

RETRIBUTIVISM, CONFRONTATION, AND THE DEATH PENALTY: SOME SKEPTICISM ABOUT DAN MARKEL’S SKEPTICISM

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There is a certain irony in dedicating an entire symposium to discussing the future of the death penalty. In terms of both its invocation and implementation, the death penalty seems to be in the throes of its own demise. It is subject to increasing constitutional limitations,¹ including, most recently, prohibitions against executing profoundly intellectually challenged defendants² and those who committed their crimes as minors.³ There is also mounting political pressure to move away from death in favor of other penalties, such as life imprisonment without the possibility of parole.⁴ Citing

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1. See *Kennedy v. Louisiana*, 554 U.S. 407, 421 (2008) (holding the Eighth Amendment barred the State of Louisiana from imposing the death penalty for child rape); *Coker v. Georgia*, 433 U.S. 584, 592 (1977) (holding sentencing someone to death for committing rape is cruel and unusual punishment and violates the Eighth Amendment).

2. See *Atkins v. Virginia*, 536 U.S. 304, 321 (2002).

3. See *Roper v. Simmons*, 543 U.S. 551, 578 (2005).

4. See ASHLEY NELLIS, *STILL LIFE: AMERICA’S INCREASING USE OF LIFE AND LONG-TERM SENTENCES* 19–22 (2017), <https://www.sentencingproject.org/publications/still-life-americas-increasing-use-life-long-term-sentences>. During the 2016 Presidential election, Hillary Clinton’s Democratic rivals, Bernie Sanders and Martin O’Malley, criticized her for not supporting an outright ban of capital punishment. See Thomas Kaplan, *Death Penalty Takes on New Dimension in 2016 Campaign*, N.Y.

ethics and international norms, pharmaceutical companies are refusing to sell to penal authorities the drugs commonly used to carry out executions.⁵ Although most states maintain the death penalty as a matter of law,⁶ abolition continues at a steady trickle.⁷ Many more states have effectively abolished the death penalty through disuse or inaction.⁸ Even in states notoriously vigorous in their death practices—such as Texas, Oklahoma, and Virginia—

TIMES (Nov. 13, 2015), <https://www.nytimes.com/2015/11/14/us/politics/death-penalty-takes-on-new-dimension-in-2016-campaign.html>. Though Clinton won her party's nomination, the party platform included a call to abolish the death penalty as a "cruel and unusual form of punishment" that "has no place in the United States . . ." *Democratic Party Platforms: 2016 Democratic Party Platform*, AM. PRESIDENCY PROJECT (July 21, 2016), <https://www.presidency.ucsb.edu/documents/2016-democratic-party-platform>. Most Republican candidates said they supported the death penalty in some circumstances, though some expressed reservations. Kaplan, *supra*. Jeb Bush, who oversaw twenty-one executions as governor of Florida and once slammed political rivals in campaign ads for being soft on the death penalty, stated in a 2015 interview that he was now "conflicted" about the issue. *Id.*; see also Ed O'Keefe, *Jeb Bush 'Conflicted' About the Death Penalty*, WASH. POST (Nov. 1, 2015), <https://www.washingtonpost.com/news/post-politics/wp/2015/11/01/jeb-bush-conflicted-about-the-death-penalty/> (discussing Jeb Bush's past death penalty campaign ads). Political opposition for the death penalty has been prompted in part by highly publicized, botched executions. See Corinna Barrett Lain, *The Politics of Botched Executions*, 49 U. RICH. L. REV. 825 (2015) (providing detailed accounts of botched executions). Lethal injection, once thought to be a more humane form of execution, has faced increased criticism. See generally *id.* In one case, after a lethal injection, an Arizona prisoner gasped for air as his body convulsed for nearly two hours before his death. *Id.* at 833. Public outcry following the execution was substantial, and even Arizona Republican Senator John McCain at one point called the incident "torture." *Id.* at 834. This departure from the death penalty parallels a greater reliance on life without parole (LWOP) sentences. NELLIS, *supra*. Between 2003 and 2016, the total number of LWOP sentences in the United States increased by 59%. See *id.* (noting this increase in part may be due to promotion of LWOP in campaigns to abolish the death penalty).

5. Erik Eckholm, *Pfizer Blocks the Use of Its Drugs in Executions*, N.Y. TIMES (May 13, 2016), <https://www.nytimes.com/2016/05/14/us/pfizer-execution-drugs-lethal-injection.html>. In May 2016, Pfizer announced it would take steps to ensure that none of the drugs produced by the company would be used for lethal injections. *Id.* Twenty other American and European drug companies had already done the same. *Id.* Leading Propofol producer Fresenius Kabi stopped selling its drugs for execution in 2012, stating it was against the company's mission of "[c]aring for life." Clare Dyer, *Company Bans Sale of Its Drug Propofol for Lethal Injections*, 345 BRIT. MED. J. 4, 4–5 (2012).

6. *States With and Without the Death Penalty*, DEATH PENALTY INFO. CTR., <https://deathpenaltyinfo.org/states-and-without-death-penalty> (last updated Oct. 11, 2018) (noting that thirty states have laws allowing the death penalty: Alabama, Arizona, Arkansas, California, Colorado, Florida, Georgia, Idaho, Indiana, Kansas, Kentucky, Louisiana, Mississippi, Missouri, Montana, Nebraska, Nevada, New Hampshire, North Carolina, Ohio, Oklahoma, Oregon, Pennsylvania, South Carolina, South Dakota, Tennessee, Texas, Utah, Virginia, Wyoming).

7. *Id.* (indicating that the following states have recently abolished the death penalty: New York (2007); New Jersey (2007); New Mexico (2009); Illinois (2011); Connecticut (2012); Maryland (2013); Delaware (2016); Washington (2018)).

8. See BUREAU OF JUSTICE STATISTICS, PRISONERS EXECUTED (2018), <http://www.bjs.gov/index.cfm?ty=pbdetail&iid=2079>. Of the thirty states with the death penalty, eleven have not carried out an execution in at least ten years (California, Colorado, Kansas, Montana, Nebraska, Nevada, New Hampshire, North Carolina, Oregon, Pennsylvania, and Wyoming). *Id.* Another nine have not carried out an execution in at least five years (Idaho, Indiana, Kentucky, Louisiana, Mississippi, South Carolina, South Dakota, Tennessee, and Utah). *Id.* Overall, use of the death penalty has seen a sharp decline since the mid-1990s. See generally Brandon L. Garrett et al., *The American Death Penalty Decline*, 107 J. CRIM. L. & CRIMINOLOGY 561 (2017).

death sentences and executions are trending downward.⁹ The result is that death sentences are increasingly rare in the United States and executions rarer still.¹⁰ Given this state of affairs, one might wonder about the point of assembling an august group of scholars and advocates to give serious consideration to the future of the death penalty. What is the point? Other than, perhaps, to gloat over death in its final gasps.

The answer depends on your perspective. For ardent opponents of the death penalty, these are trends, not markers of the end of history. They fear the chance that a shift in political power or hysteria in the face of any number of existential crises, real or imagined, might reinvigorate investment in death as a means to get tough on crime, fight the war on terrorism, or defend our borders against tides of marauding hordes.¹¹ Even if there is no revival of the death cult, those who view the death penalty as morally or ethically abhorrent cannot accept a mere reduction in death penalties and executions.¹² For them, even one execution is too many and only permanent prohibition can satisfy.¹³

For proponents, the trend away from death sentences and executions may look like a very bad idea. If the death penalty is effective as a crime-control measure, then we are wrong to abandon it thoughtlessly. We should instead use this moment to develop clear policies and practices backed by clear theory and good social science. If, as many retributivists argue, the death penalty is morally justified and appropriate in some cases, then we would be wrong to abandon the death penalty on grounds that it is inherently unjust or unjustifiable.¹⁴ What we need instead is moral clarity and a recommitment to cool rationality in all our punishment practices, including the death penalty.

9. See BUREAU OF JUSTICE STATISTICS, *supra* note 8. The number of executions in Texas decreased 46% from 261 between 1998 and 2007 to 140 between 2008 and 2017. *Id.* Oklahoma executions decreased 66% from 77 to 26 over the same period, executing only 1 prisoner in the past three years. *Id.* Virginia executions decreased 71% from 52 between 1998 and 2007 to just 15 between 2008 and 2017. *Id.*

10. See BUREAU OF JUSTICE STATISTICS, NCJ 251430, CAPITAL PUNISHMENT 14–15 (2018). The total number of death sentences imposed in the United States each year: 85 in 2012, 85 in 2013, 68 in 2014, 54 in 2015, and 32 in 2016. *Id.* at 14. Total number of executions in the United States each year: 43 in 2012, 39 in 2013, 35 in 2014, 28 in 2015, and 20 in 2016. *Id.* at 15.

11. See, e.g., Darlene Superville & Jonathan Lemire, *Trump Calls for Death Penalty to 'Get Tough' on Drug Pushers*, CHI. TRIB. (Mar. 19, 2018, 6:04 PM), <https://www.chicagotribune.com/news/nationworld/politics/ct-trump-opioid-drug-traffic-20180319-story.html> (pointing out that in March 2018, President Trump voiced support for using the death penalty to punish drug traffickers as part of his proposals to deal with the opioid epidemic). In May 2018, at a police memorial service, President Trump said he also “believe[s] criminals who kill our police should get the death penalty.” President Donald J. Trump, Remarks by President Trump at the 37th Annual National Peace Officers’ Memorial (May 15, 2018). Trump connected both crimes, drug distribution and murder of cops, to MS-13 and illegal immigration. President Donald J. Trump, Remarks by President Trump on Combatting the Opioid Crisis (Mar. 19, 2018).

12. See, e.g., Kevin M. Barry, *The Law of Abolition*, 107 J. CRIM. L. & CRIMINOLOGY 521, 526–28 (2017).

13. See generally *id.*

14. See generally IMMANUEL KANT, THE PHILOSOPHY OF LAW 198 (W. Hastie trans., T. & T. Clark 1887) (1796).

So, contrary to initial appearances, there may be no better time than now to ask whether we are heading in the right direction. I am, therefore, grateful to Professor Arnold Loewy and the editors of the *Texas Tech Law Review* for the invitation to participate in this important and timely discussion. In my view, moral justification must be at the heart of any conversation about the death penalty. If death is not morally justifiable as a penalty, then that is the end of the matter. On the other hand, if it is morally justifiable, then we can ask important policy questions about when, why, and how our justice system should inflict death as punishment.

