MARKEL AND ABOLITION

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PRELUDE

Out, out, brief candle![1]

I just finished reading Gabrielle Zevin's recent novel Tomorrow, and Tomorrow, and Tomorrow,[2] *whose title, of course, is taken from Macbeth's soliloquy about the absurdity, and brevity, of life, with "all our yesterdays" merely lighting "[t]he way to dusty death."*[3]

(Spoiler alert! If you don't want to learn important plot points from that novel, skip ahead to the "Introduction.")

One of the book's main characters, Marx, is a charismatic young man who attends Harvard in the 1990s. Though bright and talented himself, his main gifts prove to be the abilities to start and maintain relationships, to help others forge and sustain personal and professional connections, to do the hard work necessary to build a work community and manage its activities, and to understand and draw out what's best about someone else's idea, supporting that person in making their own work better. For a time, Marx's life and career are full of good fortune and success, which he has the wisdom to appreciate and not take for granted. But then, suddenly and shockingly, just as he has reached the full flower of mature adulthood with all promise of sustained accomplishment and happiness, he dies at the hands of a gunman.

Both the novel and its characters draw explicit parallels between Marx and the Trojan warrior Hector, who also (though this point of commonality only emerges later) was killed in the prime of life. Hector's funeral provides the final scene of the Iliad, notwithstanding that its epic story is generally told from the Greeks' perspective, and that the war it depicts is still raging at that moment. The poem ends on a somber note, describing the grief and burdens of those Hector leaves behind, including the young son who will not know him and the parents who have suffered one of life's gravest tragedies, that of outliving one's own child.[4]

In Zevin's story, Marx considers the ending to be the greatest part of the Iliad, admiring that its rather abrupt conclusion identifies Hector

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1. WILLIAM SHAKESPEARE, THE TRAGEDY OF MACBETH act 5, sc. 5, l. 26, https://www.folger.edu/ explore/shakespeares-works/macbeth/read/5/5/ [https://perma.cc/5B4X-MXTG].

2. GABRIELLE ZEVIN, TOMORROW, AND TOMORROW, AND TOMORROW (Alfred A. Knopf 2022).

3. SHAKESPEARE, *supra* note 1, at l. 22, 25-26.

4. *See* HOMER, THE ILIAD 607-10 (Emily Wilson trans., 2023).

not as a great or accomplished warrior, but as a "tamer of horses." As Marx puts it, " 'Tamer of horses' is an honest profession. The lines mean that one doesn't have to be a god or a king for your life to have meaning."[5]

Such are the stories I happened to encounter just before undertaking this brief essay honoring my friend Dan.[6]

INTRODUCTION

Dan Markel was taken from us in 2014, just as the contemporary abolitionist movement in criminal-law scholarship was building a head of steam, or was a rising wave yet to crest, or some other such metaphor.[7] When I was asked to participate in this symposium in his honor, the topic that occurred to me was to explore what he might have made of that movement, because I thought the answer might be more complex than it would initially seem. Of course, Markel was an avowed retributivist, much of whose intellectual project was devoted to developing a particular account of the (in his view, sound and supportable) basis of criminal law. One would not surmise that the author of an article entitled *Against Mercy*[8] would have much enthusiasm about the idea of abolition. Yet Markel's account also (as he recognized) offers arguments for questioning the legitimacy of the criminal law when the political preconditions stipulated by his theory are in fact absent.[9]

I don't actually think it's plausible to claim that Markel's views would have developed in the direction of anything like abolitionism, were he still alive. In any case, I doubt it's especially worthwhile to speculate about the potential views of someone who's no longer here. So rather than trying to carry Markel's ideas forward, I propose to consider how abolitionism might tie back to those ideas, specifically about the relevance of broader political considerations and context to the justification (or not) of criminal law. Instead of contemplating Markel's

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5. ZEVIN, *supra* note 2, at 258.

6. Here and in the conclusion, which offer more personal reflections, I refer to him as Dan, as I did in life (though many others called him Danny). In the body of the essay, which considers his scholarly work, I will refer to him as Markel, as I think befits such a discussion.

7. For example, Allegra McLeod's pathbreaking article elaborating a thorough and comprehensive argument for prison abolition was published in 2015. Allegra M. McLeod, *Prison Abolition and Grounded Justice*, 62 UCLA L. REV. 1156 (2015).

8. Dan Markel, *Against Mercy*, 88 MINN. L. REV. 1421 (2004).

9. *See infra* notes 23-24 and accompanying text.

potential thoughts on abolitionism, I hope instead to ask in this brief essay: to what extent might abolitionists be described as Markellians, in their approach if not their conclusions?

Part I offers a very brief description of Markel's theory, which he described as the "confrontational conception of retribution" (CCR). That theory offers a justification of criminal law as promulgated within—but importantly, *only* within—political systems that are adequately democratic, egalitarian, and respectful of human rights and dignity. Part II considers the extent to which the current abolitionist position is rooted in an argument that the contemporary American sociopolitical context fails to satisfy the CCR's criteria for political legitimacy, and thus for the legitimacy of a system of criminal justice (I'll use this term and abbreviate it to "CJ," while recognizing that using the word "justice" is a contested descriptor in this context[10]). To the extent this is so, abolitionists might be said to share Markel's perspective regarding *how* a CJ system might be justified, while disagreeing about *whether* (or the extent to which) our current system meets that standard.

I. MARKEL'S ACCOUNT

Markel began to elaborate the CCR in an article published while he was still a law student,[11] and continued to flesh it out in later works addressing particular topics like the death penalty[12] and shaming penalties,[13] ultimately writing one piece generally setting out the CCR[14] and another explaining and justifying at (considerable) length how the CCR's political account contrasts with moral accounts of retributivism.[15] The CCR offers a political theory of retribution,[16] positing that a valid retributive system of criminal punishment is supported by

10. *See generally* Benjamin Levin, *After the Criminal Justice System*, 98 WASH. L. REV. 899 (2023) (discussing debate about the term "criminal justice system" and the relative merits of alternative terms).

