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The Paradox of Recidivism

Christopher Lewis

THE PARADOX OF RECIDIVISM

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ABSTRACT

The idea that we should respond more severely to repeated wrongdoing than we do to first-time misconduct is one of our most deeply held moral principles, and one of the most deeply entrenched principles in the criminal law and sentencing policy. Prior convictions trigger, on average, a six-fold increase in the length of punishment in states that use sentencing guidelines. And most of the people we lock up in the U.S. have at least one previous conviction.

This Article shows that given the current law and policy of collateral consequences, and the social conditions they engender, judges and sentencing commissions should do exactly the opposite of what they currently do: impose a recidivist sentencing discount*, rather than a premium. This thesis is counterintuitive and politically unpalatable. It goes against the grain of criminal law and policy dating back as far as we know it, virtually the entire scholarly literature, and millennia of social tradition. But this Article shows that it follows logically from fairly ordinary moral premises.*

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INTRODUCTION

The idea that we should respond more severely to repeated wrongdoing than we do to first-time misconduct is one of our most deeply held moral principles, and one of the most deeply entrenched principles in the criminal law and sentencing policy. Criminal justice systems around the world, including the U.S. federal system and those in every U.S. state, punish repeat offenders much more severely than first-time wrongdoers convicted of similar crimes.[1] Recidivist sentencing enhancements are promulgated in state and federal sentencing guidelines and statutory provisions;[2] imposed by sentencing judges as a discretionary matter;[3] and furthered in decisions made by parole boards, probation officers, and other corrections officials.[4] A convicted offender's prior criminal record is one of the two most important determinants of how long they will spend in prison, along with the severity of the present criminal offense.[5] Prior convictions trigger, on average, a six-fold increase in the length of punishment in states that use sentencing guidelines; some state guidelines impose a ten-fold average increase; and for some offense categories, guidelines recommend sentences 100 times more severe for offenders with the most serious criminal records, compared to first-time offenders convicted of exactly the same crime.[6] Most of the people we lock up—especially those who are Black or Latino, and poor—already have at least one prior conviction.[7] Roughly half of the people who are released from state prisons will return to prison within three years.[8] The "recidivist sentencing premium," as such, plays a large role in

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[1] *See, e.g.*, NEAL B. KAUDER & BRIAN J. OSTROM, NATIONAL CENTER FOR STATE COURTS, STATE SENTENCING GUIDELINES: PROFILES AND CONTINUUM 7, 19 (2008); JULIAN V. ROBERTS, PUNISHING PERSISTENT OFFENDERS 93–117 (2008).

[2] *See, e.g.*, RICHARD S. FRASE, JULIAN V. ROBERTS, RHYS HESTER & KELLY LYN MITCHELL, ROBINA INSTITUTE OF CRIMINAL LAW AND CRIMINAL JUSTICE, CRIMINAL HISTORY ENHANCEMENTS SOURCEBOOK 7 (2015) (cataloguing differences between state sentencing guidelines with respect to recidivist enhancements).

[3] In *United States v. Booker*, 543 U.S. 220 (2005), the Supreme Court held that judges are merely advised, not required, to follow the federal sentencing guidelines. Most judges still impose sentences within the recommended ranges provided in the guidelines, though. *See, e.g.*, Paul J. Hofer, *Federal Sentencing After* Booker, 48 CRIME & JUST. 137, 139 (2019); Crystal S. Yang, *Have Interjudge Sentencing Disparities Increased in an Advisory Guidelines Regime? Evidence from* Booker, 89 N.Y.U. L. REV. 1268, 1272 (2014). *See generally* U.S. SENTENCING COMMISSION, SOURCEBOOK OF FEDERAL SENTENCING STATISTICS (2015), https://www.ussc.gov/research/sourcebook/archive/sourcebook-2015 (exhibiting sentencing information and guideline applications).

[4] *See, e.g.*, Joel M. Caplan, *What Factors Affect Parole: A Review of Empirical Research*, 71 FED. PROB. 16, 16 (2007)

[5] KAUDER & OSTROM, *supra* note 1, at 3–6.

[6] RICHARD S. FRASE & JULIAN V. ROBERTS, PAYING FOR THE PAST: THE CASE AGAINST PRIOR RECORD SENTENCE ENHANCEMENTS 101 (2019).

[7] *See* BRIAN A. REAVES, FELONY DEFENDANTS IN LARGE URBAN COUNTIES, 2009, at 8–9 (2013).

[8] MATTHEW R. DUROSE, ALEXIA D. COOPER & HOWARD N. SNYDER, RECIDIVISM OF PRISONERS

shaping the size of the incarcerated population, and in determining its demographic distribution.

But as this Article demonstrates, the law and policy of collateral consequences, and the social conditions they engender, have left us in a situation where judges and sentencing commissions ought to do precisely the opposite of what they currently do: treat prior criminal convictions as a presumptive mitigating factor, rather than an aggravating one—imposing a recidivist sentencing *discount*, rather than a premium.

The case for this thesis unfolds in four parts.

The first two parts of the paper examine the prevailing rationales for the recidivist sentencing premium. In Part I, I assess and cast doubt upon rationales that appeal to the incapacitation—and deterrent—effects of the premium. I pinpoint several important areas where existing empirical research provides insufficient reason to be sure of these standard views and show that the recidivist sentencing premium may be counterproductive to crime control in some circumstances. There is an undeniable correlation between one's past criminal record and one's future likelihood of reoffending. But we must weigh a number of other determinants of public safety that the existing literature on recidivism fails to consider—including "replacement effects," the potential backlash of concentrated incarceration, crime that occurs inside of our prisons and jails, the biases and heuristics that underlie all human decision-making, and the probability that an offender with prior criminal convictions will be detected. Given our lack of information about the extent of these phenomena and how they correlate with prior criminal convictions, considerations of public safety do not weigh in favor of the recidivist sentencing premium as clearly as most people think.

This portion of the argument should be taken as a possibility proof and a call for further empirical research, rather than a decisive refutation of the rationales under examination. Future empirical research could vindicate these rationales, partially undermine their force, or potentially show that the recidivist sentencing premium is counterproductive to crime control. But until such research is completed, we should be skeptical of incapacitation- and deterrence-based arguments for the recidivist sentencing premium.

RELEASED IN 30 STATES IN 2005: PATTERNS FROM 2005 TO 2010, at 1 (2014), https://www.bjs.gov/content/pub/pdf/rprts05p0510.pdf.

In Part II, I turn to backward-looking considerations of blameworthiness and culpability. As the Federal Sentencing Guidelines put it, "a defendant with a record of prior criminal behavior is more culpable than a first offender and thus deserving of greater punishment."[9] A wide range of criminal law theorists defend various forms of this position.[10] Some argue that in cases of repeat offending, we have more evidence of malice, ill will, or bad character than we do when someone is convicted of an otherwise similar first offense. And others argue that repeat offenders are guilty, by virtue of their past criminal history, of an additional wrong on top of their current offense—for example, defiance of a judicial mandate not to reoffend, or a failure to organize their lives in such a way as to prevent themselves from repeating past mistakes. I argue that all of these backward-looking rationales are either viciously circular or otherwise unsound. This, combined with the possibility proof I give in Part I, shows that there is no clear reason to think we are justified in punishing repeat offenders more severely than first-time wrongdoers as a matter of course.

In Part III, I lay out the central, positive argument. The severity with which we punish offenders, relative to one another, should track the amount of ill will their crimes manifest. The amount of ill will an offense manifests depends in large part on the strength of the offender's "incentives" to commit that crime, measured in terms of the extent to which *getting away with* that crime would foreseeably add to the offender's bundle of what Rawls called the "primary goods"[11]—things that anybody would want, regardless of whatever else they wanted—or in terms of Nussbaum and Sen's "Capabilities Approach,"[12] which tracks, roughly, one's opportunities to live a life they have reason to value. I canvass the wide range of barriers that people with prior criminal convictions face to finding employment; beginning careers; getting welfare, housing, and education; and to achieving a basic level of social status or esteem in their communities. These barriers give people with prior convictions stronger "incentives" than first-time offenders to commit just about any kind of crime—with the possible exception of sexual violence. So, we cannot justifiably blame

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[9] U.S. SENT'G COMM'N, GUIDELINES MANUAL 392 (2016).

[10] *See*, *e.g.*, Youngjae Lee, *Recidivism as Omission: A Relational Account*, 87 TEX L. REV. 571, 621 (2009); Andrew von Hirsch, *Desert and Previous Convictions in Sentencing*, 65 MINN. L. REV. 591, 591–92 (1981) [hereinafter von Hirsch, *Desert and Previous Convictions in Sentencing*]; Andrew von Hirsch, *Criminal Record Rides Again*, 10 CRIM. JUST. ETHICS 2, 55 (1991) [hereinafter von Hirsch, *Criminal Record Rides Again*]; PREVIOUS CONVICTIONS AT SENTENCING: THEORETICAL AND APPLIED PERSPECTIVES (Julian V. Roberts & Andrew von Hirsch eds., 2010); RECIDIVIST PUNISHMENTS: THE PHILOSOPHER'S VIEW 1 (Claudio Tamburrini & Jesper Ryberg eds., 2012).

[11] *See, e.g.*, JOHN RAWLS, JUSTICE AS FAIRNESS: A RESTATEMENT 58–61 (Erin Kelly ed., 2001).

