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Retributivism for Progressives: A Response to Professor Flanders

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Response

RETRIBUTIVISM FOR PROGRESSIVES: A RESPONSE TO PROFESSOR FLANDERS

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I. INTRODUCTION

The population of persons incarcerated in the United States again reached a record high in 2008[1]: 2,424,279.[2] That total treats "incarcerated" broadly and includes "inmates held in . . . U.S. territories, military facilities, U.S. Immigration and Customs Enforcement (ICE) owned and contracted facilities, jails in Indian country, and juvenile facilities."[3] Narrowing the focus a bit, federal and state adult prisons and local jails incarcerated a total of 2,304,115 individuals in 2008.[4] Federal and state prisons had custody of over 1,610,446 individuals, of whom 1,540,036 were serving sentences of one year or more.[5]

Comparing the 2,304,115 total to the overall population yields an incarceration rate of 754 adult inmates for every 100,000 adult residents.[6] Ninety-three percent of the 1,610,446 prisoners held in federal and state prisons were men.[7] Men aged twenty-five to twenty-nine represented the largest percentage of those serving sentences of a year

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1. *See* WILLIAM J. SABOL ET AL., U.S. DEP'T OF JUSTICE, NO. NCJ 228417, BUREAU OF JUSTICE STATISTICS BULLETIN: PRISONERS IN 2008, at 1 & fig.1 (rev. 2010), *available at* http://bjs.ojp.usdoj.gov/content/pub/pdf/p08.pdf.

2. *Id.* at 8 tbl.9.

3. *Id.*

4. *Id.* at 8.

5. *Id.* at 2 tbl.1. The vast majority of the difference is comprised of persons held in local jails and persons held in juvenile facilities. *See id.* at 8 tbl.9.

6. *Id.* at 8.

7. *Id.* at 2.

or more—17.2%[8]—but with an incarceration rate of only 2,238 per 100,000, men in that age range ranked second to men aged thirty to thirty-four, who were incarcerated at a rate of 2,366 per 100,000.[9]

Among men serving sentences in federal and state prisons, 38% were black, 34% were white, and 20% were Hispanic,[10] with the consequence that white men were serving sentences of a year or more at a rate of 487 per 100,000, Hispanic men at a rate of 1,200 per 100,000, and black men at a rate of 3,161 per 100,000.[11] Another "4,270,917 adult men and women were on probation and 828,169 were on parole or mandatory conditional release following a prison term."[12] All told, according to the Bureau of Justice Statistics, at the end of 2008 "over 7.3 million people were on probation, in jail or prison, or on parole," constituting "3.2% of all U.S. adult residents or one in every 31 adults."[13]

Many of these individuals were serving lengthy prison sentences, often for drug crimes. Of the 79,904 defendants convicted and sentenced between October 1, 2005 and September 30, 2006, about 80% were sentenced to terms of incarceration.[14] The average sentence imposed for state felony offenses in 2006 was 59 months.[15] The average sentence imposed in the federal system was approximately 64 months.[16] Of state felony convictions, 33.4% were for drug offenses compared to 18.2% for violent offenses and 28.4% for property offenses.[17] In both the federal and state systems, more than 95% of persons convicted for murder or non-negligent manslaughter were sentenced to prison.[18] The mean maximum sentence length for those prosecuted by states for these crimes was 244 months—though it was only 124 months in the federal system.[19] For drug offenses, 65% of

8. *Id.* at 9.

9. *Id.*

10. *Id.* at 2.

11. *Id.* at 5 tbl.6.

12. Office of Justice Programs, *Total Correctional Population*, BJS: BUREAU OF JUST. STAT. (Oct. 9, 2010), http://bjs.ojp.usdoj.gov/index.cfm?ty=tp&tid=11.

13. *Id.*

14. BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, NO. NCJ 225711, FEDERAL JUSTICE STATISTICS 2006—STATISTICAL TABLES tbl.5.1 (2009), *available at* http://bjs.ojp.usdoj.gov/content/pub/html/fjsst/2006/fjs06st.pdf.

15. SEAN ROSENMERKEL ET AL., U.S. DEP'T OF JUSTICE, NO. NCJ 226846, BUREAU OF JUSTICE STATISTICS: STATISTICAL TABLES, NATIONAL JUDICIAL REPORTING PROGRAM: FELONY SENTENCES IN STATE COURTS, 2006—STATISTICAL TABLES 1 (2009), *available at* http://bjs.ojp.usdoj.gov/content/pub/pdf/fssc06st.pdf.

16. *See* BUREAU OF JUSTICE STATISTICS, *supra* note 14, at tbl.5.2. R

17. ROSENMERKEL ET AL., *supra* note 15, at tbl.1.1. R

18. *Id.* at tbl.1.6.

19. *Id.*

persons convicted in state courts received prison terms, with a mean maximum of 31 months (23 months for possession, 38 months for trafficking).[20] By contrast, 93% of those convicted of felony drug offenses in the federal system were sentenced to prison terms, with a mean maximum of 87 months (48 months for possession, 87 months for trafficking).[21]

For those who are incarcerated, life is exceptionally unpleasant. Imprisonment entails extensive inherent constraint on movement and freedom, often for twenty-three hours a day. In addition, overcrowding,[22] aging facilities, and violence make life in most prisons and jails exceptionally dangerous. In 2007, 4.5% of prisoners in state and federal adult facilities reported being victimized sexually, often at the hands of staff.[23] Of minors detained in juvenile facilities nationwide, 12% reported being sexually victimized from 2008 to 2009, most of the time at the hands of facility staff.[24] Just as is the case with sexual assault outside prison, most experts assume that these numbers reflect dramatic underreporting.[25] Non-sexual assaults are, of course, much more common, though accurate statistics are hard to find.[26]

This long string of statistics can be summed up quite simply: In the United States, there are a lot of people who are incarcerated for a considerable period of time in unpleasant and often dangerous conditions. But do these statistics bespeak a criminal justice system that is

20. *Id.*

21. *Id.*

22. SABOL ET AL., *supra* note 1, at 44–45 app. tbl.24. In 2008, the federal system was operating at 135% of capacity and almost half of the state systems were operating above capacity. *Id.* R

23. ALLEN J. BECK & PAIGE M. HARRISON, U.S. DEP'T OF JUSTICE, NO. NCJ 219414, BUREAU OF PRISON STATISTICS: SPECIAL REPORT, PRISON RAPE ELIMINATION ACT OF 2003: SEXUAL VICTIMIZATION IN STATE AND FEDERAL PRISONS REPORTED BY INMATES 2007, at 1–2 (rev. 2008), *available at* http://bjs.ojp.usdoj.gov/content/pub/pdf/svsfpri07.pdf.

24. ALLEN J. BECK ET AL., U.S. DEP'T OF JUSTICE, NO. NCJ 228416, BUREAU OF JUSTICE STATISTICS: SPECIAL REPORT, SEXUAL VICTIMIZATION IN JUVENILE FACILITIES REPORTED BY YOUTH 2008–09, at 1 (2010), *available at* http://bjs.ojp.usdoj.gov/content/pub/pdf/svjfry09.pdf.

25. *See, e.g.*, JAMES Q. WHITMAN, HARSH JUSTICE: CRIMINAL PUNISHMENT AND THE WIDENING DIVIDE BETWEEN AMERICA AND EUROPE 61 (2003) [hereinafter WHITMAN, HARSH JUSTICE] (stating that the "real prevalence" of sexual assault in "high-security American carceral institutions" is "essentially impossible to determine"); *see also* JAMES BYRNE, COMMISSION ON SAFETY AND ABUSE IN AMERICA'S PRISONS: SUMMARY OF TESTIMONY 5 (2006), *available at* http://www.prisoncommission.org/statements/byrne_james_m.pdf (estimating that incidents of prison violence, both physical and sexual, are underreported by at least a factor of ten).

26. *See* JOHN J. GIBBONS & NICHOLAS DE B. KATZENBACH, COMM'N ON SAFETY AND ABUSE IN AMERICA'S PRISONS, CONFRONTING CONFINEMENT 24 (2006), *available at* http://www.prisoncommission.org/pdfs/Confronting_Confinement.pdf.

excessively "harsh"? Professor James Q. Whitman is on record for believing that they do.[27] He is particularly struck by the wide disparities between sentencing patterns in the United States and sentencing patterns in other developed Western nations.[28] While the pantheon of those responsible for harsh justice in the United States is many and diverse, Whitman reserves special blame for retributivism, which he regards as inherently harsh.[29] In his view, the ascendency of retributivism in the latter half of the twentieth century has justified criminal justice laws, policies, and practices that have led us inevitably to our current situation and have saddled us with a criminal justice system that is far too harsh.[30] It follows, on his view, that for progressive agendas to proceed in the criminal justice field, critics, theorists, activists, and policymakers must reject retributivism as a theory of criminal justice.

