

Idealism, Disproportionality, and Democracy: A Reply to Chambers and Garvey

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There are three phases to the argument I develop in “Legitimate Punishment in Liberal Democracy.”¹ In the first, methodological phase, I argue for a Rawlsian approach to the problem of punishment, and construct a model of the original position that, I claim, represents the appropriate perspective from which to derive principles on the basis of which a liberal democracy might legitimately punish convicted offenders. In the second phase, I put this model to work to determine the content of such principles. And in the third phase, I draw on the principles just derived to evaluate the legitimacy of current policies and practices.

Taken together, the comments offered by Professors Chambers and Garvey raise questions bearing on each phase of my argument. I cannot in this brief essay adequately respond to all their thoughtful observations, but I will attempt to address what I take to be their main concerns.

I. IDEALISM

Garvey’s central objection pertains to what he sees as the unappealing set of assumptions my argument makes about the ways individual subjects “see and relate to one another, both inside and outside the veil.”² Both as parties

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1. See Sharon Dolovich, *Legitimate Punishment in Liberal Democracy*, 7 *Buff. Crim. L. Rev.* 307 (2004).

2. Stephen P. Garvey, *Lifting the Veil on Punishment*, 7 *Buff. Crim. L. Rev.*

in the original position and as citizens in society, he argues, these subjects as I describe them are fearful, disengaged, and not genuinely or sufficiently respectful of one another's moral status and interests. Given this set of attitudes, he suggests, it is no wonder my model yields principles of punishment that are themselves alienating in their effect, denying citizens access to the very approach to punishment that would deepen their connections with one another and reinforce community ties.

To adequately consider this objection, we must distinguish between two sets of assumptions about the attitudes and perspectives of the parties in the original position. First, there are those assumptions we introduce to achieve the strict impartiality impossible in real-world deliberations. These constructions—the constraints of the veil of ignorance chief among them—do lead the parties to consider others' interests out of sheer prudence and not genuine respect. But the fact that these “artificial creatures”³ view others' interests in this light says nothing about our own attitudes—yours and mine—toward our fellow citizens. To the contrary, we embark on the thought experiment of the original position precisely because we are genuinely committed to the baseline liberal democratic values, including that of equal concern and respect for all.⁴ We posit certain limiting conditions on the parties' deliberations to keep in check the biases and power differentials that can skew real-world deliberations away from what these values demand. In this sense, the original position functions not as a social theory but as a heuristic, a way of realizing many of the values Garvey himself wants to endorse.

Garvey is quite right, though, that other structuring assumptions of the original position under conditions of partial compliance *do* reflect features of a social vision that are non-ideal but are nonetheless allowed to shape the principles of punishment at which I ultimately arrive. My

443, 459 (2004).

3. John Rawls, *Political Liberalism* 28 (1993).

4. See Dolovich, *supra* note 1, at 313-14.

model does, that is, in some sense assume an “emotional economy” of fear.⁵ It does assume that members of society interact largely as strangers. It does assume an inability or unwillingness on the part of the law-abiding to identify with criminal offenders or view their interests as worthy of consideration.

In contrast, on Garvey’s alternative vision, citizens share “a deeper connection.”⁶ They identify equally with the victims of crime and with the perpetrators, who despite their wrongdoing are acknowledged as “member[s] of the community, possessing the same dignity as all other members.”⁷ They respond to crime and criminal offenders in ways intended to condemn the wrong and express solidarity with the victim.⁸ Citizens in Garvey’s world fear no state excesses. Instead, they “welcome [punishment] as a form of secular penance”⁹

Given this vision, it is no surprise that Garvey views punishment not as a necessary evil but as a force for good. He asks: in what kind of society would we like to live? And how might punishment be used to shore up respect and fellow-feeling among community members? But Garvey’s world, like the world of Rawls’s well-ordered society, is not our world. In proposing his alternative vision, Garvey takes issue with the very assumptions of my analysis that model the way citizens within contemporary liberal democratic societies do in fact approach issues of crime and punishment. As I see it, however, if a theory of punishment is to be meaningful for us, it cannot assume away basic features of contemporary society—especially if those features are destined to be an ongoing reality. Thus, even while imposing certain artificial constraints on deliberations designed to help us realize our political ideals to the greatest possible extent, I take as given several features of social reality that Garvey understandably regrets.

5. Garvey, *supra* note 2, at 460.

6. *Id.*

7. *Id.* at 462.