For canonical retributivists, the death penalty is morally justified as a punishment for murder.¹⁵ However, some contemporary retributivists take a different view. Dan Markel was among them.¹⁶ Before his untimely death, Professor Markel was one of the leading punishment theorists of his generation.¹⁷ He was well-known and highly regarded for advancing and defending a theory of retributive punishment called the Confrontational Conception of Retributivism (CCR).¹⁸ In contrast with more traditional retributivist theories, which largely favored the death penalty, Professor Markel argued that CCR counseled against the death penalty.¹⁹ For reasons elaborated below, I am skeptical of Professor Markel's skepticism. Anyone committed to retributivism as a theory of criminal punishment (and that should be everyone!) should also recognize the death penalty as a morally appropriate punishment for some crimes. This is true for both traditional retributivists and adherents to CCR. There may be very good, practical, or prudential reasons for limiting the imposition of the death penalty, even to the point of effective abstinence; but it would be a mistake, I will argue, to treat those practical considerations as grounding a retributivist argument for abolition.

15. *E.g.*, G. W. F. HEGEL, ELEMENTS OF THE PHILOSOPHY OF RIGHT 129–30 (Allen W. Wood ed., H.B. Nisbet trans., Cambridge University Press 1991) (1821); KANT, *supra* note 14 (“[W]hoever has committed [m]urder, must die.”) (alterations in original). “For since life is the entire compass of existence [*Dasein*], the punishment [for murder] cannot consist [*bestehen*] in a *value*—since none is equivalent to life—but only in the taking of another life.” HEGEL *supra* (alterations in original).

16. *See generally* Dan Markel & Chad Flanders, *Bentham on Stilts: The Bare Relevance of Subjectivity to Retributive Justice*, 98 CALIF. L. REV. 907 (2010) (discussing retributivist theory).

17. *See* Jordan Anderson, *Murder Trial Delayed for Death of Law Professor*, FSUNews.com (Jan. 7, 2018, 12:43 PM), <https://www.fsunews.com/story/news/2018/01/07/murder-trial-delayed-death-law-professor/1011156001/> (discussing Markel's accomplishments and his untimely death at age forty-one).

18. *See* Dan Markel, *Against Mercy*, 88 MINN. L. REV. 1421, 1445–53 (2004) [hereinafter Markel, *Against Mercy*]; Dan Markel, *Retributive Justice and the Demands of Democratic Citizenship*, 1 VA. J. CRIM. L. 1, 5 (2012) [hereinafter Markel, *Democratic Citizenship*]; Dan Markel, *What Might Retributive Justice Be? An Argument for the Confrontational Conception of Retributivism*, in RETIBUTIVISM: ESSAYS ON THEORY AND POLICY 49–72 (Mark D. White ed., 2011) [hereinafter Markel, *What Might Retributive Justice Be?*].

19. *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, 425–40 (2005) (outlining Markel's anti-death penalty argument).

The Article proceeds in four parts. Part I outlines a standard retributivist case for the death penalty based on the work of Immanuel Kant, who is probably the leading canonical contributor to retributivist theory. Part II provides a brief exegesis of Dan Markel's CCR and explains his objections to the death penalty. Part III argues for the death penalty on CCR grounds. Part IV leverages this work to respond to Professor Markel's critique of the death penalty. I conclude that there may well be good retributivist grounds for severely limiting the imposition of the death penalty, particularly in light of practical realities that define our criminal justice system. I maintain, however, that these practical concerns support parsimony, not abolition.

I. THE STANDARD RETRIBUTIVIST'S CASE FOR THE DEATH PENALTY

Punishment is central to the philosophy of criminal law.²⁰ Any theory of criminal law worth its salt must be able to explain why punishment is justified as a general practice and then determine how that general justification can yield results in specific cases. In general, we can define punishment as an undesirable deprivation of liberty imposed upon an offender by a duly recognized state authority in response to his violation of the criminal law.²¹ For retributivists, punishment is justified as a social response by the state to a crime.²² When it punishes, the state follows through on the threats posed by the criminal law²³ and reinforces public commitments to the norms and prohibitions contained in the criminal law.²⁴ In specific cases, retributivists hold that punishment is justified only if, and only to the extent that, it is deserved.²⁵ That commitment marks the defining point of contrast between retributivists and consequentialists.²⁶ Consequentialists hold that punishment is justified only when, and to the extent, it can produce some future good, usually in the form of crime control.²⁷

For retributivists, punishment is justified as a general practice because it gives offenders what they deserve.²⁸ But how might a retributivist go about determining whether punishment is deserved? This really asks two questions. The first is whether an offender deserves to be punished. The second is whether the punishment inflicted is deserved, with respect to both its form

20. *See generally id.*

21. H.L.A. HART, PUNISHMENT AND RESPONSIBILITY: ESSAYS IN THE PHILOSOPHY OF LAW 4–5 (2d ed. 2008).

22. GEORGE P. FLETCHER, RETHINKING CRIMINAL LAW 415 (2000) (explaining retributivist ideals on punishment).

23. *See generally* Herbert Morris, *Persons and Punishment*, 52 MONIST 475, 477–78 (1968).

24. *See generally* JOEL FEINBERG, DOING AND DESERVING: ESSAYS IN THE THEORY OF RESPONSIBILITY 95–118 (1970); Markel, *What Might Retributive Justice Be?*, *supra* note 18, at 52.

25. HART, *supra* note 21, at 233–34.

26. *See* FLETCHER, *supra* note 22, at 414–15.

27. *Id.* at 414.

28. *See* Markel, *What Might Retributive Justice Be?*, *supra* note 18, at 51.

and degree. The answer to the first question is familiar to any student of criminal law. Punishment is deserved when there is a “concurrency of an evil-meaning mind with an evil-doing hand”²⁹ A retributivist will only impose punishment when an offender has engaged in a culpable violation of criminal law.³⁰ That all seems pretty intuitive. But how would a retributivist go about determining what kind of punishment to impose and to what degree?³¹ Here, the concept of proportionality plays a central role in retributivist theory.

Retributivists regard a punishment as deserved if it is proportionate to the crime in terms of both nature and degree.³² For the most part, retributivists argue that offenders who perpetrate serious crimes deserve severe deprivations of their liberty, and those who commit less serious crimes deserve less severe deprivations of their liberty.³³ Two retributivists might disagree on the exact hierarchy of offenses and the particular kind and degree of liberty deprivation that is appropriate in response to, say, petit larceny, but we can set these conversations aside for now. We are concerned here with only one form of punishment: death. Death marks a complete and permanent deprivation of liberty. It is the most severe punishment available to the state and is, therefore, only proportionate in response to the most serious offenses.³⁴ For most retributivists, this means that the only offenders who deserve death are those who commit murder.³⁵

In *Metaphysics of Morals*, Immanuel Kant offers perhaps the most famous retributivist defense for the proposition that murderers deserve the death penalty.³⁶ Consistent with the defining commitment of retributivism, Kant maintains that punishment “can never be inflicted merely as a means to promote some other good for the criminal himself or for civil society.”³⁷ Instead, “[i]t must always be inflicted upon [the criminal] only *because he has committed a crime*.”³⁸ Once an offender has “been found *punishable*,” Kant contends that punishment is an imperative of justice.³⁹ By definition, a

29. *Morrisette v. United States*, 342 U.S. 246, 251–52 (1952).

30. See HART, *supra* note 21, at 232 (explaining retributivist theory).

31. *Id.* at 234.

32. *Id.* at 233–34.

33. *Id.*

34. See *Crimes Punishable by the Death Penalty*, DEATH PENALTY INFO. CTR., <https://deathpenaltyinfo.org/crimes-punishable-death-penalty> (last visited Jan. 1, 2019).

35. See *id.* On this point, the Supreme Court agrees. See *Kennedy v. Louisiana*, 554 U.S. 407, 446 (2008) (holding it unconstitutional to impose the death penalty for child rape); *Coker v. Georgia*, 433 U.S. 584, 598 (1977) (holding that it is unconstitutional to impose the death penalty for rape).

36. IMMANUEL KANT, *THE METAPHYSICS OF MORALS* (Mary Gregor ed., trans., 1996); see David Gray, *Punishment as Suffering*, 63 VAND. L. REV. 1619, 1660–65 (2010) (giving additional accounts of Kant’s theory of punishment). See generally David Gray & Jonathan Huber, *Retributivism for Progressives: A Response to Professor Flanders*, 70 MD. L. REV. 141 (2010) (explaining Kant’s theory further).

37. KANT, *supra* note 36, at 105.

38. *Id.*

39. *Id.*

crime is an offense against the conditions of justice described by the law.⁴⁰ If a state fails to punish an offender, then it allows that injustice to stand.⁴¹ Only by punishing in a manner proportionate to the offense can justice be restored.⁴² This is the law of retribution, or *ius talionis*.

As Kant points out, a punishment imposed under the principle of *ius talionis* is, by definition, deserved. In his view, that is because “whatever undeserved evil you inflict upon another within the people, that you inflict upon yourself. If you insult him, you insult yourself; if you steal from him, you steal from yourself; if you strike him, you strike yourself; if you kill him, you kill yourself.”⁴³ This may seem like nothing more than tit-for-tat, or eye-for-an-eye, as a positive determinant of just punishment. But Kant is defending *ius talionis*, not *lex talionis*.⁴⁴ He is not arguing for criminal punishment as revenge.⁴⁵ The point he is making is that crimes imply their own just punishment.⁴⁶ To see why, it is important to understand how and why conduct can be regarded as a crime.

Crime, for Kant, is linked to the concept of the categorical imperative, which lies at the heart of his moral philosophy.⁴⁷ The categorical imperative requires that we act only “on a maxim which can also hold as a universal law.”⁴⁸ A maxim is the rule of action that an agent makes the principle of his conduct, completely independent of any practical goals he might hope to achieve.⁴⁹ For example, a thief might steal a loaf of bread with the goal of feeding his hungry family, but the maxim of his action goes only to the act of theft itself, something like “I take that which is not mine.” The categorical imperative requires that we act only on maxims from which we can make general rules of conduct for everyone, without logical or practical contradiction.⁵⁰ When deciding whether to steal a loaf of bread, the potential thief must ask himself whether he could endorse the maxim “I take that which is not mine” as a universal law. Quite obviously, he cannot. If everyone acted on such a maxim, then the whole concept of mine and thine upon which the maxim of theft is based would cease to exist. The mind experiment therefore reveals that theft is self-contradictory. More practically, if everyone was invited to act on the maxim “I take that which is not mine,” then nobody

40. *Id.*

41. *Id.* at 109.