In his important Article, Professor Chad Flanders takes up Whitman's gauntlet, asking the question Whitman largely begs: Is retributive justice inherently harsh?[31] This is surely the right question. After all, theory is often the victim in public policy circles where politicians and policymakers too frequently misconstrue, misapply, or misrepresent theory—or even facts—in post hoc efforts to justify their views and reactions. If retributivism has been systematically abused for half a century to justify harsh criminal justice policy, then the solution for progressives may not be to abandon retributivism. Flanders ultimately concludes that many theories that purport to be retributivist are harsh but finds that others may not be.[32] In the latter category, Flanders is particularly attracted to Augustine and Adam Smith, who advance retributivism as a machinery for rational restraint against emotional drives for vengeance by setting upper limits on punishment to avoid harsh outcomes.[33]

While we share many of Flanders's views, we think that his discussion is incomplete in important ways and that he leaves in the ground

27. *See* James Q. Whitman, *What Happened to Tocqueville's America?*, 74 SOC. RES. 251, 251–52 (2007) (discussing "America's sorry place on the far harsh end of the punishment spectrum").

28. *See, e.g.*, James Q. Whitman, *The Comparative Study of Criminal Punishment*, 1 ANN. REV. L. & SOC. SCI. 17, 29 (2005).

29. *See* James Q. Whitman, *A Plea Against Retributivism*, 7 BUFF. CRIM. L. REV. 85, 85–89 (2003) [hereinafter Whitman, *Plea*].

30. *See id.* ("The old belief in rehabilitation, which was closely associated with indeterminate sentencing, has been widely abandoned. In its place has come the triumph of American neo-retributivism.").

31. *See generally* Chad Flanders, *Retribution and Reform*, 70 MD. L. REV. 87 (2010).

32. *See id.* at 109–33.

33. *See id.* at 124–33.

significant retributivist resources progressives might like to exploit. Foremost, he does not—and so far as we can find, neither does Whitman—define in clear terms what harsh means in his discussion.[34] Given the centrality of harshness as a metric for measuring criminal justice policies and outcomes in their discussions, we think this is a fundamental omission. In Part II of this Response, we explore briefly some of the possibilities and settle on harsh as a pass-through term for disproportionate, though perhaps with some aesthetic overtones. Having identified more clearly the normative core of a harshness charge, we turn in Part III to a brief analysis of the American criminal justice system using the theory of punishment held by perhaps the most prominent Enlightenment retributivist: Immanuel Kant. This discussion leads us to the conclusion that the American criminal justice system is indeed harsh. However, we think that American justice is harsh as measured by retributive standards and that it would be less harsh if policymakers took more seriously the constraints on punishment that retributivism recommends.[35]

While Whitman and Flanders focus on punishment, we conclude that retributivists should regard American justice as harsh in at least three regards. First, contemporary criminal codes are far too expansive by retributivist standards, leading to broad overcriminalization and dramatic increases in crime, violence, and rates of imprisonment.[36] Second, many sentences imposed in the United States are disproportionate to the crimes to which they are nominally attached.[37] Third, prison conditions in many state and federal facilities are harsh insofar as inmates are made to suffer unjustified harm.[38] In Part IV we briefly expand upon these conclusions. We conclude by returning to the question at the core of the discussion Flanders began: Is retributivism harsh or progressive? We think that it is progressive, or at least has the potential to be, and we hope that our efforts here will provide modest contributions to the valuable conversation Flanders advances in his Article.

II. WHAT IS "HARSH"?

If the point of the conversation is to determine whether current criminal law and policy in the United States is harsh and whether retributivism is inherently or contingently harsh, it seems important as a

34. *See infra* Part II.
35. *See infra* Part III.
36. *See infra* Part IV.A.
37. *See infra* Part IV.B.
38. *See infra* Part IV.C.

threshold matter to be clear about what harsh means. Neither Flanders nor, so far as we can tell, Whitman provide a succinct definition of this central term.[39] However, their use of the word provides material for a useful reverie.

Many of Whitman's and Flanders's uses of harsh seem to be aesthetic: Harsh is applied to conditions and conduct that make us shiver. Being in prison in America seems to be extremely unpleasant in almost every respect.[40] The physical conditions are uncomfortable: There is little daylight, the air is stagnant, the beds consist of thin mattresses, the food is terrible, and there are extreme physical threats from fellow prisoners and staff. Harsh in this sense stands shoulder-to-shoulder with mean, ugly, and perhaps cruel. Discussions of prison conditions in Flanders's and Whitman's works fall into this category of usage. Here harsh carries a strong emotional valence and seems calculated to evoke an intestinal reaction.[41]

The problem with harshness as an aesthetic is that it is highly subjective. We might share some sensibilities with Flanders and Whitman that would lead us to agree that much of our current punishment practice is quite ugly indeed, but that delightful happenstance leaves us without much to say to those who feel charged pride when they survey the same practices and policies that inspire shame in us. That unpromising prospect looms large given broad support in the American electorate for many of the policies responsible for the current tableau. Public celebrations of figures like Joe Arpaio, the fifth-term sheriff of Maricopa County, Arizona, who has built a controversial

39. *See* WHITMAN, HARSH JUSTICE, *supra* note 25, at 32–39 (attempting to define "[h]arshness in *criminalizing conduct*," "*subjecting numerous classes of persons to potential criminal liability*," "*grading*," "*inflexible doctrines of criminal liability*," "*enforcement*," "*the law of punishment*," "*the application of punishment*," and "*the inflexibility of punishment*"). R

40. *See id.* at 59–62 (discussing the trend in American prisons "toward a growing harshness" that is bolstered by "drastic overcrowding, inmate-on-inmate violence, and guard-on-inmate violence," as well as "[h]omosexual rape, in particular"); Flanders, *supra* note 31, at 95–96. We limit our observation to "seems to be" because we are fortunate enough not to have first-hand knowledge. We suspect that most observers would agree that prison is entirely undesirable, unpleasant, and misery inducing, but we must acknowledge a robust debate about precisely whether the subjective negative experience of prison, including adaptation to prison conditions, should impact sentencing policies and practices. *See* John Bronsteen, Christopher Buccafusco & Jonathan Masur, *Happiness and Punishment*, 76 U. CHI. L. REV. 1037 (2009); John Bronsteen, Christopher Buccafusco & Jonathan Masur, *Retribution and the Experience of Punishment*, 98 CAL. L. REV. (forthcoming 2010); David Gray, *Punishment as Suffering*, 63 VAND. L. REV. (forthcoming 2010) (on file with the Maryland Law Review) [hereinafter Gray, *Punishment as Suffering*]; Dan Markel & Chad Flanders, *Bentham on Stilts: The Bare Relevance of Subjectivity to Retributive Justice*, 98 CAL. L. REV. (forthcoming 2010); Dan Markel, Chad Flanders & David Gray, *Beyond Experience: Getting Retributive Justice Right*, 98 CAL. L. REV. (forthcoming 2010). R

41. *See supra* note 40. R

public image around his commitment to law enforcement practices and maintenance of jail conditions that Whitman and Flanders likely would identify as harsh, only add to the pall.[42] Harsh as an aesthetic therefore seems a rather thin and unpromising foundation upon which to build a progressive agenda. It certainly provides no grounds for Flanders's claim that "[r]egardless of a theory's elegance, and even its truth or falsity, a theory of punishment that does not give us clear resources to condemn our current system of punishment—its long sentences, its mass imprisonment, its degrading conditions—is not a theory worth taking seriously."[43] Quite to the contrary, this seems to get things backward.

At other times, harsh seems to reflect a comparison of American punishment practices to those of other nations. Whitman is particularly drawn to this usage and spills considerable ink elaborating a sociohistorical narrative of punishment practices in Europe and the United States.[44] Without dwelling on the substance of these comparisons, we will simply point out that harsh as a comparative concept also fails to advance the progressive ball. As Whitman notes, "What counts as 'harsh' depends on the sensibilities and structures of a given society."[45] So, while American punishment may seem harsh from a European point of view, American sensibilities may find European policy and practice too lenient, compromising, and accommodating to criminals; and that is pretty much the end of the debate. Further, given current skepticism of European practices and sensibilities among the American electorate,[46] pinning progressive hopes to an agenda of Europeanization seems a particularly dim prospect.

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42. *See generally* William Finnegan, *Sheriff Joe*, NEW YORKER, July 20, 2009, at 42 (discussing "Arpaio's theatre of cruelty").