11. Dan Markel, *The Justice of Amnesty? Towards a Theory of Retributivism in Recovering States*, 49 U. TORONTO L.J. 389, 392 (1999) ("[T]he constructive argument I make outlines the contours of a theory that might be called the 'confrontational' conception of retributive justice."); *id.* at 421-42 (articulating theory).

12. *See* Dan Markel, *State, Be Not Proud: A Retributivist Defense of the Commutation of Death Row and the Abolition of the Death Penalty*, 40 HARV. C.R.-C.L. L. REV. 407 (2005).

13. *See* Dan Markel, *Are Shaming Punishments Beautifully Retributive? Retributivism and the Implications for the Alternative Sanctions Debate*, 54 VAND. L. REV. 2157, 2183-91 (2001).

14. Dan Markel, *What Might Retributive Justice Be? An Argument for the Confrontational Conception of Retributivism*, *in* RETRIBUTIVISM: ESSAYS ON THEORY AND POLICY 49 (Mark D. White ed., 2011).

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

16. *See* Markel, *supra* note 14, at 49 ("This particular conception is political, not comprehensive, and thus is interested in defending the claim that *state* punishment is, as a general matter, warranted as a response to *legal* wrongdoing.").

political concerns or preconditions both institutionally (i.e., the broader political system must itself be legitimate for the criminal prohibitions to be so[17]) and substantively (i.e., part of the reason the government can enact criminal laws in particular is out of a concern for what Dan calls "democratic self-defense" or the preservation of civil order and the state itself[18]). On this view, in contrast with most retributivist theories, the basis of punishment is not *moral* wrongdoing but the existence of a *legal* prohibition that, importantly, emerges from a sufficiently democratic political process and exists within a system that is sufficiently respectful of fundamental norms of equality and liberty. Vis-à-vis the CCR's relation to abolitionism, it should be acknowledged that Markel's theory has the effect (and perhaps purpose?) of justifying, or at least allowing for, an *expanded* scope of criminal law relative to moral retributivism, insofar as he explicitly defends the ability of the state to enact, and enforce, what he calls "dumb but not illiberal" (DBNI) criminal laws prohibiting conduct that involves no actual or even purported moral wrong.[19]

This political-retributivism account has received its share of criticism, both in terms of its political underpinnings (claiming that what it means to be "sufficiently" democratic or liberal, as that modifier was used in the previous paragraph, is defined either sketchily or with a normative thumb on the scale to arrive at whatever conclusions Markel would favor[20]) and its justificatory payoff (that it's an undesirable form of retributivism if, indeed, it is one at all[21]). Markel offered his own rejoinders to the critiques.[22] But the point here isn't to accept or reject the merits of the theory so much as to suggest that its recognition of criminal justice as embedded in a broader social and political

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17. *See* Markel, *supra* note 15, at 7-8 (noting as "restrictive conditions" for the CCR that it justifies punishment only (1) within liberal democracies and (2) for offenses consistent with liberal values).

18. *See* Markel, *supra* note 14, at 54-57 (describing democratic self-defense as part of CCR's basis).

19. *See* Markel, *supra* note 15, at 14-16. By contrast, moral retributivists would oppose even "smart" (i.e., efficacious and well-tailored) offenses that prohibit non-immoral conduct for the sake of harm or risk reduction. *See id.* at 12-14.

20. *See, e.g.*, Josh Bowers, *Blame by Proxy: Political Retributivism & Its Problems, A Response to Dan Markel*, 1 VA. J. CRIM. L. 135, 137 (2012) ("[Markel] ends up drawing arbitrary and *ad hoc* lines to mark certain substantive conduct as beyond the capacity of any liberal democracy to criminalize. The reader is, thus, left to wonder whether the substantive boundaries represent anything more than Markel's own conception of blameless conduct . . . .").

21. *See, e.g.*, Bowers, *supra* note 20, at 137-38 ("Markel discusses ways in which his theory *promotes* democratic self-defense and equal liberty under the law. Undoubtedly, the promotion of these values is a worthy (even critical) societal goal, but, significantly, these values are not retributive values. Rather, they are, as Markel concedes, 'political values,' and there is nothing intrinsically retributive (or even moral) about political values.").

22. *See* Markel, *supra* note 15, at 125-29; *see generally* Dan Markel, *Making Punishment Safe for Democracy: A Reply to Professors Bowers, Cahill & Duff*, 1 VA. J. CRIM. L. 205 (2012).

environment, and its insistence that the broader political structures must be legitimate for the criminal law to be so, may resonate with the underpinnings of current abolitionist arguments, even if Markel himself would not use those premises to arrive at the abolitionist conclusion.

In suggesting such a resonance, it may be worthwhile to offer at some length Markel's own description of what he calls the "restrictive conditions" that must be satisfied for a state's exercise of criminalization authority to be (at least presumptively) justified:

> The first restrictive condition is that the account focuses on justifying state punishment within a *liberal democracy*. By that . . . I simply mean a regime marked by the presence of free and fair elections, reasonably powerful legislatures, independent judiciaries, and a legal and political culture that respects the fundamental individual rights of procedural due process, free speech, free association and petition, free exercise of religion, freedom of movement, substantial privacy, equal protection, and the right to a substantial degree of sexual and reproductive autonomy. By contrast, what I will call a *bad regime* lacks some or all of these features having to do with structure and rights. But the badness of a regime is not binary; rather, it obviously admits of differences by degree.
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> The *second restrictive condition* refers to the fact that this justification covers punishment only for violations of laws *consistent* with liberal democratic values. Thus, laws referring to suspect classes or infringing fundamental rights must survive a higher standard of justification than laws that do not.[23]