42. *See id.* at 105 (explaining that justice cannot be achieved if punishment is substituted for an unequal alternative).

43. *Id.*

44. *Id.* at 105–06.

45. *See id.* at 105 (providing Kant’s argument).

46. *See id.* at 108 (establishing the connection between crime and its relative punishment).

47. *Id.* at 109.

48. *Id.* at 108.

49. *Id.* at 107.

50. *Id.*

could be secure in their property and possessions. Thus, any society that recognizes a right to property must also reject theft.⁵¹

The criminal law, in Kant's view, is a collection of rules that prohibit actions deemed contrary to public law.⁵² All just states must prohibit conduct that violates the categorical imperative, such as theft, assault, rape, and murder, but a state might also prohibit other conduct in its criminal code that is deemed contrary to the public good and a danger to the commonwealth.⁵³ Thus, by definition, criminal conduct harms more than the individual victim.⁵⁴ By proposing as universal law a maxim deemed criminal by the state, a criminal introduces an inequality and injustice into the social order.⁵⁵ The state is therefore obliged to respond by punishing criminals in order to protect the social order and in a way that accurately reflects the nature of the threat.⁵⁶

According to the principle of *ius talionis*, punishment should directly address the injustice inherent in criminal conduct by inflicting on the offender the consequence he proposed to inflict on society.⁵⁷ For example, Kant tells us: "Whoever steals makes the property of everyone else insecure"⁵⁸ The most fitting punishment for the thief is, therefore, to deny him security in his property by revoking his right to own property.⁵⁹ This is what Kant means when he writes that the thief steals from himself. By proposing as universal law a maxim that violates the criminal law's prohibition on theft, the thief sacrifices his own right to own, use, and dispose of property.⁶⁰

The retributivist case for the death penalty runs on a parallel course. The maxim of murder is something along the lines of "I take innocent life." If everyone were to act on this maxim, it would mean the end of society and, perhaps, rational beings altogether. Therefore, all states must prohibit murder in order to preserve themselves and the most basic conditions of justice for all their members.⁶¹ Anyone who violates the prohibition on murder proposes a maxim that would mean insecurity for the life and liberty of all.⁶² According to the principle of *ius talionis*, the only proper, proportionate punishment for

51. See generally Michael E. Tigar, *The Right of Property and the Law of Theft*, 62 TEX. L. REV. 1443, 1446 (1984). Of course, in any society that does not recognize a right to property, theft would not exist as a concept. See *id.*

52. KANT, *supra* note 36, at 105.

53. *Id.* One of us has argued elsewhere that retributivism counsels in favor of a very parsimonious criminal code. See Gray & Huber, *supra* note 36.

54. KANT, *supra* note 36, at 105.

55. Morris, *supra* note 23, at 478 ("A person who violates the rules has something others have—the benefits of the system—but by renouncing what others have assumed, the burdens of self-restraint, he has acquired an unfair advantage.").

56. See Gray & Huber, *supra* note 36.

57. KANT, *supra* note 36, at 106.

58. *Id.*

59. *Id.*

60. *Id.*

61. *Id.* at 106–07.

62. *Id.* at 105.

murder is to inflict upon the offender exactly that which he proposed to inflict upon society.⁶³ Thus, Kant concludes that if an offender has committed murder, then he must die.⁶⁴ “[T]here is no substitute that will satisfy justice.”⁶⁵ At the same time, Kant requires that the sentence must be carried out by means “freed from any mistreatment that could make the humanity in the person suffering it into something abominable.”⁶⁶ He therefore rejects the kind of death spectacles that defenders of punishment-as-savage-justice might favor.⁶⁷

Kant’s theory is not the only retributivist theory out there, of course, but his is notably clear in its moral reasoning and explanations of the appropriate punishments in response to common crimes.⁶⁸ It also provides a good model for a defining feature of retributivist theory, which is the idea of objective proportionality.⁶⁹ The punishment for any crime must be proportionate to that crime.⁷⁰ A punishment that is disproportionate by its nature or severity either fails to achieve justice for the crime or inflicts an undeserved injustice on the offender.⁷¹ For Kant, the commitment to proportionality entails a close fit between crime and punishment that is almost poetic.⁷² The punishment perfects the crime. As we have seen, this is why Kant is committed to the death penalty as the logical and necessary punishment for murder.⁷³ But even in a world where we have a more limited punitive vocabulary, translating most punishments into imprisonment, there is no punishment short of death that is proportionate to murder. As Kant puts it, “There is no *similarity* between life, however wretched it may be, and death, hence no likeness between the crime and the retribution unless death is judicially carried out upon the wrongdoer”⁷⁴ Mere imprisonment for murder is disproportionate and, therefore, falls short of achieving justice.

Dan Markel saw things differently. He was a retributivist who maintained a commitment to proportionality in punishment.⁷⁵ Nevertheless,

63. *Id.*

64. *Id.* at 106.

65. *Id.*

66. *Id.*

67. See WILLIAM IAN MILLER, BLOODTAKING AND PEACEMAKING: FEUD, LAW, AND SOCIETY IN SAGA ICELAND 10–11 (1990) (recounting the violent vengeful punishments used in “Saga” Icelandic society which often included the “limb[ing]” of men (chopping off of the hands and feet) before decapitation); see also, e.g., MICHEL FOUCAULT, DISCIPLINE AND PUNISH: THE BIRTH OF THE PRISON 3–6 (Alan Sheridan trans., Vintage Books 2d ed. 1995) (1977) (describing the grotesque, public spectacle of pulling apart the body of a prisoner by quartering and burning it to ashes).

68. See KANT, *supra* note 36, at 105–06, 130.

69. *Id.* at 105–06.

70. *Id.*

71. *Id.*

72. *Id.* at 105–09.

73. See generally *id.*

74. *Id.* at 106.

75. See generally Markel, *What Might Retributive Justice Be?*, *supra* note 18 (defending the CCR).

he was opposed to the death penalty.⁷⁶ The next Part provides a brief summary of his particular theory of retributivism and explains why he thought retributivists should oppose the death penalty on both theoretical and policy grounds.

II. THE CONFRONTATIONAL CONCEPTION OF RETRIBUTIVISM AND THE DEATH PENALTY

The centerpiece of Dan Markel's work on punishment theory is his Confrontational Conception of Retributivism (CCR).⁷⁷ Although many canonical views on retributivism are grounded in ontological moral theory, Markel grounded CCR in the liberal democratic state.⁷⁸ Also in contrast with many other retributivist theorists, Markel has argued that the death penalty is fundamentally inconsistent with CCR principles and, on that ground, has advocated against the death penalty and in favor of across-the-board commutations.⁷⁹ This Part provides a brief exegesis of CCR and Markel's criticisms of the death penalty.

A. *The Confrontational Conception of Retributivism*

The fundamental contribution of CCR to punishment theory is the claim that punishment is justified primarily, if not solely, as a means of communicating official condemnation to criminal offenders on behalf of a democratic state.⁸⁰ In this regard, CCR bears a resemblance to some utilitarian approaches to punishment that seek to justify punishment as a means of individual deterrence or rehabilitation.⁸¹ Markel is clear, however, that the act of condemnatory communication is an end in itself for CCR.⁸² Before inflicting punishment, CCR requires the presence of basic conditions necessary for effective communication.⁸³ So, in line with constitutional doctrine, CCR would not sanction punishing insane offenders who are incapable of understanding the nature or stakes of a criminal proceeding.⁸⁴ To do so would be little more than "a festival of coercive deprivation visited upon the offender."⁸⁵ But CCR would have no reservations in punishing an

76. *Id.*

77. See generally Markel, *Democratic Citizenship*, *supra* note 18.

78. See Markel, *Against Mercy*, *supra* note 18, at 1421; Markel, *Democratic Citizenship*, *supra* note 18, at 1; Markel, *What Might Retributive Justice Be?*, *supra* note 18, at 49.

79. See generally Markel, *supra* note 19.

80. Markel, *Democratic Citizenship*, *supra* note 18, at 21–26.

81. *Id.* at 102.

82. See Markel, *supra* note 19.

83. See Markel, *What Might Retributive Justice Be?*, *supra* note 18, at 57 (making the link between communication and punishment).

84. Markel, *supra* note 19, at 429.

85. *Id.* at 428. Markel had an enviable talent for these kinds of witty, sophisticated turns of phrase.

intransigent offender who does not care to listen.⁸⁶ Specific deterrence and rehabilitation are nice from a CCR point of view but are not necessary to justify punishment.⁸⁷

By directly addressing and condemning criminal conduct, CCR perfects the moral agency of an offender.⁸⁸ A cornerstone of liberal democracies, in Markel's view, is the belief that individuals are accountable for their actions.⁸⁹ By confronting a wrongdoer and communicating disapproval for his behavior, the state "communicates to the offender our commitment to moral responsibility for the choice between lawful and unlawful conduct"⁹⁰ and "expresses our belief in the dignity of the offender by treating him as a responsible moral agent and communicating that belief to him."⁹¹ By contrast, declining to punish would be condescending to the offender, communicating to him that his decisions and choices do not matter, thereby failing in the state's duty to give full force and effect to the equal agency of all citizens, including defendants.⁹²

Reciprocally, punishment reinforces the moral status of victims. In line with the work of Jean Hampton⁹³ and other retributivists, Markel recognizes that *malum in se* crimes represent unwarranted claims of privilege and superiority by an offender over his victim.⁹⁴ By communicating its condemnation, the state instantiates its commitment to equality as a public norm and the equal status of all citizens.⁹⁵ By contrast, if the state fails to punish, then it communicates its tacit approval of an offender's claim of superiority.⁹⁶

In line with its core ethic, CCR emphasizes that the primary audience for the condemnatory message sent by punishment is the offender.⁹⁷ But Markel is not blind to the fact that there are other audiences as well, including

86. See generally Dan Markel et al., *Beyond Experience: Getting Retributive Justice Right*, 99 CALIF. L. REV. 605, 623–24 (2011).