43. *See* Flanders, *supra* note 31, at 137. Quite to the contrary, we think that gets the order of burdens exactly backward. R

44. *See, e.g.*, WHITMAN, HARSH JUSTICE, *supra* note 25, at 19 ("American punishment is comparatively harsh, comparatively degrading, comparatively slow to show mercy."); Flanders, *supra* note 31, at 131 n.253. We are also deeply skeptical of Whitman's painting of European society, politics, and history in such broad strokes. *See, e.g.*, WHITMAN, HARSH JUSTICE, *supra* note 25, at 13 ("Why are the values of mercy so much stronger in continental Europe?"). Europe is composed of diverse states, many of which are further subdivided by language, culture, and history. Whitman does spend some time focusing on a few countries in particular (Germany, for example), which we think is a much more promising approach to comparative analysis. *See, e.g.*, *id.* at 69–95. R R R

45. WHITMAN, HARSH JUSTICE, *supra* note 25, at 32. R

46. *See, e.g.*, David Alan Sklansky, *Anti-Inquisitorialism*, 122 HARV. L. REV. 1634, 1635–36 (2009) (criticizing that "[a] lengthy tradition in American law looks to the Continental, inquisitorial system of criminal adjudication for negative guidance about our own ideal").

At other times, Whitman and Flanders use harsh to mean "determinate" or "inflexible."[47] This is a common critique of retributivism, to which Martha Nussbaum, among others, has given persuasive voice.[48] There is no doubt that determinacy and inflexibility are a sustained fashion in American criminal justice. From 1987 until 2005, sentencing in the federal system was governed by the mandatory Federal Sentencing Guidelines with the expressed purpose of limiting flexibility and discretion in sentencing.[49] In 2005, the Supreme Court rendered the Guidelines "advisory," but district courts still must "consider" them;[50] in practice, the vast majority of sentences remain within Guidelines ranges or higher;[51] and most circuit courts of appeals have endorsed Guidelines range sentences as presumptively reasonable

47. *See, e.g.*, WHITMAN, HARSH JUSTICE *supra* note 25, at 35, 49 (emphasis omitted); Flanders, *supra* note 31, at 93. R R

48. *See, e.g.*, Martha C. Nussbaum, *Equity and Mercy*, 22 PHIL. & PUB. AFF. 83, 115 (1993) (describing retributivism as "brutal in its neglect of human complexity"). For an engaging critical discussion of mercy in retributive theory, see Dan Markel, *Against Mercy*, 88 MINN. L. REV. 1421 (2004).

49. Michael M. O'Hear, *Rethinking Drug Courts: Restorative Justice as a Response to Racial Injustice*, 20 STAN. L. & POL'Y REV. 463, 469 (2009). It is worth noting that determinate sentencing came to the fore in the face of broad skepticism about progressive sentencing reforms of the mid-twentieth century. *See generally* U.S. SENTENCING COMM'N, FIFTEEN YEARS OF GUIDELINES SENTENCING: AN ASSESSMENT OF HOW WELL THE FEDERAL CRIMINAL JUSTICE SYSTEM IS ACHIEVING THE GOALS OF SENTENCING REFORM 1–3 (2004), *available at* http://www.ussc.gov/15_year/15_year_study_full.pdf (outlining "the historical context of sentencing reform").

50. United States v. Booker, 543 U.S. 220, 245–46 (2005).

51. Erin P. Johnson, *Advisory Guidelines and Lengthier Sentences: Relevant Conduct Sentencing as an Increasingly Harmful Sentencing Practice Post-*Booker, 1 HUM. RTS. & GLOBALIZATION L. REV. 147, 148–49 (2008) (citing U.S. SENTENCING COMM'N, FINAL REPORT ON THE IMPACT OF *UNITED STATES V. BOOKER* ON FEDERAL SENTENCING vii (2006), *available at* http://www.ussc.gov/booker_report/Booker_Report.pdf).

when reviewing district court judgments.[52] More than half of states also utilize guidelines schemes.[53]

In addition to sentencing guidelines, legislatures in recent decades have passed a raft of criminal statutes with mandatory minimum sentences attached.[54] Many states have followed the federal lead by severely limiting or eliminating early release, particularly for violent offenders.[55] As a consequence of these efforts, American criminal punishment is indeed increasingly inflexible, but it is hard to see how that determinacy alone makes it harsh. Without appeal to another standard, it is impossible to tell whether a determinate sentencing scheme is inflexibly lenient, inflexibly harsh, or fortuitously just right in all cases despite its inflexibility. Moreover, the raison d'être of de-

52. *See* United States v. Favara, Nos. 09-2589 & 09-2593, 2010 WL 3155891, at *4 (7th Cir. Aug. 11, 2010) (stating that a district court's sentence within the Guidelines range is presumed to be reasonable); *accord* United States v. Masek, 588 F.3d 1283, 1290 (10th Cir. 2009); United States v. Vonner, 516 F.3d 382, 389 (6th Cir.), *cert. denied*, 129 S. Ct. 68 (2008); United States v. Dorcely, 454 F.3d 366, 376 (D.C. Cir. 2006); United States v. Alonzo, 435 F.3d 551, 554 (5th Cir. 2006); United States v. Lincoln, 413 F.3d 716, 717–18 (8th Cir. 2005); United States v. Gonzalez, 134 F. App'x 595, 596–97 (3d Cir. 2005) (unpublished decision). *But see* United States v. Phaknikone, 605 F.3d 1099, 1107 (11th Cir.) ("Although we do not apply a presumption of reasonableness to within-guidelines sentences, when the district court imposes a sentence within the advisory Guidelines range, we ordinarily will expect that choice to be a reasonable one." (internal quotation marks omitted)), *petition for cert. filed*, (July 30, 2010) (No. 10-5864); United States v. Carty, 520 F.3d 984, 988 (9th Cir.) (declining to establish a presumption of reasonableness), *cert. denied*, 553 U.S. 1061 (2008); United States v. Fernandez, 443 F.3d 19, 27 (2d Cir. 2006) (declining "to establish any presumption, rebuttable or otherwise, that a Guidelines sentence is reasonable"). While the Supreme Court has endorsed the practice of circuit courts affording a presumption of reasonableness to Guidelines range sentences imposed by trial courts, *see* Rita v. United States, 551 U.S. 338, 347 (2007), it has rejected attempts by trial courts to indulge in a presumption that a sentence within the Guidelines range is reasonable, *see* Nelson v. United States, 129 S. Ct. 890, 892 (2009) (per curiam).

53. Susan R. Klein & Sandra Guerra Thompson, *DOJ's Attack on Federal Judicial "Leniency," the Supreme Court's Response, and the Future of Criminal Sentencing*, 44 TULSA L. REV. 519, 520 n.5 (2009) ("Close to half of the states had followed the federal model post-1984 and enacted some form of [sentencing] guidelines.").

54. Cathi J. Hurt, Note, *Juvenile Sentencing: Effects of Recent Punitive Sentencing Legislation on Juvenile Offenders and a Proposal for Sentencing in the Juvenile Court*, 19 B.C. THIRD WORLD L.J. 621, 626 (1999) (explaining that "mandatory minimum sentencing" has become "prevalent in both the state and federal sentencing schemes").

55. *See* WILLIAM J. SABOL ET AL., URBAN INST. JUSTICE POLICY CTR., THE INFLUENCES OF TRUTH-IN-SENTENCING REFORMS ON CHANGES IN STATES' SENTENCING PRACTICES AND PRISON POPULATIONS: REPORT TO THE NATIONAL INSTITUTE OF JUSTICE 17–23 (2002), *available at* http://www.urban.org/UploadedPDF/410470_FINALTISrpt.pdf (noting that twenty-one states have followed the federal lead and have limited or eliminated early release for violent offenders). Florida's statute abolishing parole, for instance, was a source of some concern for the Supreme Court in its recent decision to bar life sentences for juveniles without "some realistic opportunity to obtain release." Graham v. Florida, 130 S. Ct. 2011, 2034 (2010); Act Effective Oct. 1, 1998, ch. 204, § 2, 1998 Fla. Laws 204, *invalidated by Graham*, 130 S. Ct. 2011.

terminate sentencing schemes is equality and comparative proportionality.[56] These are weighty interests that seem well served by limiting discretion and flexibility in sentencing. Determinacy and inflexibility alone therefore seem not to provide firm grounds either for Whitman's and Flanders's critical efforts or for progressive reform programs.