[12] *See, e.g.*, MARTHA C. NUSSBAUM, CREATING CAPABILITIES: THE HUMAN DEVELOPMENT APPROACH, at x (2011).

or punish them for reoffending as severely as we could do for the same crime, if it were a first offense. Judges and sentencing commissions, as such, have moral reason to treat prior convictions as a presumptive mitigating factor at sentencing—imposing a recidivist sentencing discount, instead of a premium.

In Part IV, I examine and rebut two of the most important potential objections to the central argument: (1) that people with prior convictions are themselves to blame for the incentives they face to reoffend, so those incentives cannot excuse them even partially; and (2) that a recidivist sentencing premium is necessary to "balance out" the declining marginal severity of collateral consequences after a first conviction.

Before considering any of these claims in more depth, I want to flag two important features of the scope and significance of the argument.

First, it is important to note that the argument I defend is *comparative.* That is, the claims I make in this paper relate to the severity with which repeat offenders should be punished, *compared to* first-time offenders. I do not make any claims here about how severely people should be punished in *absolute* terms. The arguments I defend in this paper are, in principle, compatible with the idea that absolute levels of punishment should be higher, lower, or the same as they are currently. I happen to think that prison sentences in the U.S. should be much shorter than they are, for the most part, and that prison conditions should be much more conducive to offenders' future and present wellbeing (or capabilities). And I defend those views in other work. But those views are neither here nor there for the purposes of this paper.

Second, given that my argument for the recidivist sentencing discount depends on the premise that collateral consequences incentivize future crime, it is natural to wonder why we don't simply get rid of collateral consequences, instead of trying to compensate for them at sentencing with a discount for recidivists. After all, passing legislation that would eliminate those collateral consequences certainly seems more politically palatable than imposing a recidivist sentencing discount.

But eliminating the power of the incentives that people with prior convictions have to return to crime would require sweeping legislative, administrative, and broader social change that neither judges nor sentencing commissions or corrections officials can themselves unilaterally enact. Such change is unlikely to be realized in the foreseeable future. Until it is, I argue, judges and sentencing commissions have moral reason to treat prior convictions as a presumptive mitigating factor, regardless of how unpalatable that may seem.

Moreover, it may not be possible to eliminate all of the incentives that people with prior criminal convictions have to return to crime without a fundamental society-wide shift toward Scandinavian-style social democracy. A group of economists studying Norwegian prisoners found that spending time in well-resourced prisons with robust rehabilitative and job-training programs can reduce offenders' future offending and increase their employment prospects.[13] But Norway incarcerates far fewer people *per capita* than the U.S. (44 per 100,000, compared to almost 700 per 100,000); spends far more on each prisoner (around $120,000/year, compared to approximately $30,000/year); and has a far more robust social welfare state, higher minimum wages, far less poverty, and far less inequality.[14] Even the most ambitious reentry programs in the U.S. do not come close to achieving the results of these Norwegian programs.[15]

Nor is it clear that eliminating all collateral consequences would be desirable, on balance. Some policies designed to reduce those barriers may have significant drawbacks. For example, a recent study found that "Ban The Box" legislation could exacerbate racial discrimination in employment, as companies unable to obtain information about applicants' past criminal records may use cues about an applicant's racial group membership as a proxy for criminality instead.[16] Whether or not the unfairness and potential inefficiencies associated with that increase in racial discrimination are outweighed by the protections that such policies ostensibly offer for formerly convicted people is unclear.

So, the unpalatability of the recidivist sentencing discount may indeed give us—as citizens and as a society—one reason among many to reduce the barriers formerly convicted people face to productive reentry. But unfortunately, for judges and sentencing commissions, the paradox of recidivism is not that easy to escape.

I. EFFICIENCY AND PUBLIC SAFETY

Our criminal justice systems do not have unlimited resources, nor can they prevent every possible crime from occurring. Both macro-level sentencing policy and individual sentencing decisions affect the amount of crime that occurs

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[13] Manudeep Bhuller, Gordon B. Dahl, Katrine V. Løken & Magne Mogstad, *Incarceration, Recidivism, and Employment*, 128 J. POL. ECON. 1269, 1272 (2020).

[14] *Id.* at 1288–89.

[15] *See* MARIE GOTTSCHALK, CAUGHT: THE PRISON STATE AND THE LOCKDOWN OF AMERICAN POLITICS 79–97 (2014).

[16] *See* Amanda Agan & Sonja Starr, *Ban the Box, Criminal Records, and Racial Discrimination: A Field Experiment*, 133 Q. J. ECON. 191, 193–94 (2018).

in society, which in turn affects the wellbeing and functioning of the citizenry and the society as a whole.[17] If public safety or crime control is the primary aim of punishment, as many think it ought to be, then our sentencing policy and sentencing decisions ought to minimize crime (or maximize public safety) as much as possible given the fiscal, constitutional, and moral constraints within which our systems operate.[18]

A large body of empirical research shows that repeat offenders are more likely to reoffend than those who have only been convicted of a single offense. For example, in a meta-analysis of 131 studies, Gendreau et al. found that "criminal history"—including both prior convictions and other contact with the criminal justice system, such as prior arrests—was one of the most reliable predictors of recidivism.[19] A more recent study found, similarly, that young first-time offenders who avoid a subsequent conviction for ten years are no more likely to commit a further crime than someone who has never been convicted at all; older first-time offenders who avoid a second conviction reach this level of risk even faster; but people with multiple prior convictions never reach that level.[20]

The recidivist sentencing premium is thus often seen as an efficient way to allocate the scarce resources of our criminal justice systems, with the aim of public safety in mind. On this view, we are justified in incarcerating repeat wrongdoers for longer periods of time than first-time offenders convicted of similar crimes because either (1) it takes more severe sanctions to deter them, or

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[17] The standard way to measure the relationship between imprisonment and crime, and between crime and social welfare, is through cost-benefit analysis. *See, e.g.*, John J. Donohue II & Peter Siegelman, *Allocating Resources Among Prisons and Social Programs in the Battle Against Crime*, 27 J. LEGAL STUD. 1, 1–2 (1998). This approach has a number of well-known normative limitations, however. *See, e.g.*, DANIEL HAUSMAN, MICHAEL MCPHERSON & DEBRA SATZ, ECONOMIC ANALYSIS, MORAL PHILOSOPHY, AND PUBLIC POLICY 158–70 (2017); Amartya Sen, *The Discipline of Cost-Benefit Analysis*, 29 J. LEGAL STUD. 931, 950 (2000); MATTHEW D. ADLER, WELL-BEING AND FAIR DISTRIBUTION: BEYOND COST-BENEFIT ANALYSIS 88–114 (2012).

[18] *See, e.g.*, Gary Becker, *Crime and Punishment: An Economic Approach*, 76 J. POL. ECON. 169, 170 (1968). "Side constrained" consequentialist theories hold that a sentencing scheme must also pass some additional moral bar—for example, that it not violate anyone's rights, that it not mandate or allow punishment of the innocent, or that it not allow more punishment than any individual offender deserves; on these views, passing the cost-benefit analysis is necessary, but not sufficient, for the justification of a sentencing scheme. *See, e.g.*, RICHARD FRASE, JUST SENTENCING: PRINCIPLES AND PROCEDURES FOR A WORKABLE SYSTEM 7 (2013); NORVAL MORRIS, THE FUTURE OF IMPRISONMENT, at ix–x (1974); John Rawls, *Two Concepts of Rules*, 64 PHIL. REV. 3–5 (1955); H.L.A. HART, PUNISHMENT AND RESPONSIBILITY: ESSAYS IN THE PHILOSOPHY OF LAW 1–28 (2008).

[19] Paul Gendreau, Tracy Little & Claire Goggin, *A Meta-Analysis of the Predictors of Adult Offender Recidivism: What Works!*, 34 CRIMINOLOGY 575, 582 (1996).

[20] Shawn D. Bushway, Paul Nieuwbeerta & Arjan Blockland, *The Predictive Value of Criminal Background Checks: Do Age and Criminal History Affect Time to Redemption?* 49 CRIMINOLOGY 27, 28 (2011).

(2) they are more dangerous, so incapacitating them through imprisonment promises a greater net benefit.

In this section, I show that neither one of these two future-oriented rationales for the recidivist sentencing premium is definitively supported by the existing empirical evidence. Rather, it is uncertain whether efficiency and crime control-related considerations tell in favor of, or against, a recidivist sentencing premium—and this section identifies areas where empirical research is needed to fully address that question. But I show that it is at least possible that the recidivist sentencing premium could be counterproductive to crime control.

I should note at the outset that, because of its reliance on data tracking arrests, convictions, and other official contact points with the criminal justice system, the empirical literature may exaggerate the connection between prior convictions and future offending. People who are more likely to have been caught breaking the law many times already are also more likely to be caught doing so in the future.[21] Some of the factors that contribute to the mismatch between crime statistics and the actual commission of crime can be controlled for.[22] But there are a number of factors that cannot—such as criminal skillfulness. Arrest and conviction data inevitably reflect this factor: all things equal, more skillful offenders are caught less often than the clumsy ones. So, while prior convictions may have some predictive value for projecting future crime, that value is likely at least somewhat overstated. This at least slightly mutes the power of both the incapacitation and deterrence rationale.

A. Incapacitation

Now let us turn to the incapacitation rationale specifically. Given that (1) prior convictions are a predictor of future crime and (2) our criminal justice

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[21] *See infra* Part I.B.3 ("Probabilities of Detection").

