interpret contemporary policies as at least as much a failure of retributivism’s influence as its triumph. Our prevailing regime of severe, often inflexible sentencing combined with strict liability elements seems to me to represent the considerable influence of an instrumentalism aimed at prevention, deterrence, and incapacitation, unmoored (or insufficiently moored) to meaningful conceptions of desert. Nonetheless, retributivism’s incomplete triumph also points to its particular vulnerability in the political arena. Not only was it too weak or indeterminate to constrain rival utilitarian impulses. It also contributed to the punitive turn to the extent that its “hot” rhetoric of retribution in political and policymaking arenas was easily leveraged to justify more severe punishments motivated more by instrumentalist rationales. When Whitman notes retributivism’s close “conceptual kinship to the larger culture of attacks on the social welfare state” that was part of resurgent conservatism since the 1970s, I take him in part to refer to this contributing role played by retributivist rationales and rhetoric in the steady adoption of severely punitive U.S. sentencing policies. If that interpretation is correct, contemporary retributivism has suffered from the same fault (or fate) that its adherents alleged of the modernist era: policies supposedly premised on a desert-based account of criminal punishment in fact reflect the infiltration of utilitarian policies unconstrained by moral proportionality.

V. Conclusion

A lesson criminal law theorists might draw from all this—from Whitman’s corrective account of penal modernism and from the punitive turn that accompanied retributivism’s rise from the 1970s—is implicit in Whitman’s references to resurgent political conservatism and the broader “mood of the age” in the retributivist era. Perhaps the best explanation for U.S. criminal justice policies of the last forty years should not put too much emphasis on the role of criminal law theory. The primary explanation may be a bluntly political one that stresses how political actors beginning in the late 1960s used rising crime rates and transformed race relations in the wake of the civil rights era to create a long, divisive era of law-and-order politics. Compared to those forces, the role played by any criminal law theory may be modest.

12 See Alexander & Ferzan, supra note 3, at 7-17.


15 Whitman, supra note 1, at 180.

That seems especially likely in the United States (compared, say, to Germany), where most policymaking lies with politically responsive officials, and experts or non-partisan institutions have weaker influence than elsewhere. In this setting, theories incompatible with the views of significant political actors tend to be marginalized. But those that have common ground with politically potent movements are at risk of being distorted or hijacked. The first was arguably modernism’s fate. Some retributivists would argue the second was their fate. I think there is some truth to that. I take Whitman to imply that retributivists bear more responsibility for contemporary policies given the easy alliance of their views with the broader anti-welfare-state politics within which they worked. Either way, the story suggests a cautionary lesson for theorists lucky enough to work within a \textit{zeitgeist} that does not leave them on the policymaking sidelines.