8. See *id.*

9. *Id.*

My account thus takes as its starting points the conditions of partial compliance, the coercive and violent character of state punishment, and an awareness of the tendency of democratic majorities to discount considerably—if not entirely—the interests of the politically and economically marginalized. I add to this picture the reality of crime and the fear it understandably evokes in ordinary citizens going about the business of their lives. And I ask: in such a world, on what terms consistent with the demands of the baseline liberal democratic values may the state legitimately punish criminal offenders?

Given our divergent views, it is unsurprising that Garvey and I would react very differently to the prospect that “a terrible crime” might go unpunished by the state.¹⁰ My own view is that, if punishing the offender could not be shown to be reasonably certain to appreciably deter the commission of other offenses causing harm as severe as the punishment imposed, imposing any state punishment in this case would be gratuitous and therefore illegitimate.

Garvey would reject such an outcome as a moral failure, a rent in the community’s moral fabric. As I see it, however, state punishment is first and foremost not a moral vindication but an act of political power. The stakes are too high, the mechanisms too crude, and the moral commitments of citizens too varied and complex to regard it otherwise.

Is this to say that the offender does not deserve punishment for his “terrible crime”? Not at all. If the victim were someone I loved, I would likely want to tear the guilty party limb from limb. But as I see it, if state punishment is to be legitimate, it cannot be treated as coextensive with the satisfaction of our moral preferences, however defensible they may be.

In short: wrongdoers in society may sometimes deserve punishment that the state may not legitimately impose. And because, despite its proneness to excess, the state for

10. *Id.* at 463.

good reason has a monopoly on legitimate coercive force, this means that some wrongdoers who deserve punishment will escape it altogether. This conclusion, I realize, may leave some readers deeply dissatisfied. We should, however, be wary of any move from such dissatisfaction to a call for state punishment on this ground alone. For my sense is that a great deal of the gratuitous punishment imposed in this country may be accounted for by the false equation of moral righteousness with political legitimacy.

II. DISPROPORTIONALITY

Garvey also takes issue with the principles of punishment I derive in the second phase of my argument. Here, I focus on his claim that the principles are flawed to the extent that they fail to include a prohibition on disproportionate punishment.¹¹ I myself have wrestled with this feature of the principles, and Garvey's comments provide a welcome and valuable perspective on the issue.

The principles of punishment I identify authorize disproportionately severe punishment where doing so could be shown to a reasonable certainty to appreciably deter offenses at least as severe as the punishment imposed.¹² In

11. Garvey also objects that the principles fail to exempt from punishment those offenders who "should be excused for their crime." Garvey, *supra* note 2, at 455. For purposes of my argument, however, I deliberately bracket questions as to substantive criminal law doctrines bearing on the determination of guilt. See Dolovich, *supra* note 1, at n.173. Because I view the matter of duress and other excuses in this light, I do not address them. I see, however, that I may have unintentionally created the misimpression that the parties would be unsympathetic to such excuses. I hope it will clarify things to emphasize that, in contemplating conditions that would leave the parties uncertain as to their future capacity to remain law-abiding, I mean to conjure the image of one who makes *bad* choices, not one whose acts, morally speaking, represent no choice at all. That this is so, I believe, leaves open the possibility that the model would yield the principles of legal excuse Garvey wants to endorse.

12. See Dolovich, *supra* note 1, at 394-400. On the meaning of the "reasonably certain" standard, see *id.* at 402-04. Although nothing in the principles would preclude disproportionately severe inhumane punishment, the analysis only goes to show that inhumane punishment would be authorized by the parties where the offense of conviction was itself inhumane. See *id.* at 417-18. This condition would at least mitigate any disproportionate punishment, if not prohibiting it outright.

response, Garvey argues that the parties' "sense of justice" as to offenders' desert should lead them to reject disproportionality under any circumstances. The parties, however, do not reason according to their sense of justice. Instead, deliberating under conditions of uncertainty for a partially compliant society, they select principles that, consistent with maximin,¹³ will ensure them the best worst-off position measured in terms of their higher-order interest in the greatest protection possible for their security and integrity. And, on this basis, the parties would endorse the imposition of disproportionate punishments under the conditions just noted, however much they hope that they themselves will not ultimately experience such punishment.