87. See Markel, *Democratic Citizenship*, *supra* note 18, at 102–03 (relating deterrence and rehabilitation to the CCR perspective).

88. See Markel, *supra* note 19, at 427; Markel, *What Might Retributive Justice Be?*, *supra* note 18, at 51 ("[P]unishment . . . communicates to [an offender] a respect for his dignity as an autonomous moral agent."). In this regard, CCR endorses a version of the offender's right to be punished. See Morris, *supra* note 23, at 476. But see John Deigh, *On the Right to Be Punished: Some Doubts*, 94 ETHICS 191 (1984) (discussing a trenchant critique of this view).

89. Markel, *What Might Retributive Justice Be?*, *supra* note 18, at 51–53.

90. Markel, *supra* note 19, at 429.

91. *Id.* at 427.

92. See Markel, *What Might Retributive Justice Be?*, *supra* note 18, at 53–54 (discussing punishment as a means of communicating with an offender).

93. See Jean Hampton, *Correcting Harms Versus Righting Wrongs: The Goal of Retribution*, 39 UCLA L. REV. 1659, 1666 (1992) (discussing the goal of retribution to combat an offender's claim of superiority).

94. Markel, *supra* note 19, at 433.

95. *Id.* at 432.

96. *Id.* at 431–32.

97. Markel, *Democratic Citizenship*, *supra* note 18, at 26.

the victim and society.⁹⁸ He therefore joins retributive theorists like Joel Feinberg in recognizing the value of punishment as a public expression of the state's commitment to criminal norms, the moral agency of offenders, and the equality and liberty of victims.⁹⁹ In light of this, Markel is clear that punishment should be public and transparent, but he stops well short of linking the justification of punishment to any contingent products of that public expression, such as general deterrence.¹⁰⁰

Finally, Markel argues that punishment is justified as a matter of democratic self-defense.¹⁰¹ In any liberal democracy, criminal prohibitions mark fundamental expressions of the right to self-rule.¹⁰² Criminal laws enjoy legitimacy by virtue of their democratic pedigree, of course, but they are far more central to political society than civil regulations.¹⁰³ They are central to political society because the criminal law represents values deemed central to the political ethos of society and often also defines the basic rules of public conduct that are necessary for the state to function.¹⁰⁴ By violating the criminal law, an offender threatens the authority of the state as a democratic institution, the core values of the state, and the peace and security of society.¹⁰⁵ It "is an active rebellion against the political order of equal liberty under law"¹⁰⁶ and "against the constitutionally democratic determinations of where those rules lie."¹⁰⁷ In Markel's view, that affront justifies punishment as a matter of democratic self-defense.¹⁰⁸ By clearly and publicly condemning the offender's claim of superiority over the state and its citizens, the state defends the "decision-making authority of the regime itself."¹⁰⁹

In contrast with retributive theories, such as those advanced by Immanuel Kant, CCR is neutral as to the form punishment should take. What matters is the condemnatory message, which can be communicated by numerous forms of sanction. Moreover, by linking punishment to democratic legitimacy, CCR allows for the possibility that there may well be significant differences among societies with regard to both criminal codes and systems

98. See Markel, *What Might Retributive Justice Be?*, *supra* note 18, at 53 (recognizing punishment as communication that reaches audiences other than just the offender).

99. See generally Joel Feinberg, *The Expressive Function of Punishment*, in *DOING AND DESERVING: ESSAYS IN THE THEORY OF RESPONSIBILITY* 95 (1970). See also Markel, *What Might Retributive Justice Be?*, *supra* note 18, at 53–54 (highlighting Markel's views on the value of punishment).

100. Markel, *What Might Retributive Justice Be?*, *supra* note 18, at 53 (explaining that "the good [of] retributive punishment is internal to the practice of punishment itself," whereas expressive benefits like "psychological satisfaction for victims or their allies, [reduction of] private violence, or [education of] the public about norms of rightful conduct . . . are contingent goals . . .").

101. *Id.* at 54–57.

102. Markel, *Democratic Citizenship*, *supra* note 18, at 43.

103. See *id.* at 7 (discussing the role of criminal law in society).

104. See *id.* at 47 (giving justification for the societal value placed on criminal law).

105. Markel, *What Might Retributive Justice Be?*, *supra* note 18, at 54.

106. Markel, *supra* note 19, at 433.

107. *Id.* at 434.

108. *Id.* at 433–34.

109. *Id.* at 434.

of punishment. Nevertheless, Markel maintains that systems of punishment and particular sentences must fulfill several conditions in order to conform to CCR.¹¹⁰

First, punishment must be democratically legitimate.¹¹¹ This requirement goes to both the substantive and procedural law.¹¹² The substantive criminal law must be the product of democratic lawmaking.¹¹³ Procedural rules and systems of criminal justice must be accountable to society through the democratic process.¹¹⁴

Second, punishment must be administered by the state.¹¹⁵ Criminal punishment is not a private affair.¹¹⁶ Criminal punishment is a public act.¹¹⁷ The state is in the unique position of being the only entity with a legitimate claim to engage in the public condemnation that is criminal punishment.¹¹⁸ This is in line with Markel's view that it is the state, rather than any particular person, who is the victim of the crime.¹¹⁹

Third, the criminal process must accurately identify offenders and their crimes.¹²⁰ It is only by being accurate that the state can hope to direct the right condemnatory communications to the right people.¹²¹ In Markel's view, this means that the criminal process must be objective, impartial, and unbiased.¹²² It must also be insulated from influences that are not relevant to the core questions of guilt and condemnation.¹²³ For example, the race of a defendant should play no role in assessing punishment because nobody has agency over their race. The same is true of other existential features of identity, such as sex, gender, ethnicity, or class.

Fourth, because punishment aims to communicate condemnation to an offender, it must occur in conditions where communication is possible.¹²⁴ As we saw above, this does not mean that the message must actually be received or that an offender must actually internalize the condemnatory message.¹²⁵

110. Markel, *Against Mercy*, *supra* note 18, at 1445.

111. Markel, *What Might Retributive Justice Be?*, *supra* note 18, at 55 (differentiating obligations to obey "democratic" states from those of "tyranny or oppression").

112. *Id.*

113. *Id.*

114. *Id.* at 55–56.

115. Markel, *supra* note 19, at 432–33.

116. *Id.* at 434–35.

117. *Id.*

118. *Id.* at 432.

119. *Id.*

120. *Id.* at 463.

121. See Markel, *What Might Retributive Justice Be?*, *supra* note 18, at 57 (discussing punishment as communication).

122. Markel, *supra* note 19, at 447 n.168.

123. See *id.* at 448 (explaining punishment should not be based on "arbitrary characteristics such as race or intrastate geography").

124. See Markel, *What Might Retributive Justice Be?*, *supra* note 18, at 61 (discussing communication inherent in punishment).

125. Markel, *supra* note 19, at 428.

CCR requires only that the punishment aim to communicate with the offender, which means that basic conditions of communicative exchange must be present.¹²⁶ CCR would not endorse punishing the insane, the infantile, or the unconscious.¹²⁷

Finally, punishment must be both objectively and comparatively proportionate.¹²⁸ Punishments must be objectively proportionate in the sense that they reflect both the nature and severity of an offense. This means that punishment must aim at producing more than generic suffering.¹²⁹ That kind of punishment might serve as expiation for society, but it would not necessarily communicate effectively with offenders.¹³⁰ Markel contends that respecting objective proportionality will also preserve scarce public resources by “expend[ing the] quantum of social resources necessary to convey the seriousness of the norms breached by the offender, but not more.”¹³¹ Finally, objective proportionality limits the consequences for innocent third parties, such as the family members of an offender, who do not deserve condemnation.¹³²

In addition to being objectively proportionate, Markel also maintains that punishments must be comparatively proportionate in that like cases must be treated alike.¹³³ In Markel’s view, failure to respect comparative proportionality violates core CCR and democratic commitments to equality by expressing condemnation for irrelevant features, factors, or facts.

B. Professor Markel’s Case Against the Death Penalty

Professor Markel’s case against the death penalty comes in the context of an article defending then-Governor George Ryan’s 2003 decision to commute death sentences in Illinois en masse.¹³⁴ In Markel’s view, Ryan’s actions were justified in light of serious concerns about accuracy and social justice in the criminal justice system.¹³⁵ Markel goes further, however, arguing that these and other considerations amount to a theoretical case

126. *See id.*

127. *See id.* at 428–29.

128. Markel, *What Might Retributive Justice Be?*, *supra* note 18, at 62–64.

129. *See generally* Markel & Flanders, *supra* note 16.

130. *Id.* at 946.

131. Markel, *supra* note 19, at 435.

132. *See* Markel, *Against Mercy*, *supra* note 18, at 1469.

133. *See id.* at 1455–56 (arguing that giving leniency in some cases and not others for arbitrary reasons contradicts retributivist commitment to proportionality and “equal liberty under [the] law”).

134. *See* Markel, *supra* note 19. In 2003, just before leaving office, Governor Ryan granted clemency to all death row inmates in the State of Illinois, reducing four prisoners’ sentences to forty years in prison and 164 prisoners’ sentences to life without parole. *Id.* at 408–09. This act sparked outrage by some who saw it as an unwarranted, even dangerous, use of executive power. *Id.*

135. *See generally id.*

against the death penalty on retributivist grounds.¹³⁶ This Section lays out his argument.

Markel's primary concern is with the inaccuracy of death sentences.¹³⁷ As we have seen through the work of the Innocence Project and other advocates, our criminal justice system produces a substantial number of "false positives."¹³⁸ These errors often take decades to uncover and correct.¹³⁹ But, of course, if an innocent person has been executed in the meantime, then the motive to uncover any inaccuracy disappears.¹⁴⁰ Worse, there is no opportunity to correct the error or offer meaningful compensation.¹⁴¹ Cases of actual innocence certainly represent a minority of death row sentences, but the numbers were so significant in Illinois that then-Governor George Ryan commuted the sentences of every offender on his state's death row.¹⁴² Of course, no retributivist can support punishing an innocent person. Given the inevitability of false positives in our system, and the inability to correct mistakes if an innocent person has been executed, Markel argues that, as a matter of humility, no retributivist can, or should, support the death penalty.¹⁴³

Beyond questions of actual innocence, the diversity of crimes for which death is available and aggravating factors cited in death statutes raise concerns for Markel about whether individual death sentences are given for the right reasons.¹⁴⁴ More concerning still is the undeniable influence of factors not specifically sanctioned by law, such as race, gender, and class, which play a role in many death cases.¹⁴⁵ Given these realities, Markel argues that there is good reason to think that many death sentences are imposed for the wrong reasons.¹⁴⁶ In light of these accuracy concerns, Markel argues that simple humility counsels against maintaining the death penalty at all.¹⁴⁷ Our society and our criminal justice system are far from perfect and often tolerate,

136. *See id.* at 460–68.