Markel later notes an example of how illiberality might infect even a state that would generally, or previously, have counted as a liberal democracy:

> One might reasonably wonder, however, when a regime becomes too illiberal as to warrant any deference to its otherwise permissibly DBNI laws. For instance, . . . if I were a citizen of a pervasively racist state, do I owe my conformity to its otherwise permissibly DBNI laws? I think the answer is no . . .: the polity in those situations lacks moral standing and thus is estopped from holding the wrongdoer to account for those kinds of crimes because it has not satisfied the liberal preconditions permitting DBNI laws. (That said, it is a painfully difficult question regarding whether the bad regime has standing to call to account those who [violate] incontrovertibly good criminal laws.)
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> Still we have a few line drawing problems worth our attention. It is clear that certain intolerant laws can catapult a regime into the illiberal territory (exclusions based, for example, on race, religion or gender). The problem is that we do not always know (let alone agree upon) which bad laws push the government over the line. . . . [T]he problem

23. Markel, *supra* note 15, at 7-8.

> is not that the answer is difficult because it is vague; it is difficult because we do not always know the moral truth generally, and thus, we can't be sure when exactly a particular regime is sufficiently liberal so that it has moral authority to generate new moral obligations. Notwithstanding what I just said, and despite its many moral failures over time, I am sheepish about saying that today the United States (whether at the national or state level) cannot count as a sufficiently successful liberal democracy to create new moral obligations.[24]

So Markel stops short of claiming either that the entire criminal law (as opposed to just "dumb but not illiberal" crimes that punish morally trivial conduct) is invalid in a "bad regime," or that American jurisdictions might be such "bad regimes."

II. THE ABOLITIONIST ACCOUNT

The contemporary abolitionist movement does not stop short of making those claims. Indeed, this essay means to suggest that the abolitionist account makes *precisely* those claims, namely, that American criminal-justice systems exist within a social and political framework that is fundamentally morally invalid ("illiberal" for Markel), specifically due to its racism, classism, and other forms of inequality and bias, and that those systems are themselves invalid as a reflection and manifestation (indeed, the strongest, harshest, and worst manifestation) of that moral rot.[25] In that way and to that extent, abolitionists are using a version of Markel's criteria for justification, even though they derive a different conclusion about the satisfaction of those criteria by the American system(s).

A strong version of that thesis might assert that those claims are in fact the *core* claims of contemporary abolitionism—its central pillar, rather than just one of several bases on which it rests. If so, then, like Markel, contemporary abolitionism would in its essence be offering a political or contingent account of criminal law, rather than a generalized punishment theory that makes substantive claims about how or when punishment is normatively acceptable in the abstract. That is, the abolitionist account might accept that punishment could be justified or effective in other times or places—or simply take no stand on its justification in the abstract—but deny that it is legitimate here or

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24. *Id.* at 127-28.

25. *See, e.g.*, Dorothy E. Roberts, *Foreword: Abolition Constitutionalism*, 133 HARV. L. REV. 1, 4-5 (2019) ("Key aspects of carceral law enforcement—police, prisons, and the death penalty—can be traced back to slavery and the white supremacist regime that replaced slavery after white terror nullified Reconstruction. Criminal punishment has been instrumental in reinstating the subjugated status of black people and preserving a racial capitalist power structure. Many individuals have therefore concluded that the answer to persistent injustice in criminal law enforcement is not reform; it is prison abolition."); *id.* at 14 ("[P]risons are part of a larger system of carceral punishment that legitimizes state violence against the nation's most disempowered people to maintain a racial capitalist order for the benefit of a wealthy white elite.").

now, given our society's fundamental and ongoing racism and inequality (among other things).

That strong claim—asserting abolitionist accounts to be either *fundamentally* or *exclusively* political and contingent—might be too strong. Different abolitionists might come to their position via different avenues and for different reasons, such that no single account provides *the* basis, or even the main basis, for the abolitionist position.[26] The balance of this essay seeks both to indicate that "Markellian" political arguments are a meaningful aspect of abolitionist thought, and to situate those arguments among other possible kinds of claims or positions that might support an abolitionist view (some of which might be mutually exclusive, others not).

Before proceeding further, it may be worthwhile to note a point of distinction between Markel's orientation and that of many, perhaps most, discussions of abolition. The CCR primarily seeks to justify, and describe the proper parameters of, the state's exercise of its ex ante criminalization authority, rather than its ex post enforcement authority. Markel acknowledges at various points that his theory has little to say about the scope of enforcement or the obligations of enforcers;[27] what he does say offers arguments in favor of enforcing criminal laws (even "dumb but not illiberal" ones).[28] Abolitionist accounts, by contrast, typically focus on the state institutions that enforce the law and impose punishment; indeed, they typically characterize themselves

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26. *See, e.g.*, Angela Y. Davis & Dylan Rodriguez, *The Challenge of Prison Abolition: A Conversation*, SOC. JUST. Fall 2000, at 212, 213-14 ("I would hesitate to characterize the contemporary prison abolition movement as a homogenous and united international effort . . . ."); Rafi Reznik, *Retributive Abolitionism*, 24 BERKELEY J. CRIM. L. 123, 127 (2019) ("The prison abolition movement is complex and multi-faceted, resists theoretical uniformity, and is irreducible to a single reproach or demand. To abolish prisons is seemingly the primary goal, but it can be articulated as various, conflicting ends and processes that harbor strategic differences.").