"Detached from the purpose of punishment" is another possibility. For instance, if the purpose of punishment was solely to rehabilitate offenders,[57] then it certainly would be harsh if the criminal system provided no rehabilitative services or indeed made ex-convicts less likely to be able to reintegrate into society by inflicting permanent psychological damage or branding them with a sort of scarlet letter. While more promising than other uses, this application of harsh leaves unresolved the question of what the purpose of punishment should be. Absent an answer to that highly charged and hotly debated question, we cannot hope to determine whether, and to what extent, current criminal practice in the United States is detached from the purpose of punishment.

While this conversation could go on for a while, we will take a shortcut to what we think is the most likely conclusion: Harsh is a pass-through term for disproportionate or otherwise unjustified. Only by incorporating this normative standard do we think that labeling a punishment or a system of punishment as harsh can back a demand for reform. Moreover, it seems to us that proportionality is what lies behind the other ways Whitman and Flanders use harsh. Disproportionate punishment is likely to sponsor a negative emotional response. Grossly disproportionate punishment is likely to be nauseating. Sentencing schemes that by virtue of their inflexibility impose disproportionate punishment by barring consideration of relevant facts can fairly be called harsh.[58] Other practices condemned by Whitman, including criminalization, grading, enforcement, application, etc. follow

56. *Cf.* D. Brock Hornby, *The Business of the U.S. District Courts*, 10 GREEN BAG 2d 453, 465 (2007) (explaining that "the American public as stakeholder depends upon [courts] to articulate publicly the principles that control a sentence, [and] to monitor and expose prosecutorial failure to fulfill congressional goals such as proportionality and equality").

57. The juvenile justice system, for example, has often been characterized as having a rehabilitative purpose. *See, e.g.*, Sara Sun Beale, *You've Come a Long Way, Baby: Two Waves of Juvenile Justice Reforms as Seen from Jena, Louisiana*, 44 HARV. C.R.-C.L. L. REV. 511, 516 (2009) ("Because of their immaturity, rehabilitation—rather than punishment—should be the overriding social purpose when juveniles are involved in antisocial or criminal activity.").

58. *See* WHITMAN, HARSH JUSTICE, *supra* note 25, at 35 (explaining that a system which "appl[ies] unvarying punishments regardless of any sense of the individual deserts of offenders" may "be called relatively harsh"). R

the same pattern.[59] Alone, these practices cannot fairly be called harsh. What makes them harsh, if they are, is that they result in punishments that are disproportionate or otherwise unjustified. Absent that conclusion, there simply is nothing to the charge of harshness, and certainly nothing that could demand or justify progressive reform.

The same is true for perhaps the most important use of harsh in Whitman's work. At the center of Whitman's historical diagnosis is his claim that American justice has consistently been implicated in broader social systems organized around the production and maintenance of structural status inequalities.[60] One of us has written on the role of status inequality in the production and justification of systematic violence and injustice, so we are in no small degree sympathetic to this concern.[61] Again, however, we think the concern must reduce to harshness as disproportion. To make the point, let us assume that Whitman is right and that American criminal justice is implicated in a broader system for the production and maintenance of status inequality. Now let us further assume that, despite this systemic injustice, each of the individual punishments inflicted by that system is absolutely correct as determined by some standard of justice external to the system of injustice. In such a circumstance, we have a hard time seeing how the systemic status inequality critique could suggest, much less demand, any real progressive changes to punishment practices. That goal requires a clear standard for measuring the results of criminal processes in individual cases. Broad condemnation of the system is neither sufficient to that critical task nor to the challenge of proposing and justifying specific reform.

Progressives such as Whitman, Flanders, and us find many of our current criminal justice policies and practices harsh. We do not think, however, that these opinions are nothing more than our idiosyncratic aesthetic views. Neither do we think that we ought to conform our criminal law and punishment practices to European fashions simply because they are European. Finally, while we are deeply concerned that broad racial, gender, and class trends in the criminal justice sys-

59. *Id.* at 33–35.

60. *Id.* at 19–32.

61. *See, e.g.*, David Gray, *Constitutional Faith and Dynamic Stability: Thoughts on Religion, Constitutions, and Transitions to Democracy*, 69 MD. L. REV. 26 (2009); David Gray, *Extraordinary Justice*, 62 ALA. L. REV. (forthcoming 2010); David Gray & Benjamin Levin, *Feminist Perspectives on Extraordinary Justice*, *in* CONFLICT AND TRANSITIONAL JUSTICE: FEMINIST APPROACHES (Martha Fineman & Estell Zinsstag eds.) (forthcoming 2011); David C. Gray, *A No-Excuse Approach to Transitional Justice: Reparations as Tools of Extraordinary Justice*, 87 WASH. U. L. REV. 1043 (2010).

tem evidence systemic distributional injustice,[62] we fail to see how those concerns can justify objections to particular sentences and therefore to broader sentencing arrangements. Rather, we think that we have good reasons to condemn as harsh much of current criminal policy in the United States because it results in punishments that are disproportionate or otherwise unjustified.[63] To make that claim requires reliance on a theory of criminal punishment. Whitman and, to a lesser degree, Flanders think that there is no safe harbor for our progressive instincts in retributivism. Quite to the contrary, they think that retributivism is part of the problem.[64] We disagree. In the next Part, we explain why.

III. AMERICAN JUSTICE IS HARSH BY RETRIBUTIVIST STANDARDS

In our view, many criminal punishments in the United States are harsh in the sense that they are disproportionate or otherwise unjustified.[65] The most significant category of these harsh punishments is a consequence of dramatic overcriminalization.[66] This is a view we share with Whitman;[67] but contrary to Whitman we think that retributivism supports our view and provides good grounds for progressive reform. We also believe that retributivism provides ample ammunition to criticize many current punishment policies, which result in disproportionate punishment or unjustified harm. We think that Immanuel Kant's approach to retributivism is particularly well suited

62. *See generally* Dorothy E. Roberts, *The Social and Moral Cost of Mass Incarceration in African American Communities*, 56 STAN. L. REV. 1271, 1272 (2004) (explaining that young African-American men are disproportionately represented in the prison population).

63. *See, e.g.*, Erik Eckholm, *Congress Moves to Narrow Cocaine Sentencing Disparities*, N.Y. TIMES, July 28, 2010, http://www.nytimes.com/2010/07/29/us/politics/29crack.html (explaining that the House of Representatives passed a bill to reduce disparities in mandatory federal sentences for crack and powder cocaine violations to help correct an "unjustified" sentencing disparity that results in different prison terms for black and white individuals); *see also* Doris Marie Provine, *Too Many Black Men: The Sentencing Judge's Dilemma*, 23 L. & SOC. INQUIRY 823, 824 (1998) (explaining that the Guidelines system and its mandatory minimums were supposed to confine judicial discretion to avoid disproportionate punishment to minority defendants and offenders, but the result has been the opposite).

64. *See* WHITMAN, HARSH JUSTICE, *supra* note 25, at 38 ("[R]etributivism is a theory that has proven to be consistent with many possible forms of harshness."); Flanders, *supra* note 31, at 111–13; Whitman, *Plea*, *supra* note 29, at 89–94. R R

65. *See supra* note 63. R

66. *Cf.* Erik Luna, *The Overcriminalization Phenomenon*, 54 AM. U. L. REV. 703, 717 (2005) (summarizing that overcriminalization consists of "grossly disproportionate punishments," "untenable offenses," "superfluous statutes," and "doctrines that overextend culpability," among others).

67. WHITMAN, HARSH JUSTICE *supra* note 25, at 33–34. R

to this critique, and we use this Part to provide a brief overview of his views.[68]

Kant's theory of punishment is linked to his moral theory. The categorical imperative is at the center of Kant's moral theory.[69] There are several formulations, but the most commonly cited is that "I should never act except in such a way that I can also will that my maxim should become a universal law."[70] To fully understand what this means, we must first understand the terms "will" and "maxim."[71] Our capacities to reason are many and varied. Among the most important is instrumental reason.[72] If one wants to achieve a certain end, then instrumental reason instructs one on the course of action best suited to that end based on considerations of effectiveness and efficiency.[73] The recommendations of instrumental reason come in a familiar "If . . . then" form as hypothetical imperatives.[74] Instrumental reason, however, has little to say when the question is one of deciding among possible goals or principles of action.[75] This is instead the domain of morality and ethics.[76]

It is worth a moment to distinguish between ethical and moral judgments. "Ethics," for present purposes, refers to conceptions of the good life. There are, on this definition, a variety of competing and often mutually exclusive visions of the good life that one might choose for oneself just as there are unique conceptions of the good indigenous to different identities and endeavors. In general, Kant's categorical imperative offers no counsel when deciding among careers, life partners, and paint colors. Rather, the categorical imperative is a tool for discovering the moral law, which for Kant is a set of universal prohibitions on conduct—categorical imperatives—that we have a moral duty as rational beings to respect no matter our ethical dispositions.[77]

To determine whether an act is morally permissible, one must first identify the maxim of that act. A maxim is "[a] rule that the

68. For a more expansive exegesis of Kant's retributivism, see Gray, *Punishment as Suffering*, *supra* note 40. R

69. *Id.* (manuscript at 46).