[22] For example, some groups are much more heavily monitored and policed than others. Young Black men in low-income areas of New York City are much more likely to be stopped, frisked, and subsequently arrested than older white men in higher income areas of New York. *See, e.g.*, Decio Coviello & Nicola Persico, *An Economic Analysis of Black-White Disparities in the New York Police Department's Stop-and-Frisk Program*, 44 J. LEGAL STUD. 315, 315 (2015); Floyd v. City of New York, 959 F. Supp. 2d 540, 556 (2013). As such, we could expect both that young Black men facing a current criminal conviction would be more likely than older white men in the same boat to have a record of prior convictions, and we could also expect that the same young Black men would be more likely to be arrested and convicted once again upon being released. We can at least theoretically control for this by comparing intra-race, intra-class, and within-neighborhood recidivism rates between first-time and repeat offenders. And we can perhaps control for much more than just the most obvious factors that could otherwise distort data on recidivism rates, taking any statistical factors into account that we have or could conceivable collect data on: for example, marital status, parents' education levels, job history, credit reports, known criminal acquaintances, and neighborhood characteristics across the lifespan.

systems have limited resources, it seems logical that the most efficient way to promote public safety may be to incarcerate repeat offenders for significantly longer periods than first-time lawbreakers. After all, the thought goes, even if the vast majority of the people we lock up have to return to the community eventually, we can at least ensure that they pose no risk to the public *while they are in prison*.[23]

Criminologists measure the "incapacitation effects" of incarcerating any given offender by calculating that offender's counterfactual likelihood of committing crime during the prospective period of incarceration were he or she to remain free in the community. (In the literature this projection is represented by the Greek lambda (λ)).[24]

For example, imagine two people, Crabbe and Goyle, both of whom were caught selling heroin to undercover drug enforcement agents. Crabbe had a squeaky-clean record before his current offense, while Goyle has a rap sheet longer than his arm. According to our best risk assessment instruments, Goyle is predicted to commit about four times as much crime as Crabbe per year for the foreseeable future (taking into account both the frequency and seriousness of their predicted offending). Assume that the cost of imprisonment in their jurisdiction, Hogsmeade, is $50,000/year per prisoner. Now consider two hypothetical sentencing options:

(a) Crabbe and Goyle both get two years in prison—the default sentence in Hogsmeade.
(b) Crabbe gets one year; Goyle gets three years.

Option (a) would cost the state $200,000 ($50,000/year per prisoner). Option (b) would impose the same fiscal burden on the state as option (a) ($200,000) but would have a 30% greater total incapacitation effect. Assuming that these are the only two options, if sentencing officials in Hogsmeade want their criminal justice system to promote public safety as much as possible given a fixed budget, then option (b) seems clearly preferable to (a).

1. Replacement Effects

If incapacitating a specific offender from committing further crime is to have any net social benefit, it cannot be the case that somebody else who would

[23] For an influential defense of this thesis, see JAMES Q. WILSON, THINKING ABOUT CRIME 145–61 (1975).

[24] *See, e.g.*, Alex R. Piquero & Alfred Blumstein, *Does Incapacitation Reduce Crime?*, 23 J. QUANTITATIVE CRIMINOLOGY 267, 268–69 (2007).

otherwise have been law-abiding "steps up to the plate," so to speak—committing the same amount of crime (or more) than the incarcerated person would have otherwise committed herself.

Unfortunately, the literature on "replacement effects" suggests that this may often be the case—especially for crimes that are either conducted or organized by groups, or offenses that are "market driven."[25] Organized crime can continue when one member of a gang or other criminal enterprise is incarcerated, but the others are not.[26] And incarcerating one person for a market-driven offense—for example, trafficking an addictive drug like heroin—can open up new, lucrative criminal opportunities for someone else.[27] The stronger these replacement effects are, the less any change in the incarceration rate is likely to influence public safety or wellbeing at the community-level.

Replacement effects are likely to be stronger for offenders with prior convictions than those without. Black, Latino, and poor defendants in criminal cases are more likely to have prior convictions than their white and wealthy peers.[28] Blacks and Latinos are overrepresented in the incarcerated population generally,[29] but even more so among those convicted of gang-related violence or the trafficking of addictive drugs (especially heroin, crack, and powder cocaine).[30] And young men and boys living in poverty are much more likely to join gangs than the better-off.[31]

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[25] *See, e.g.*, Thomas J. Miles & Jens Ludwig, *The Silence of the Lambdas: Deterring Incapacitation Research*, 23 J. QUANTITATIVE CRIMINOLOGY 287, 288 (2007); Andrew von Hirsch & Don M. Gottfredson, *Selective Incapacitation: Some Queries About Research Design and Equity*, 12 N.Y.U. REV. L. & SOC. CHANGE 11, 30 (1983); Marcia R. Chaiken & Jan M. Chaiken, *Offender Types and Public Policy*, 30 CRIME & DELINQUENCY 195, 199 (1984).

[26] Hirsch & Gottfredson, *supra* note 25.

[27] *See, e.g.*, Isaac Ehrlich, *Crime, Punishment, and the Market for Offenses*, 10 J. ECON. PERSP. 43, 53 (1996).

[28] *See* BRIAN A. REAVES, FELONY DEFENDANTS IN LARGE URBAN COUNTIES, 2009 – STATISTICAL TABLES (2013), https://jpp.whs.mil/Public/docs/03_Topic-Areas/07-CM_Trends_Analysis/20160122/04_BJS_Report_State_Felony_Sentencing_2009.pdf.

[29] *See* BRUCE WESTERN, PUNISHMENT AND INEQUALITY IN AMERICA 16–17 (2006).

[30] *See, e.g.*, BUREAU OF JUST. STAT., DRUG OFFENDERS IN FEDERAL PRISON: ESTIMATES OF CHARACTERISTICS BASED ON LINKED DATA (2015), https://cdn.theatlantic.com/assets/media/files/dofp12_sum.pdf; MALCOLM W. KLEIN & CHERYL L. MAXSON, STREET GANG PATTERNS AND POLICIES 3–15 (2006).

[31] Irving A. Spergel, *Youth Gangs: Continuity and Change*, 12 CRIME & JUST. 171, 171 (1990) (arguing that "[t]he gang is an important social institution for low-income male youths and young adults . . . because it often serves social, cultural, and economic functions no longer adequately performed by the family, the school, and the labor market").

2. The Backlash of Concentrated Incarceration

The recidivist sentencing premium also cannot be justified on incapacitation grounds without considering how it might affect informal mechanisms of social control. Concentrated incarceration in poor, predominantly Black, urban neighborhoods can also *cause* crime by making it harder for those communities to maintain informal mechanisms of social order and control.[32] Offenders with prior criminal convictions are disproportionately drawn from the same communities that are most likely to experience the backlash effect of concentrated incarceration.

Close to 20% of adult men are imprisoned in some of our country's least well-off neighborhoods.[33] Almost everyone in those communities has a male family member who either is or has been incarcerated.[34] This exerts a great deal of strain on those families' personal and economic resources, which in turn keeps them in poverty.[35] In these circumstances, parents are hard-pressed to teach their children social skills to keep them out of trouble with the law.[36]

As a result, informal social control—which is more important than formal social control for public safety—is undermined in these neighborhoods.[37] So, increasing rates of imprisonment in communities where incarceration is already concentrated can cause more crime than it prevents.[38] Conversely, decreasing rates of incarceration in these communities can reduce rates of crime—or at least not elevate them to the extent that individual assessments of released offenders' risk of future crime would predict.

Eliminating the recidivist sentencing premium or imposing a recidivist sentencing discount would shift the distribution of our prison populations away from communities that have passed the "tipping point" beyond which concentrated imprisonment has a backlash effect on crime, even if we held the

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[32] TODD R. CLEAR, IMPRISONING COMMUNITIES: HOW MASS INCARCERATION MAKES DISADVANTAGED NEIGHBORHOODS WORSE 49–69 (2007).

[33] *See* James P. Lynch & William J. Sabol, *Assessing the Effects of Mass Incarceration on Informal Social Control in Communities*, 3 CRIMINOLOGY & PUB. POL'Y 267, 269 (2004).

[34] *See generally* Todd Clear, Dina R. Rose & Judith A. Ryder, *Incarceration and the Community: The Problem of Removing and Returning Offenders*, 47 CRIME & DELINQUENCY 335 (2001) (discussing data on family members in prison).

[35] DONALD BRAMAN, DOING TIME ON THE OUTSIDE: INCARCERATION AND FAMILY LIFE IN AMERICA 154–163 (2004).

[36] DON WEATHERBURN & BRONWYN LIND, DELINQUENCY-PRONE COMMUNITIES (2001).

[37] CLEAR, *supra* note 32.

[38] Dina Rose & Todd Clear, *Incarceration, Social Capital, and Crime: Examining the Unintended Consequences of Incarceration*, 36 CRIMINOLOGY 441, 441 (1998).

overall rate of incarceration constant. In order to have a realistic picture of the effects of our sentencing policies and decisions on public safety, we must take these community-level dynamics into account, yet the existing literature on recidivism and sentencing fails to do so.

