

**POLITICS AND PUNISHMENT: REACTIONS TO MARKEL'S POLITICAL
RETRIBUTIVISM**

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I commend the editors and advisors of this journal for making such an excellent selection for its inaugural featured author. Dan Markel is not only one of the most thoughtful and prolific of the emerging generation of criminal-law scholars, but also a diligent and supportive colleague to the other members of that cohort, including myself. Through both his own work and his thorough and insightful comments on and reactions to the work of others, he is sure to be one of the most significant and influential thinkers in this area for years to come. Moreover, the kind of work he is pursuing is in the vanguard of contemporary trends in punishment theory. He belongs to a group of current theorists who are bringing to bear not only moral theory (as has long been done), but also political theory, to help address important fundamental questions about the proper scope and attributes of criminal law. That is a significant intellectual project, and he is among those at the forefront of it.

In response to the article that forms this symposium's centerpiece, I would like to discuss two general sets of issues—less concerns than questions about aspects or implications of Markel's views that might not yet be entirely resolved. The first relates to his views of the justification of punishment. The second, which I will discuss more briefly, relates to his understanding of the political institutions that are tasked with imposing punishment.

First, the general question of punishment. It bears noting that the confrontational conception of retributivism ("CCR") theory presented in the article offers a bold and provocative answer to the fundamental question of how punishment is to be justified and when it is to be applied.

⁸ Associate Dean for Academic Affairs and Professor of Law, Brooklyn Law School. I am very grateful to the student editors of the *Virginia Journal of Criminal Law* for inviting me to participate in this written symposium and in the conference held at the University of Virginia School of Law on April 7, 2011, as well as for their logistical and editorial support. Particular thanks are due to Daniel Ross for overseeing the administrative details of the event. Thanks also to my fellow participants in that conference: Dan Markel, Josh Bowers, Darryl Brown, and Antony Duff.

As is well known, there are thought to be two standard so-called “theories of punishment,”¹ each of which gives a different answer to the question of when and whom to punish: *retributivist* theory claims that punishment is justified as a response to moral wrongdoing, and *utilitarian* (or consequentialist or deterrence) theory claims that punishment is justified as a means of preventing harm.

Markel’s CCR theory² says something different. Fundamentally it claims that criminals merit punishment not because they committed a moral wrong (*per se*), or because they caused or risked harm (*per se*), but rather *because they broke the law*. We might say that retributivists (at least “standard issue” retributivists) are concerned with *moral wrongs*; deterrence theorists are concerned with *social harms*; and the CCR is concerned with *legal violations*. Of course, all three of these categories overlap to a great degree. Conduct that is morally wrongful often causes or risks harm; conduct that causes or risks harm tends to be considered morally wrongful; and both of those categories of conduct tend to be criminalized on one, or the other, or both bases. Even so, the CCR sets out a significantly distinct answer to the question of when and why punishment is acceptable or appropriate.

Given its distinctive formulation, a question arises immediately: is the CCR truly a retributivist theory? Markel says it is;³ Josh Bowers, in response, says it is not.⁴ They might both be right. Markel defends his theory as retributive in part by contrasting it to what it is not: he maintains it does not justify punishment in terms of its beneficial consequences (and is therefore not a consequentialist theory), but rather in terms of its intrinsic goodness⁵ (and is therefore a retributive theory). The CCR may

¹ For a brief discussion of these two theories and other possible theories, as well as why the term “theory of punishment” is a misnomer for them, see Michael T. Cahill, *Retributive Justice in the Real World*, 85 WASH. U. L. REV. 815, 817–20 & n.5 (2007).

² See Dan Markel, *Retributive Justice and the Demands of Democratic Citizenship*, 1 VA. J. CRIM. L. 1, 5 (2012).

³ See *id.* at 18–19.

⁴ See Josh Bowers, *Blame by Proxy: Political Retributivism & Its Problems, A Response to Dan Markel*, 1 VA. J. CRIM. L. 135, 137–48 (2012).

