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Can Retributivism Be Progressive? A Reply to Professor Gray and Jonathan Huber

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Reply

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I. INTRODUCTION

Professor David Gray and Jonathan Huber have done a great service in their Response to my Article.[1] They have helped me to see the wrong turns in my argument and the areas in which my argument needs to be clarified and amplified. In this brief Reply, I attempt to respond to some of their concerns.

Gray and Huber's response is an excellent example of the type of engagement philosophers of punishment should be making with the practical realities of punishment in America and in the world. They do not simply say what retributivism is and then attempt to justify it. Rather, they contextualize retributivism in the real world of overcriminalization, lengthy sentences, and brutal prison conditions.[2] They explain how retributivism, rightly understood, can assist us in thinking about cures for these ills.[3] We need more of this kind of dialogue in contemporary punishment philosophy. Unfortunately, it is all too rarely on display. Philosophy of punishment is, for the most part, accomplished in a practical vacuum—as if it were no different than, say, philosophy of mathematics.

In my Article, I emphasized how important it is that philosophies of punishment orient their theories in the appropriate manner.[4] I meant two things by this claim: First, I meant (or perhaps more implied) that philosophical theories should be attuned to the practical effects of their theories. What would happen if they were generally

* Assistant Professor of Law, Saint Louis University School of Law; J.D. 2007, Yale Law School; Ph.D. 2004, University of Chicago (philosophy). I thank Justin Tiwald, William Baude, Christopher Bradley, David Svolba, Maggie Grace, and especially David Gray and Jonathan Huber.

1. *See* David Gray & Jonathan Huber, *Retributivism for Progressives: A Response to Professor Flanders*, 70 MD. L. REV. 141 (2010).

2. *See id.* at 157–64.

3. *See id.* at 152–57.

4. *See generally* Chad Flanders, *Retribution and Reform*, 70 MD. L. REV. 87, 111–13 (2010).

accepted? How should they be applied? Second, and more specific to the realities of American punishment, I argued that philosophers of punishment should orient their theories toward mitigating the intrinsic harshness of punishment. How could our theories help us make punishment more humane while still fulfilling the goals and purposes of punishment? Philosophers of punishment rarely consider what, if anything, their philosophies can contribute to the improvement of punishment practices in the real world and whether their philosophies might be contributing to the harshness of these practices. This should change.

In the process of asking these questions, I tentatively offered my own theory of retributive justice. Based on the writings of Augustine and Adam Smith, I suggested that punishment should be basically retributive—it should be justified as a way of giving wrongdoers what they deserve—but should be mindful of our tendency to punish excessively and treat offenders in worse ways than they deserve.[5]

I also left many points unsaid or underdeveloped, which Gray and Huber call my attention to in their response. First, Gray and Huber worry that I have not adequately defined what I mean by harshness and proceed with their own definition of the term.[6] Harsh, for them, is basically a "pass-through" term for disproportionality in punishment.[7] As discussed below, I resist this easy equation of harshness with disproportionality.[8] I am not sure that disproportionality is any less ambiguous than the ways in which I tried to define harshness.

Second, Gray and Huber develop Kant's theory of retributivism, applying their conclusions to certain contemporary features of American harsh justice—overcriminalization, sentencing, and brutal prison conditions.[9] I did not spend much time in my Article discussing Kant, except to the extent that he has influenced modern punishment theorists such as Professors Herbert Morris and Jeffrie Murphy.[10] Gray and Huber are correct to focus my attention on Kant. But, are Gray and Huber correct that Kant gives us a "retributivism for progressives"?