3. Crime Inside Prisons

There is a potentially more insurmountable problem with the incapacitation-based rationale for the recidivist sentencing premium. The criminologists who measure "incapacitation effects" almost always treat crime within prisons as non-existent.[39] Crime that occurs in prison is underreported and under-prosecuted.[40] And given the conditions of many of our prisons, decisions about who we incarcerate, and for how long, may dictate *who* gets hurt, and whose rights are violated—but not *whether* people get hurt, or how much.[41]

In our popular culture and discourse, this is both known and accepted.[42] Within that popular discourse is a kind of primitive "rights forfeiture" theory: convicted criminals, in the popular view, forfeit their rights not only to, for example, the freedom of movement and association that incarceration inevitably takes away, but also to bodily integrity, freedom from harm, and police protection.[43] But even if one accepts the view that people forfeit *some* of their rights when they commit an imprisonable offense, there is no good reason to think they forfeit *all* of their human rights when they do so, or that their interests can be completely discounted in a cost-benefit analysis or social welfare functions as soon as they are locked up.[44]

We accept that offenders found guilty of even relatively minor crimes might be brutalized, beaten, and raped in prison, but we launder this out of cost-benefit

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[39] *See, e.g.*, Alex R. Piquero & Alfred Blumstein, *Does Incapacitation Reduce Crime?*, 23 J. QUANTITATIVE CRIMINOLOGY 267, 268 (2007) (discussing traditional models of studying incapacitation effects).

[40] *See, e.g.*, Nancy Wolff, Cynthia L. Blitz, Jing Shi, Jane Siegel & Ronet Bachman, *Physical Violence Inside Prisons: Rates of Victimization*, 34 CRIM. JUST. & BEHAV. 588, 589 (2007) (citing Richard C. McCorckle, *Fear of Victimization and Symptoms of Psychopathology Among Prison Inmates*, 19 J. OFFENDER REHAB. 19, 27–41 (1993)); Richard C. McCorckle, *Personal Precautions to Violence in Prison*, 19 CRIM. JUST. & BEHAV. 160, 160 (1992)).

[41] *See, e.g.*, Ben Gifford, *Prison Crime and the Economics of Incarceration*, 71 STAN. L. REV. 71, 71 (2019).

[42] *Id.* at 113 (citing Elizabeth Stoker Bruenig, *Why Americans Don't Care About Prison Rape*, NATION (Mar. 2, 2015), https://www.thenation.com/article/archive/why-americans-dont-care-about-prison-rape/).

[43] For general discussion and defense of rights forfeiture as a justification for punishment, see Christopher Heath Wellman, *The Rights Forfeiture Theory of Punishment*, 122 ETHICS 371 (2012). Wellman does not endorse the popular view under consideration here. *Id.*

[44] Gifford, *supra* note 41, at 112.

analyses of crime policy.[45] At the same time, we don't include the things that might happen to people inside of our jails and prisons in how we think about the severity of punishment. In *Farmer v. Brennan*, the Supreme Court held that the conditions of a prison count as "punishment" only if (1) a prison official knows that there is a substantial risk of serious harm to inmates, and (2) he or she disregards that knowledge by failing to take reasonable precautions to protect inmates from the risk at hand.[46] If sentencing severity were measured so as to include the kinds of brutality we expect and allow many incarcerated people to experience, the punishments we inflict on people would be clearly disproportionate by any reasonable standard, and would likely trigger constitutional protections under the Eighth Amendment.[47]

The phenomenon of crime within prisons shows that using "incapacitation" as a rationale for penal policy decisions is a dubious proposition in general. Our information about the extent of this crime is much less reliable than our data on crime rates in the free population. Decisions about who should be imprisoned, and for how long, cannot be made with the blind assumption that the incarcerated will be unable to commit crime or cause harm during their imprisonment. That assumption is both empirically and normatively implausible. Crime of all kinds occurs within prison walls, and that crime cannot be written off or discounted in cost-benefit analysis or social welfare functions.

To sum up, it is unclear at best whether the recidivist sentencing premium can be justified by its incapacitation effects. It does no good for us to "incapacitate" a large portion of the community if others will rise up to commit the same crimes that our prisoners would have committed had we never locked them up in the first place, or if doing so erodes informal modes of social control, and thus causes more crime than it prevents. These negative externalities are likely strongest for people with prior convictions. How much crime we have to live with is what fundamentally matters for public safety; it doesn't matter *who* commits those crimes. And we should be very skeptical of the extent to which the people we lock up are really incapacitated, rather than simply redirected, in their criminal endeavors.

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[45] *Cf., e.g.*, John Donohue, *Assessing the Relative Benefits of Incarceration: Overall Changes and the Benefits on the Margin*, *in* DO PRISONS MAKE US SAFER?: THE BENEFITS AND COSTS OF THE PRISON BOOM 269, 272–73 (Steven Raphael & Michael A. Stoll eds., 2009) (providing overview of cost-benefit analysis that not does factor in crimes against incarcerated offenders); William N. Trumbull, *Who Has Standing in Cost-Benefit Analysis?* 9 J. POL'Y ANALYSIS & MGMT. 201, 208–15 (1990) (discussing individuals considered in cost-benefit analysis without inclusion of incarcerated offenders).

[46] Farmer v. Brennan, 511 U.S. 825, 825 (1994).

[47] Sharon Dolovich, *Cruelty, Prison Conditions, and the Eighth Amendment*, 84 N.Y.U. L. REV. 881, 885 (2009).

B. Deterrence

Now let us turn to deterrence. It is a commonplace argument that those with longer criminal records have shown that they have a stronger taste for crime (or a weaker aversion to punishment) by virtue of repeatedly breaking the law. They are harder to deter, so we must punish them more harshly to get them to desist. In this section, I bring together three sets of empirical findings that throw this rationale into doubt. These findings, combined with the incapacitation-related findings synthesized above, show that it is unclear whether considerations of crime control or public safety tell in favor of the recidivist sentencing premium at all.

1. General Doubts

Recidivist sentencing enhancements are rules of criminal law, and there are a number of reasons to doubt that *any* such rule has much of a deterrent effect.[48] While the *existence* of a justice system that imposes criminal punishment can deter crime, the manipulation of rules and penalties within that system can only do so under unusual conditions.[49] In order for a rule or penalty to have a deterrent effect, it must be well known to the public;[50] it must carry a meaningful penalty, the perceived threat of which must exceed the perceived benefit of breaking the law;[51] the chance of being caught must be seen as non-trivial;[52] and those potentially subject to it must be willing and able to bring that information to bear on their decision-making.[53]

These preconditions for the criminal law to have a genuine deterrent effect are rarely all met at the same time. For example, as Robinson and Darley note, "people rarely know the criminal law rules, even when those rules are

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[48] *See, e.g.*, Aaron Chalfin & Justin McCrary, *Criminal Deterrence: A Review of the Literature*, 55 J. ECON. LITERATURE 5, 39 (2017) (suggesting "repeat offenders have already paid the informal costs associated with being labeled a criminal" as a consideration for sentencing severity); Paul H. Robinson & John M. Darley, *Does Criminal Law Deter? A Behavioral Science Investigation*, 24 OXFORD J. LEGAL STUD. 173, 191 (2004) (arguing repeat offenders are less deterred by the risk of reincarceration after discovering prison is not "so bad after all").

[49] Paul H. Robinson & John M. Darley, *The Role of Deterrence in the Formulation of Criminal Law Rules: At Its Worst When Doing Its Best*, 91 GEO. L. J. 949, 951 (2003).

[50] Paul H. Robinson, John M. Darley & Kevin M. Carlsmith, *The Ex Ante Function of the Criminal Law*, 35 LAW & SOC'Y. REV. 165, 166 (2001).

[51] *Id*. (asserting criminal law can only prevent unlawful conduct if the public is aware of the penalties attached to unlawful conduct).

[52] *See, e.g.*, Daniel S. Nagin, *Deterrence: A Review of the Evidence by a Criminologist for Economists*, 5 ANN. REV. ECON. 83, 85 (2013).

[53] Robinson & Darley, *supra* note 48.

formulated under the express assumption that they will influence conduct."[54] Instead, people often use their own moral intuitions to guess at legal rules without any actual knowledge of the legal code.[55] Over 75% of "active criminals" and almost 90% of the "most violent criminals . . . perceive no risk of apprehension or are incognizant of the likely punishments for their crimes."[56] Those who commit crime tend to be impulsive and risk-seeking in general, and often intoxicated when they do.[57]

There is no *prima facie* reason to think the recidivist sentencing premium is an exception to any of these general trends. Therefore, justifying that principle on the basis of its deterrent effect is a tall task from the start.

2. Biases and Heuristics

Findings in the behavioral sciences also show that, because of the biases and heuristics that guide human decisions, it is unlikely that the recidivist sentencing premium could have much of a deterrence-related benefit, if any.[58] People weigh information and experiences that are *salient* to them more heavily in their decision-making than ideal models of rationality would dictate.[59] Likewise, people tend to discount information and experiences that are less salient.[60] For example, people weigh their own first-hand, direct experiences much more heavily than equally reliable information about other people's experiences.[61] They weigh recent experiences much more heavily than experiences in the distant past.[62] And they weigh the perceived risks of vivid or dramatic experiences and events (*e.g.*, witnessing an explosion) much more heavily than less dramatic ones (*e.g.*, long-term weight gain)—even when the less dramatic risks are actually higher.[63]

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[54] *Id.* at 176.

[55] John Darley, Catherine A. Sanderson & Peter S. LaMantia, *Community Standards for Defining Attempt: Inconsistencies with the Model Penal Code*, 39 AM. BEHAV. SCIENTIST 405, 414 (1996).

[56] David A. Anderson, *The Deterrence Hypothesis and Picking Pockets at the Pickpocket's Hanging*, 4 AM. L. & ECON. REV. 295, 295 (2002).

[57] *See, e.g.*, Marianne Junger, Robert West & Reiner Timman, *Crime and Risky Behavior in Traffic: An Example of Cross-Situational Consistency*, 38 J. RSCH. CRIME & DELINQUENCY 439, 439 (2001).