70. IMMANUEL KANT, GROUNDING FOR THE METAPHYSICS OF MORALS 14 (James W. Ellington trans., Hackett Publ'g Co. 3d ed. 1993) (1785) [hereinafter, KANT, GROUNDING].

71. Gray, *Punishment as Suffering*, *supra* note 40 (manuscript at 143). R

72. IMMANUEL KANT, THE METAPHYSICS OF MORALS 12–13 (Mary Gregor ed. & trans., Cambridge Univ. Press 1996) (1797) [hereinafter KANT, METAPHYSICS OF MORALS].

73. Gray, *Punishment as Suffering*, *supra* note 40 (manuscript at 143). R

74. KANT, GROUNDING, *supra* note 70, at 25. R

75. KANT, METAPHYSICS OF MORALS, *supra* note 72, at 12–13. R

76. *Id.* at 13–14.

77. *Id.* at 17; Gray, *Punishment as Suffering*, *supra* note 40 (manuscript at 143–44). R

agent himself makes his principle [of action] on subjective grounds."[78] When the maxim of a proposed action has been identified, agents must then inquire whether this maxim can be universalized without contradiction.[79] The universal law formulation of the categorical imperative is therefore a test that agents use to determine whether the maxim of an act entails its own contradiction.[80] If a maxim fails the test, then an agent must, as part of his moral duty, refrain from acting upon it.[81]

Theft provides an easy example. The maxim of theft is taking another's property.[82] To determine whether theft is moral, the agent must ask whether the maxim "I take that which is not mine" can be universalized without contradiction.[83] The answer is "no" because the maxim "I take that which is not mine" stands in contradiction to the concept of ownership upon which the maxim depends.[84] Theft is therefore wrong because it contains its own contradiction.[85] Ethical justifications of a theft are, on this analysis, irrelevant. There are certainly circumstances where doing the wrong act may be necessary to achieve a specific goal. No matter how respectable that goal, however, theft remains immoral.[86]

In a perfect world, agents would respect their moral duties as an ethical matter.[87] Kant has no illusions about human nature, however, so follows most contract theorists to the conclusion that justice re-

78. KANT, METAPHYSICS OF MORALS, *supra* note 72, at 17–18. An agent's maxim of action is, by definition, available only to him but can be imputed to him based on his actions. *Id.* at 18–19. R

79. *Id.* at 18; Gray, *Punishment as Suffering*, *supra* note 40 (manuscript at 144). R

80. Gray, *Punishment as Suffering*, *supra* note 40 (manuscript at 144). R

81. *Id.*

82. *Id.* (manuscript at 144–45).

83. *Id.* (internal quotation marks omitted).

84. *Id.* (internal quotation marks omitted).

85. *Id.* In most cases, moral duty derives from background social practices. *Id.* (manuscript at 145 & n.215). Take a purely communist society, for example, where the maxim of theft would make no sense because there is no understanding of mine and thine. *Id.* Murder and suicide, are two exceptions, however, that "would entail the destruction of humanity and the exercise of reason in general" if taken to their logical ends. *Id.* Society therefore cannot condone or allow murder or suicide as a moral matter. *Id.*

86. It is likely that only the most naïve agent would refuse to bear the moral weight of a minor theft to prevent multiple deaths, say; but even if justified on this sort of "all things considered" analysis, theft remains a moral wrong. Thus, while it may be true that theft is *justified* in some circumstances, the claim that theft is *moral* in some circumstances is fallacious. *Cf.* KANT, METAPHYSICS OF MORALS, *supra* note 72, at 28 (making this point in the context of "necessity" killings). R

87. *Cf.* IMMANUEL KANT, CRITIQUE OF PURE REASON 312–13 (Norman Kemp Smith trans., Macmillian Press LTD 1929) (1781) [hereinafter KANT, CRITIQUE OF PURE REASON] ("[I]n a perfect state no punishments whatsoever would be required."); Gray, *Punishment as Suffering*, *supra* note 40 (manuscript at 145). R

quires an external authority, usually a sovereign state, to which we grant authority to enforce the law.[88] Like agents, states "are subject to the commands of the categorical imperative."[89] Out of respect for these obligations and constraints, a state can only subject citizens to laws that respect their autonomy and are consistent with the freedom of all.[90] Punishment that seeks to effect or promote extraneous goods for criminals or for society is forbidden[91] because it offends respect for autonomy as the foundation of a just society.[92] The state, however, has a duty to punish where punishment is deserved.[93]

This raises the question of *what* punishment is deserved when an agent breaks the law.[94] Kant's answer is "the principle of equality (in the position of the needle on the scale of justice), to incline no more to one side than to the other."[95] By its terms, a crime is a contradiction that imperils the moral community.[96] To right Kant's metaphorical needle, the contradiction must be resolved on terms contained within the maxim of the crime upon which the offender acts.[97] Just punishment therefore demands no more and no less than "expiation of the contradiction posed by the criminal and his crime."[98] Accordingly, "Whoever steals makes the property of everyone else insecure and therefore deprives himself (by the principle of retribution) of security in any possible property."[99]

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88. Immanuel Kant, *Perpetual Peace: A Philosophical Sketch* (1795), *reprinted in* KANT: POLITICAL WRITINGS 93, 105, 112–13 (Hans Reiss ed., H.B. Nisbet trans., Cambridge Univ. Press 2d ed. 1991); IMMANUEL KANT, RELIGION WITHIN THE LIMITS OF REASON ALONE 87–91 (Theodore M. Greene & Hoyt H. Hudson trans., Harper & Brothers 1960) (1794); Gray, *Punishment as Suffering*, *supra* note 40 (manuscript at 145). R

89. Gray, *Punishment as Suffering*, *supra* note 40 (manuscript at 145); *see also* KANT, CRITIQUE OF PURE REASON, *supra* note 87, at 312; Jeffrie G. Murphy, *Does Kant Have a Theory of Punishment?*, 87 COLUM. L. REV. 509, 521, 527–28 (1987). R R

90. KANT, CRITIQUE OF PURE REASON, *supra* note 87, at 312; Gray, *Punishment as Suffering*, *supra* note 40 (manuscript at 145). R R

91. KANT, METAPHYSICS OF MORALS, *supra* note 72, at 104–05; Gray, *Punishment as Suffering*, *supra* note 40 (manuscript at 145–46). R R

92. JOHN RAWLS, A THEORY OF JUSTICE 241 (1971); Gray, *Punishment as Suffering*, *supra* note 40 (manuscript at 145–46). R

93. KANT, METAPHYSICS OF MORALS, *supra* note 72, at 104–05; Gray, *Punishment as Suffering*, *supra* note 40 (manuscript at 145–46). R R

94. *See* H.L.A. HART, PUNISHMENT AND RESPONSIBILITY 4 (1968); Gray, *Punishment as Suffering*, *supra* note 40 (manuscript at 145–46). R

95. KANT, METAPHYSICS OF MORALS, *supra* note 72, at 105; Gray, *Punishment as Suffering*, *supra* note 40 (manuscript at 145–46). R R

96. Gray, *Punishment as Suffering*, *supra* note 40 (manuscript at 145–46). R

97. *Id.*

98. *Id.*

99. KANT, METAPHYSICS OF MORALS, *supra* note 72, at 106. R

This is all far too quick. But this brief overview ought to be sufficient to make two critical points. First, retributivism recommends an extremely parsimonious criminal code. For Kant, and for many other retributivists, criminal law is linked to the moral law.[100] There are very few maxims of conduct that contain their own contradiction and therefore stand in logical opposition to fundamental norms. Most are familiar to students of the common law: homicide, rape, theft, and fraud pretty much cover the territory.[101] Each of these crimes violates the categorical imperative and constitutes an abuse of a particular kind of liberty, inclining the needle. The just punishment for each of these offenses is to constrain the liberty of the offender in kind and to a degree necessary to right the needle.[102]

In modern states, regulatory offenses that identify and enforce necessary rules of conduct for broad social enterprises may be added to the criminal code, but punishments for violating the rules would, by definition, be capped at exclusion from the enterprise.[103] For example, to engage in automobile transportation, we need a rule telling people on which side of the road to drive. Those who refuse to obey that rule can certainly lose the privilege of driving, but they should probably not be subject to imprisonment unless their refusal to obey traffic laws also constitutes a core offense against public law. Though on a different scale, the same concept applies to a range of conduct from producing corn flakes to operating nuclear power plants. In all circumstances, however, to justify criminal enforcement of a rule, that rule must be essential to the enterprise such that allowing participants to engage in the prohibited conduct would pose a contradiction to that enterprise.