27. He notes several times that his theory allows for enforcement agents such as prosecutors to retain significant discretion, and he says little about how they should use (or concerns that they might abuse) that discretion, except that they may not adopt "an enforcement scheme that is utterly at odds with the regime of equal liberty that these officials are obligated to secure. So, if the enforcement policy is to arrest only black men who are guilty of [an] offense, then at that point, the police officer bears moral responsibility for what he does." Markel, *supra* note 15, at 96-97; *see id.* at 16 ("[T]he argument summarized above does not preclude the desirability of discretionary sites of enforcement . . . ."); *id.* at 94 ("[M]y account would not strip prosecutors, for example, of their discretion with respect to setting enforcement priorities and assessing evidentiary challenges."); *id.* at 125 ("[T]he argument here does not call for the elimination of the multitude of discretionary sites where officials must carefully weigh the decision to seek or impose punishment. This is precisely because even carefully crafted laws can have gaps, conflicts, or ambiguities, and these problems require judgment applied with sensitivity to whether a person is actually guilty or whether a class of offenders warrants consideration as an enforcement priority.").

28. *See generally* Markel, *supra* note 15, at 93-102 (defending position that "officials in liberal democracies have a *pro tanto* reason," though not an *obligation,* "to enforce permissibly DBNI laws"). Though enforcers always have good reason *to* enforce the law, Markel also recognizes that they have discretion *not* to do so, as discussed *supra* note 27.

not as efforts to abolish criminal *law* per se, but rather as favoring the abolition of criminal institutions, usually the police[29] or prisons.[30] In that way, Markel's theory and abolitionist perspectives are orthogonal to each other.[31] Even so, it seems to me that one can fruitfully explore the extent to which the underlying bases of those views resonate.

To engage in this project of identifying abolitionists' "Markellian" lines of argument and situating them among other lines of argument, it makes sense at the outset to put on the table the various kinds of arguments available. I can think of three kinds of general claims that (singly, or in combination) might provide a basis for an abolitionist view; each can in turn be expressed in (at least) two ways, as noted below:

1. State-imposed punishment is illegitimate,[32] always and everywhere.
   A. This is the case because state punishment is inherently improper or immoral as a matter of principle.
   B. This is the case because state punishment serves no purpose (or fails to serve its ostensible purposes) in fact, even if it might have justification(s) in principle—i.e., even if not inherently wrongful (as 1.A contends), it is pointless, unnecessary, or inferior to some other option(s) for achieving its end.
2. State-imposed punishment is illegitimate because it is imposed by or within a political system that is itself illegitimate.
   A. This is true of the system as a *structural* matter.
   B. This is true of the system based on its historical, social, and/or economic *context*.
3. State-imposed punishment is illegitimate because, though the political system generally may be legitimate, the CJ system itself is not.
   A. This is the case because the CJ system, in some or all aspects, is fundamentally flawed or unfair.
   B. This is the case because, and to the extent that, punishment is imposed excessively or using inappropriate means.

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29. *See generally* Amna A. Akbar, *An Abolitionist Horizon for (Police) Reform*, 108 CALIF. L. REV. 1781, 1788 (2020).

30. *See generally* McLeod, *supra* note 7.

31. Of course, to the extent Markel is offering reasons to enforce the law while abolitionists are offering reasons to reduce or eliminate enforcement, their views are in fact contrary to one another.

32. The second version of this claim, 1.B, says that punishment is literally "unjustified": there is no justification for it or sound reason to do it. The first version, 1.A, is even stronger, contending that there are compelling affirmative reasons *not* to allow a system of punishment.

I have ordered these claims or critiques based on how general and fundamental I take them to be in undermining the *idea* of a system of punishment, as opposed to the context in which punishment is undertaken.

Only claim 1.A is truly categorical, opposing the very idea of state punishment and asserting that it cannot be carried out in a morally acceptable manner. Some theorists (frequently moral philosophers rather than legal scholars) adopt this position or something close to it, arguing that punishment is itself wrongful in all cases, or cannot be justified for any *possible* case[33]—because it imposes suffering or hardship for no valid reason—or that any *system* of punishment is unacceptable if it involves any possible potential for error (including, on some accounts, *epistemic* error about whether we have definitive access to moral truth, which is a type of error we could never eliminate even in the abstract, unlike the potential for factual error in specific cases).[34]

Some legal scholars (not all of them abolitionists) advance arguments of this kind vis-à-vis one of the two "classic" purposes of punishment,[35] retribution, expressing concerns that the concept is empty[36] or, even if it has content, could not support the expenditure of resources in its pursuit, given the opportunity cost of devoting such resources to retributive justice instead of various other social goals that should be given priority over that one.[37] (Indeed, some of Markel's work,[38] and

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33. *See, e.g.*, DEIRDRE GOLASH, THE CASE AGAINST PUNISHMENT: RETRIBUTION, CRIME PREVENTION, AND THE LAW (N.Y.U. Press 2005); MICHAEL J. ZIMMERMAN, THE IMMORALITY OF PUNISHMENT (Broadview Press 2011); Greg Roebuck & David Wood, *A Retributive Argument Against Punishment*, 5 CRIM. L. & PHIL. 73 (2011).

34. *See, e.g.*, Nathan Hanna, *Against Legal Punishment*, *in* THE PALGRAVE HANDBOOK ON THE PHILOSOPHY OF PUNISHMENT 559-78 (Matthew C. Altman ed., 2023); *cf.* Adam J. Kolber, *Punishment and Moral Risk*, 2018 U. ILL. L. REV. 487 (2018) (advancing concerns about risk of error as major issues for retributive accounts of criminal law in particular).

35. For discussion of various general purposes or considerations that might be offered in favor of or against punishment, see generally Michael T. Cahill, *Punishment Pluralism*, *in* RETRIBUTIVISM: ESSAYS ON THEORY AND POLICY (Mark D. White ed., 2011).

36. *See, e.g.*, Alice Ristroph, *Desert, Democracy, and Sentencing Reform*, 96 J. CRIM. L & CRIMINOLOGY 1293 (2006) (expressing skepticism about content of the concept of "desert").

