Penal Modernism: An American Tragedy

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Abstract

This paper discusses Whitman's analysis of penal modernism. While I am in agreement with the central claim that penal modernism has been ignored and caricatured, I argue here that Whitman's account of the penal modernist theory of judging must be understood in the context of a wider reframing of the social functions of the criminal law in penal modernism. This is explored by considering the unusual connection that the novel *An American Tragedy* (1925) has to the history of American criminal law, and the light that this can shed on the question of the meaning of penal modernism.

I. Introduction

Whitman's article on penal modernism is a hugely important contribution to contemporary debates about criminal law and punishment. While the argument is nuanced and covers a lot of ground, the central claim is straightforward. Penal modernism has been misunderstood, even caricatured, in contemporary theoretical discussions where it is depicted as a form of soulless utilitarianism, treating offenders as "pure objects, to be handled in whatever manner best served the ends of social policy."[1] Whitman argues, by contrast, that properly understood it was a movement deeply rooted in the institutions of criminal law and judgment, and centrally concerned with limiting punishment. These limits were not to be found in sentencing grids or ever more precise legal definitions, but in the conscience of the judge.[2] This view, he argues, was expressed in the morality of judging which required the judge to be sensible to the uniqueness of the individual: "[*A*] *just system punishes* persons, *not* acts; *and it must do so because the conscience of the judge requires it.*"[3] His argument is thus primarily aimed at reinstating the idea that doing justice was central to penal modernism, that it was centrally concerned with the morality of punishment—thus confronting retributive theories of punishment on their own ground. However, he also wants to argue, more radically, that as an approach to criminal justice this offers the

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[1] James Q. Whitman, The Case for Penal Modernism: Beyond Utility and Desert, 1 CAL 143, 146 (2014).

[2] It is interesting to note that a very similar account of sentencing, arguing that the role of the judge should be to mitigate from statutory maxima, was advanced by Edward Cox in England in a book published in 1877. Edward Cox, The Principles of Punishment as Applied in the Administration of the Criminal Law (1877).

[3] Whitman, supra note 1, at 149 (emphasis in original); cf. id. at 157 ("[c]riminal law must be a law of conscience").

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potential to punish less, and thus that it deserves consideration as a corrective to the harshness of current retributivism.

In this comment I want to engage with the historical part of his argument, the characterization of penal modernism, rather than this normative argument. I do not disagree with the general thrust of his argument—that penal modernism is misunderstood and caricatured in current debates, and that this historical myopia is damaging—but I want to add to this by suggesting that penal modernism was broader in character than he allows. Indeed, I think that his argument that penal modernism was primarily about judges and judging, expressed in the claim that "penal modernism was a legal realist movement," itself runs the risk of slipping into caricature.[4] Penal modernism, and modernism in general, were much more complex, and cannot be reduced to such simple claims. If we are to understand penal modernism better, as Whitman argues, we need to reverse this claim and see that legal realism was a modernist movement, a change of emphasis that will then allow us to see how penal modernism connects with broader social ideas and movements.

I shall make this argument by considering the unusual connection that the novel *An American Tragedy* (1925) has to the history of American criminal law, and the light that this can shed on the question of the meaning of penal modernism.

II. An American Tragedy

An American Tragedy was a bestselling novel by Theodore Dreiser. It is probably not much read now (it has been filmed at least twice in English in 1931 and 1951) though the title at least has acquired a certain enduring cultural resonance.[5] It has, however, a fascinating connection with the criminal law. First, which is not so unusual, the plot of the novel was based on an actual case. More unusually, though, the novel then became the basis for discussion of criminal law theory.

The novel tells the story of an ambitious young man called Clyde Griffiths. Clyde gets his working-class lover, Roberta Alden, pregnant but he does not want to marry her, because he hopes for a marriage that would advance his career. When he is unable to obtain an abortion for Roberta, he plots to kill her. They travel together to the Adirondack Mountains in upstate New York where Clyde says that they will get married. Clyde then takes Roberta out in a small boat on a secluded lake, planning to capsize the boat and swim to shore (knowing that she cannot swim), and then claiming that this was an accident. While in the boat he gets cold feet about the plan and realizes that he cannot follow through on it. However, as he realizes this, there is in fact an accident and the boat capsizes; Clyde swims to shore and Roberta is drowned. When Roberta's body is found, Clyde is arrested and charged with capital murder—and eventually executed.

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[4] Id. at 153.

[5] See An American Tragedy, in Wikipedia (http://en.wikipedia.org/wiki/An_American_Tragedy).