[58] *See, e.g.*, David A. Dana, *Rethinking the Puzzle of Escalating Penalties for Repeat Offenders*, 110 YALE L.J. 733, 759–72 (2001).

[59] Amos Tversky & Daniel Kahneman, *Availability: A Heuristic for Judging Frequency and Probability*, 5 COGNITIVE PSYCH. 207, 228–29 (1973).

[60] *Id.*

[61] Dana, *supra* note 58, at 759.

[62] Tversky & Kahneman, *supra* note 59, at 224.

[63] Paul Slovic, *Perception of Risk*, 236 SCI. 280, 283 (1987).

Offenders who have been imprisoned already have first-hand, direct experience with incarceration. That experience is usually recent, given the 'revolving door' effect of parole and reentry processes across the country.[64] And actually being imprisoned is much more vivid than merely imagining the prospect of it. Incarceration, as such, is more of a salient deterrent for those have already experienced it before than it is for those who have not. So, even if substantive rules of criminal law could deter people from crime, people who have been incarcerated in the past may already have a much more salient deterrent than those who haven't due to the actual experience of incarceration.

3. Probabilities of Detection

People assign exponentially greater weight to the likelihood of getting caught than they do to the severity of potential penalties in deciding whether to commit a crime.[65] Having a prior criminal record itself makes people easier to monitor, and thus more likely to get caught. A history of prior contact with the criminal justice system gives law enforcement agencies information about offenders that makes any subsequent crimes they commit easier to detect. Some of this information is propensity related—for example, police departments keep records about previously convicted offenders' modus operandi.[66] Some of it aids in prosecution efforts—for example, having fingerprints, DNA samples, photographs, and information about an offender's acquaintances on file.[67] These kinds of records both help law enforcement agencies link known violations to unknown perpetrators, and also help them detect hidden or unreported violations.[68]

From the perspective of a law enforcement agency, targeting people with prior convictions for investigation is an efficient strategy—even if those people are no more likely than anyone else to have committed the crime in question, or any crime at all.[69] For example, when fingerprints are recovered at a crime scene, it is easy for police departments to check them against fingerprint databases of

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[64] MATTHEW R. DUROSE, ALEXIA D. COOPER & HOWARD N. SNYDER, RECIDIVISM OF PRISONERS RELEASED IN 30 STATES IN 2005: PATTERNS FROM 2005 TO 2010, at 1 (2014), https://www.bjs.gov/content/pub/pdf/rprts05p0510.pdf.

[65] Chalfin & McCrary, *supra* note 48, at 7–8; Nagin, *supra* note 52, at 97–100.

[66] *See, e.g.*, L. ENF'T INFO. TECH. STANDARDS COUNCIL, STANDARD FUNCTIONAL SPECIFICATIONS FOR LAW ENFORCEMENT RECORDS MANAGEMENT SYSTEMS (RMS) 4 (n.d.); Donald C. Stone, *Practical Use of Police Records System*, 24 J. CRIM. L. & CRIMINOLOGY 668, 669 (1933).

[67] *See* L. ENF'T INFO. TECH. STANDARDS COUNCIL, *supra* note 66.

[68] Dana, *supra* note 58, at 744–46.

[69] *See* WALTER L. PERRY, BRIAN MCINNIS, CARTER C. PRICE, SUSAN C. SMITH & JOHN S. HOLLYWOOD, PREDICTIVE POLICING: THE ROLE OF CRIME FORECASTING IN LAW ENFORCEMENT OPERATIONS 2 (2013).

previously convicted felons, and that is a prudent investigative strategy even if there is no reason to think that the perpetrator had a prior conviction.

So, the nature of criminal investigation should also cast some doubt on the idea that the recidivist sentencing premium is justified by its deterrent effects. Repeat offenders are more likely to get caught than first-time lawbreakers; and the probability of detection drives decisions about whether or not to commit crime much more than the anticipated severity of punishment conditional on being detected.

The findings canvassed here show that (1) substantive rules of criminal law such as statutory recidivist sentencing enhancements tend to have little to no deterrent effect in general; (2) people with prior convictions have more salient deterrents than first-time offenders; and (3) repeat offenders are more likely than others to get caught, which is what would deter people from breaking the law, if anything would. So, to the very limited extent that tinkering with the rules of criminal law or sentencing policy is likely to have any deterrent effect at all, the recidivist sentencing premium may be counterproductive, as repeat offenders seem to face stronger deterrents to crime than first-time offenders even without it. These findings, combined with the incapacitation-related findings synthesized above, give us reason to be skeptical of the idea that the recidivist sentencing premium is justified by considerations of public safety more generally.

II. CULPABILITY

The recidivist sentencing premium may not be justified by considerations of crime control or public safety. But that is not the only rationale on offer. According to the Federal Sentencing Guidelines, "[a] defendant with a record of prior criminal behavior is more culpable than a first offender and thus deserving of greater punishment."[70] A number of criminal law theorists defend variants of this position.[71] The greater culpability of repeat offenders, according to this outlook, could either require or permit the state to impose a recidivist sentencing premium.

In this section, I canvas these culpability-based rationales for the recidivist sentencing premium and show why all of them are either viciously circular or

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[70] U.S. SENT'G COMM'N, *supra* note 9.

[71] *See, e.g.*, Lee, *supra* note 10; von Hirsch, *Desert and Previous Convictions in Sentencing*, *supra* note 10; von Hirsch, *Criminal Record Rides Again*, *supra* note 10; PREVIOUS CONVICTIONS AT SENTENCING: THEORETICAL AND APPLIED PERSPECTIVES (Julian V. Roberts & Andrew von Hirsch eds., 2010); RECIDIVIST PUNISHMENTS: THE PHILOSOPHER'S VIEW (Claudio Tamburrini & Jesper Ryberg eds., 2012).

otherwise unsound. We have no good reason to think that repeat offenders are—in principle, in general, or even on average—more culpable than first-time offenders.

A. Character

Some legal scholars argue that when a previously convicted offender is found guilty of a subsequent crime, we have more evidence of ill will or bad character than we do when a first-time wrongdoer commits the same crime. These character-based views come in two main variants: (1) notice and (2) "lapse." The former of the two rationales is considerably weaker than the latter, and its main proponent, Julian Roberts, has renounced it in recent years,[72] so I discuss it briefly.

1. Notice

According to the "notice" rationale, the formal censure that comes with a criminal conviction makes, or should make, offenders more aware of the wrongfulness of their crimes.[73] The more an offender is—or should be—aware of the wrongness of an offense, the more severely we are justified in blaming and punishing him for it, the idea goes.[74] So, if repeat offenders either are or should be more aware of the wrongness of their crimes, we may be justified in imposing enhanced criminal sentences upon them.

Victim impact statements at sentencing may have an especially strong pedagogical function in this regard—they illustrate the consequences of crime to the perpetrator in a way that an abstract understanding of what is wrong with the offense cannot. As Julian Roberts puts it, "[a] first-time burglar may not be fully aware of the harm inflicted by breaking into someone's home. A repeat burglar who has experienced numerous sentencing hearings and received multiple sentences is under no illusions about the consequences of domestic burglary."[75]

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[72] *See* FRASE & ROBERTS, *supra* note 6.

[73] ROBERTS, *supra* note 1, at 38 (2008); Julian Roberts, *First Offender Sentencing Discounts: Exploring the Justifications*, *in* PREVIOUS CONVICTIONS AT SENTENCING: THEORETICAL AND APPLIED PERSPECTIVES, *supra* note 10, at 17–19.

[74] *See, e.g.*, Gideon Rosen, *Culpability and Ignorance*, 103 PROC. ARISTOTELIAN SOC'Y 61, 75, 83 (2003) (arguing that those who *should* understand the wrongfulness of their actions, but do not, are culpable for their normative ignorance—which in turn enhances their culpability for the action itself).

[75] Roberts, *supra* note 73, at 19–20.

The fact that an offender has a prior conviction for one thing does not make it any more likely that he has a special knowledge of the wrongfulness of an entirely different kind of crime, however. Some repeat offenders have an established *modus operandi*, and others have addictions that push them to commit the same offenses over and over again; but repeat offenders do not always duplicate the crimes that led to their prior convictions.[76] And there is little reason to think that having been convicted of burglary leaves one with a greater understanding of the wrongfulness or the consequences of reckless driving, arson, or assault and battery on a police officer.

Similarly, it is implausible that having a prior conviction for one kind of crime gives an offender a stronger *obligation* to understand what is wrong or harmful about an entirely different kind of crime.[77] Even if there is an implicit message in the processes of adjudication, sentencing, or corrections, that convicted arsonist ought to think about what he did, the accompanying obligation cannot extend to thinking about what is wrong with sexual battery, for example.

One might respond that a prior conviction should have prompted a repeat offender to contemplate and understand what is wrong with breaking the law *in general*. But understanding what is wrong with breaking the law in general accounts for very little of our understanding of what is wrong with *malum in se* crimes like assault or murder, the wrongness of which are independent of their illegality.

Roberts suggests a more individualized approach to sentencing as a solution to this problem: first-time offenders should be able to argue for leniency at sentencing if they can show that they were not fully aware of the wrongfulness of their crimes.[78] But this approach already seems built into the standard *mens rea* inquiry. The criminal law assigns a higher degree of culpability to offenders who intentionally commit crime in full knowledge of the wrongfulness of their actions than those who recklessly or negligently commit similar crimes without regard to their wrongfulness or believing their actions to be less seriously wrong than they actually are.[79]

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[76] *See* Michael M. O'Hear, *Recidivism and Criminal Specialization*, MARQ. UNIV. L. SCH. FAC. BLOG (Dec. 11, 2016), https://law.marquette.edu/facultyblog/2016/12/recidivism-and-criminal-specialization/.