There is, it is true, one very narrow opening through which the parties' sense of justice may be engaged in their deliberations: even behind the veil, the parties understand that they have "basic natural duties" to one another not to "injure other persons in their life and limb, or to deprive them of their liberty and property."¹⁴ Assuming a partially compliant society in which some amount of crime is inevitable, the parties would anticipate such violations, and even from behind the veil would recognize the blameworthiness of those who commit such acts against others—and the blamelessness of those who do not. This insight, I suggest, reinforces the parties' sense of the inherently illegitimacy of wrongful conviction.¹⁵

Garvey wants to argue that by this same logic, the parties' "sense of justice" should also lead them to "ban the disproportionate punishment of the guilty."¹⁶ The difficulty here, however, is that when the offender is assumed to be guilty, he would not be subject to punishment through no

13. On the idea of maximin, see *id.* at 343-46.

14. John Rawls, *A Theory of Justice* 314 (1971).

15. See Dolovich, *supra* note 1, at 404-08. See also *id.* at 404 (arguing that the parties would condemn wrongful conviction as inherently illegitimate "[f]or anything else would authorize the state to actively and affirmatively compromise the security and integrity of an innocent member of society in precisely the way the parties would condemn were the agent of the harm a fellow citizen").

16. Garvey, *supra* note 2, at 454, 453.

fault of his own. He would instead be recognized by the parties as blameworthy, and thus the thought of his punishment would not violate the parties' sense of justice in this narrow sense.

Garvey does not acknowledge this difference. More importantly, he never considers the serious negative implications for the parties' security and integrity of his proposed ban on disproportionate punishment, nor does he explain why, given the parties' primary goal of ensuring the best worst-off position for themselves however things turn out, they would prefer his alternative. But in fairness, these are not Garvey's concerns. When he asks: "What sense of justice is it that allows the state to punish someone more harshly than he deserves?"¹⁷ he signals that, as he sees it, in deriving principles of state punishment, we should start with the fruits of our own moral judgments, however incompatible this approach may be with the strict impartiality demanded by the Rawlsian model. In this way, Garvey's approach differs fundamentally from my own.

It is interesting that Garvey invokes Rawls's concept of reflective equilibrium to support his position.¹⁸ For Rawls, to arrive via the original position at principles of justice that conflict with our considered judgments is an indication that something has to change. In such cases, Rawls tells us, "we have a choice. We can either modify the account of the initial situation or we can revise our existing judgments."¹⁹ True, some judgments—for example, the idea that slavery is wrong²⁰—are fixed points not open to revision. In such cases, a conflict between our judgments and the principles indicates that we have yet to articulate deliberative conditions constituting "the most favored

17. *Id.* at 455.

18. See *id.* at 453.

19. Rawls, *supra* note 14, at 20. Notice that for Rawls, achieving reflective equilibrium requires a process of reshaping, in light of our prior judgments, the terms of the original position and not, as Garvey suggests, the content of the principles themselves. See Garvey, *supra* note 2, at 453.

20. See John Rawls, *Justice as Fairness: A Restatement* 29 (Erin Kelly ed., 2001).

description of th[e initial] situation.”²¹ Where, however, our judgments are not fixed in this sense and no alternative account of the original position proves more consonant with our considered convictions as to the fair terms of deliberation over principles of justice, Rawls’s concept of reflective equilibrium suggests that it may instead be our judgments that require modification.

I myself initially approached this enterprise with an expectation that the framework would yield a prohibition on disproportionate punishment. But much in the way contemplated by Rawls’s concept of reflective equilibrium, the process of constructing the argument for the principles of legitimate punishment has unsettled my sense of the *per se* wrongfulness of disproportionate punishment. As I now see it, the real injustice in a partially complaint society lies not in disproportionate punishments *per se* but in gratuitous punishments (which are often themselves disproportionate).

III. DEMOCRACY

Chambers’s main concern is of a different order. She appears sympathetic to the conceptual approach I adopt, and apparently regards the modified original position—with what she terms its “humility constraint”²²—as a compelling and appropriate way to identify principles of just punishment. It is the third phase of my argument that Chambers finds troubling. Specifically, she perceives in my discussion of the policy implications of the principles what she terms a “democratic deficit.”²³ This deficit, she suggests, arises from a conception of legitimacy that, as she puts it, “never involves actual justification to real citizens.”²⁴

21. Rawls, *supra* note 14 at 20.

22. Simone Chambers, *Democratizing Humility*, 7 *Buff. Crim L. Rev.* 465, 470 (2004).

23. *Id.* at 468.

24. *Id.*

Chambers raises an important point. For all my invocation of “liberal democratic values,” there is in the theory I develop little apparent concern with public debate or citizens’ democratic autonomy. It is my theory of implementation that Chambers terms “top down and paternalistic,”²⁵ but arguably the same can be said—perhaps even more readily—for the process of deriving the principles themselves. What, in short, does my liberal theory of punishment have to do with democracy?