This story was based on a case that had taken place in 1906, involving an ambitious young man called Chester Gillette (note the same initials) who had drowned his pregnant lover, Grace Brown, in Big Moose Lake, also in the Adirondack Mountains. As in the novel, it appears that Gillette had induced Brown to go on the trip with the promise of marriage. He had taken her out on the lake, but had then beaten her with a tennis racket and thrown her overboard—so when her body was found there was clear evidence of foul play. Gillette was captured soon after, having made little attempt to escape, and was tried and convicted of her murder, and executed by electric chair at Auburn Prison, New York. In spite of the similarities, there are clear differences between the two cases—reflecting the fact that a novelist has greater opportunity and licence in constructing the interior mental states of his protagonists. The biggest difference in the fictional version is that the reader knows that Clyde has decided not to kill Roberta. In spite of having taken substantial steps towards the completion of his plot, he has reached the point where he has gone back on his original intention. The double irony in the novel is that it is at precisely this point that the accident takes place which results in the boat capsizing, and then that Clyde is convicted on the basis of evidence of his original plot—and the appearance it gave of an intention to kill—even though he no longer possessed that intention.

The novel sold well (over 50,000 copies by the end of 1926), in spite of critical reviews, and in order to boost publicity yet further, the publishers came up with the idea of an essay contest for a prize of $500: the topic "Was Clyde Griffiths guilty of murder in the first degree?" So far so ordinary; but what makes this unusual is that the contest was won by a law professor, Albert Lévitt, at the time of Washington and Lee University, who had previously written to Dreiser praising the construction of his "beautiful legal problem."[6] He was an unusual character. He had seen active service in the First World War, had trained in theology and law, and was linked to a circle of progressive academics. He had, moreover, recently published a series of papers on the topic of *mens rea* in the criminal law in which he sought to articulate a self-consciously modern approach to the criminal law.[7]

Lévitt's prizewinning essay received only limited circulation. It was mimeographed on cheap paper and seems to have quickly disappeared, with a single copy surviving in the Library of Congress, unnoticed until its discovery by Philip Gerber in 1991. It is, however, a fascinating document. It is in four parts, each of which addresses a different dimension of Griffiths's guilt. The first part addresses his legal guilt. On this Lévitt is clear: this could not be murder in the first degree. Clyde had no intention to kill at the time the accident

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[6] The essay is reprinted in full in Philip Gerber, "A Beautiful Legal Problem": Albert Lévitt on *An American Tragedy*, 27 Papers on Language & Lit. 214 (1991). This also contains background details on Lévitt and his career and the essay competition. For further information on Lévitt, see Albert Levitt [sic] (http://law.wlu.edu/faculty/profiledetail.asp?id=376); Albert Levitt [sic], in Wikipedia (http://en.wikipedia.org/wiki/Albert_Levitt).

[7] Albert Lévitt, The Origin of the Doctrine of Mens Rea, 17 Ill. L. Rev. 117 (1922); Extent and Function of the Doctrine of Mens Rea, 17 Ill. L. Rev. 578 (1923) [hereinafter Extent and Function]; Some Societal Aspects of the Criminal Law, 13 J. Am. Inst. Crim. L. & Criminology 90 (1922) [hereinafter Societal Aspects]. He was strongly influenced by Roscoe Pound, The Future of the Criminal Law, 21 Colum. L. Rev. 1 (1921).

took place, and was not under any duty to rescue Roberta.[8] The death was the outcome of a series of accidental acts (stumbling, capsizing the boat and so on) and, however much these might have expressed his unconscious desire, they were not legally relevant. The second part addressed the question of whether he was guilty under Christian ethics. Here Lévitt was equally clear that Clyde was guilty: he had evil in his heart and this may have contributed unconsciously to his actions. He accepted the opportunity offered by the accident, and made no effort to rescue Roberta. What is interesting about this is that Lévitt's discussion of Christian morals slips over into almost psychoanalytic terms: "When a man deliberately fastens his mind on murder with such intensity that his activities become almost automatically evil without conscious effort, he must stand the consequences of his unconscious acts. [Clyde's] obsession was voluntarily induced."[9] Thus while the criminal law was not concerned with subconscious motives, equally they could not be pleaded in his defence. Third, Lévitt asked whether the jury were right to convict. Here, he praised the formulation of the legal issues in the trial in the novel, and argued that it was reasonable for a jury on the evidence not to believe Clyde's claim that he had a change of heart; in the absence of clear evidence of this change, it was reasonable of them to convict. Finally, Lévitt addressed the question of the extent to which society or the state had any responsibility in this situation. Here he was highly critical of state policies on sex education, which he argued taught outmoded Christian doctrine.[10] Sex education was, he argued, a matter of social welfare, and by extension required the availability of birth control or abortion on demand. This, he suggests, could have prevented the murder, and the state could have "save[d] the life it was trying to save" (namely that of Roberta).[11] The last section of his essay was on the justifiability of capital punishment. Here Lévitt argued that in general terms capital punishment was justified: "There are times when human beings act so that they become unendurable menaces to organized society. There is no reason why they should be conserved."[12] He went on to argue that he saw no reason why Clyde should have been permitted to live: "[H]e was a spiritual weakling with criminal susceptibilities. A study of recidivism leads me to believe that offenders of Clyde's type never repent of their acts."[13] But once again Lévitt held that given better social conditions Clyde could have grown up as a better person. The state then, in Lévitt's view, was to blame for three deaths: Clyde's, Roberta's, and the unborn baby's.