I am skeptical. Kant was quite insistent on the death penalty and no fan of mercy (among other things).[11] He was, along many dimen-

5. *See id.* at 124–33.
6. *See* Gray & Huber, *supra* note 1, at 146–52. R
7. *Id.* at 150.
8. *See infra* Part II.
9. *See* Gray & Huber, *supra* note 1, at 152–64. R
10. *See* Flanders, *supra* note 4, at 115–16, 119. R
11. IMMANUEL KANT, THE METAPHYSICAL ELEMENTS OF JUSTICE 102 (John Ladd trans., Bobbs-Merrill Co. 1965) (1797) ("If . . . he has committed a murder, he must die.").

sions, harsh. This does not, of course, mean that we cannot adapt Kant's theory and apply it to our own nonharsh ends. But, does Kant give us much guidance here? Gray and Huber invoke Kant in defense of drug decriminalization,[12] but Kant's theory does not necessarily support this result. We may be better off defending decriminalization in terms of privacy and autonomy rights rather than in terms of punishment theory.[13] I also worry that Kant's theory as applied to sentencing and prison conditions will simply be too indeterminate to be of use. But, I hope I am wrong in that conclusion.

II. WHAT, EXACTLY, IS HARSHNESS?

Gray and Huber first take me (and James Whitman, on whom I rely) to task for not being very clear about what, exactly, is "harsh" about American criminal justice.[14] Following Whitman, I isolated three factors. First, I claimed that American justice is harsh because it is inflexible—it gives judges and other officials little discretion to depart from mandatory or fixed sentences.[15] Second, American justice is harsh because sentences are too long by almost any reasonable measure.[16] Third, American justice is harsh because prison conditions are inhumane.[17] Gray and Huber are correct that my canvassing of these three points was more impressionistic than thorough.

This was largely because I did not want to belabor the obvious—namely, that American criminal justice and prison conditions are intolerably cruel, or as Gray and Huber put it, "unpleasant in almost every respect."[18] Gray and Huber helpfully marshal statistics about the number of individuals in prison, the length of sentences, and the quality of life in prisons, objectively proving the harshness I largely assumed in my Article.[19]

But, harshness may also simply not be reducible to one metric or to one set of statistics. This impossibility does not necessarily make harshness subjective, although it does make a definition harder to pin

12. *See* Gray & Huber, *supra* note 1, at 158–60. R

13. *See, e.g.*, Dana Graham, Comment, *Decriminalization of Marijuana: An Analysis of the Laws in the United States and the Netherlands and Suggestions for Reform*, 23 LOY. L.A. INT'L & COMP. L. REV. 297, 307 (2001) ("[An] emphasis on personal autonomy and privacy is possibly the main reason why the Netherlands does not treat personal possession of marijuana as a serious crime.").

14. *See* Gray & Huber, *supra* note 1, at 146–52. R

15. *See* Flanders, *supra* note 4, at 92–93. R

16. *See id.* at 93–95.

17. *See id.* at 95–96.

18. Gray & Huber, *supra* note 1, at 146. R

19. *Id.* at 141–43.

down. Whitman seems correct in claiming that our own harshness becomes evident by observing how other countries treat their prisoners and how they sentence.[20] We can also reflect more abstractly on how we ought to treat our fellow citizens when they have committed a crime. It is true, as Gray and Huber quote Whitman, that "[w]hat counts as 'harsh' depends on the sensibilities and structures of a given society."[21] Even within our own "sensibilities and structures," however, we can still ask ourselves whether we are treating prisoners humanely or harshly. We are, in fact, failing miserably. The main problem is that, most of the time, we prefer to avert our eyes from the way we treat prisoners.[22]

After rejecting several possibilities, Gray and Huber define harshness as "disproportionate punishment."[23] I agree that this is one aspect of harshness (and said as much in my original Article). Disproportionate punishment, however, is not the only aspect, and it too has an elusive meaning. Disproportionality alone cannot fully capture the badness of brutal prison conditions or sadistic prison wardens. Moreover, our initial response to the official toleration of prison rape is not distress over its disproportionality but disgust at its inhumanity. Finally, disproportionality alone does not enable us to criticize inflexible sentencing regimes.[24]

Disproportionality works best as support for the claim that sentences are too long—that they are disproportionate to the crimes committed.[25] Even here, we might worry that the bare idea of proportionality will not offer much precision: What is a disproportionate sentence for theft, for rape, or for kidnapping?[26] Viewing punishments as simply excessive, rather than as disproportionate, may free us somewhat from the burden of specifying just how excessive punishments actually are. We can simply state that, by any measure, prison sentences in America are too long.