37. *Cf.* R. A. Duff, *Penal Communications: Recent Work in the Philosophy of Punishment*, 20 CRIME & JUST. 1, 17 (1996) (noting that "ensur[ing] that the social benefits of punishment outweigh its costs" is "something that retributivism notoriously cannot offer"); *id.* at 27-28 ("[R]etributivists . . . surely cannot justify a system of punishment by arguing only that it does justice, or secures some nonconsequential good . . . . Given a system of criminal justice, we have to decide how many resources to devote to [it] . . . [and] such decisions . . . at least involve some weighing of goods or duties against each other (the good of doing or the duty to do justice by detecting and punishing crime against such other goods or duties as the provision of health care, education, social welfare, etc.) . . . .").

38. *See, e.g.*, Markel, *supra* note 14, at 60 ("[B]ecause the CCR is less concerned with *maximizing* 'just deserts' above all other social priorities than it is with developing the claim for retributive punishment's internal intelligibility, it is better able than prior retributivist accounts to pay heed to the important costs and consequences of institutions of retributive justice. Punishment realizes many goods—while also, of course, causing some bads—but

mine,[39] among others,[40] seeks to explain whether and how the abstract and idealized claims of retributive justice[41] apply in a real world of resource constraints.) Some abolitionist works also include such opportunity-cost arguments about the indefensibility of spending on criminal justice relative to other worthwhile things.[42]

It is less common to see arguments that the other classic purpose, harm prevention (often called the "utilitarian" rationale for punishment), has no merit even in the abstract.[43] Broadside critiques of the preventive (or "utilitarian") rationale are more typically along the lines of claim 1.B, which declares state punishment to be pointless (or perhaps even counterproductive) on its own terms. Here the argument is that the system does not prevent crime; or perhaps even increases crime; or at the very least, any possible crime reduction comes at a cost (financial or human) that exceeds its benefit. Unlike claim 1.A, this claim is not absolute, inasmuch as it relies on underlying empirical and contingent claims about the (in)efficacy of punishment as currently constituted; it may be possible that the system could be changed, or new technologies developed, that would enable at least some measure of effective harm reduction through punishment. Here too, abolitionists (and others) offer arguments about the relative (un)desirability of spending on criminal justice rather than other

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these goods (fidelity to accountability, equality, and so forth) are not always at every moment the most important goods that a polity should pursue.").

39. *See generally* Michael T. Cahill, *Retributive Justice in the Real World*, 85 WASH. U. L. REV. 815 (2007).

40. *See, e.g.*, DOUGLAS HUSAK, *Why Punish the Deserving?*, *in* THE PHILOSOPHY OF CRIMINAL LAW: SELECTED ESSAYS 339 (Oxford Univ. Press 2010); Douglas Husak, *Retributivism in Extremis*, 32 L. & PHIL. 3 (2013).

41. *Cf.* Allegra M. McLeod, *Envisioning Abolitionist Democracy*, 132 HARV. L. REV. 1613, 1637-38 (2019) ("Conventional accounts of legal justice typically neglect the overwhelming discontinuity between the ideals of justice proclaimed and their deeply inadequate, often violent, racialized, and ultimately destructive realization. . . . Various justifications for criminal arrest, criminal prosecution, and criminal punishment vie for dominance in legal theory, with some embracing retributivism, others advocating deterrence-based rationales, and still others focused on the community's expression of shared norms. But the realities of the criminal legal process are starkly at odds with these theoretical justifications.").

42. *Cf.* McLeod, *supra* note 7, at 1205 ("There is compelling evidence that the opportunity costs of allocating public resources to incarceration are immense."); *id.* at 1225-26 (calling for "justice reinvestment" programs that would reallocate public resources away from the CJ system to pursue more robust social and economic goals); Akbar, *supra* note 29, at 1837-38 (noting that the CJ system consumes "upwards of $100 billion in public money that might otherwise transform housing, schools, and other forms of social programs").

43. Indeed, abolitionists sometimes describe themselves as favoring a "harm reduction" approach. *See* Jamelia Morgan, *Responding to Abolition Anxieties: A Roadmap for Legal Analysis*, 120 MICH. L. REV. 1199, 1214 (2022). This can be seen as broadly utilitarian, though perhaps seeking to broaden the perspective from the CJ system's typical focus on *crime* prevention to a more general recognition of other harms and costs as well (which any proper and thoroughgoing utilitarian should *want* to incorporate into a sound decisionmaking calculus).

possible social and political projects and purposes, in this case not only as a matter of opportunity cost but also as a matter of cost-effectiveness. That is, money spent on education or job training or any of a number of anti-poverty programs would not only advance those direct goals, but would also have a salutary effect on crime rates, perhaps comparable to or even greater than if the same money were spent on police, prisons, or other components of the CJ system.[44]

Apart from these considerations of competing or alternative options for the allocation of resources, abolitionists certainly rely with some regularity on 1.B-type arguments that the CJ system (or incarceration specifically) simply fails to achieve incapacitation, rehabilitation, or deterrence, or is indeed crimogenic, and thus not only fails to be cost-effective, but to be effective *at all* on its own terms.[45] As noted, such arguments are not absolute and may not even be comprehensive in rejecting carceral practices. For example, one subject that might be considered a matter of debate within the abolitionist community is whether and to what extent there will always exist some residual group (commonly called "the dangerous few") that will remain a proper and perhaps necessary subject of incapacitative confinement in an otherwise incarceration-free society.[46]

Claims 2.A and, especially, 2.B are the ones that most clearly share Markel's political lens regarding the justification of punishment. Claim 2.A impugns the legitimacy of punishment in what Markel would call "bad" or "wicked" regimes: those whose very structure is autocratic, authoritarian, or otherwise illiberal.[47] Markel himself expressed some ambivalence about whether such regimes could stake

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44. *See, e.g.*, McLeod, *supra* note 7, at 1163 ("A prison abolitionist framework entails, more specifically, developing and implementing other positive substitutive social projects, institutions, and conceptions of regulating our collective social lives and redressing shared problems—interventions that might over the longer term render imprisonment and criminal law enforcement peripheral to ensuring relative peace and security."); *id.* at 1165 ("[P]reventive justice, in its overlooked iterations—outside the criminal law context—may begin to illuminate how it might be possible to rely radically less on criminal law enforcement to serve the ends of security and collective peace.").