In fact, my approach is deeply informed by a commitment to democratic values and to the possibility of the democratic project. In terms of implementation, it is at the third phase, in which I consider how to translate the principles into a policy program, that I explicitly make space for democratic deliberation, political disagreement, and public challenge. At this point, I repeatedly acknowledge the broad scope for reasonable disagreement over the issues at stake, and anticipate that any proposals and arguments for change would face much public scrutiny and debate. I do, it is true, argue that all participants to such debate—policymakers and citizens alike—are obliged to approach the process as if from behind a modified veil. From this perspective, arguments would be judged on the basis of whether all would agree to them if they really did not know where in the social hierarchy they fall and thus how much political power they actually enjoy. That this is so does not deny that it is real people in all their situated particularity who will in fact be engaging the issues. It is simply to provide a standard by which to evaluate the arguments they make in so doing—a standard that is crucial if we are to ensure meaningful consideration of the interests of all citizens, and not merely reproduce a policy regime indifferent to the preferences of all but the most powerful. In this respect, I view the process of implementing the principles as one of genuine democratic engagement over crucial issues of common concern in which all perspectives may be fairly represented.

25. *Id.*

But to me, the connection of my enterprise to democratic values and the democratic project is evident right from the start, in my adoption of a modified Rawlsian approach to the problem of punishment. And this is so despite the fact that I am arguably at this point stipulating artificial burdens on democratic deliberations, leading to principles that are themselves intended to constrain democratic preferences. For as I see it, only with such an approach can we realize the democratic ideal of the "free and equal citizen." Chambers herself recognizes that, if we are to achieve justice in its most urgent forms, some constraints must be placed on the scope of the popular will.²⁶ And likewise, as paradoxical as it sounds, if we are to make meaningful democracy possible, there are some things the state cannot do no matter how strong the public demand. Hence familiar constitutional restrictions on state action.

Like constitutional principles, the principles of legitimate punishment for which I argue set bounds on what criminal penalties may be imposed by the state. The parsimony principle, for example, may be understood as a ban on gratuitous punishment. My claim is that these principles—admittedly farther reaching than the Eighth Amendment prohibition on "cruel and unusual punishment," at least under prevailing Supreme Court doctrine—ought to function in the way of constitutional standards, constraining certain majority preferences however intensely felt.

Chambers's discomfort with my "democratic deficit"²⁷ has two dimensions. The first is a "pragmatic" concern²⁸ that no political system can become stable unless citizens themselves "respect it, revere it, or believe in it."²⁹ For this reason, Chambers argues, if my theory is to have any practical effect, means must be devised by which citizens could be persuaded of the justice of my approach. On this point, she and I are in total agreement. If I say nothing in my article as to the importance of the eventual need to

26. See *id.* at 475.

27. *Id.* at 468.

28. See *id.*

29. *Id.* at 475.

secure public support for the general approach and the legislative program I advocate, it is because I take for granted the need for a political constituency before we could expect to see any of the changes for which I argue. I regard my own theory not as a policy brief to be implemented from on high, but rather as the best argument I can offer for my view as to the way we as a society ought to approach the question of punishment, and for my position that the policies I identify are illegitimate and require reconsideration.

The second aspect of Chambers's discomfort, however, does I think reflect a substantive difference in our respective positions. She argues that my "suspicio[n] of majoritarianism" fails to accord "due consideration to all members of society as democratic citizens whose right to democratic self-determination ought to be respected."³⁰ While she concedes the need to limit the reach of the popular will in certain contexts, she believes it to be "an open question" whether criminal punishment is among those arenas of state action in which such limits are normatively appropriate.³¹ Yet as should by now be clear, I myself have a hard time seeing how the arena of criminal punishment could be viewed in any other way, given what we know about the stakes for individual citizens and the state's tendency to excess in this context. Indeed, I view the enterprise of articulating meaningful constraints on the democratic will to punish as crucial to the possibility of the democratic project. Chambers cautions that my view of democracy is "inconsistent with thinking of citizens as free and equal."³² But when popular passions against convicted offenders threaten the conditions of freedom and equality, the only way to preserve the possibility of democracy may be to set bounds that we can all agree are just and fair on what the state can do to its citizens in the name of criminal justice. Or this, at least, is the driving assumption of my liberal democratic theory of punishment.

30. *Id.* at 475.

31. *Id.*

32. *Id.* at 468.