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20. *See generally* James Q. Whitman, *The Comparative Study of Criminal Punishment*, 1 ANN. REV. L. SOC. SCI. 17 (2005).

21. *See* Gray & Huber, *supra* note 1, at 147 (quoting JAMES Q. WHITMAN, HARSH JUSTICE: CRIMINAL PUNISHMENT AND THE WIDENING DIVIDE BETWEEN AMERICA AND EUROPE 32 (2003)) (internal quotation marks omitted). R

22. For a good, recent statement of the awful state of punishment in America, see *Rough Justice in America: Too Many Laws, Too Many Prisoners*, ECONOMIST, July 24, 2010, at 33.

23. Gray & Huber, *supra* note 1, at 150. R

24. Proportionality seems to require fixed and inflexible punishments—that is, once we have figured out what punishments are proportional.

25. *See, e.g.*, Coker v. Georgia, 433 U.S. 584, 597 (1977) ("[D]eath is indeed a disproportionate penalty for the crime of raping an adult woman.").

26. For a discussion on my approach to solving this puzzle, see *infra* Part III.

In the end, vagueness in the definition of harshness is not a problem. Harshness covers a multitude of sins, which is exactly why it works. Punishments can be too long, too cruel, too inflexible, or they can be all these things at once (as they often are, in America). It is less important that we identify a precise definition of harsh than we construct theories that can at least address some of the broad harshness of American criminal justice. Of course, Gray and Huber also do this,[27] and I now turn to this part of their response.

III. CAN RETRIBUTIVISM BE PROGRESSIVE?

Gray and Huber find ground for a progressive retributivism in Kant, building, in part, on Gray's earlier work[28] but adding some important nuance and detail.[29] I am worried about using Kant as a progressive resource. The real Kant, the historical Kant, was famously rigoristic—allowing no exceptions to moral rules, not a lie to the murderer at the door,[30]or, to our present concern, not allowing a guilty murderer to escape the death penalty.[31] Even if it served no social purpose, Kant believed that the murderer must be executed; if he was not, justice was thrown in doubt.[32] Kant was the inflexible punisher *par excellence*.[33]

Gray and Huber illustrate Kant's theory using the example of theft: The thief has, by his action, made everyone's property insecure, and under the principle of retribution, he deserves to have his own property made insecure.[34] Gray and Huber conspicuously do not

27. *See* Gray & Huber, *supra* note 1, at 158–64. R

28. *See* David Gray, *Punishment as Suffering*, 64 VAND. L. REV. (forthcoming 2010) (on file with the Maryland Law Review).

29. *See* Gray & Huber, *supra* note 1, at 152–57. R

30. IMMANUEL KANT, *On a Supposed Right to Lie from Philanthropy*, *in* PRACTICAL PHILOSOPHY 611 (Mary J. Gregor ed. & trans., Cambridge Univ. Press 1996) (1797).

31. *See supra* note 11. R

32. IMMANUEL KANT, THE METAPHYSICS OF MORALS 106 (Mary Gregor ed. & trans., Cambridge Univ. Press 1996) (1797) [hereinafter KANT, METAPHYSICS OF MORALS]. According to Kant:

> Even if a civil society were to be dissolved by the consent of all its members (e.g., if a people inhabiting an island decided to separate and disperse throughout the world), the last murderer remaining in prison would first have to be executed, so that each has done to him what his deeds deserve and blood guilt does not cling to the people for not having insisted upon this punishment; for otherwise the people can be regarded as collaborators in this public violation of justice.).

Id.

33. Kant only allows for clemency where the criminal has committed an offense against the sovereign himself because it allows him to "show the splendor of his majesty." *Id.* at 109–10.

34. Gray & Huber, *supra* note 1, at 154. R

mention Kant's analysis of rape: The person who rapes deserves himself to be castrated.[35] Kant does not seem a reliable guide if we seek to avoid inhumane treatment of offenders.

But, of course, great philosophers are not only great for what they say but also for what can be done with what they say. Gray and Huber update Kant in some provocative and progressive ways. For example, they use Kant to defend drug decriminalization and to condemn many punishments as disproportionate.[36] I want to remark briefly on both of these points.