[8] Lévitt's analysis reflects the controversial position that there was no duty to rescue a mistress. See People v. Beardsley, 150 Mich. 206, 113 N.W. 1128 (1907).

[9] Gerber, supra note 6, at 231.

[10] Id. at 233-34. Though see his dismissal of the views of St. Paul as an "oriental" with a "harem point of view." Id.

[11] Id. at 237.

[12] Id. at 240. He went on to argue that the value of the community should outweigh that of the individual life.

[13] Id. at 241.

III. The Meaning of Penal Modernism

The interest for our current purposes is in the way that this set of arguments can be taken as a representative expression of penal modernism. There are parts of the argument that seem to slip into the caricature of penal modernism depicted by Whitman—the social hygiene argument and Lévitt's orientalism, in particular, make for uneasy reading. But this should not prevent us from seeing the argument as a whole. In order to do this it is helpful to situate the argument within Lévitt's other writings, which, taken together, offer a unique insight into the character of penal modernism.

Lévitt defines crime as an act which threatens "organized" society. The purpose of criminal law is consequently that of harm reduction, responding to the conduct of the criminal and taking steps to prevent future occurrences of similar conduct.[14] This is to be done by dealing with ("neutralizing") the affective qualities of the criminal act on the criminal, other members of society, and the state.[15] This definition, in terms of social function and response, is a clear reaction against earlier definitions which linked crime to sin and religion or morals. Indeed, Lévitt rejected any distinction between *mala in se* and *mala prohibita* on the ground that it was merely "a difference in time in the discovery of harmfulness"—that is to say that whether or not a crime was regarded as a *malum in se* reflected no inherent difference in the social harmfulness of acts, but only when it was first registered in the criminal law.[16] This "social danger" approach made the definition of crime a consequence of state action (hence "organized" society): the state addressed crime as one manifestation of other social problems, and criminal law as one kind of response. As the essay on *An American Tragedy* made clear, crime might be suppressed by other forms of state action, such as birth control policy or sex education, and ideally would be addressed in a comprehensive way. This required a new kind of scientific approach: "The criminal law must analyze the social organization, determine how the criminal is related to and connected with this organization, and then devise the best means for protecting the organization from the danger with which the criminal threatens it."[17] Society changes, but the function of the criminal law does not, and the protective measures must keep abreast of the forms of danger. This was mainly to be addressed through the investigation of the criminal, but could be broader, including changes to criminal law doctrines or even the modernization of the form of the criminal law.[18]

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[14] Lévitt, Societal Aspects, supra note 7, at 90.

[15] Id. at 99. Affective qualities were understood as the impact that the crime could have on the minds of the criminal and others.

[16] Lévitt, Extent and Function, supra note 7, at 587-89.

[17] Lévitt, Societal Aspects, supra note 7, at 90.

[18] Manifested in some modernist codes, e.g., the U.S. Model Penal Code or the Italian "Rocco" Code. On the MPC, see Markus D. Dubber, The Model Penal Code, Legal Process, and the Alegitimacy of American Penality, in Foundational Texts in Modern Criminal Law 239 (Markus D. Dubber ed., 2014); on the Rocco Code, see Stephen J. Skinner, Tainted Law? The Italian Penal Code, Fascism and Democracy, 7 Int'l J. Law in Context 435 (2011). On codification and modernity generally, see Lindsay Farmer, Codification, in The Oxford Handbook of Criminal Law 379 (Markus D. Dubber & Tatjana Hörnle eds., 2014).