⁵ I take the claim to be not that the offender has injured something that is intrinsically good, see *id.* at 139–40, but rather that imposing punishment on the offender is itself intrinsically good: that punishment has features that directly and necessarily vindicate important and normatively desirable goals. See *e.g.*, Markel, *supra* note 2, at 27

share a formal similarity to typical retributivist theories insofar as it identifies an intrinsic good (actually, in Markel's case, multiple intrinsic goods) that might serve as a "cancelling condition" to the standard objection in the face of which punishment is said to need justification: namely, that punishment causes suffering.⁶ At the same time, only one of the three features of this intrinsic-good claim—holding offenders accountable—looks substantively similar to the desert claim asserted by retributivists to make retributive justice intrinsically good. Markel's other intrinsic-good claims, promoting equal liberty and democratic self-defense, bear less (or at least less obvious) resemblance to the usual retributivist justification.

We might say then that Markel advances a *political non-consequentialist* justification of punishment that has retributive features, or values a form of retributive justice, but does not fixate on

("Importantly, in a liberal democratic polity, the imposition of state punishment, *P*, upon *A* for doing *B* is intrinsically good regardless of the independent contingent benefits that might accompany *P* from a crime control perspective. . . . Taken together, communicative punishment practices form an *intrinsic good*—it does not rely on contingent crime control benefits or vigilantism prevention or other utilitarian advantages such as the net satisfaction of preferences of particular victims." (footnote omitted)).

I think it is more appropriate and useful to say not that punishment is an intrinsic good, but that punishment has features that are intrinsically good, or that punishment (at least when it satisfies certain conditions) produces an intrinsic good. The hallmark of the *consequentialist retributivist*, in my view, is the claim that *retributive justice* (as distinct from punishment itself) is an intrinsic good. See Cahill, *supra* note 1. Retributive punishment's promotion of that good, in turn, counts as a mark in favor of such punishment, independent of any other benefits or good consequences (such as harm prevention) that might also follow from punishment. This differs from the claim that retributive punishment is a moral *duty* (the classic assertion of deontological retributivism) and also from the claim that retribution has no value whatever (the claim of standard utilitarian consequentialism).

The case for punishment as a mechanism for promoting a good becomes stronger if one further asserts that where punishment is called for, *only* punishment is able to generate that good. In that case, punishment remains a means, but is a necessary means, of promoting the good in question: something inherent in the act of punishing makes it the only appropriate vehicle for realizing this good, in the same way that a "positive" deontological retributivist would see punishment as not only a proper but a *necessary* response to wrongdoing (but would frame that response as satisfying a moral duty rather than as promoting a good).

⁶ See Mitchell N. Berman, *Punishment and Justification*, 118 ETHICS 258, 266–71 (2008).

retribution (in the sense of accountability commensurate with moral desert) as the justification of punishment in the way that typical retributivist accounts do. It might be accurate to describe the theory as retributive, but not retributivist. Markel hopes to distinguish the theory from other retributivist accounts by adding the qualifier “political,” but even that might not fully reflect the normative pluralism I take (approvingly) to undergird Markel’s account.

I am not convinced, however, that the CCR’s derivation from, or connection to, political concerns makes it an instrumentalist theory,⁷ precisely because Markel is trying to offer an account of: (1) what makes punishment of offenders good (and the failure to punish offenders bad) *intrinsically*, not merely as a beneficial side effect; and (2) what makes punishment good *in each instance*, not merely in the aggregate. Markel claims that the values of accountability, equality, and democratic self-defense explain and justify punishment at the retail, not merely the wholesale, level. Each time we punish an offender we vindicate those values, and each time we fail to punish an offender (or do punish a non-offender), we undermine them. Indeed, Markel’s theory might operate mainly at the retail level, as he provides an explanation of why it is proper⁸ that we punish specific criminal acts, but says little about which acts to criminalize in the first place.⁹

Having sorted out the general nature of the theory as I broadly understand it, the next question is: why adopt such a theory? Why should we think that lawbreaking per se, as opposed to wrongdoing or harm,

⁷ Cf. Bowers, *supra* note 4, at 137–39 (“Markel has almost convinced me that his theory is not the quasi-consequentialist approach I once took it to be. Nevertheless, I still detect the occasional instrumental drift to his article. . . . [Markel’s values are] ‘political values,’ and there is nothing intrinsically retributive (or even moral) about political values. . . . [T]he political question is both instrumental and aggregative, while the retributive question is normative and contextualized. That is, a retributive punishment theory is unconcerned with aggregate social consequences.” (footnote omitted)).