45. *See, e.g.*, *id.* at 1159 ("Apart from the inhumanity of incarceration, there is good reason to doubt the efficacy of incarceration and prison-backed policing as means of managing the complex social problems they are tasked with addressing, whether interpersonal violence, addiction, mental illness, or sexual abuse."); *see generally id.* at 1199-1207 (analyzing the efficacy, or not, of incarceration).

46. *See generally* Thomas Ward Frampton, *The Dangerous Few: Taking Seriously Prison Abolition and Its Skeptics*, 135 HARV. L. REV. 2013 (2022) (offering a thorough examination of the question of the "dangerous few" and the extent to which it poses a challenge to abolitionism); *see also* McLeod, *supra* note 7, at 1168 ("[T]here may be, in the end, some people who are so dangerous to others that they cannot live safely among us, those rare persons referred to in abolitionist writings as 'the dangerous few.' Who and how many are the dangerous few? The answer to this question is by no means self-evident but its complete and final resolution ought not to interfere with serious engagement with abolitionist analysis . . . .").

47. *See* Markel, *supra* note 15, at 127-29.

any claim to impose justified punishment, even for instances of clear moral wrongdoing.[48] Some abolitionists have at least strongly suggested that the American political system is "wicked" in Markel's sense—that it is and has always been fundamentally undemocratic and illiberal:

> Contemporary abolitionists recognize current democracies, and particularly that of the United States, as a farce, characterized by hollow pretensions of inclusion in the face of a collective failure to reckon honestly with histories of slavery, genocide of indigenous peoples, lynching, segregation, exploitation of the working poor, gendered violence, and the persistent inequalities those practices have wrought.[49]

Even critiques this harsh, however, may leave open the possibility that American democracy is not *irretrievably* "wicked" albeit that it might be considered *foundationally* so;[50] they may admit some hope that the existing structure of American government could still fulfill the demands of liberalism even if it has not until now (and indeed even if its designers had no genuine desire or expectation that it would).[51]

At the same time, such a critique quite evidently reflects the strongly held position that the system *we have* is so rotten in various ways as to lack legitimacy and merit abolition: that is to say, the position expressed by claim 2.B. This claim is the one I suggest most deeply shares a Markellian posture with regard to the justification of punishment—namely, that it is to be assessed based on its broader political setting and context, and not based on absolutist claims of moral principle—even as it rejects the Markellian stipulation or postulate that

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48. *See id.* at 127 ("[I]t is a painfully difficult question regarding whether the bad regime has standing to call to account those who [violate] incontrovertibly good criminal laws."); *id.* at 127 n.307 ("I will assume, without arguing, that bad regimes can enforce good crimes fairly, but it may well be that it is too difficult to discern the bad regime from the wicked regime and too difficult to place any trust in the procedures and punishments used to enforce even incontrovertibly good (*malum in se*) conduct rules.").

49. McLeod, *supra* note 41, at 1618; *cf.* Roberts, *supra* note 25, at 10 ("[I]t is the realization that white supremacy is deeply woven into the fabric of every legal institution in the United States and upheld by U.S. constitutional law that made me an abolitionist in the first place.").

50. *See* Reznik, *supra* note 26, at 141, 144 ("Abolitionism is only contingently skeptical of the liberal state. The ambivalent approach toward national political frameworks is further exemplified in prison abolition's view of the Constitution. It is part of the problem but also part of the solution. . . . [P]rison abolition jurisprudence might be more liberal, republican, and constitutional than its rhetoric."); Roberts, *supra* note 25, at 10 ("Despite my disgust with the perpetual defense of oppression in the name of constitutional principles, I am inspired by the possibility of an abolition constitutionalism emerging from the struggle to demolish prisons and create a society where they are obsolete.").

51. *See* Reznik, *supra* note 26, at 137 ("[P]rison abolitionism confounds a wish to criticize in order to perfect liberal constitutionalism with a desire to fundamentally upset it building on neo-Marxist, post-colonial or other critical orientations. It is true that the policy changes advocated are in themselves a radical departure from the status quo. That is immaterial, however, when assessing the positive political vision presented vis-à-vis the most charitable possible construction of the one put forth by the Founding Fathers.").

our own political setting is an acceptable one to offer such a justification. This claim is also the one I am suggesting to be a significant feature of the contemporary abolitionist narrative.[52] As Rafi Reznik puts it, "Prison abolitionist priorities in the United States are shaped by the country's unique historical and social conditions relating to racial relations and other economic, political, legal, and cultural factors."[53] Or as Allegra McLeod put it in her early landmark article, the abolitionist project "is deeply concerned with sociological, historical, and political situations and possibilities rather than primarily with deductive moral reasoning from first premises."[54]

As a specific response to a specific historical and political context, abolitionism is not seeking to articulate an anti-punishment *theory* that responds to generalist, abstract punishment theories.[55] Hence it is fundamentally rooted more in a version of claim 2.B than either version of claim 1. Again quoting Reznik: "Penal skepticism of an analytical nature does figure in prison abolition as well, yet moral concerns relating to punishment are parasitic to concerns about political economy, and hence are, at most, on the conceptual margins of the project."[56] The middle phrase of that sentence, characterizing "moral concerns relating to punishment" as subordinate to "concerns about political economy," could well be describing Markel's theory of punishment.