137. *See generally id.*

138. *See generally Featured Cases*, INNOCENCE PROJECT, <https://www.innocenceproject.org/cases/> (last visited Jan. 2, 2019).

139. *See generally id.*

140. *See* Markel, *supra* note 19, at 462–64.

141. *Id.* at 463 (“When the guillotine drops, this opportunity is forfeited . . .”).

142. *Id.* at 459 n.225 (citing Stephen P. Garvey, *Is It Wrong to Commute Death Row? Retribution, Atonement, and Mercy*, 82 N.C. L. REV. 1319, 1320 n.4 (2004)). Thirteen death row prisoners in Illinois had been exonerated and twelve had been executed at the time Governor Ryan commuted the remaining death row inmates' sentences. *See id.* at 447.

143. *Id.* at 463.

144. *See id.* at 451. Markel notes that “only two percent of all murders are punished with the death penalty . . .” *Id.* at 457 n.216 (alteration in original omitted) (quoting Lawrence C. Marshall, *The Innocence Revolution and the Death Penalty*, 1 OHIO ST. J. CRIM. L. 573, 582–83 (2004)).

145. *See id.* at 448–49, 458.

146. *Id.* at 449.

147. *See id.* at 463.

or even promote, injustice. It would therefore be hubris, Markel contends, to maintain the death penalty.¹⁴⁸

In addition to these general concerns about our criminal justice system, Markel claims that the death penalty is in conflict with core commitments maintained by CCR.¹⁴⁹ CCR seeks to use punishment as a means to communicate public disapproval to an offender.¹⁵⁰ Although actual communication of that condemnation to an offender and actual reception and internalization of that message by the offender are not necessary to justify punishment under CCR, Markel maintains that the conditions of punishment should make it possible for communication to be effective and for the offender to receive and internalize the message.¹⁵¹ In Markel's view, the death penalty makes effective communication and internalization impossible because, well, the audience is dead!¹⁵² By definition, then, the death penalty defeats the dynamic between state and offender that CCR is committed to maintaining as a condition of just punishment.¹⁵³

Like all retributivist theories, CCR is committed to objective proportionality as a standard of criminal punishment.¹⁵⁴ Offenders should receive only the punishment they deserve, which suggests a fit between the offense committed and the sentence received.¹⁵⁵ Although canonical retributivist theories like Kant's hold that perpetrators of some crimes deserve death, and that death uniquely expiates death, Markel views CCR as neutral when it comes to the means of punishment.¹⁵⁶ What matters is that the punishment carries the correct kind and degree of condemnation.¹⁵⁷ In Markel's view, the death penalty does not carry any kind of special condemnation that would make it uniquely well-suited as a means of condemning particular crimes, such as murder.¹⁵⁸ To the contrary, he thinks that long terms of imprisonment, perhaps including life without the possibility of parole, communicate the same kind and degree of condemnation as the death penalty—and perhaps more.¹⁵⁹ After all,

148. *Id.* at 468.

149. *Id.* at 426–27.

150. *See id.* at 428.

151. *Id.*

152. *See id.* at 461–62 (comparing the death penalty to “an insult shouted to an offender in a language she does not understand”).

153. *See id.* at 428.

154. *Id.* at 425.

155. *See id.*

156. *See id.* at 475 (“[N]othing intrinsic to retributivism says that the most severe punishment the state must impose is the death penalty.”).

157. *See id.* at 475–77.

158. *See id.* at 476 (explaining murder is wrong “because it involves the intentional and radical disruption of an ‘autonomous life,’” which can be repaid to the offender by the radical disruption of his life, not necessarily by execution).

159. *See id.* at 461–62 (discussing the continuing condemning nature of a life sentence). Markel notes that some prisoners actually request the finality of execution over life without parole. *Id.* at 445 n.164. After death, the prisoner no longer lives with daily condemnation. *Id.*

imprisonment continues to communicate condemnation to the living, while any condemnation communicated to an offender by the death penalty ends with his life.¹⁶⁰ Given the availability of equally, or more, effective means of communicating the appropriate condemnation, Markel sees no reason for CCR to preserve the death penalty, particularly in the face of accuracy and social justice concerns.¹⁶¹ More pointedly, he thinks that inflicting death when equally viable alternative means exist fails to give full recognition to the dignity of the offender.¹⁶²

In addition to objective proportionality, Markel believes that retributivists are committed to comparative proportionality as an independent standard of justice.¹⁶³ Like cases should be treated alike.¹⁶⁴ As it is practiced in the United States, Markel argues that the death penalty fails to meet the demands of comparative proportionality.¹⁶⁵ Like cases are regularly treated quite differently.¹⁶⁶ More worrisome is the fact that these different outcomes are often explained by variables irrelevant to the kind of objective justice demanded by retributivists.¹⁶⁷ Rather than the nature of the act and degrees of culpability, what best predicts the use of the death penalty in the United States is the county in which the case is prosecuted,¹⁶⁸ the race of the victim, the race of the defendant, and whether the defendant had access to retained counsel and paid investigators.¹⁶⁹ In light of these facts, Markel maintains that CCR cannot sanction the use of the death penalty because our system produces unequal, and therefore unjust, results.¹⁷⁰

160. See *id.* at 460–61. Furthermore, Markel argues that even prisoners who spend years on death row do not necessarily have a realistic chance of internalizing the values communicated by their punishment because of a constant fear of their impending death. *Id.* at 462.

161. *Id.* at 460.

162. *Id.* at 464–68.

163. *Id.* at 447 n.168. One of us had an ongoing debate with Professor Markel about the independent status of comparative proportionality as a standard of retributive justice. See Gray & Huber, *supra* note 36, at 1670–72. Prior to his death, Professor Markel seemed to be softening on the point but had yet to be fully convinced. See Dan Markel et al., *supra* note 86.

164. Markel, *supra* note 19, at 447 n.168.

165. See *id.* at 446 n.166. Markel points out that in the United States morally neutral factors like race and physical geography allow similar cases to be treated differently for arbitrary reasons. *Id.* at 458.

166. E.g., *supra* note 144 and accompanying text (arguing that the diversity of aggravating factors in death statutes fails to meet the demands of comparative proportionality). One extensive study of the death penalty in Kentucky revealed that between 1973 and 2007, 4,686 murders were committed in Connecticut and only nine death sentences were issued. See generally John J. Donohue, *Capital Punishment in Connecticut, 1973–2007: A Comprehensive Evaluation from 4686 Murders to One Execution*, BEPRESS (2013), http://works.bepress.com/john_donohue/87/.

167. See generally Lee Kovarsky, *Muscle Memory and the Local Concentration of Capital Punishment*, 66 DUKE L.J. 259 (2016) (discussing improper motivations for the death penalty).

168. See Frank R. Baumgartner et al., *The Geographic Distribution of US Executions*, 11 DUKE J. CONST. L. & PUB. POL'Y 1, 1–33 (2016); Kovarsky, *supra* note 167, at 263.

169. Michael Tracy, *Race as a Mitigating Factor in Death Penalty Sentencing*, 7 GEO. J.L. & MOD. CRITICAL RACE PERSP. 151 (2015).

170. Markel, *supra* note 19, at 458.

Finally, Markel argues that we should abandon the death penalty because it produces a wide range of secondary harms to the demos and our democratic society.¹⁷¹ First, it is expensive.¹⁷² Getting a death sentence and carrying out an execution require devoting far more resources than, say, life without the possibility of parole.¹⁷³ In a world of limited resources, Markel contends that faith with democratic principles points decidedly against maintaining the death penalty.¹⁷⁴ This is not purely a matter of utility for Markel. To the contrary, those resources might well be used to advance the liberty and dignity of innocent persons through important social programs.¹⁷⁵ There are also human costs for agents of death to consider.¹⁷⁶ Prosecutors, jurors, judges, and executioners are all called upon to participate in the process, potentially compromising their dignity by making them complicit in killing.¹⁷⁷ For Markel, these considerations provide yet more reasons for a theory of punishment committed to the principles of liberal democracy to abandon the death penalty.¹⁷⁸

Although necessarily brief, this Part has provided a summary of Dan Markel's case against the death penalty. Many of Markel's concerns are compelling. The realities of our criminal justice system generally, and our death penalty processes in particular, raise serious concerns about respect for retributivist commitments to punish only the guilty and only to the extent they deserve. But, as I will argue below, these contingencies do not provide grounds for a normative case against the death penalty at the theoretical level.¹⁷⁹ It is perfectly plausible for a retributivist to maintain that some criminals deserve the death penalty while also criticizing a particular criminal justice system and its machinery of death. I find less compelling Markel's theoretical arguments against the death penalty.¹⁸⁰ In fact, I think there are good reasons for CCR to endorse the death penalty as a unique means of communicating condemnation to offenders who commit particularly brutal and cold-blooded killings. I make that case in the next Part.

171. *See id.* at 459 (“[T]he retributivist social planner cannot deny responsibility for the predictable (if unintended) deleterious effects of their actions.”).

172. *See generally id.*

173. *See id.* at 435 n.123.

174. *See* Markel, *Democratic Citizenship*, *supra* note 18, at 115–20. The most appropriate punishment leads a frugal government to impose a sentence that is sufficient but not greater than necessary. Markel, *supra* note 19, at 435 (citing Hugo Adam Bedau, *An Abolitionist's Survey of the Death Penalty in America Today*, in *DEBATING THE DEATH PENALTY* 15, 34 (2004)).

175. Markel, *supra* note 19, at 436–37.

176. *See id.* at 464–68.

177. *Id.* at 467–68.

178. *Id.*

179. *See infra* Part IV (arguing there are limitations to Markel's objections to the death penalty).