⁸ I use this term to avoid expressing any strong position as to whether imposing punishment consistent with the CCR should best be seen as acceptable, or obligatory, or (as Markel most often seems to say) morally demanded but only defeasibly so.

⁹ See the discussion of the limited “fallibility conditions” for criminal law in Markel, *supra* note 2, at 77–81.

provides a suitable basis for punishment?¹⁰ As alluded to above, the CCR provides three answers to that question, claiming that this focus promotes: (1) the accountability of the offender; (2) a regime of equal liberty; and (3) democratic self-defense.¹¹ Those are all good answers, insofar as they are all good things. I am certainly in favor of all of them, and all else equal, I would support a system of punishment that achieved them and oppose a system that undermined them. It seems possible, however, that those three goals or justifications may sometimes be in tension with each other.

To frame things somewhat differently than Markel does, there are two basic kinds of reasons why we might say that lawbreaking as such—rather than moral wrongdoing or social harm—offers a proper basis for punishment. These two categories replicate, in modified form, the two usual grounds that people give for punishment, offering two different claims about why lawbreaking per se justifies punishment. If (and only if) either or both of these claims are true, lawbreaking as such could provide an appropriate basis for punishment.

The first possible claim is that lawbreaking creates a *desert basis* for punishing the offender, i.e., that an individual who unreasonably violates a legal prohibition merits punishment for that reason, with no further explanation or justification necessary. I take the first of the three rationales supporting the CCR—promoting offender accountability—to be making this kind of claim, i.e., that punishment holds offenders accountable for their offenses, and such accountability is in itself a desirable thing.¹² As noted above, this is similar to, but quite distinct from, the standard retributivist claim, which relies on a desert basis of a different kind: namely, that conduct deserves punishment by virtue of being wrongful, rather than unlawful.

¹⁰ Note that “punishment” as used here is distinct from “suffering” or “hardship,” for it refers to a specific *institutional* practice, as discussed in the text below.

¹¹ See Markel, *supra* note 2, at 5–6.

¹² In my view, the claim might be stronger (not only in emphasis but in its analytical force) if it asserted that *only* punishment enables such accountability, see *supra* note 5, but Markel does not take this position. See Dan Markel & Chad Flanders, *Bentham on Stilts: The Bare Relevance of Subjectivity to Retributive Justice*, 98 CAL. L. REV. 907, 939 n.122 (2010).

Importantly, and this is something Markel emphasizes, reliance on lawbreaking rather than wrongdoing as the linchpin of the desert claim makes the CCR an account about the justification of *punishment* specifically, rather than *suffering*.¹³ By contrast, the moral retributivist's account seems to explain why a wrongdoer would deserve to suffer, but does not necessarily explain why the wrongdoer must suffer at the hands of the state via the mechanism of criminal justice. Moral wrongdoing is pre-legal and pre-political; if there were no government or no criminal-justice system to impose punishment, wrongful conduct would still be wrongful, and the wrongdoer would at least arguably still merit the same degree of hardship or suffering by virtue of his wrongdoing. Even where a criminal-justice system exists, it is not clear why that system is the only appropriate agent to impose deserved hardship or suffering on wrongdoers. The CCR account, on the other hand, provides a reason to see the state as an indispensable part of the equation: lawbreaking is an affront against the moral, not just the practical, authority of the liberal democratic state in particular, which thereby merits a response from the state in particular.