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100. *See, e.g.*, Gray, *Punishment as Suffering*, *supra* note 40 (manuscript at 148) (noting that "[l]ike Kant, John Rawls connects crime to moral rules"). R

101. Kant draws some pretty fine lines here, at one point contending that embezzlement is essentially a private wrong that should be resolved through private law, while theft is a public wrong that is a proper target for the criminal law. KANT, METAPHYSICS OF MORALS, *supra* note 72, at 105. R

102. *See* Gray, *Punishment as Suffering*, *supra* note 40 (manuscript at 147). (arguing that "[t]he maxim of theft poses a contradiction to the concept of ownership" and that "the proper legal punishment for an act of theft is to deny the offender access to property in a form and to a degree commensurate with his offense"). R

103. *Cf.* Luna, *supra* note 66, at 708–09 (explaining how "the rise of the modern administrative state" has contributed to overcriminalization by "erecting a vast legal labyrinth buttressed by criminal penalties in areas ranging from environmental protection and securities regulation to product and workplace safety"). R

While woefully incomplete,[104] this brief exegesis suggests that for one of the most important contributors to the retributivist canon,[105] American justice indeed is harsh in that it results in punishments that are disproportionate or otherwise unjustified. Books would be necessary to sort through all of the possible targets, but we want to highlight three broad areas of harshness identified by a retributive analysis that we think many progressives are likely to embrace. The first is pandemic overcriminalization. States and the federal government have used the criminal law to condemn and punish a variety of behavior that is perfectly consistent with the freedom of all and therefore ought not be subject to criminal punishment.[106] In our opinion, any punishment inflicted upon those who engage in such conduct is by definition "harsh." Second, we strongly suspect that much of our sentencing practice results in punishments that are disproportionate as measured by retributive standards. Third, we think that conditions in many prisons and jails in the United States inflict unjustified harm on offenders.[107]

IV. PROGRESSIVE RETRIBUTIVISM

Judged by retributivist standards, American criminal justice is harsh insofar as it punishes too many people, punishes too severely, and inflicts additional unjustified harm on offenders. In this Part, we make the case briefly for each of these conclusions as examples of harsh justice.

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104. For more on the substantial debates among Kant scholars than this short presentation can possibly present, see JEFFRIE G. MURPHY, *Kant's Theory of Criminal Punishment*, *in* RETRIBUTION, JUSTICE, AND THERAPY: ESSAYS IN THE PHILOSOPHY OF LAW 82 (1979); B. Sharon Byrd, *Kant's Theory of Punishment: Deterrence in its Threat, Retribution in its Execution*, 8 L. & PHIL. 151 (1989); Samuel Fleischacker, *Kant's Theory of Punishment*, *in* ESSAYS ON KANT'S POLITICAL PHILOSOPHY 191 (Howard Lloyd Williams ed., 1992); Murphy, *supra* note 89; Don E. Scheid, *Kant's Retributivism*, 93 ETHICS 262 (1983). Among the live questions in these debates is whether Kant meant to limit the scope of the criminal law to state enforcement of the moral law. *See, e.g.*, Fleischacker, *supra*, 206–08 (exploring the role of the state as moral enforcer). We think there is good evidence that he did, or at least that his theory entails this conclusion. For present purposes, however, it is not necessary to untangle these thorny exegetical questions. Rather, the goal here is to offer an analytic perspective on contemporary American criminal justice grounded in retributivist principles. R

105. *See* John Bronsteen, *Retribution's Role*, 84 IND. L.J. 1129, 1130 (2009) (noting Kant's centrality in the punishment canon).

106. *See generally* Luna, *supra* note 66, at 703–12 (examining ways in which "[b]oth federal and state governments have contributed over the past quarter century to a punishment binge of unprecedented size and scope"). R

107. *See, e.g.*, Sharon Dolovich, *Cruelty, Prison Conditions, and the Eighth Amendment*, 84 N.Y.U. L. REV. 881, 887 (2009) (noting that correctional facilities are "chronically overcrowded and short-staffed" and that "[r]ape and other forms of coerced sexual conduct are commonplace").

A. *Overcriminalization: American Drug Laws Are Harsh by Retributivist Standards*

The many governments with police authority in the United States have (as all governments do) a long list of conduct they would prefer that citizens either refrain from or engage in. It is always tempting for officials invested in these social policies and the ethical visions that animate them to use the criminal law as a tool for effecting their goals. In the past half century, United States legislators have frequently indulged this temptation, expanding dramatically the scope of the criminal law from its traditional common law core.[108] While various consequentialist theories of criminal punishment may justify using the criminal law to effect social policy in this way, retributivism does not.[109] This expansion of the criminal law is therefore harsh by retributivist standards. Among the most notable of these harsh uses of the criminal law are decisions to punish those who use, possess, distribute, or produce intoxicating chemicals.

The maxims of action that lie behind the use, possession, production, or distribution of intoxicating chemicals do not entail an internal contradiction and thus do not violate the categorical imperative.[110] Unlike murder and theft, these acts are entirely consistent with the freedom of all. From a retributive point of view, therefore, there seems no justification for punishing these acts as public crimes. There may well be beneficial economic or health policy reasons to encourage abstinence or at least moderation in the use of intoxicating chemicals. From a retributive point of view, however, those interests simply do not justify the infliction of punishment.

The criminalization of intoxicating substances is heavily implicated in the harshness of American criminal law. In 2006, more than 33% of felony convictions in state courts were for drug offenses.[111] The total number of felony convictions for drug crimes in the federal and state systems that year was over 400,000.[112] In 2006, 265,800, or 20%, of the total state prison population was composed of individuals incarcerated solely for drug offenses.[113] The federal system's overall prison population is smaller, but the role of drug crimes is even more

108. *See generally*, Luna, *supra* note 66. R

109. *See* Robert A. Pugsley, *Retributivism: A Just Basis for Criminal Sentences*, 7 HOFSTRA L. REV. 379, 381 (1978) (noting retributivism's stance that "additional social-utilitarian goals cannot morally *justify* the imposition of criminal sanctions").

110. *See supra* text accompanying notes 77–81 (discussing Kant's categorical imperative). R

111. ROSENMERKEL ET AL., *supra* note 15, at 3 tbl.1.1. R

112. *Id.* at 9 tbl.1.6.

113. SABOL ET AL., *supra* note 1, at 37 app. tbls.15 & 16. R

pronounced. Out of the 182,333 individuals in federal prison in 2008, a staggering 95,079, or 52%, were incarcerated solely for drug crimes.[114] Absent criminalization, we would have at least 365,000 fewer people in United States prisons and jails. In addition, the criminalization of drugs is responsible for a considerable number of violent crimes and weapons offenses. The latest figures we have found for the United States classify 4.8% of murders committed nationwide between 1991 and 1998 as drug-related.[115] Earlier numbers from Baltimore, Maryland put that percentage at 48%.[116] The percentage reaches 90% in Mexico, where thousands of murders are committed by Mexican drug cartels in their efforts to supply the United States market.[117] Those cartels routinely include police and government officials among their targets. In addition, criminalization dramatically inflates the price for drugs, which correlates with increases in property crime.[118]

These statistics suggest that many fewer individuals would be incarcerated in the United States if drugs were decriminalized. The American experiment with alcohol prohibition makes the point. Murder and other acts of violence were routine features of the illegal alcohol trade,[119] but as far as we can tell, nobody was murdered in the United States last year in the competition between Miller and Anheuser-Busch over beer supply, distribution centers, and market share. There also would be considerable cost savings of, conserva-

114. *Id.* at 38 app. tbl.17.

115. JOHN P. WALTERS, EXEC. OFFICE OF THE PRESIDENT, OFFICE OF NAT'L DRUG CONTROL POLICY, NO. NCJ 181056, FACT SHEET: DRUG-RELATED CRIME 4 tbl.4 (2000), *available at* http://www.whitehousedrugpolicy.gov/publications/pdf/ncj181056.pdf ("Drug-related homicides are those murders that occurred specifically during a narcotics felony, such as drug trafficking or manufacturing.").

116. Edward Burns, *Bulletin: Gang- and Drug-Related Homicide: Baltimore's Successful Enforcement Strategy*, BUREAU OF JUST. ASSISTANCE (July 2003), http://www.ncjrs.gov/html/bja/gang/pfv.html (discussing crime statistics from 1988).