The core of penal modernism, though, was in the way it dealt with the "criminal," looking at the physical and psychological structure of each individual to assess the danger that person posed to society: "The mental characteristics of the accused indicate the nature and extent of the peril he represents."[19] The mental state of the accused was important not as a constitutive element of the crime, but as a way of assessing what to do to the offender.[20] This then sought to reverse the normal understanding of criminal law: acts were the symptom of criminality and the underlying intent is the cause of anti-social activities that must be addressed. This required changes to courts and in the treatment of offenders. Lévitt argued that "every court that deals with criminal cases should have a psycho-pathological laboratory attached to it," so that the judge could sentence on the basis of a proper physical and psychoanalytical examination of the criminal.[21] However, the specific control method would differ depending on the diagnosis of the cause. Lévitt was doubtful about the efficacy of punitive measures of deterrence, and clearly favored reformative treatment.[22] This was based on "the relation of the criminal to himself and the possibility of restoring him to a full participation in societal activities and relationships."[23] This was essentially therapeutic in character, aimed at restoring to normality, and had to be adapted to the "physio-psychological characteristics of the criminal."[24] Judgment sits within this broader complex. Whitman's argument about the role of judges must be understood in this context. They are important, as the nexus between the finding of guilt and punishment, but they are part of a larger system in which the function of the criminal law, and the intellectual resources that it can draw on, have been reconstructed according to the vision of penal modernism.

I would add two further points, because they bear on the point about legal realism. The first is that law is conceived as a social science: "The function of the criminal law is to protect society. If such protection cannot be given unless the criminal law is sociological, psychological, philosophical and economic in nature, then the criminal law must develop that nature."[25] Lévitt cites extensively from sources in criminology, psychology, and psychoanalysis to show how this new conception of law was to operate. And second, this was a self-consciously international movement. He cites the work of Ferri, Saleilles, Tarde and many others, significantly drawing on the translations of their work in the *Mod-*

[19] Lévitt, Societal Aspects, supra note 7, at 92.

[20] Lévitt, Extent and Function, supra note 7, at 579, 589. Even in his earlier article on the origins of mens rea he was concerned to establish the argument that mens rea is an index of punishment.

[21] Lévitt, Societal Aspects, supra note 7, at 98 (citing approvingly the work of the Psychopathic Laboratory of the Municipal Court of Chicago); see also Lévitt, Extent and Function, supra note 7, at 590.

[22] Lévitt, Societal Aspects, supra note 7, at 96 ("Punitive measures appear less efficacious when one remembers that criminals are usually insensitive to pain and lacking in sympathetic imagination.").

[23] Id.

[24] Id. at 97 (citing Lombroso and including extensive references to contemporary psychology).

[25] Id. at 103 (citing Roscoe Pound in support of this view). On Pound, see the collections of his essays on criminal law and criminal justice published in 10:4 Crime & Delinquency (1964).

ern Criminal Science series and the *Continental Legal Science* series published by Little, Brown & Co. To see penal modernism in terms of American legal realism is, I would suggest, to miss both this internationalism and the intellectual foundations of penal modernism.[26]

The purpose of this reconstruction of Lévitt's view of the criminal law, from his prizewinning essay and other writings, is to show how penal modernism was part of a larger attempt to understand crime and criminal law from a modern scientific perspective. Of course, there were different forms of penal modernism, and other connections to modernism that I have not explored here, but the overall picture that emerges is one in which the criminal law is seen as a dynamic instrument for dealing with social problems.[27]

IV. Conclusion

Penal modernism is complex and multi-faceted, and its history has been neglected—as Whitman suggests—because it is mainly known in the caricatured version, and it has been too easy to associate its excesses with the biopolitics of mid-twentieth-century totalitarian regimes. Yet just because there are elements of penal modernism that we are uncomfortable with, and evidence of unjust practices committed in the name of penal modernism, this should not lead us to ignore it altogether. It is worthy of further study as the origin of many penal practices that are widespread today, such as probation and parole, and in its own right as a movement that sought to use social science to address social problems. That we know so little about penal modernism is evidence of a damaging ahistoricism in criminal law scholarship.

The tragedy of penal modernism is that it is forgotten and ignored. The valuable initiatives that were undertaken in its name and the lessons that we might learn from the historical experience have been lost. If Whitman is right about this, as I think that he is, the American tragedy is not only that criminal law has forgotten its own history—but that it may thus be condemned to repeat it as farce.

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[26] Of course some legal realists, notably Jerome Frank, drew extensively on psychoanalysis, but this underlines the point that it was these modern ideas that underpinned movements such as legal realism, rather than vice versa.

[27] On varieties of penal modernism see Lindsay Farmer, The Modest Ambition of Glanville Williams, in Foundational Texts in Modern Criminal Law 263 (Markus D. Dubber ed., 2014). On other connections between modernism and criminal law, see Rex Ferguson, Criminal Law and the Modernist Novel (2013).