Claim 3.A is perhaps a narrower version of claim 2, asserting that even if American government or society as a whole is not so deeply flawed as to invalidate the CJ system (or possibly in *addition* to it being so generally flawed), the CJ system itself is so unfair and

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52. *See, e.g.*, Morgan, *supra* note 43, at 1203 ("One of the bedrocks of abolitionist analysis is an understanding of the historical antecedents of the PIC: chattel slavery, racial capitalism, settler colonialism, the dispossession of Native lands, the eugenics policies that promoted the forcible sterilization of disabled people (including individuals with physical, developmental, and intellectual disabilities), and the forced segregation of disabled people into large state-run mental hospitals."); Roberts, *supra* note 25, at 7 (describing as "central tenets that are common to formulations of abolitionist philosophy" that "today's carceral punishment system can be traced back to slavery and the racial capitalist regime it relied on and sustained" and that "the expanding criminal punishment system functions to oppress black people and other politically marginalized groups in order to maintain a racial capitalist regime").

53. Reznik, *supra* note 26, at 129.

54. McLeod, *supra* note 7, at 1234; *see also* Roberts, *supra* note 25, at 19 ("The case for abolition *that is grounded in history and politics* provides a compelling framework for understanding the need to eradicate the entire carceral punishment system . . . .") (emphasis added).

55. *Cf.* Reznik, *supra* note 26, at 134 ("Whether punishment can be justified is simply not the question being asked [by abolitionist scholarship].").

56. *Id.* at 130; *see also id.* at 130-31 ("What prison abolition sets out to abolish is thus not the institution of crime and punishment, but the use of prisons as 'catchall solutions to social problems.' . . . Criticism of the prison industrial complex has a lot to say about authoritative misuse and abuse of punishment, but has little to say about punishment itself.").

repressive as to be illegitimate.[57] And like claim 2.B in particular, in fact in tandem with claim 2.B, it comprises a meaningful part of abolitionist accounts. For example, the argument for *police* abolition has this tenor, arguing that the institution of the police has its origins in white supremacy and continues to advance a racist agenda, by design or in effect.[58] Critiques of the police can offer a narrower version of either claim 2.A, arguing that the entire institution is fundamentally unsound and must be abandoned, or of claim 2.B, arguing that a standing police force might be acceptable in another time or place but that, given its history or current context or both, has no place in contemporary American society.

For example, Amna Akbar, one of the most prominent abolitionist scholars, offers a comprehensive account of "the centrality of violence to policing in the United States,"[59] summarizing an abolitionist critique of policing (and of the "prison-industrial complex" more generally) along three dimensions: historical, material, and ideological. The historical critique elaborates how "[t]he roots of modern police can be traced to slave patrols, the Ku Klux Klan, militias, and early police forces. These policing efforts sought to monitor, control, suppress, and kill Black and Indigenous people: to exploit labor, life, and land."[60] The materialist critique ties policing to the maintenance of capitalism and class structures, arguing that the police's "core mission is not to provide safety, but rather to hold in place racialized and capitalist social relations. Police protect property over people, and the capitalist class over labor."[61] One can perhaps see in these claims a shared commitment to Markel's demand for liberalism, democracy, and respect for human rights and equality as a precondition of the exercise of criminal (including policing) authority, coupled with a rejection of Markel's premise that the American system meets that demand. Rather than serving a society predicated on equal protection, this account holds that the police sustain hierarchy and inequality, not by accident but as their mission.[62]

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57. *See, e.g.*, Roberts, *supra* note 25, at 42-43 ("[P]risons, police, and the death penalty function to subordinate black people and maintain a racial capitalist regime. Efforts to fix the criminal punishment system to make it fairer or more inclusive are inadequate or even harmful because the system's repressive outcomes don't result from any systemic malfunction. Rather, the prison industrial complex works effectively to contain and control black communities as a result of its structural design.").

58. *See generally* Akbar, *supra* note 29, at 1788-1802; *see also supra* note 25.

59. Akbar, *supra* note 29, at 1788; *see generally id.* at 1788-1802 (elaborating on this claim in detail).

60. *Id.* at 1817-18.

61. *Id.* at 1822.

62. *Cf.* Morgan, *supra* note 43, at 1211 ("[A]bolitionist analysis starts from an entirely different set of intellectual priors—namely, that policing and punishment systems function to subordinate in racist, gendered, and classist ways.").

The historical and materialist critiques can be understood to address American policing, or at least particular systems of policing, rather than the idea of policing itself, but Akbar's "ideological" critique might extend the argument from a narrower version of claim 2.B to a narrower version of claim 2.A, namely, that policing is *inherently* problematic no matter its political, social, or historical context. The ideological critique rejects the need or desire for police at all, contending flatly that "police do not provide public safety. To the contrary, police detract from the social provision of human needs. They sustain large-scale suffering and inequality through their violence and the broader structural violence that their violence enables."[63] This critique asserts that no society, whatever its history or current features, would be well served by investing resources in a standing police force rather than elsewhere.

The critique of policing extends more broadly to the CJ system as a whole:

> Abolition ensures we stay focused on understanding police in relation to the carceral state and its political economy. When organizers talk about abolishing the prison industrial complex, they mean to refer not just to the police but also prisons, surveillance, and other forms of penal control. Without a comprehensive look at these interconnected institutions that sustain unprecedented levels of incarceration, we cannot make reform recommendations capable of even denting this hydra-like system.[64]

Akbar's account also connects claim 3.A to the broader claim 2, noting that policing both reflects and helps create deep-seated social hierarchy and bias:

> A growing number of legal scholars see police and prisons as constitutive of the larger political, economic, and social order. Police have operated as a conduit to broader structures of race, class, and gender: white supremacy, capitalism, colonialism, and patriarchy. They reflect the undemocratic status quo. In these accounts, policing is a problem of our system of laws and the state in which it functions—not a departure therefrom.
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> . . . .
>
> This crisis of police violence is more than a crisis of the police. It is a crisis of our entire system of laws and statecraft. Understanding police as central to the maintenance of a political economy of racialized violence and exploitation, abolition necessitates the fundamental transformation of society.[65]

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63. Akbar, *supra* note 29, at 1823.