117. Traci Carl, *Violence Indicates Progress in Mexico Drug War*, PRESS ATLANTIC CITY, Mar. 11, 2009, at A3.

118. *Cf.* DAVID SIMON & EDWARD BURNS, THE CORNER: A YEAR IN THE LIFE OF AN INNER-CITY NEIGHBORHOOD 185–93 (1998) (highlighting the role of property crimes in the world of the corner-level drug trade); Carl, *supra* note 117 (noting recent spikes in cocaine prices and correlating increases in crime in Mexico). R

119. *See* David L. Teasley, *Drug Legalization and the "Lessons" of Prohibition*, 19 CONTEMP. DRUG PROBS. 27, 44 (1992) (describing "prolegalizers James Ostrowski and Milton Friedman['s]" reliance on the rising murder rate during Prohibition, "reaching almost 10 per 100,000 in 1933, after which there was a rapid decline" to support their legalization position). *But see id.* at 45 ("In a study of historical trends in violent crime, in the United States during this period, Ted Robert Gurr concurs with the argument that the murder rate rose but maintains that the increase was probably due mainly to a rise in the number of black homicides.").

tively, $13 billion a year spent on incarcerating drug offenders and another $40 to $50 billion a year spent on dedicated law enforcement efforts.[120] There is some concern that there might be an increase in crimes perpetrated by people who are intoxicated. For example, 1997 statistics show that about 22% of federal offenders and 33% of state offenders reported being under the influence of drugs at the time of their offenses.[121] But any claim of a causal link is speculation at best; and the relatively low correlation certainly is not sufficient to demonstrate any criminality inherent in intoxication. After all, incidents of intoxication that are not associated with crime certainly far outnumber those that are. At any rate, retributivists have no objection to punishing those who perpetrate thefts or assaults while voluntarily intoxicated.[122]

B. Sentencing Practice in the United States Is Harsh by Retributive Standards

It is impossible here to do an exhaustive study of sentencing policy in the United States. Nevertheless, painting in broad strokes suggests that there are many sentencing policies and practices in the United States that lead to disproportionate, and therefore harsh, sentences as measured by retributive standards. We are particularly suspicious of the dramatic enhancements imposed under the Federal Sentencing Guidelines and in many state systems for recidivist crimes. The expansion of liability in conspiracy cases is also cause for concern.

The Federal Sentencing Guidelines provide for dramatic enhancements of sentence based on an offender's criminal history, the length of prior sentences, and whether the offender was on probation or parole at the time of his offense.[123] With a few relatively minor, nonviolent offenses that are the stock-and-trade of street level hustlers—such as possession of a vial or two of crack cocaine, sale of a vial or two of crack cocaine, and petty theft—it is relatively easy for an offender to build up the thirteen criminal history points necessary to enter the highest Guidelines criminal history category, particularly if his convictions are in a relatively short period of time.[124] Once in the

120. *See* JEFFREY A. MIRON, DEP'T OF ECON., HARVARD UNIV., THE BUDGETARY IMPLICATIONS OF DRUG PROHIBITION 1, 9, 24 app. tbl.B (2010), *available at* http://www.economics.harvard.edu/faculty/miron/files/budget%202010%20Final.pdf.

121. WALTERS, *supra* note 115, at 3 tbl.2. R

122. Markel, *supra* note 48, at 1466 & n.137. R

123. U.S. SENTENCING GUIDELINES MANUAL § 4A1.1(a)–(f) (2008).

124. *See id.* at §§ 4A1.1(a)–(f), 5A (providing for nonexclusive addition of criminal history points based on prior offenses, how recent those prior offenses are, and whether the offender is on probation or otherwise in custody at the time of his most recent offense).

highest criminal history category, the punishment for a petty theft rises from zero to six months to twelve to eighteen months; the range for possession of a vial or two of crack cocaine rises from ten to sixteen months to thirty to thirty-seven months.[125] That is an increase of sentence somewhere between double and infinite. Nearly half of the states have passed like-minded statutes that provide similarly dramatic enhancements of sentence for those deemed "habitual offenders."[126] The most notorious of these is California's "Three Strikes and You're Out" law,[127] which in one famous case led to a sentence of twenty-five years to life for theft of three golf clubs worth a total of about $1,200.[128]

The United States Sentencing Commission justifies such facially disproportionate sentences on grounds that "[a] defendant with a record of prior criminal behavior is more culpable than a first offender and thus deserving of greater punishment."[129] While there is much to

125. The base offense level for larceny of goods valued less than $5,000 is six. *Id.* at § 2B1.1 (a)–(b). For petty thieves in criminal history category I, the Guidelines recommend a sentence of zero to six months imprisonment. *Id.* at § 5A. For those in criminal history category VI, the recommended Guidelines sentencing range is twelve to eighteen months. *Id.* The base offense level for possession of less than 500 milligrams of cocaine base is twelve. *Id.* at § 2D1.1(c)(14). For those convicted for possession of a vial of cocaine base who are in criminal history category I, the recommended Guidelines sentencing range is ten to sixteen months. *Id.* at § 5A. For offenders in criminal category VI who are convicted for possession of a vial of cocaine base, the sentencing range recommended by the Guidelines is thirty to thirty-seven months. *Id.*

126. *Cf.* Sarah French Russell, *Rethinking Recidivist Enhancements: The Role of Prior Drug Convictions in Federal Sentencing*, 43 U.C. DAVIS L. REV. 1135, 1149 (2010) ("[B]etween 1993 and 1995, twenty-four states and the federal government enacted 'three strikes laws.' Today, all states and the federal system have statutory recidivism enhancements, and sentencing guideline regimes universally use criminal history as a primary factor—along with the seriousness of the offense—in calculating sentencing ranges." (footnotes omitted)).

127. CAL. PENAL CODE § 667(b)–(i) (West 2010); *id.* §§ 1170.12, 1192.7 (West 2004 & West Supp. 2010); *see also* Naomi Harlin Goodno, *Career Criminals Targeted: The Verdict Is In, California's Three Strikes Law Proves Effective*, 37 GOLDEN GATE U. L. REV. 461, 462–65 (2007) (outlining the enactment of California's "Three Strikes Law").

128. Ewing v. California, 538 U.S. 11, 19–20 (2003). Proposition 36, a ballot initiative passed by voters in 2000, modified California law to provide drug treatment for "first- and second-time nonviolent, simple drug possession offenders" otherwise eligible for life sentences. *See About Prop 36*, CAL. PROPOSITION 36, http://www.prop36.org/about.html (last visited Oct. 6, 2010); *accord* Jessica A. Levinson & Robert M. Stern, *Ballot Box Budgeting in California: The Band of the Golden State or an Overstated Problem?*, 37 HASTINGS CONST. L.Q. 689, 726 (2010). A broader initiative to roll back the "Three Strikes and You're Out" law by referendum failed in 2004. *See State Ballot Measures*: *California General Election, November 2, 2004*, CAL. SECRETARY ST.: KEVIN SHELLEY (Dec. 7, 2004, 6:14AM), http://vote2004.ss.ca.gov/Returns/prop/00.htm (stating that Proposition 66, "3 Strikes Limits," received 52.7% no-votes).

129. U.S. SENTENCING GUIDELINES MANUAL, ch. 4, pt. A, introductory cmt. (2009).

be said on the topic,[130] we think that retributivists ought to be quite skeptical of such a claim. After all, the maxim of action that defines an act as a crime does not change just because the offender has perpetrated the offense before.[131] Neither does personal awareness of the criminal punishment consequences of an act tighten the linkage between agent and act.[132] If, upon closer examination, dramatic enhancements of sentence for recidivists are not justified on retributivist grounds, then the sentencing practices of the federal government and many states are harsh indeed because they result in disproportionate sentences in many cases as measured by retributivist standards.

Enhanced sentences justified by expansions of conspiracy liability also result in punishments that appear to be harsh by retributive standards. A conspiracy is an agreement between one or more persons to pursue an unlawful goal or to pursue a lawful goal through unlawful means.[133] Conspiracy is widely charged in its traditional form and through statutory cousins like the Racketeer Influenced and Corrupt Organizations Act ("RICO").[134] Conspiracy has long been the target for serious concerns based on the potential for abuse inherent in the doctrine.[135] Those concerns took on another dimension after the Su-

130. *See generally* Youngjae Lee, *Desert and the Eighth Amendment*, 11 U. PA. J. CONST. L. 101, 102 (2008) ("While the belief that repeat offenders are 'deserving of greater punishment' thus seems widespread, there is far more ambivalence among desert theorists on this issue, and there has been no satisfactory theoretical account of the prevailing view that recidivists are more culpable."); Youngjae Lee, *Recidivism as Omission: A Relational Account*, 87 TEX. L. REV. 571, 586 (2009) [hereinafter Lee, *Recidivism as Omission*] (arguing that a repeat offender is thought to deserve more punishment because we infer that an offender's prior criminal acts "are not acts out of character" and that the offender "ha[s] character traits that are worthy of extra punishment"); Paul H. Robinson, *Punishing Dangerousness: Cloaking Preventive Detention as Criminal Justice*, 114 HARV. L. REV. 1429, 1435–36 (2001) (noting that habitual-offender legislation often imposes "a purely preventive detention portion that cannot be justified as deserved punishment").