180. *See supra* Section II.B (outlining Markel's case against the death penalty).

III. THE CCR CASE FOR THE DEATH PENALTY

I have the deepest respect for Professor Markel and his work. I nevertheless believe that he both overlooks a substantial case for the death penalty on CCR grounds and gives improper weight to collateral concerns about the contingent practicalities of death penalty practice in a society shot through with injustice. In this Part, I argue that CCR advocates should support the death penalty as the proportionate punishment for the most serious offenses. Although I share Professor Markel's concerns that the criminal justice system is not always accurate in its assessments of guilt,¹⁸¹ along with his worry about the effects of background conditions of social injustice on our criminal justice system at all levels,¹⁸² I do not regard these as good reasons to reject the death penalty in theory or practice. They may well augur in favor of a policy of extreme parsimony, reserving the death penalty for only the most serious of offenses and only when there is no question as to guilt, but they do not support Professor Markel's call for complete prohibition.

Consistent with canonical retributivism, the Supreme Court has long held that "death is different."¹⁸³ This view is informed by commitments to the inherent value of human life¹⁸⁴ and the fact that death is singular and permanent.¹⁸⁵ The Court's special valuation of death has given rise to a host of procedural safeguards that add layers of deliberation to the death penalty process¹⁸⁶ and seek to limit its application to the most serious crimes¹⁸⁷ and the most culpable defendants.¹⁸⁸ As a result, the system is designed, at least

181. See Markel, *supra* note 19, at 459.

182. See, e.g., Markel, *Democratic Citizenship*, *supra* note 18, at 38–41.

183. See, e.g., *Ring v. Arizona*, 536 U.S. 584, 606 (2002) ("[N]o doubt that '[d]eath is different.'") (alterations in original); *Woodson v. North Carolina*, 428 U.S. 280, 305 (1976) ("[T]he penalty of death is qualitatively different from a sentence of imprisonment, however long."); *Furman v. Georgia*, 408 U.S. 238, 286 (1972) (Brennan, J., concurring) ("Death is a unique punishment . . ."); *id.* at 306 (Stewart, J., concurring) ("The penalty of death differs from all other forms of criminal punishment, not in degree but in kind.").

184. See, e.g., *Roper v. Simmons*, 543 U.S. 551, 578 (2005) ("[T]he Constitution . . . sets forth, and rests upon, innovative principles original to the American experience, such as . . . broad provisions to secure individual freedom and preserve human dignity.").

185. See, e.g., *id.* at 574 (holding that the state cannot execute a minor and "extinguish his life and his potential to attain a mature understanding of his own humanity").

186. *Ring*, 536 U.S. at 614 (Breyer, J., concurring) (citing *Gregg v. Georgia*, 428 U.S. 153, 196 (1976)) (noting that the "Eighth Amendment requires States to apply special procedural safeguards when they seek the death penalty").

187. See *Atkins v. Virginia*, 536 U.S. 304, 306 (2002). Various jurisdictions require enumerated "aggravating factors" and "mitigating factors" to be considered to determine whether a death sentence may be imposed. *E.g.*, 18 U.S.C. § 3592 (2006); ALA. CODE § 13A-5-49 (2018); FLA. STAT. ANN. § 921.141 (West 2018). Usually, at least one aggravating factor and limited mitigating factors must be apparent for the death penalty to be imposed. See, e.g., 18 U.S.C. § 3592.

188. *Atkins*, 536 U.S. at 337 (Scalia, J., dissenting) (criticizing the Court's holding that executing severely mentally challenged defendants violates the Eighth Amendment as the "pinnacle of . . .

in theory, to reserve the death penalty for murder cases involving aggravating circumstances that mark the crime as distinctly brutal, preternaturally cold and carefully calculated, or otherwise sufficiently distinct from the mine-run of other homicide crimes.¹⁸⁹ This approach to the death penalty lines up exactly with the normative demands of CCR.¹⁹⁰

Death is different in kind from any other punishment. Nothing is more closely protected or highly valued than life.¹⁹¹ It is the precondition of the liberty, autonomy, and dignity that animate Markel's vision of a democratic society.¹⁹² Although other punishments may impinge on liberty, autonomy, or dignity in some way and to some degree, there is still life.¹⁹³ Only death is death. This means that no other punishment can communicate the same condemnation as death.¹⁹⁴ There is simply nothing equivalent to what is communicated when the state intentionally and deliberately takes away the life of an offender. There is no experience equivalent to walking those last yards, being strapped to a gurney, being invited to make a final statement, and then knowing, finally, that this is the end. Some might argue that death is a mercy compared to decades of imprisonment, suggesting that life without the possibility of parole is a more severe punishment than the death penalty, but that is a different question. "There is no *similarity* between life, however wretched it may be, and death . . ."¹⁹⁵ Death is different.

This suggests that CCR should preserve the death penalty as a unique means of communicating condemnation for some crimes. In line with canonical retributivism, the most natural fit would seem to be exceptionally brutal, cold-blooded homicides. These are, after all, the most serious offenses in any democracy that holds highest among its values the sanctity of life. Given such commitments, it is hard to see how any other penalty could communicate condemnation sufficient to meet the demands of absolute proportionality where these crimes are concerned. So, again in line with canonical retributivism, it seems that CCR should support the death penalty in cases of brutal, cold-blooded homicide because the condemnatory message

death-is-different jurisprudence"); *see also Roper*, 543 U.S. at 571 (holding that juveniles are less culpable than adults and cannot be sentenced to death for their crimes).

189. *See Zant v. Stephens*, 462 U.S. 862 (1983) (holding that capital sentencing schemes "must genuinely narrow the class of persons eligible for the death penalty and must reasonably justify the imposition of a more severe sentence on the defendant compared to others found guilty of murder").

190. *See generally* Markel, *supra* note 19, at 427.

191. *See Furman v. Georgia*, 408 U.S. 238, 286 (1972) (Stewart, J., concurring) ("In a society that so strongly affirms the sanctity of life, not surprisingly the common view is that death is the ultimate sanction.").

192. *See generally* Markel, *supra* note 19.

193. *See Furman*, 408 U.S. at 306 (Stewart, J., concurring) (asserting that unlike other forms of criminal punishment, the death penalty is irreversible).

194. *See* Markel, *supra* note 19, at 462 n.236 (quoting Samuel Johnson for the proposition that "when a man knows he is to be hanged in a fortnight, it concentrates his mind wonderfully").

195. KANT, *supra* note 36, at 106.

sent by any other punishment will always fall short. From a communication point of view, imprisonment and other punishments are not proportionate.

Consider as an example Justin Ross Harris.¹⁹⁶ Harris deliberately and intentionally killed his twenty-two-month-old son by leaving the child in a closed car for seven hours on a hot day to “swelter and die”¹⁹⁷ It seems that Harris was motivated in part by a desire to be free of his responsibilities as a father so he could more readily pursue several sexual affairs, including one with a teenage girl.¹⁹⁸ He apparently hit on this inhumanly gruesome method of killing his son after watching an online video documenting the effects of leaving a pet alone in a hot car.¹⁹⁹ Brutal, cold-blooded crimes like these clearly communicate an utter contempt for human life, an absolute denial of the liberty and dignity interests of another human being, the exploitation of a position of power to harm someone who is innocent and powerless, and an abnegation of the most sacred relationship of trust. Can society communicate the right kind of condemnation in these kinds of cases by inflicting the same punishment handed down for drug dealing or embezzlement? Is the message really changed by making the term of imprisonment longer? For CCR, it seems the answer to both questions is unequivocally “no.”

The unique, condemnatory messaging of the death penalty is not limited to the final act. The process of prosecution, conviction, sentencing, appeal, and pleas for executive leniency is rife with moments of communication. When choosing to pursue the death penalty, prosecutors must array facts and make public judgments documenting that the death penalty is particularly proportionate in that case. This, of course, is a moment of deliberate, clear, rational, and public condemnation. As is required by Supreme Court doctrine, death can only be imposed by a jury after a separate sentencing hearing.²⁰⁰ These processes mark extended opportunities to communicate through evidence, witness impact testimony, and solemn, deliberate condemnation of an offender and his acts in the unique shadow of death.²⁰¹ For CCR, there is

196. Alan Blinder, *Georgia Father Is Convicted of Murder in Toddler's Death in Hot Car*, N.Y. TIMES (Nov. 14, 2016), <https://www.nytimes.com/2016/11/15/us/georgia-father-is-convicted-of-murder-in-toddlers-death-in-hot-car.html>.

197. Daniella Silva, *Georgia Dad Justin Ross Harris Sentenced to Life in Son's Hot Car Death*, NBC NEWS (Dec. 5, 2016, 1:05 PM), <https://www.nbcnews.com/storyline/hot-cars-and-kids/georgia-dad-justin-ross-harris-sentenced-life-son-s-hot-n692086>. Judge Mary Staley Clark, at the sentencing hearing, noted that this “factually was a horrendous horrific experience for this 22-month[-]old child who had been placed in the trust of his father and in violation and dereliction of duty to that child, if not love of that child, callously walked away and left that child in a hot car in June in Georgia in the summer to swelter and die” *Id.*

198. *Id.*

199. *Id.*

200. *Ring v. Arizona*, 536 U.S. 584, 609 (2002) (holding that in addition to the findings of facts at a trial on the merits, the Sixth Amendment requires a jury, not a judge, to determine the absence or presence of aggravating or mitigating factors at the sentencing phase of a death penalty trial).

201. See Markel, *What Might Retributive Justice Be?*, *supra* note 18, at 51.

simply no equivalent in terms of messaging or proportionality. Death is different.²⁰²

The processes and procedures necessary to impose a death sentence and then to conduct an execution also provide singular opportunities for unique communication.²⁰³ Death row inmates are often housed separately from the general population.²⁰⁴ As the time for an execution approaches, offenders are usually moved to unique facilities.²⁰⁵ Just prior to their executions, offenders get a last meal and time with a spiritual leader or counselor.²⁰⁶ These process differences matter from a communicative point of view, and, therefore, should matter to CCR. In fact, these differences provide good reasons for CCR to endorse the death penalty as an essential means of communicating the correct and proportionate condemnation in cases of exceptionally brutal, cold-blooded murder.