[77] *C.f.*, *infra* Part II.B.

[78] Roberts, *supra* note 73, at 20.

[79] Douglas N. Husak, *The Sequential Principle of Relative Culpability*, 1 LEGAL THEORY 493, 496 (1995).

An individualized or heavily fact-sensitive sentencing regime is, if anything, somewhat incompatible with the kinds of recidivist sentencing enhancements that we have—which are for the most part mechanical or formulaic: mandatory minimums, advisory guidelines, or judicial presumptions. And the considerations that tell in favor of individualized sentencing procedures—sensitivity to the particular facts of the case, including the defendant's motivations for the crime—apply just as well to cases where the defendant has multiple prior convictions. So, the "notice" view cannot justify the recidivist sentencing premium.

2. "Lapse"

Andrew von Hirsch, among others, defends a different kind of character-based view meant to justify treating first-time offenders more leniently than repeat offenders.[80] On his view, criminal sentencing should be sensitive to human frailty, which may sometimes be manifested in acts that violate the criminal law. von Hirsch argues that frailty is an inevitable part of human agency, and one we ought to be forgiving of. A first-time offender may have broken the law, as such, but may have done so only in a moment of weakness or a lapse of self-control that is "out of character."[81] An offender who repeatedly and persistently breaks the law, however, is less plausibly acting "out of character," and his actions cannot so readily be interpreted as resulting from a lapse of control or momentary weakness—instead, they likely tell us more about who he really is, and what kinds of attitudes he has toward others and toward the norms of the society at large. Good people can do bad things, the idea goes, and if a first-time offender has a long track record of being a law-abiding citizen, it is likely that his crime was an aberration, rather than a manifestation of deeply entrenched attitudes toward other people or the society at large.[82]

There is a certain amount of uncertainty in all of this, to be sure: it is possible that a first-time offender's crime is totally *in* character, and that a ten-time offender is extraordinarily unlucky to have been in the wrong place at the wrong time over and over again. But, on von Hirsch's view, recidivism is at least a good *proxy* for committing crime that is in character; and the possibility that an

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[80] For the most recent statement of this view, see Andrew von Hirsch, *Proportionality and the Progressive Loss of Mitigation: Some Further Reflections*, *in* PREVIOUS CONVICTIONS AT SENTENCING: THEORETICAL AND APPLIED PERSPECTIVES, *supra* note 10, at 1.

[81] Youngjae Lee, *Repeat Offenders and the Question of Desert*, *in* PREVIOUS CONVICTIONS AT SENTENCING: THEORETICAL AND APPLIED PERSPECTIVES, *supra* note 10, at 49.

[82] *See* YUVAL FELDMAN, THE LAW OF GOOD PEOPLE: CHALLENGING STATES' ABILITY TO REGULATE HUMAN BEHAVIOR 1 (2018).

offense resulted from a momentary lapse becomes less and less likely with multiple prior convictions.

This is taken to justify what von Hirsch calls the "progressive loss of mitigation": first-time offenders are spared the full severity of punishment that their offense might otherwise warrant, on the assumption that they may have acted out of character.[83] As they accumulate more convictions, that mitigation is progressively lost, and eventually they must face the fully earned punishment that their crimes warrant.

von Hirsch emphasizes that he is in favor of leniency for first-time offenders, rather than escalating the severity with which we punish people with prior convictions.[84] In practice, there is little to distinguish sentencing regimes that treat the presence of a prior conviction as an aggravating factor from ones that treat a clean record as a mitigating factor, however. And since this Article focuses on whether and why there might be reason to treat recidivists differently from first-time offenders at all, that distinction has little significance here. Something like von Hirsch's view could potentially rationalize the kind of guideline-based systems we see in both the U.S. and the U.K. today, where the more prior convictions an offender has (and the more serious those convictions are), the more severely the guidelines advise judges to punish them.

The "lapse" view is much stronger than the "notice" view, and seeing what is wrong with it takes careful attention to both the idea of acting "out of character," and how that idea connects, if at all, to recidivism. I use a "proof by cases" style argument to illustrate this here. There are three ways we could understand the concept of "character," and on closer examination, none of them support von Hirsch's justification for the recidivist sentencing premium.

First, "character" is usually understood as a dispositional property of persons.[85] That is, one's character traits are understood in terms of what one

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[83] von Hirsch, *supra* note 80.

[84] *Id.*

[85] For an explicit defense of this view, see GILBERT RYLE, THE CONCEPT OF MIND (1949). This dispositional view of character is shared across competing theories of virtue and vice through the history of philosophy. *See, e.g.*, ARISTOTLE, NICHOMACHEAN ETHICS § II.7 (Roger Crisp trans., Cambridge Univ. Press 2014); DAVID HUME, A TREATISE OF HUMAN NATURE § 3.2 (L. A. Selby-Bigge ed., Oxford Univ. Press, 1978); IMMANUEL KANT, CRITIQUE OF PRACTICAL REASON § 5:156-7 (Mary Gregor trans., Cambridge Univ. Press 2015). This is how the "situationist" literature in social psychology—which argues against the idea that human behavior is determined by external, situational factors, rather than people's character traits—understands the concept of "character" as well. *See, e.g.*, John M. Darley & C. Daniel Batson, "*From Jerusalem to Jericho*": *A Study of Situational and Dispositional Variables in Helping Behavior*, 27 J. PERSONALITY & SOC. PSYCH. 100, 107 (1973); Rachana Kamtekar, *Situationism and Virtue Ethics on the Content of Our Character*, 114 ETHICS

would do (or think or feel) in a range of actual or counterfactual circumstances. For example, a coward would fail to stand up for what is right even if doing so would objectively cost him very little; a greedy person seeks to profit even if they already have more than enough, and even when other considerations should outweigh that motive; a generous person tries to help others even when doing so comes at an objectively high cost for them.

It is unclear how acting out of character is even *possible* given this background view of what character is. If character is just a counterfactual disposition to act in certain ways given certain circumstances, then we must *always* act in character. We may be surprised or disappointed when people act in ways we don't expect, given our prior conceptions about them. But those reactions are likely explained by the fact that character is easy to misjudge, not by any robust sense in which people can actually act "out of character."

Second, one could think of "character" in a purely probabilistic sense: one's character is just what one usually does, feels, and thinks.[86] But if "acting out of character" is just doing something statistically unusual in one's life course, it no longer seems like the fact that a crime was out of character has any normative relevance to how severely we punish them for it.

Consider the following case:

> *Luxury Tax:* Money Bag is an ambitious and successful financier with no criminal record, a wealthy and powerful family background, and an immaculate professional resume. He attended the best private schools as a child, studied at a prestigious university, and then made a name for himself in banking for a firm on Park Place, moving up the career ladder through his twenties. Shortly after being promoted again in his early thirties, he is presented with an opportunity to move up even further through an elaborate scheme to help the firm avoid the Luxury Tax—his first opportunity of this kind. He jumps at the chance, feeling like he is too smart to get caught and too well-connected to be punished even if he were.

The fact that Money Bag's offense was "out of character" in this purely probabilistic sense, tells us little about how severely we should blame or punish him for committing securities fraud. Money Bag jumps at his first opportunity to commit the crime, in circumstances that give him little objective reason to do so. Perhaps he would have committed the crime much earlier if he had the

458, 458 (2004).

[86] *More Definitions for* Character, MERRIAM-WEBSTER, https://www.merriam-webster.com/dictionary/character (last visited June 17, 2021) (defining character as "the way someone thinks, feels, and behaves).

opportunity then. And what if we knew that Money Bag would invariably jump at the opportunity to commit the same crime every time, if such opportunities only came about more often? It would seem to matter little that this was his first offense. So, if the fact that one's action was out of character is supposed to mitigate how much we can blame him for it, then we cannot think about "acting out of character" in a purely probabilistic way.

Third, we might think about the connection between crime and "character" in terms of the likelihood that one would commit any given crime, controlling for the difficulty of one's circumstances. I think this is the only plausible way to interpret von Hirsch's argument. For example, consider the following case:

> *Free Parking*: Racecar and Scottie Dog are irregularly employed day laborers. They often find themselves wearing out their welcome on friends' couches and end up sleeping in the Free Parking lot from time to time on an empty stomach. Life is hard for both of them, but Scottie Dog sucks it up and tries his best to find work by waiting in front of the Electric Company with his toolbox, hoping somebody driving by will pick him up and give him a day's work. Racecar mostly does the same, but he dreads the hungry and cold nights in the Free Parking lot more than Scottie—and from time to time, he rolls down to St. James Place looking for someone to rob. He has now been convicted of robbery once a year for the past ten years. Scottie, on the other hand, goes nine years without breaking the law once, but in his tenth year living rough, he finally lapses, and decides to rob someone on St. James Place like Racecar.

It seems that the only thing that could explain why Scottie has only broken the law once over the last ten years, while Racecar has done so ten times, is that Scottie has a better character; their circumstances, by stipulation, are the same. This argument might justify a recidivist sentencing premium (or von Hirsch's "progressive loss of mitigation") if first-time and repeat offenders in general commit crime against similar circumstances, like Racecar and Scottie.