64. *Id.* at 1841.

65. *Id.* at 1799, 1842.

Here is where one might see a broader critique rooted in claim 2.A rather than 2.B, i.e., not that American institutions *have been used* to perpetuate bias and inequality, but that the American constitutional order is perhaps *fundamentally structured* to do so.[66] I'm not sure whether the critique goes as far as that, i.e., whether it would hold that the American system of government is a "wicked regime" that does not admit reform from within but would need to be entirely replaced, as opposed to seeing the potential of our constitutional democracy to support a functioning liberal democracy, even if it has not (and indeed, was not meant to) heretofore.

The final potential claim supporting abolition, 3.B, has two aspects: the first is basically an expression of the *prison* abolition movement in particular, taking the position that incarceration is unacceptable and should be abolished, even if other forms of punitive sanction are at least potentially acceptable.[67] As noted earlier, some anti-incarceration arguments are expressions of a version of claim 1.B above, asserting that prison does not reduce and perhaps even increases crime. But others are perhaps arguments against the appropriateness of incarceration in principle rather than its efficacy in fact. For example, claims that prison isolates and "others" a class of people, wrongfully denying them membership in the community as citizens or equals,[68] are arguments against incarceration distinct from a claim that, say, it fails to incapacitate or rehabilitate.

The second aspect of claim 3.B is a condemnation of American "mass incarceration," which certainly has many critics,[69] but that critique (however valid) is distinct from abolitionism; opposing "mass" incarceration is not the same as opposing incarceration per se (though the latter position obviously includes the former, and both may marshal similar or overlapping arguments in their favor). Accordingly,

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66. *Cf. id.* at 1824-25 ("Together, the historical, material, and ideological critiques create a framework for understanding the fundamental problems of policing. They suggest policing is not broken, but working in ways that reflect and extend the status quo social relations.").

67. Reznik advances a case for abolishing prison while retaining other punitive sanctions. *See generally* Reznik, *supra* note 26.

68. *Cf.* McLeod, *supra* note 7, at 1182-84 (critiquing fundamental dehumanization that attends incarceration).

69. Just a smattering of the literature addressing, critiquing, explaining the causes of, and/or proposing ways to end mass incarceration includes MICHELLE ALEXANDER, THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS (New Press 2010); RACHEL ELISE BARKOW, PRISONERS OF POLITICS: BREAKING THE CYCLE OF MASS INCARCERATION (Belknap Press 2019); JEFFREY BELLIN, MASS INCARCERATION NATION: HOW THE UNITED STATES BECAME ADDICTED TO PRISONS AND JAILS AND HOW IT CAN RECOVER (Cambridge Univ. Press 2023); JOHN F. PFAFF, LOCKED IN: THE TRUE CAUSES OF MASS INCARCERATION—AND HOW TO ACHIEVE REAL REFORM (Basic Books 2017); DANIELLE SERED, UNTIL WE RECKON: VIOLENCE, MASS INCARCERATION, AND A ROAD TO REPAIR (New Press 2019).

that aspect of claim 3.B is somewhat to the side of this essay's interests.

CONCLUSION

One might try to justify, or oppose, criminal punishment as a matter of principle: that is, using arguments about general normative considerations that would support or disallow punishment as a practice. Some thinkers devote their efforts and attention to arguments of this kind. Dan Markel was more interested in offering an account of criminal law as a *political* practice whose legitimacy is in some way derived from the legitimacy of the political system in which it is situated—hence justified only in context and not based on abstract principles. It has been the suggestion of this essay that the contemporary abolitionist account can be seen (at least in part) as the other side of the Markellian coin, *rejecting* the legitimacy of the CJ system based on concerns about its historical, social, and political context.

In any case, whether or not his work had any influence on or connection to abolitionist thought, Dan Markel left behind a profound legacy as a scholar, as it was clear during his lifetime that he would. In 2011, Dan was chosen by a brand-new criminal law journal at the University of Virginia to be the keynote author for its inaugural volume. An event was organized for him to give a lecture and for several other scholars (I was one) to offer commentary, all of which would then be published as the debut issue of the journal. The journal's selection of a scholar so relatively young and junior as the very first person to honor in this way left me amazed and, I must say, jealous—but not surprised. At the event, before addressing the substance of Dan's remarks, I said a few words about Dan himself:

> If you look at Dan's résumé, you will see that he is one of the most prolific young scholars out there, not only about punishment theory, but about a number of other things as well. What you won't see is that Dan is also one of the most voracious, generous, and diligent readers of other people's work, and someone who offers such thorough and useful and helpful comments and suggestions to other people, that not only through his own work—which is more than enough for him to hang his hat on—but also through the way that he has crafted and improved other people's work, it is clear that Dan is one of the most significant and influential criminal theorists of his (and my) generation.[70]

Unlike many thoughts I commit to print, time has not eroded my confidence now in what I said then. And I have always found some small comfort, and gratitude, in having had the opportunity to offer that praise to and about Dan, in his presence, while he was alive.

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70. Michael T. Cahill, *Politics and Punishment: Reactions to Markel's Political Retributivism*, 1 VA. J. CRIM. L. 167, 167 (2012).

Yet the enduring afterglow of all Dan gave us smolders in the dark shadow of all we lost with him. And that loss, too, endures; it is ongoing. In July, several of the contributors to this symposium, among others, shared thoughts about Dan and his work at the annual two-day "CrimFest!" conference, which brought together more than 150 scholars from around the country—a conference Dan established years ago, and another centerpiece of his legacy in the academic community. Each year I think: Dan should still be here. However long I am given for my own professional life, I will never stop thinking that.

Out, out, brief candle.