IV. THE LIMITS OF PROFESSOR MARKEL'S OBJECTIONS TO THE DEATH PENALTY

Professor Markel's objections to the death penalty fall into one of two general categories. Objections in the first category target contingencies of death penalty policy and practice.²⁰⁷ Markel's worries about inaccurate results and his concerns about the effects of systemic racism on the death penalty process fall into this category.²⁰⁸ In general, I am fully sympathetic with these concerns. No retributivist wants to execute someone who is innocent or otherwise undeserving.²⁰⁹ There is also no denying the impact of background racism in our criminal justice system at all levels.²¹⁰ I join Markel in his concerns that race plays an outsized role in death penalty practice.²¹¹ As I will argue below, however, these concerns cannot provide grounds for a normative objection to the death penalty on a theoretical level. It is perfectly reasonable to support the death penalty in the abstract while recognizing that contingent concerns demand extreme parsimony in practice.

202. *Ring*, 536 U.S. at 605–06.

203. *See supra* Section II.A (discussing punishment as a communication opportunity in CCR).

204. *Time on Death Row*, DEATH PENALTY INFO. CTR., <https://deathpenaltyinfo.org/time-death-row> (last visited Nov. 26, 2018).

205. *Id.*

206. *See* Henry Hargreaves, *Last Meals of Death Row Inmates*, CBS NEWS, <https://cbsnews.com/pictures/last-meals-of-death-row/> (last visited Jan. 2, 2019) (presenting a slideshow of death row inmates' final meals).

207. Markel, *supra* note 19, at 458–60.

208. *Id.* at 447–52.

209. *See id.* at 415. Of course, a utilitarian might well want to punish an innocent person, which is one good reason to be a utilitarian. *See id.* at 436.

210. *See* Kovarsky, *supra* note 167, at 263 (discussing race as an improper motive to impose the death penalty).

211. Markel, *supra* note 19, at 448.

The second class of objections that Markel advances against the death penalty do raise conceptual concerns from within the CCR. For example, Markel argues that the death penalty contradicts core CCR commitments to (potentially) effective communication.²¹² Here, I set myself squarely against Professor Markel. Consistent with the arguments advanced in Part III, Professor Markel should support the death penalty because it is a singular means of communicating a unique condemnatory message to offenders.

A. The Death Penalty Process Is Not Adequately Reliable

Errors happen across our criminal justice system. By far predominate are “false negatives” in the form of failures to identify, prosecute, or convict the perpetrators of crimes,²¹³ but there are also many false positives in the form of innocent persons convicted, perpetrators convicted of the wrong offenses, and perpetrators subject to disproportionate punishments.²¹⁴ There have been, and no doubt are now, people on death row who are innocent or facing disproportionate punishment.²¹⁵ It is also virtually certain that at least one innocent or undeserving person has been executed in the past. So, what should a retributivist make of these mistakes?

No retributivist would endorse punishing an innocent person or punishing a guilty person more than he deserves.²¹⁶ So, no retributivist can be fully comfortable with a system that produces false positives. But, as Professor Markel recognizes, these are contingent concerns.²¹⁷ The fact that mistakes happen does not mean that a retributivist cannot, or should not, support the death penalty, at least as a matter of theory. Professor Markel accepts this but maintains that false positives in the system should inspire a level of humility among retributivists that translates into support for blanket commutations, such as the one issued by George Ryan, and a general prohibition on the death penalty as a matter of policy.²¹⁸

It is easy to understand Professor Markel’s point. The most obvious solution to accuracy problems in the death penalty system is to adopt policies designed to prevent false positives. But one can never be completely sure at

212. *Id.* at 460–62.

213. See Martin Kaste, *Open Cases: Why One-Third of Murders in America Go Unresolved*, NPR (Mar. 30, 2015, 5:04 AM), <https://www.npr.org/2015/03/30/395069137/open-cases-why-one-third-of-murders-in-america-go-unresolved>. For example, fully one-third of murder cases are never closed. *Id.* The Bureau of Justice Statistics reports that that only seventy percent of defendants charged with murder are convicted. *FAQ Detail*, BUREAU JUST. STAT., <https://www.bjs.gov/index.cfm?iid=403&ty=qa> (last visited Jan. 2, 2019).

214. See Markel, *supra* note 19, at 450–51. As one of us has argued elsewhere, canonical retributivists of a Kantian stripe would likely favor much more parsimonious criminal codes and less severe sentences for many offenses. See generally Gray & Huber, *supra* note 36.

215. See Markel, *supra* note 19, at 451.

216. See *id.* at 415.

217. *Id.* at 459.

218. *Id.* at 452, 460, 477–80.

a systemic level that errors will not happen. So, humility would seem to counsel against the practice altogether, particularly where there are equally appropriate alternatives available, such as life without the possibility of parole.²¹⁹ This last bit is important.

Markel's argument from humility turns, in part, on the availability of equally proportionate punishments we can substitute for the death penalty. As I argued in Part III, however, there is no punishment equivalent to death for the retributivist, including CCR advocates. The more appropriate response to accuracy concerns therefore seems to be parsimony—maybe even to the point of effective abstinence—but not a policy of complete abandonment.²²⁰ There are, after all, defendants who are demonstrably guilty, beyond any contest or doubt, of grievous murder, which sets them apart from defendants who commit run-of-the-mill homicides.²²¹ These represent the kinds of cases for which there is simply no proportionate punishment other than death. I would cite Justin Ross Harris as such a case, but there are others.²²² If there were cases of cold-blooded contract killings in which prosecutors have uncontroversial documentary and forensic evidence, along with reliable witness testimony removing any shadow of doubt as to guilt, those would certainly qualify. Of course, reasonable people might have different opinions regarding where to draw the line. That is fine. The point is that there exists a set of limitations on the deployment of the death penalty that would satisfy any reasonable concerns about punishing innocent or undeserving persons. Retributivists, including CCR advocates, should be interested in identifying those constraints. That is where the argument based on humility fails to support blanket prohibition.

Professor Markel might argue in response that allowing for the imposition of the death penalty, even in limited circumstances, opens the door to inevitable expansion and equally inevitable mistakes.²²³ In support, he might point to our present system. In response to the commands of due process and Eighth Amendment constraints, the system we have now is designed to limit imposition of the death penalty to exceptional cases where

219. See *id.* at 452, 460. There is a certain tension here between Markel's critique of the death penalty and his critique of mercy. Professor Markel argues that we should never modify an offender's punishment based on facts and considerations not relevant to his crime and culpability. See generally Markel, *Against Mercy*, *supra* note 18, at 1462. For example, Markel is against taking into consideration an offender's past military service as grounds for reducing his sentence because that past service does not change the fact of what he did or the nature of his mental connection to his acts and the results of his conduct. *Id.* Markel's arguments against the death penalty based on systemic concerns seem to run into these same concerns. See generally *id.* After all, the fact that another person may have been wrongly convicted or wrongly sentenced is completely irrelevant when assessing what *this* offender deserves. See generally *id.*

220. See *supra* Part III (discussing the CCR in relation to the death penalty).

221. See, e.g., Christopher Mele, *Indiana Serial Killer Pleads Guilty to Murders of Seven Women*, N.Y. TIMES (May 4, 2018), <https://www.nytimes.com/2018/05/04/us/Darren-Vann-women-murders-guilty.html>.

222. See, e.g., Blinder, *supra* note 196.

223. See Markel, *supra* note 19, at 449–52.

guilt is firmly established.²²⁴ Yet, there are many cases where defendants guilty of basic homicide are sentenced to death, along with a continuing stream of exonerations.²²⁵ Markel might argue that this is inevitable. Inevitably, legislators will expand the scope of death statutes to include additional aggravating factors, providing broader discretion for prosecutors to pursue the death penalty, even in cases of straightforward homicide. Inevitably, flawed science, false confessions, and mistaken witnesses will build cases against the wrong people. Inevitably, aggressive prosecutors will stretch death penalty statutes to cover broader ranges of cases. Given these realities, Markel might contend it is just inevitable that even the most stringent constraints will loosen over time, leading to the conviction of innocent persons and the sentencing of undeserving offenders to death. Faced with these cold truths, he might conclude that humility demands a policy of permanent prohibition. No matter how firm its theoretical footing, we just cannot be trusted with the death penalty.

Although I am sympathetic with these kinds of concerns, I remain skeptical that they inevitability lead to prohibition. After all, one could more broadly make these same points against the criminal justice system as a whole. As a systemic matter, our criminal justice system makes mistakes.²²⁶ It no doubt will continue to make mistakes. Does this mean that we are obliged to abandon the field? Of course not.²²⁷ As Markel has argued, criminal justice is one of the basic, essential functions of the liberal state.²²⁸ Abdication is simply not an option, even in the face of past mistakes and the likelihood of future mistakes. The task, instead, is to learn from past mistakes and to try to do better in the future. If that is the attitude humility counsels in the face of accuracy concerns about the criminal justice system more broadly, then why should the death penalty be different? The only answer is that death is different.²²⁹ But, of course, that same singularity is what makes the death penalty essential in any criminal justice system committed to punishing offenders according to what they deserve. Due care and humility might lead to extreme parsimony when it comes to the death penalty, but they simply cannot underwrite an absolute prohibition.

224. See generally *id.* at 475–76 (discussing the interplay among retribution, proportional punishment, and due process).

225. *Id.* at 415.

226. See, e.g., *supra* notes 137–143 and accompanying text (discussing errors within the system and the inability to correct them).

227. On this point, Professor Markel agrees. Markel, *supra* note 19, at 452.

228. See generally Markel, *Against Mercy*, *supra* note 18 (critiquing the role of mercy in the criminal justice system).

229. See *Ring v. Arizona*, 536 U.S. 584, 605–06 (2002).

B. The Death Penalty Is Disproportionate

In addition to his contingent concerns about death penalty practice, Professor Markel advances several conceptual objections against the death penalty. Among these is that the death penalty is objectively and comparatively disproportionate.²³⁰

Objective proportionality is an essential feature of just punishment for any retributivist.²³¹ To maintain the death penalty as an available punishment, a retributivist must argue that there are some offenses for which death is the right, fitting, and appropriate punishment. To impose the death penalty in any particular case, a retributivist must identify features of the crime that make death a right, fitting, and appropriate punishment.²³² I have argued here that death is the proportionate punishment for particularly cold-blooded, calculated, deliberate, and brutal killings.²³³ Well-meaning people might argue about the precise boundary conditions that limit imposition of the death penalty.²³⁴ I am happy to have these debates. And, in keeping with CCR's commitment to democracy, I am happy to have those boundary conditions worked out through a careful process of politically accountable policymaking. But any disagreements on the boundary conditions by definition grant the core thesis that death is the objectively proportionate punishment for some crimes.