An issue arises from the claim that lawbreaking, as such, merits punishment. Normally, when moral retributivists say wrongdoing deserves punishment (or suffering), they are speaking of *culpable* wrongdoing, and they take the view that the degree of deserved punishment tracks the degree of the wrongdoer's culpability. If the CCR is relying on a similar desert claim, I wonder whether that suggests or implies a similar view. In this case, the lawbreaker's degree of deserved punishment should relate in some way to her culpability *as to lawbreaking*—not just as to the conduct being performed, or as to its circumstances or possible results (these would bear on one's moral culpability), but specifically as to the illegality of the conduct. If the unique and significant thing that merits punishment is lawbreaking per se, then it might follow that inadvertent lawbreaking (meaning inadvertent as to the illegality of the offending conduct) generates no deserved punishment. After all, the "offender" in that situation is not culpably, or by choice, disrespecting the state's authority. On the other hand, deliberate lawbreaking—a conscious decision to violate a legal norm—would seem to merit greater punishment on this account, as it flouts the state's authority, directly disrespecting, and on

¹³ See Markel, *supra* note 2, at 21–24.

some level rebelling against, the polity and the people. Perhaps the strongest reading of Markel along these lines would interpret the CCR as holding that every crime amounts to, and is punishable precisely because it amounts to, a low-grade act of treason.¹⁴ Indeed, Markel sometimes speaks this way, referring to crimes as rebellions against the state.¹⁵

Even if not intending to be quite as bold as that, Markel at least describes his account as one that punishes those who somehow *choose* to break the law, which hints that he does think only culpable violations (i.e., culpable *qua* unlawfulness, not just culpable *qua* offense elements) merit punishment.¹⁶ It is unclear whether such culpability might be relevant, if indeed it is relevant at all, only to the acceptability of punishment *vel non*, or whether it also affects the proper amount of punishment, such that offenses involving greater degrees of culpability as to criminality merit greater punishment than otherwise similar offenses.

Take a favorite example of Markel's, the person eating on the subway. Suppose someone boards a subway train with a jumbo-sized bucket of fried chicken and shouts:

I refuse to abide by this dumb law against eating on the subway—even if it is dumb but not illiberal! I will eat where I please, and no legislature will tell me otherwise! To signal my opposition, I will now eat this bucket of chicken! Just watch me, you conformist sheep!

Such a person seems especially culpable, not only as to the act of eating on the subway, but as to the very consideration that seems to animate Markel's theory: the fact that he is violating a duly enacted piece of legislation to which he owes respect. One might think he is thus more

¹⁴ Cf. Stephen P. Garvey, *Are Attempts Like Treason?*, 14 NEW CRIM. L. REV. 173, 176 (2011).

¹⁵ See Markel, *supra* note 2, at 38 (“[The offender] is, in a manner, supporting or implicitly fomenting a rebellion . . .”); *id.* at 40 (referring to “offenders who have wrongly rebelled against the liberal democratic order”); *id.* at 27 (referring to offenses as “low-level rebellions or usurpations of decision-making authority”).

¹⁶ See *e.g.*, *id.* at 79 (referring to offender's “unreasonable flouting, which implicitly manifests a disrespect to the endeavor of democracy”).

deserving of being held accountable, under the CCR, than another citizen who violates the law with reluctance and regret.

This view, of course, generates some curious and perhaps problematic results. First, it suggests that acts of civil disobedience are somehow more worthy of punishment than other kinds of violations. This may be troubling even in terms of Markel's own preferences, for the kinds of citizens who engage in civil disobedience are often especially politically engaged and care deeply about civil society even as they question one of its particular laws. Conversely, if culpable lawbreaking (as opposed to culpable wrongdoing) forms the desert basis for punishment, the absence of culpability suggests the absence of desert, so we potentially need to adopt a far more expansive defense for (reasonable) mistakes of law or ignorance of law. Markel says such a defense would be fine by him,¹⁷ but he may need to commit himself to a stronger position; such a defense, and a rather expansive one at that, might be necessarily entailed by his theory.

Perhaps Markel takes the view that the responsibilities of citizenship in a liberal democracy include some obligation to know the law, and we can properly hold people accountable for their failure to know it. I tend to think that would be somewhat unfair, at least in the world of modern criminal codes, which are extremely complicated and cover all manner of conduct.¹⁸ It strikes me as more appropriate to place the obligation on the legislature to pass laws that are knowable, not on the citizen to know the law. But, where the legislature blunders, must the unknowing citizens pay the price?