Gray and Huber maintain that Kantian theory does not support imprisonment for many regulatory offenses, which make up a large part of our criminal law.[37] They further, and provocatively, apply a similar type of reasoning to drug offenses.[38] There is nothing in drug use, Gray and Huber explain, that is incompatible with the freedom of all.[39] The same claim, however, could not be made of murder and theft, which do threaten the liberties of others. So, according to Kant's theory, punishment (as opposed to health and safety measures to manage and to treat drug users) is not permissible for drug offenses.[40]

Modern day Kantians have not taken the same route as Gray and Huber, and it is not hard to see why. When an individual breaks the law, he commits at least one moral wrong—he has broken the law. Of course, he may also have committed an additional moral wrong given the nature of his underlying crime. For instance, the murderer has done something morally wrong in itself (an unjustified killing) *and* has also committed the moral wrong of breaking the law. With regulatory offenses, in contrast, we may only have the wrong of breaking the law. This is also, arguably, the case with drug offenses.

These types of offenses, however, are still wrongs against the state. Once the state has made an act illegal, the state should have the right to punish one who acts illegally. The offender has harmed all of us by making the legal order unstable. This is true whether the crime is

35. KANT, METAPHYSICS OF MORALS, *supra* note 32, at 130 (explaining that "[t]he punishment for rape and pederasty is castration"). To be fair, Kant concedes that it would violate the rapist's dignity to give him what he really deserves—namely, to be raped himself. We might also mention, however, that chemical castration (to put it delicately) was not an option in Kant's day. R

36. *See* Gray & Huber, *supra* note 1, at 158–60. R

37. *See id.* at 156.

38. *See id.* at 158–60.

39. *See id.* at 158–59.

40. *See id.* at 158.

murder or abandoning your refrigerator.[41] Simply breaking the law, for Kant, involved a contradiction. You cannot will that you be allowed to break the law while no one else can.[42] Indeed, Kant was clear that even an unjust legal order required obedience.[43] Thus, breaking the law is immoral and deserves punishment—a point that applies to drug and regulatory offenses as much as it does to murder. This is justification enough for punishment for those crimes from a retributive point of view.

Now, we might think that some things should not be crimes in the first place. But, this is a different sort of argument. It is not an argument based in the philosophy of punishment. Rather, it is one based in the philosophy of freedom.[44] We cannot argue from principles of retributive justice alone about what things are properly crimes or are not. Kant was clear that, from a punishment perspective, a violation of the law—whatever the law happens to be—justified retributive punishment against the lawbreaker. What things should properly be made illegal is then a separate inquiry.

This still leaves Gray and Huber's points about sentencing.[45] It may be that even if we can punish for merely breaking the law, those punishments should be rather slight. This seems right and is reflected in our scheme of regulatory infractions. Many regulatory infractions carry only a fine and very rarely involve jail time.[46] Gray and Huber's Kantian story helps us better understand this familiar reality.

Can we move much past this relatively uncontroversial claim? Here is where the Kantian formula for proportionality would appear to enter. Say we want to discover the proper punishment for theft. Gray and Huber quote Kant as stating that '"[w]hoever steals makes the property of everyone else insecure and therefore deprives himself

41. MO. REV. STAT. § 577.100 (West 2003) (criminalizing abandonment of an airtight icebox).

42. KANT, METAPHYSICS OF MORALS, *supra* note 32, at 97 (explaining how disobedience to the law is "self-contradictory"). R

43. *Id.* at 96–97 (stating that people have a duty to obey "even what is held to be an unbearable abuse of supreme authority").

44. If we wanted to make arguments for decriminalizing drugs or for removing many regulatory offenses, we might simply want to make those arguments directly rather than relying on Kantian arguments about whether something can be universalized without contradiction. *See, e.g.*, Gray & Huber, *supra* note 1, at 154 (citing KANT, METAPHYSICS OF MORALS, *supra* note 32, at 18). For instance, we might say that we have autonomy or privacy rights that are infringed by drug laws. *See, e.g.*, Ravin v. State, 537 P.2d 494, 511 (Alaska 1975) (explaining that "possession of marijuana by adults at home for personal use" is protected under the privacy clause of the Alaska constitution). R R

45. *See* Gray & Huber, *supra* note 1, at 160–64. R

46. *See generally* Staples v. United States, 511 U.S. 600 (1994) (noting that public offenses which do not require scienter impose lighter punishment).