In *State, Be Not Proud*, Professor Markel is also concerned about comparative proportionality.²³⁵ Specifically, he is worried that similar cases are routinely treated differently in our criminal justice system and that morally irrelevant factors often account for whether a perpetrator receives the death penalty or a prison term.²³⁶ These are serious concerns, no doubt, but do they underwrite a conceptual objection to the death penalty for retributivists? I do not think so.

Retributivists should not be concerned with comparative proportionality as an independent constraint on just punishment. If an offender is getting the punishment he deserves, then he is getting the punishment he deserves. That another offender is not getting the punishment she deserves is irrelevant.²³⁷ This is not to say that equal protection of the laws is not important, but it is a heuristic for retributivists, not an independent normative constraint. If we see two similarly situated offenders receiving very different punishments, then

230. See generally Markel, *supra* note 19, at 446 (discussing the computation of death row inmate sentences, regardless of the severity of the crime).

231. *Id.* at 423–24.

232. *Id.* at 448, 451.

233. See *supra* notes 183–202 and accompanying text (explaining proportionality in punishment for the most serious crimes).

234. See *supra* Part I (discussing variations of moral philosophy viewpoints on the death penalty).

235. See Markel, *supra* note 19, at 447–49.

236. *Id.*

237. See Gray & Huber, *supra* note 36, at 1670–72.

that might tell us that at least one of them is not receiving the punishment he deserves. But it certainly does not tell us that nobody deserves that punishment.

For these reasons, the real impact of comparative proportionality concerns is practical, not conceptual. If we notice that similar cases are not being treated alike in our system, then that should alert us to the possibility that morally irrelevant considerations are leaking into our death penalty practice. We should then do our best to diagnose the sources of those errors, correct for them, and impose reforms that will ensure that all offenders get the punishments they deserve. Comparative proportionality as a form of ends testing is perfectly appropriate, but comparative disproportionality will never provide an independent ground for conceptual objections on retributivist grounds against a particular form of punishment, including the death penalty.

C. The Death Penalty Defeats Conditions of Effective Communication

CCR requires that punishment be inflicted only under conditions where effective communication of the condemnatory message is possible.²³⁸ Due to this commitment, CCR would not endorse punishing the unconscious or insane.²³⁹ In Professor Markel's view, this means that CCR cannot support the death penalty because, by definition, it creates conditions in which effective communication is not possible.²⁴⁰ Dead men hear no tales.

For reasons set forth in Part III, this objection misses the point.²⁴¹ Although it is certainly true that an execution puts an end to the conversation between the state and the offender, the conversation up to the point of death is utterly unique in terms of its communicative gravity and content. Imposing an additional requirement for extended opportunities for an offender to internalize that message defeats the point and treads closely to rehabilitation.

At one point, Professor Markel seems to recognize this point, citing Samuel Johnson for the proposition that "nothing concentrates the mind so wonderfully as the sight of the hanging gallows."²⁴² But his response then misses the point. Specifically, he cites concerns about the stress of the death penalty process, which may "preclude opportunities for these moral norms to take root."²⁴³ He then cites no lesser authority than W.C. Fields "in a movie where he played a wag about to be executed [and] quipped to his hangman that his execution will 'sure be a lesson to me.'"²⁴⁴ Though cute, this is a non

238. Markel, *supra* note 19, at 428–29.

239. *Id.*

240. *Id.*

241. *Id.* at 462.

242. *Id.*

243. *Id.*

244. *Id.*

sequitur. Death no doubt ends the conversation, but that is precisely what makes the process unique as a form of condemnatory punishment.

Moreover, it is probably not true that the whole death penalty process is so fraught with stress that offenders cannot be expected to understand and internalize the message. In part to ensure accuracy, offenders routinely wait years between sentencing and execution.²⁴⁵ During that long wait, there are plenty of times when offenders are subject to no more than the normal stress associated with incarceration.²⁴⁶ These long periods provide many opportunities for offenders to internalize the condemnation associated with their sentences.²⁴⁷ The final moments leading up to an execution, and the executions themselves, are uniquely stressful, no doubt.²⁴⁸ Here, however, the stress is an essential feature of the communication.

D. The Death Penalty Is Harmful to Executioners

Professor Markel is also concerned with the well-being of executioners.²⁴⁹ In particular, he worries that compelling someone to participate in an execution is an affront to their dignity.²⁵⁰ By extension, he worries that maintaining the death penalty impinges upon the dignity of citizens.²⁵¹ I see things quite differently. In my view, the affront to dignity is denying the agency to those individuals who choose to participate in executions and societies that choose to maintain the death penalty. Professor Markel and others who are against the death penalty might believe that individuals and societies involved in the death penalty are irrationally blood-thirsty or acting on the wrong kinds of reasons.²⁵² As I have explained, however, there are very good reasons for those committed to retributivism to at least keep death as an option.²⁵³ To deny those individuals and societies the benefit of their reasoned beliefs is paternalistic and antidemocratic.

I certainly would not want anyone—be they juror, judge, corrections official, doctor, or executioner—to find themselves subject to institutional forces that compel them to participate in a death sentence and execution if they, as a matter of conscience or constitution, do not want to participate. Prosecutors and corrections officers should be allowed to decline death penalty assignments without judgment or penalty. Potential jurors should be

245. See *Time on Death Row*, *supra* note 204.

246. See Diana Peel, *Clutching at Life, Waiting to Die: The Experience of Death Row Incarceration*, 14 W. CRIMINOLOGY REV. 61, 65 (2013).

247. Markel, *supra* note 19, at 462.

248. See *id.*

249. *Id.* at 459–60.

250. *Id.* at 467.

251. *Id.* at 467–68.

252. See generally *id.*

253. See *supra* Part III (considering the message the death penalty communicates regarding particular crimes).

able to withdraw from death penalty cases. I also support efforts by drug manufacturers to ban the use of their products in executions to the extent they feel ethically compelled to do so.²⁵⁴ But I likewise recognize that there are plenty of people perfectly willing to impose death and carry out executions when it is warranted. I do not see how denying those folks the benefit of their choices respects their dignity.

E. The Death Penalty Is Expensive

Although he is a retributivist, Professor Markel is not a blind moralist. His work, inclusive of his theory of punishment, lives in the real world.²⁵⁵ Therefore, it is relevant to him that keeping the death penalty is very expensive because it draws limited social resources away from a wide variety of important efforts to achieve social justice.²⁵⁶ If, as a matter of humility, we gave up on the death penalty, then we might realize important gains elsewhere in the criminal justice system as well as in education, health care, or any number of other places where we could spend the funds.²⁵⁷

Many retributivists would reject this kind of objection out of hand. For example, Immanuel Kant would condemn Professor Markel for “crawl[ing] through the windings of eudaemonism . . .”²⁵⁸ In Kant’s view, any compromise against the categorical demand for perfect justice means that “there is no longer any value in human beings’ living on the earth.”²⁵⁹ This is all well and good for a philosopher, but Professor Markel is correct that in the real world good policy demands compromise.²⁶⁰ Given the availability of equivalent punishments, such as life without the possibility of parole, the humble realist might well forgo the death penalty to preserve resources for other worthy endeavors.

Here again, Professor Markel’s argument turns, in part, on the claim that imprisonment expresses the same condemnatory message as death. For reasons set forth above, I do not think this is true, and I suspect Professor Markel probably shared that view.²⁶¹ However, the fact remains that there are tradeoffs in any state among competing initiatives, policies, and departments.

254. *E.g.*, Eckholm, *supra* note 5.

255. *See supra* Section II.B (detailing the deficiencies and difficulties in the misapplication of the death penalty).

256. Markel, *supra* note 19, at 452, 474.

257. *Id.* at 435, 474.

258. KANT, *supra* note 36, at 105.

259. *Id.*

260. *See* Markel, *supra* note 19, at 477, 480 (discussing reasons society should not use the death penalty).

261. *See supra* notes 160–162 and accompanying text (contrasting the reality of life imprisonment and the death penalty as facilitating separate, condemnatory messages).

To the extent that the death penalty is expensive,²⁶² I see no fault again in a parsimonious approach, reserving the death penalty for extraordinary cases.

V. CONCLUSION

In *State Be Not Proud*, Professor Markel argues that preserving the death penalty is incompatible with retributivism, and particularly his CCR.²⁶³ In making his argument, he misses, or at least gives short shrift, to the unique nature of the death penalty as a means of communicating condemnation to particularly deserving offenders. Death is different.²⁶⁴ Consequently, the process of imposing and carrying out a death sentence is pregnant with meaning and import that just cannot be conveyed any other way.²⁶⁵ When it is deserved, nothing else is proportionate. I therefore conclude that, as a conceptual matter at least, Professor Markel should support the death penalty in those few cases of particularly cold-blooded and brutal murder, where it is truly deserved.

Professor Markel is also worried about practical realities.²⁶⁶ Ours is a society fractured by race and class.²⁶⁷ Those differences play out in all our social institutions, including our criminal justice system.²⁶⁸ Throughout the system, those inequities lead to some offenders' getting punishments they do not deserve, whether too severe or not severe enough. Our criminal justice system also produces mistakes.²⁶⁹ As a result, it punishes some innocent people and punishes some guilty people more than they deserve. For Professor Markel, recognizing these realities means that we should, as a matter of humility, abandon the death penalty.²⁷⁰ I think that goes too far—perhaps reflecting a bit of hubris on Professor Markel's part. Faced with these cold realities, humility is certainly due. But I think that humility leads to a policy of parsimony, perhaps even to the point of effective abstinence, but not wholesale abandonment.

262. Markel, *supra* note 19, at 452, 474.

263. *Id.* at 436, 458.

264. *Ring v. Arizona*, 536 U.S. 584, 605–06 (2002).

265. *See supra* notes 183–188 and accompanying text (arguing there is not a punishment that communicates condemnation in the same way as a death sentence).

266. *See generally*, Markel, *supra* note 19.

267. *Id.* at 449–50.

268. *Id.* at 450.

269. *Id.* at 452, 463.

270. *See generally id.*