Markel might avoid this issue of culpability altogether by saying that what is important, and even intrinsically good, about criminal punishment relates less to the desert of the individual offender than to its value for society as a whole. Punishment serves as a way for the community to knit the social fabric more tightly by expressing, promoting, and strengthening its shared values. He points specifically to equal liberty and democratic self-defense. I agree that those values are important, but

¹⁷ See *id.* at 39 (“I am sympathetic to a reasonable ignorance of the law excuse.”).

¹⁸ See generally DOUGLAS HUSAK, *OVERCRIMINALIZATION: THE LIMITS OF THE CRIMINAL LAW* (2008); Paul H. Robinson & Michael T. Cahill, *The Accelerating Degradation of American Criminal Codes*, 56 *HASTINGS L.J.* 633 (2004) [hereinafter Robinson & Cahill, *Accelerating Degradation*].

we can promote them, even via punishment, whether the specific offender appreciates our doing so or not. We as a society can communicate to each other our shared values by imposing punishment on one who violates them, whether or not we are communicating anything in particular to the offender by doing so. Indeed, why should we not care more about communicating with each other than with the offender, who has made clear by her offense that she does not respect our values?

Markel resists that conclusion—he is quite interested in the communicative power of punishment *vis-à-vis* offenders specifically, rather than its expressive power more broadly—but it is not obvious why communicating to the offender is more important than communicating to anyone else.¹⁹ Why not other citizens, or victims, or even other offenders or would-be offenders who also “hear” the message we send by punishing this offender? Punishing even recalcitrant (or incompetent) offenders may serve the goals of the CCR from the perspective of other citizens, who see it as vindicating their sense of justice, making clear that nobody is above the law, and protecting the polity and its members.²⁰

¹⁹ See Markel, *supra* note 2, at 26 (describing the offender as “the person most in need of hearing these messages”).

²⁰ Markel seems to take the *communicative*, relational aspect of punishment (its sending a message to the offender) to be crucial to the claim about its intrinsic goodness, whereas its *expressive* aspect (sending a message to others) must be only instrumentally good. I am not sure that is so.

First, I think it is useful to distinguish the claim that punishment is intrinsically good from the claim that punishment advances or creates one or more intrinsic goods. See *supra* note 5. I take Markel to claim that accountability, equality, and democratic self-defense are intrinsic goods promoted by punishment, at least in the right cases.

I am not sure, however, that only communicative punishment promotes those goods, though I concede it may promote them more, or better, than non-communicative punishment. Rather, I think Markel’s position about the critical importance of communication versus mere expression might be rooted in the notion of *duty*, which is different from the notion of goodness.

If the expressive benefits of punishment are achieved only by imposing hardship on the offender, then the offender is being used instrumentally, in the sense that he is being treated as a means to some end whose benefits he does not obtain. We might say that such punishment violates some duty we owe the offender, and that it is bad or even morally forbidden on that basis, but that is not the same claim as denying that the punishment also has features that are intrinsically good. If retributive justice, or distributive justice, or beauty is an intrinsic good, I would think it remains so irrespective of the means by which such a good is produced. We can oppose forcing a violinist to play

In addition to Markel's general understanding of the basis of punishment, I would like to briefly interrogate his understanding of the political institutions charged with imposing punishment. One contribution of the CCR account, which Markel recognizes and rightly identifies as a significant feature, is that it seeks to encompass not only criminalization but also enforcement issues. Specifically, it seeks to reassure law enforcers that it can be acceptable for them to enforce legal norms that do not reflect any moral wrong.

Indeed, such enforcement might be not only acceptable but presumptively good.²¹ Some questions arise as to the strength of the presumption and how it can be overcome. Markel remains interested in authorizing some discretion on the part of prosecutors, judges, and juries—that is, the people charged with implementing the law. But such discretion might involve: (1) discretion to assess the *morality* of the law (or the relative immorality of a particular offender); or (2) discretion to balance other principled considerations or goals, such as crime prevention, against the law's morality; or only (3) discretion based on practical considerations such as resource constraints, evidentiary limitations, and the like. Markel implies that, as to “dumb but not illiberal” laws, only (2) and (3) are proper forms of enforcement discretion. I, however, am not convinced that (1) should not also be within the range of enforcers' discretion, at least at times, or even how (2) or (3) could be effectuated without some resort to (1). If prosecutors are expected to exercise discretion to make tradeoffs necessitated by limited resources, would it not be acceptable (and perhaps best) for them to make the relevant and necessary tradeoffs in light of the relative immorality of the offenses, or the offenders? And quite apart from such tradeoffs, are enforcers expected