(by the principle of retribution) of security in any possible property.'"[47] But, what does this mean in terms of punishment? Do we steal from the thief? If so, how much of his property should we take? (And what if he has no property?)

More generally, can Kant tell us how to fix the appropriate term of years for any given offense? Beyond instructing that the proportional punishment for murder is the death penalty, Kant is less than helpful.[48] We can say that the person who steals should be deprived of his security in property, but what does this mean in terms of days or months or years served? Gray and Huber are reduced to stating that some sentences "appear" to be disproportionate to their offenses,[49] but we lack any way of asserting that they actually are disproportionate in terms of being too long by *X* number of years.

Of course, such precision might be too much to ask of any theory, but I wonder whether reading Kant will advance us any further than simply suggesting that our sentences are excessive along any dimension—retributive, deterrent, or rehabilitative. There is a potentially large range of appropriate sentences for each crime: We can exclude sentences that are too long or too short, but what should we do about the wide variation in the middle? In my Article, I suggested that rather than trying to find the right number—or some formula for fixing sentences—we should instead think institutionally.[50] Who is in the best position to make sentencing decisions? And how do we prevent those who do sentence from considering irrelevant factors or

47. Gray & Huber, *supra* note 1, at 155 (quoting KANT, METAPHYSICS OF MORALS, *supra* note 32, at 106)). R

48. *See supra* note 11; *see also* KANT, METAPHYSICS OF MORALS, *supra* note 32, at 130 ("For the only time a criminal cannot complain that a wrong is done him is when he brings his misdeed back upon himself, and what is done to him in accordance with penal law is what he has perpetrated on others, if not in terms of its letter at least in terms of its spirit." (footnote omitted)). R

49. *See* Gray & Huber, *supra* note 1, at 162 ("Enhanced sentences justified by expansions of conspiracy liability also result in punishments that appear to be harsh by retributive standards."). R

50. *See* Flanders, *supra* note 4, at 109, 130. As John Finnis has emphasized, punishment presents an example of "the need for *determinatio*, a process of choosing freely from a range of reasonable options none of which is simply rationally superior to the others." John Finnis, *Retribution: Punishment's Formative Aim*, 44 AM. J. JURIS. 91, 103 (1999). The problem with discretion is not in how to eliminate it (in this case it cannot be eliminated). Rather, the problems are in determining who is in the best position to wield discretionary power and in ensuring that this discretionary power is wielded responsibly. R

from being too harsh in their sentencing? By contrast, the quest for an objective notion of proportionality seems nearly hopeless.[51]

IV. CONCLUSION

I have spent most of this Reply disagreeing with Gray and Huber's claims: First about harshness, and second about the uses of Kant for retributive theory. I think harshness, although vague, is still a useful term to describe American punishment practices. In addition, I worry that Kant may be less helpful, and possibly even harmful, in thinking about how we can become less harsh.

These disagreements, however, are small in comparison to the deep agreement between us. We agree in spirit if not in letter. My Article was mostly about articulating the philosophy of punishment in the right spirit, as being geared toward the real and pressing problem of American harsh justice. I wanted us, *qua* philosophers of punishment, to think twice about theorizing without considering the real world effects of our theories. Some theories are too abstract. Even worse, some theories are abstract and potentially harmful. They lead us to philosophize about punishment in the wrong spirit.

Gray and Huber's response is philosophy of punishment undertaken in the right spirit. Gray and Huber focus our attention on punishment theory's pressing practical interest in changing the status quo for the better. If our exchange encourages others to see the important obligation punishment theory has to real reform, then this has been one step toward making that needed reform real.

51. For my early effort to make this point, see Chad Flanders, *Shame and the Meanings of Punishment*, 54 CLEV. ST. L. REV. 630–31 (2006) (noting difficulty of finding any "absolute" proportionality in figuring appropriate punishments).