The problem is that having a criminal record totally changes one's circumstances. As I discuss below in Part III, the collateral consequences of a prior criminal conviction give one much stronger incentives to return to crime than one would otherwise have. A repeat offender who commits the same crime over and over again is not actually *in* the same circumstances as a first-time offender who commits the same crime after a long time with a clean record—unless the first-time offender is significantly worse off, apart from his criminal record, than the repeat offender. That would be the only way their circumstances could be comparable, since prior convictions are such a big disadvantage.

This is not at all like the patterns we see in real life. First-time offenders in real life are not, on average, much worse off than repeat offenders, apart from their record.[87] In fact, the opposite is the case: repeat offenders tend to be at a relative disadvantage *even without all of the burdens* of their criminal record—they are more likely to be Black or Latino;[88] from poor family backgrounds and disadvantaged neighborhoods;[89] unemployed;[90] have lower levels of education; and to have weaker support systems and social networks.[91]

As such, while we might be able to reconstruct a logically sound interpretation of von Hirsch's argument, that argument is an empirically unsound rationale for the recidivist sentencing premium in societies like our own—where prior criminal convictions are both constitutive of disadvantage in and of themselves, and also correlated with many other forms of deep disadvantage, all of which incentivize crime.

B. Additional Wrong

Another family of culpability-based rationales for the recidivist sentencing premium holds that repeat offenders are guilty of defying, or otherwise failing to live up to, the message implicit in their first conviction: that what they did was wrong, and that they should organize their lives so as not to break the law again. There are two principal variants of this family. I discuss the feebler "defiance" variant first, before turning to Youngjae Lee's more sophisticated,

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[87] *See* Megan F. Dickson, Nesa E. Wasarhaley & J. Matthew Webster, *A Comparison of First Time and Repeat Rural DUI Offenders*, 52 J. OFFENDER REHAB. 421, 426–27 (2013).

[88] *See, e.g.*, ASHLEY NELLIS, THE COLOR OF JUSTICE: RACIAL AND ETHNIC DISPARITY IN STATE PRISONS 10 (2016) ("Prosecutors are more likely to charge [B]lack defendants under state habitual offender laws than similarly situated white defendants."); Sarah B. Hunter, Eunice Wong, Chris M. Beighley & Andrew R. Morral, *Acculturation and Driving Under the Influence: A Study of Repeat Offenders*, J. STUD. ALCOHOL 458, 458 (2006) ("DUI recidivism rates have been found to be higher among Mexican Americans in comparison with whites."); Idelisse MalavÉ & Esti Giordani, *Latino Populations and Crime in America*, UTNE, https://www.utne.com/community/latino-populations-ze0z1501zdeh (last visited June 17, 2021) ("Latinos are more likely than [w]hite Americans to get arrested and account for a disproportionate share of all felony and misdemeanor arrests.").

[89] *See, e.g.*, Nick Tilley, *Analyzing and Responding to Repeat Offending*, ASU CTR. FOR PROBLEM-ORIENTED POLICING (2016), https://popcenter.asu.edu/content/analyzing-and-responding-repeat-offending ("There is a risk that multiple contacts with the criminal justice system unintentionally provide 'stepping stones' toward further criminal involvement, especially among the poor.").

[90] *See, e.g.*, Stewart J. D'Alessio, Lisa Stolzenberg & David Eitle, *"Last Hired, First Fired": The Effect of the Unemployment Rate on the Probability of Repeat Offending*, 39 AM. J. CRIM. JUST. 77, 77–93 (2014).

[91] Bill Keller, *Seven Things to Know About Repeat Offenders*, MARSHALL PROJECT (Mar. 9, 2016, 11:00 PM) ("Inmates who didn't finish high school are 10 points more likely to be arrested again than those who got a high school diploma – and 40 points more likely than those who finished college."); Stephanie A. Spohr, Sumihiro Suzuki, Brittany Marshall, Faye S. Taxman & Scott T. Walters, *Social Support Quality and Availability Affects Risk Behaviors in Offenders*, 4 HEALTH & JUST. 1, 7 (2016).

but ultimately still unsound, "omission" theory. Thinking through the problems with the omission theory will help bring us to the moral, political, and legal paradox at the core of this article.

1. Defiance

One frequently discussed (though not frequently defended) rationale for the recidivist sentencing premium is that, after having been explicitly censured for their past conduct, people with prior criminal convictions are guilty of further defying the law, or the norms of the society in general, upon reoffending.[92] That initial censure creates an additional (or a stronger) obligation on the offender to be law-abiding in the future. So, the offender's defiance, as manifested in his or her reoffending, constitutes an additional wrong, which in turn renders the offender more culpable for the current offense than he or she otherwise would be.

This rationale is sometimes seen as analogous to some features of the ethics of parenting. Parents of a rebellious teenage child who persists in misbehaving after being punished repeatedly might think they are justified in punishing him more severely the more he persists in acting out—not just because their initial disciplinary measures failed to deter him, but because the persistence in and of itself amounts to a blameworthy act of defiance against their parental authority.

Most critics are quick to dismiss this rationale out of hand for the ways in which it seems to entail authoritarian presumptions about the role of the state that are incompatible with liberal democratic values.[93] That the rationale is analogous to the ethics of parenting is taken to be telling in this regard—in a free country, the government is not supposed to be like a parent and its citizens are not like children.

There may be some contexts in which punishing defiance seems at least *prima facie* defensible, though. For example, take "obstruction of justice" provisions, in which defiance in certain contexts is criminalized under state and federal law.[94] One way to commit the federal crime of contempt is "[d]isobedience or resistance to [a federal court's] lawful writ, process, order, rule, decree, or command."[95] Likewise, there are a variety of state statutes that

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[92] *See, e.g.*, Markus Dirk Dubber, *Policing Possession: The War on Crime and the End of Criminal Law*, 91 J. CRIM. L. & CRIMINOLOGY 829, 962 (2001); R. A. DUFF, PUNISHMENT, COMMUNICATION, AND COMMUNITY 168 (2001); George P. Fletcher, *The Recidivist Premium*, 1 CRIM. JUST. ETHICS 54, 57 (1982).

[93] *See* DUFF, *supra* note 92.

[94] Lee, *supra* note 10, at 599–601.

[95] 18 U.S.C.§ 401.

criminalize resisting arrest or the defiance of law enforcement officers in various other contexts, such as when police officers are trying to control large crowds or contain riots.[96] As Lee puts it, "the fact that one did not do what one was told to do is precisely at the heart of this type of criminality."[97]

Legal institutions, including courts and the police, require compliance to be able to serve the public. And citizens may be morally obligated not to interfere with institutions that are legitimate and just. So, incentivizing compliance with law enforcement officers through these kinds of provisions could be justified by considerations of both efficiency and justice, at least in the abstract.[98]

But while there may be some plausible justification of the punishment of defiance in some obstruction of justice contexts, it is harder to make the case that the state's interest in punishing defiance is a defensible underlying reason to impose a recidivist sentencing premium.

Obstruction of justice provisions are designed to punish acts of defiance against *new* legal directives that are created by legitimate legal authorities. These new directives (whether issued by a judge during court proceedings, or by a police officer during a routine traffic stop) create new legal (and perhaps moral) duties. If and when an offender is justifiably charged with contempt of court, resisting arrest, or other obstruction of justice-related offenses, they are charged with violating specific and cognizable legal obligations that are distinct from any other offenses they might have committed.[99]

Criminal court judges often exhort first-time offenders not to do anything that brings them back into the same courtroom again and warn them that the consequences will be much more severe the second time around.[100] But those warnings do not create new legal duties to avoid reoffending. Criminal conduct is already prohibited in general. And merely warning first-time offenders of the harsher penalties they might face if they reoffend cannot itself justify imposing those penalties. If it could, then the state would be justified in imposing any kind of punishment it wanted for any kind of conduct, as long as offenders received

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[96] Lee, *supra* note 10, at 599.

[97] *Id.* at 600.

[98] For the sake of argument, I want to consider the justification of obstruction of justice provisions separately from questions about the arbitrary or disparate enforcement of those laws—for example, when people are charged with the crime of resisting arrest, without being charged with anything else, raising the question of what they were being arrested for in the first place.

[99] *See generally* CHARLES DOYLE, OBSTRUCTION OF JUSTICE: AN OVERVIEW OF SOME OF THE FEDERAL STATUTES THAT PROHIBIT INTERFERENCE WITH JUDICIAL, EXECUTIVE, OR LEGISLATIVE ACTIVITIES (2014).

[100] *See, e.g.*, Report and Recommendation at 7, United States v. Rigger, No. 3:08-cr-00027-RLJ-HBG (E.D. Tenn. filed Dec. 30, 2008).

adequate warning of the consequences of their actions—no matter how unjust or inefficient the punishment in question.

However, there are some situations in which courts do issue distinct, individualized legal directives to first-time offenders that create new legal duties, which can then be violated upon a second offense. For example, courts often sentence offenders to probation, where the terms of probation include new legal duties not applicable to the general public, many of which look like directives to organize one's life to avoid recidivism—for example, prohibitions on associating with past accomplices,[101] barring the offender from being in or around the area of the offense or knowingly coming near the victim,[102] completing a number of hours of mandatory community service,[103] being subject to random drug tests,[104] having proof of employment or enrollment in education or training programs,[105] completing drug rehabilitation or anger management therapy,[106] abiding by a curfew or house-arrest arrangement,[107] wearing a GPS ankle-monitoring bracelet,[108] or simply having to appear for regular meetings with a probation officer.[109]

But there are already sanctions in place for people who violate the kinds of individualized legal directives that courts issue to first-time offenders. And recidivist sentencing enhancements apply to people facing entirely new criminal charges unrelated to parole violations or the like. Therefore, the recidivist sentencing premium cannot be justified by these kinds of legal directives, or by the idea that repeat offenders are defiant.

