Response to My Commentators

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Abstract

In this brief response, I concede that Professor Farmer is right to say that the dark side of penal modernism may deserve more attention than I give it, but maintain that there was a certain moral courage even in the darker claims of the movement. In response to Professor Brown I argue that the doctrinal failure of retributivism in contemporary American criminal law is a disaster foretold by the legal realists; and while I admit the force of his pessimism about the future of penal modernism in America, I insist that law teachers still have some hope of inculcating thoughtful professional attitudes in their students.

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It is a privilege to receive responses from such sharp-eyed, learned, engaged, and elegant writers. Many thanks to both Darryl Brown and Lindsay Farmer! I thank them especially for the generosity of their praise. At the same time, I recognize that their commentaries present serious challenges to my argument.

First, Lindsay Farmer’s challenge.1 It is my aim to present penal modernism “in its best light.” Professor Farmer wonders whether I can really get away with it. In the end, don’t I just substitute one (overly cheery) caricature for another (overly glum) one? He makes marvelous use of Dreiser’s An American Tragedy and Albert Lévi’s analysis of it to drive his point home, memorably evoking an interwar culture that certainly displayed some interest in moral philosophy, but that also had a chilling openness to technocratic management of the population—and a comical faith in psychoanalysis to boot. Can I leave out all the nasty stuff (and the silly stuff, too) and still claim to be writing a history of penal modernism?

One easy answer is that I don’t leave out the nasty stuff—though I certainly don’t present it with Farmer’s lovely literary verve. I speak of the “destructive hubris” of “self-described scientists,” and I mean it. But that answer is really too easy. Professor Farmer could appropriately respond that a line or two about the dark side of penal modernism is not enough. Knowledgeable scholars will still view my account as a caricature. His response to my article deserves a deeper reply, and I will try to give one.

Professor Farmer has a point. The nasty stuff may well deserve more attention than I accord it. But having conceded that, I wish to add a caveat. As we talk about the nasty stuff, I think we must be wary of taking too contemptuous or dismissive an attitude toward the work of our modernist predecessors. In my view it is one of the plusses of penal modernism that its advocates acknowledged that criminal justice is sometimes a nasty

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1 Lindsay Farmer, Penal Modernism: An American Tragedy, 1 CAL 189 (2014).
business. Penal modernists did not flatter themselves that they could always be caring, or that they could always act as angels of true justice rather than human officers charged with coping in tough ways with tough social problems. They had the courage to acknowledge that doing criminal justice sometimes means getting your hands dirty.

Of course, their conception of what counted as appropriate toughness today seems dated, comical, and not infrequently brutal. It is true that when we open up interwar texts they seem by turns quaint and hideously soulless. Nevertheless we must resist the temptation to make fun of them, or for that matter to wax indignant or huffy in ways that allow us to feel morally superior. The Freudianism of their age was absurd, and their social engineering was sinister. The horror of the death penalty has grown spectacularly since Lévitt wrote. But as we reject what now seems dated, absurd, and sinister in penal modernism, we must not allow ourselves to pretend that criminal justice can do without its tough and sometimes coldhearted side. The penal modernists had the courage to admit that difficult truth, and we should too—though of course in ways that seem right to us in our own age. They said many stupid things, but they still displayed a kind of intellectual and moral mettle that we ought to take seriously.

Professor Brown, for his part, contends that we already are tough and coldhearted in America. At the very least, he contends that it is wrong to think that what dominates in American criminal justice is the retributivist impulse, rather than the impulse to deal with dangerous offenders by whatever means necessary. In particular, he points to the persistence of strict liability offenses in American criminal law, which he has done such signal work to document. So what if our classroom teaching turns on a spurious clash between retributivism and utilitarianism? Is it really worth investing so much scholarly energy in attacking retributivism when the truth is that it has failed to shape American criminal law?

This is a serious challenge indeed, and one that Professor Brown would not be alone in making. It has become a commonplace in the American literature that considerations of dangerousness dominate in our criminal justice system—and a commonplace correspondingly that our problem is not too much retributivism, but too little. But I think this familiar diagnosis of the American dilemma is misguided, and misguided precisely because it fails to appreciate the claims of legal realism. Yes, it is true that neo-retributivism has not achieved its intended ends. But the legal realist claim is precisely that legal programs like retributivism are fated never to achieve their intended ends. What they produce instead are dangerous, disruptive, and thoroughly unintended consequences. As Jerome Frank put the standard legal realist point, retributivist claims of justice can never be realized in practice, because they produce “results felt to be unjust.” Retributivists may try to shut the front door on considerations of dangerousness; but the predictable consequence is that those considerations come in instead through the back window, and in ways that are much less forthrightly examined.

I think a legal realist analysis of that kind is well worth making when we wrestle with the tragic state of contemporary American criminal justice. This brief response is not

the place to make it in full, but I will take the opportunity to offer an admittedly specula-
tive word on the topic of strict liability. Why do we see strict liability offenses in American
law and not in continental law? Here is a legal realist answer. Continental law does address
itself to dangerousness. But it does so through the simple procedural expedient of not
bifurcating the trial into guilt and sentencing phases. In practice, questions of dangerous-
ness are amply considered in the course of a continental trial, regardless of what the
doctrine dictates. It is precisely because the continental tradition does not maintain a strict
evidentiary/procedural focus on mens rea that it can allow itself the luxury of a strict doc-
trinal focus on mens rea. American law is arguably different precisely because of the way
the guilt phase evolved: in the nineteenth century, we shut the procedural front door on
considerations of dangerousness; but the historical consequence has been that those con-
siderations come in, in incoherent and damaging ways, through the doctrinal back
window. In our hearts we are not willing to accept the risk that dangerous offenders will
not be convicted simply because we cannot prove that they had the necessary mens rea; so
we jimmy our mens rea analysis to avoid that risk. Similar legal realist claims could be
made, I think, about the unintended consequences of the determinate sentencing move-
ment. Yes indeed, retributivism has failed in America. But it has failed in exactly the
destructive way that penal modernism predicted it would fail.

I suspect Professor Brown might agree with that legal realist analysis; I would cer-
tainly rejoice if I could win him over. His challenge does not end there, though. He also
offers a truly worrisome counsel of despair about America. America has a fragmented and
politicized system of justice, which does not encourage optimism about the possibility of
a penal modernist system that depends on the professionalism of judges and prosecutors.
Moreover American society is too heterogeneous to permit deference to the judicial con-
science. Only societies with a deeper sense of shared values can do that. Most broadly
American criminal justice is shaped by American social forces. Criminal law theory just
doesn’t matter that much.

Those points are all well taken. I worry too. I am not sure how much hope there is
for a humane criminal justice system in a country as fragmented, politicized, and under-
professionalized as ours. Still, I am not willing to despair yet. In particular, I am not ready
to concede that what law professors say in the classroom does not matter. We are training
the legal elite of the future. Maybe our students, whether at Yale or Virginia, will never be
responsive to the sort of teaching that the penal modernists offered. Maybe they will
simply dismiss the moral claims of mid-twentieth-century criminal law theory. But I for
one am not prepared to believe that education is that insignificant a force in human lives;
and I cling to the hope that a generation of lawyers trained differently will behave differ-
ently in office, even as they confront all the social and institutional ills of our country, and
all the political countercurrents.

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3 See his shrewd account of the judicial response to the Model Penal Code in Darryl K. Brown, Criminal