a sonata against her will without denying the beauty of the coerced performance if it does occur. Similarly, one might recognize that punishment, in specific cases or across the board, will generate various bad consequences, or even breach moral obligations—and even take those consequences or breaches to weigh decisively against imposing punishment—without denying that it also has good consequences.

Perhaps this line of thinking merely betrays my own consequentialist tendencies as against Markel's commitment to moral duties, in which case it merely talks past him.

²¹ See Markel, *supra* note 2, at 90–92 (agents “may reasonably enforce” dumb law—i.e., they have “a *pro tanto* reason” to enforce it); *id.* at 97 (“[E]xecutive or judicial officials have a *pro tanto* reason to enforce and punish violations of criminal laws except when the laws are spectacularly dumb or illiberal.”).

to prosecute infractions that clearly violate the law but are equally clearly *de minimis* as a moral matter, from the viewpoint of any reasonable person?

These issues are especially noteworthy given that such reasonable persons may, and hopefully do, include the legislators who enacted the law to be enforced. In a world such as the one we inhabit, where no general rule can perfectly capture all and only “bad” behavior (however one defines “badness”), legislative enactments should not be, and neither citizens nor legislative bodies should want them to be, the last word as to who and what should be punished. Even if legislators were capable of writing laws that capture as best as possible our beliefs about the exact scope of criminal behavior, legislators could (quite reasonably) choose to write laws based on different considerations. They might knowingly enact laws that are overbroad on their face, with the expectation, and even the hope, that someone else—a prosecutor, judge, or jury—will ensure that no punishment is imposed on conduct that is legally improper yet morally blameless. The criminal law’s content, moral or otherwise, need not be dictated *ex ante* by legislative fiat, but could arise from a dialogue between the various relevant institutional players (legislature, police, prosecutors, judges, juries, etc.). Whether or not such a legal system would be the best (or only genuinely possible) one, that system at least seems consistent with a sensible account of liberal democracy.

Moreover, quite apart from political theory, as a descriptive matter, the existing politics of criminal legislation and enforcement certainly seem consistent with a story of effective, and deliberate, delegation of moral discretion (one might say more strongly, of *de facto* criminalization authority) by legislatures to enforcement agents, judges, and others.²² If such delegation is either actually extant and forms part of legislatures’ understanding of their own practical role, or if it is consistent with a

²² See e.g., Michael T. Cahill, *Punishment Decisions at Conviction: Recognizing the Jury as Fault-Finder*, 2005 U. CHI. LEGAL F. 91, 112 (“Offense definitions sweep too broadly, and penalties reach too high, because legislators expect prosecutors to weed out the excesses via non-prosecution or plea-bargaining downward—or expect that the prosecutors, rather than the legislators, will take the blame for any failure to do so.”); Robinson & Cahill, *Accelerating Degradation*, *supra* note 18; Paul H. Robinson & Michael T. Cahill, *Can a Model Penal Code Second Save the States from Themselves?*, 1 OHIO ST. J. CRIM. L. 169, 173–75 (2003) (describing the political pressures on each of the “players in the criminal justice process”).

normatively acceptable scheme of liberal governance, then it seems feasible (or even necessary) to recognize that robust exercise of moral judgment can be part of the institutional role of enforcement officials as well as legislatures. Indeed, Markel makes clear elsewhere that he acknowledges the need for discretion, but is simply troubled by *unreviewable* discretion.²³ In that case, the real issue is less the relation between the strictures of written law and the consciences of the officials who enforce it than the relation between the various institutional agents who collectively bear and share responsibility for the law and its enforcement—as is entirely appropriate.

²³ See Dan Markel, *Against Mercy*, 88 MINN. L. REV. 1421, 1460 (2004).