131. Russ Shafer-Landau, *The Failure of Retributivism*, 82 PHIL. STUD. 289, 305 (1996) ("After all, [a recidivist's] behavior and mental state may be effectively identical to that of a first-time offender, so this would appear to argue for the claim that recidivists in such cases deserve no more than first-time offenders.").

132. *But cf.* Lee, *Recidivism as Omission*, *supra* note 130, at 577, 610 (arguing that failure to correct past criminal behavior—"his failure to take steps to prevent himself from committing another crime"—justifies increased punishment). R

133. *See, e.g.*, United States v. Jimenez Recio, 537 U.S. 270, 274 (2003) ("The Court has repeatedly said that the essence of a conspiracy is 'an agreement to commit an unlawful act.'" (quoting Iannelli v. United States, 420 U.S. 770, 777 (1975))).

134. *Cf.* Beth Allison Davis & Josh Vitullo, *Federal Criminal Conspiracy*, 38 AM. CRIM. L. REV. 777, 777–79 (2001) ("Conspiracy, the prosecutor's 'darling,' is one of the most commonly charged federal crimes." (footnote omitted)).

135. *See, e.g.*, Hyde v. United States, 225 U.S. 347, 386–87 (1912) (Holmes, J., dissenting) (arguing that since "[e]very overt act done in aid of [the conspiracy] . . . is attributed to the conspirators, and if that means that the conspiracy is present as such wherever any overt act is done, it might be at the choice of the Government to prosecute in any one of twenty

preme Court's decision in *Pinkerton v. United States*,[136] which allowed for co-conspirators to be punished as primary agents in crimes perpetrated by their co-conspirators in the course and in furtherance of the conspiracy.[137] Particularly in lengthy or open-ended criminal conspiracies with multiple objectives, the combination of these legal doctrines allows prosecutors to charge relatively minor peripheral players with long lists of serious crimes in which they had no agency role.[138] For these and other reasons, many scholars and jurists have called for a restriction of conspiracy and RICO liability on grounds that are notably retributivist.[139] By contrast, defenses of conspiracy law tend to be consequentialist in character.[140]

States in none of which the conspirators had been"); Albert J. Harno, *Intent in Criminal Conspiracy*, 89 U. PA. L. REV. 624, 624 (1941) ("In the long category of crimes there is none, not excepting criminal attempt, more difficult to confine within the boundaries of definitive statement than conspiracy."); Francis B. Sayre, *Criminal Conspiracy*, 35 HARV. L. REV. 393, 393 (1922) ("A doctrine so vague in its outlines and uncertain in its fundamental nature as criminal conspiracy lends no strength or glory to the law; it is a veritable quicksand of shifting opinion and ill-considered thought.").

136. 328 U.S. 640 (1946).

137. *Id.* at 646–47; *see also* Note, *Vicarious Liability for Criminal Offenses of Co-Conspirators*, 56 YALE L.J. 371, 378 (1947) (criticizing the *Pinkerton* decision and arguing that "[w]hile membership in a conspiracy may well be evidence for the jury's consideration in holding others than the direct actor guilty, it should not be sufficient, in the absence of some further showing of knowledge, acquiescence, aid or assistance, to convict one conspirator for another's criminal act").

138. *Cf.* Milton C. Lorenz, Jr., Comment, *Conspiracy in the Proposed Federal Criminal Code: Too Little Reform*, 47 TUL. L. REV. 1017, 1037 (1973) ("Indiscriminate or reflexive use of the conspiracy charge by government prosecutors may be equated to a wide dragnet, snaring members of dangerous criminal syndicates as well as persons who have made questionable or innocent remarks." (footnote omitted)).

139. *See, e.g.*, Susan W. Brenner, *RICO, CCE, and Other Complex Crimes: The Transformation of American Criminal Law?*, 2 WM. & MARY BILL RTS. J. 239, 303 (1993) (arguing that a decision on compound liability should "be made only after thoroughly investigating the nature and imminence of the perils to be guarded against and weighing those perils against the impact of implementing compound liability, even on a modest scale"); Phillip E. Johnson, *The Unnecessary Crime of Conspiracy*, 61 CAL. L. REV. 1137, 1139–40 (1973) ("The problem [with conspiracy] is not with particular results, but with the use of a single abstract concept to decide numerous questions that deserve separate consideration in light of the various interests and policies they involve."); Gerard E. Lynch, *RICO: The Crime of Being a Criminal* (pts. 3 & 4), 87 COLUM. L. REV. 920, 947 (1987) ("The requirement of agreement is further diluted by the frequently repeated doctrine that a conspirator does not need to agree to, or even to know about, all of the objectives of the conspiracy in order to be liable for joining it."); Paul Marcus, *Criminal Conspiracy Law: Time To Turn Back from an Ever Expanding, Ever More Troubling Area*, 1 WM. & MARY BILL RTS. J. 1, 36 (1992) ("The conclusion remains inescapable that individuals are being punished more than once for having engaged in a single criminal venture, the conspiratorial agreement.").

140. *See, e.g.*, Neal Kumar Katyal, *Conspiracy Theory*, 112 YALE L.J. 1307, 1370–72 (2003) (arguing that conspiracy law imposes increases in "[t]otal punishment . . . and is justified because of pernicious group dynamics at work in conspiracy—from polarization to conformity, performance success to loyalty"). It is worth noting that Katyal himself is critical of

C. *Conditions in Many Prisons and Jails Are Harsh by Retributive Standards*

Whitman gives due credit to reform efforts in the late twentieth century that succeeded in making conditions in American prisons and jails more humane.[141] As he points out, however, that reform movement peaked long ago.[142] Consequently, offenders sentenced to prison in the United States are subjected to a considerable amount of hard treatment, violence, abuse, and degradation that is neither endorsed by law nor justified by any credible theory of punishment or penology.[143] While the characterization of prisoner-on-prisoner violence, sexual assault in prison, and post-release discrimination have been a recent source of debate in the literature, we agree with Flanders, his co-authors, and other participants in that debate that this sort treatment and the harm it causes are unjustified and should be remedied.[144] To the extent these harms persist in the American system, the system is harsh because those in its care are made to suffer harms that are disproportionate or otherwise unjustified.[145]

V. CONCLUSION

In his Article, Professor Chad Flanders advances an important debate about whether, and to what extent, the American criminal justice system is harsh and, if it is, whether retributivism is responsible.[146] While Flanders does not offer a clear and succinct definition of harsh, we have argued here that the most persuasive option is as a pass-through for disproportionate or otherwise unjustified.[147] We then asked whether criminal justice in the United States generates policies and outcomes that are disproportionate or otherwise unjustified from

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using conspiracy statutes to layer consequences and punishments on peripheral and one-shot players. *Id.* at 1334–35.

141. WHITMAN, HARSH JUSTICE, *supra* note 25, at 59–60. R

142. *Id.* at 60.

143. *See e.g.*, *supra* notes 22–26 and accompanying text. For a compelling and somewhat graphic narrative of how prisoner-on-prisoner violence affects offenders, see GLADIATOR DAYS: ANATOMY OF A PRISON MURDER (Blowback Productions 2002). R

144. *See supra* note 40. R

145. *See* DeShaney v. Winnebago Cnty. Dep't of Soc. Servs., 489 U.S. 189, 200 (1989) ("[W]hen the State by the affirmative exercise of its power so restrains an individual's liberty that it renders him unable to care for himself, and at the same time fails to provide for his basic human needs—*e.g.*, food, clothing, shelter, medical care, and reasonable safety—it transgresses the substantive limits on state action set by the Eighth Amendment and the Due Process Clause.").

146. *See generally* Flanders, *supra* note 31. R

147. *See supra* Part II.

a retributive point of view.[148] We concluded that it is in three important respects: overcriminalization, excessively severe sentences for some crimes, and tortuous prison conditions.[149] Given this conclusion, we think that progressives such as Whitman and Flanders choose the wrong enemy by blaming retributivism for harshness in American criminal justice. Quite contrary to the instincts promoted in their work, we think that retributivism holds considerable untapped promise for progressives.

148. *See supra* Part III.
149. *See supra* Part IV.A–C.