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[101] *See, e.g.*, 18 U.S.C. § 3563(b)(6) (permitting courts to instruct criminal defendant to "refrain from . . . associating unnecessarily with specified persons").

[102] *See, e.g.*, *id.* (permitting courts to instruct criminal defendant to "refrain from frequenting specified kinds of places").

[103] *See, e.g.*, 18 U.S.C. § 3563(b)(12) (permitting courts to instruct criminal defendant to "work in community service").

[104] *See, e.g.*, *A Study of Drug Testing Practices in Probation*, ILL. CRIM. JUST. INFO. AUTH., https://icjia.illinois.gov/researchhub/articles/a-study-of-drug-testing-practices-in-probation (last visited June 17, 2021).

[105] *See, e.g.*, 18 U.S.C. § 3563(b)(4) (permitting courts to instruct criminal defendant to "work conscientiously at suitable employment or pursue conscientiously a course of study or vocational training that will equip him for suitable employment").

[106] *See, e.g.*, 18 U.S.C. § 3563(b)(9) (permitting courts to instruct criminal defendant to "undergo available medical, psychiatric, or psychological treatment, including treatment for drug or alcohol dependency").

[107] *See, e.g.*, *Special Conditions of Supervision*, GA. DEP'T CMTY. SUPERVISION, https://dcs.georgia.gov/special-conditions-supervision-0 (last visited June 17, 2021).

[108] *See, e.g.*, *Electronic Monitoring Program (EMP)*, CNTY. SANTA CLARA POLICE DEP'T, https://probation.sccgov.org/adult-services/electronic-monitoring-program (last visited June 17, 2021).

[109] *See, e.g.*, Michelle S. Phelps, *Mass Probation: Toward a More Robust Theory of State Variation in Punishment*, 19 PUNISHMENT & SOC'Y 53 (2016).

2. Omission

According to Youngjae Lee's "omission" theory, criminal punishment changes the relationship between the offender and the state, giving the offender the duty to rearrange his or her life to stay out of trouble in the future.[110] The recidivist sentencing premium is justified, on this view, by the repeat offender's failure to do so (the "omission"). The omission theory attempts to get around some of the difficulties identified with the "defiance" view by turning to the broader circumstances within which criminal offending occurs.[111]

Lee emphasizes that crime does not occur in isolation, or in a vacuum—it occurs in the context of a lifestyle and against the background of many other choices an offender makes before ultimately committing the crime he or she is convicted of. According to Lee, "[t]his in turn means that well before individuals end up committing crimes, they can steer their lives in different directions in order to minimize the risk of finding themselves in a position in which committing a criminal offense becomes a compelling—or at least appealing—option."[112]

Lee notes that one could potentially say something similar about first-time offenders: They've also failed to organize their lives to avoid committing crime.[113] But the crucial difference between first-time offenders and recidivists, on Lee's theory, is that "the repeat offender has gone through *a process* with the state that has created *a relationship* with the state, and the point of that relationship was to ensure that whatever led the offender to the status of being a convict should be avoided in the future."[114]

Criminal punishment, according to "expressive" and "communicative" accounts of its nature, involves a message to the offender that his act was wrong.[115] "Implicit in that message," Lee tells us, is the idea that "after his punishment is complete, he shall not offend again."[116] This, in turn "should

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110 Lee, *supra* note 10.

111 Christopher Bennett defends an "apology" based rationale in '*More to Apologise For': Can We Find a Basis for the Recidivist Premium in a Communicative Theory of Punishment?*, *in* PREVIOUS CONVICTIONS AT SENTENCING: THEORETICAL AND APPLIED PERSPECTIVES, *supra* note 10, at 73. His view is also vulnerable to the problems identified in this section with Lee's view.

112 Lee, *supra* note 10, at 609.

113 *Id.*

114 *Id.* at 614.

115 *See, e.g.*, Joel Feinberg, *The Expressive Function of Punishment* 49 MONIST 397, 403 (1965); DUFF, *supra* note 92, at 97; CHRISTOPHER BENNETT, THE APOLOGY RITUAL: A PHILOSOPHICAL THEORY OF PUNISHMENT 32 (2008).

116 Lee, *supra* note 10, at 613.

prompt a period of reflection on the part of offenders to determine how they ended up committing the prohibited act."[117] Offenders should identify what went wrong in their life to lead them to crime, according to Lee, and then organize their lives upon release so that they don't go down the same path.[118]

> A repeat offense by someone who has gone through this process of reflection, diagnosis, and prescription justifies the inference that, for whatever reason, the prescription was not followed, and the offender failed to prevent herself from reoffending by failing to organize her life in a way that steers clear of criminality.[119]

So, repeat offenders are guilty not only of their current offense, but also of violating this additional obligation entailed by their changed relationship with the state.

The "omission" theory fails to explain the *source* of this special relationship between offender and state in a way that could plausibly justify the recidivist sentencing premium, however. Where, at any stage of criminal procedure—from arrest through sentencing and corrections—do we see evidence of the kind of special relationship between the offender and the state that Lee's account is premised on?

Parolees and probationers are subject to drug testing, curfews, employment or education requirements, and many other forms of monitoring. But many of those convicted of crimes are never on parole or probation.[120] And the sanctions associated with parole and probation violations are already explicitly incorporated in criminal codes—so there would be no need for a recidivist sentencing premium if its only purpose was to punish that kind of conduct.

The only other place in the criminal law where we can find evidence of the kind of relationship Lee thinks previously convicted offenders have with the state is in recidivist sentencing enhancements themselves. Recidivist sentencing enhancements are evidence that, once convicted, lawbreakers have a changed relationship with the state—one where any future transgressions will be punished more harshly than if they had not already slipped up. But if the only

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117 *Id.*

118 *Id.*

119 *Id.*

120 *See Probation and Parole Systems Marked by High Stakes, Missed Opportunities*, PEW TRS. (Sept. 25, 2018), https://www.pewtrusts.org/en/research-and-analysis/issue-briefs/2018/09/probation-and-parole-systems-marked-by-high-stakes-missed-opportunities#:~:text=Nationwide%2C%204.5%20million%20people%20are,federal%20prisons%20and%20local%20jails (noting the difference between people on probation or parole and the incarcerated population).

evidence of the offender's special relationship with the state is our recidivist sentencing enhancements themselves, then we have nothing upon which to *justify* those enhancements. The mere fact that we have chosen one legal arrangement over another is not sufficient reason to think that what we have chosen is good.

However, it is possible to interpret the idea that criminal punishment changes the relationship between offender and state in the way Lee suggests as a purely conceptual premise, rather than an empirical or doctrinal one. On this reading, the changed relationship between offender and state is supposed to follow from a feature of criminal punishment that we detect analytically—namely, its "communicative" or "expressive" function—rather than from any doctrine in the criminal law or from observations of our criminal justice systems in action.[121] The communicative or expressive part of criminal punishment contains an implicit message to organize one's life so as to avoid reoffending, at least on this interpretation of Lee's view.

There is no evidence, conceptual or otherwise, that this implicit message is necessarily part of what is expressed or communicated by criminal punishment, though. Punishment is said to be distinct from other forms of state-imposed deprivation of rights or liberty, such as preventive detention or quarantine, by the fact (among other things) that it communicates or expresses moral condemnation of, or blame for, the crime in question.[122] But condemning a crime, or blaming the offender for committing that crime, does not entail passing judgment on the prior courses of action that led the offender to it. And we should be very hesitant to rationalize the wide range of policies and judicial decisions that fall under the umbrella of the recidivist sentencing premium on the basis of scant evidence (if any) that there is some implicit message contained in the very concept of "punishment," yet nowhere to be found in the substantive criminal law nor observable at any stage of criminal adjudication.

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[121] It is possible to read expressive and communicative theories about the *nature* of punishment (rather than the *justification* of punishment) as either conceptual or empirical. For example, Feinberg, in his classic article, argues that "[p]unishment is a conventional device for the expression of attitudes of resentment and indignation, and of judgments of disapproval and reprobation[.]" Feinberg, *supra* note 115, at 400. A "conventional device" might refer to the actual practices that we call "punishment" in the particular kind of contingently arranged society we happen to have. But as Feinberg appears to intend, the "conventional device" in question is the *concept* "punishment" itself, which has come (by convention) to *mean* the kind of practice, that, among other things, expresses moral condemnation of a criminalized action. *Id.* at 401–02. For a defense of this analysis of "punishment," see DAVID BOONIN, THE PROBLEM OF PUNISHMENT 3–28 (2011).

[122] *See, e.g.,* Feinberg, *supra* note 115, at 401–02; DUFF, *supra* note 92.

We should be skeptical, as such, of the premise that people with prior criminal convictions stand in a special relationship to the state—apart from any probation, parole, or suspended sentence arrangement they might have with the criminal courts, and apart from the fact that they are subject to the recidivist sentencing premium. Since the purported special relationship is supposed to *justify* the recidivist sentencing premium, the two cannot be identical. And even if that premise were true, it would not follow that the recidivist sentencing premium is justified. As Lee acknowledges himself, the kinds of legal and extralegal barriers that ex-offenders face to reentering society, and to becoming law-abiding, productive citizens, "are inconsistent with the system's demand that offenders set their lives straight after going through the process of conviction and punishment."[123] And he concedes that "the size of the recidivist premium should reflect the ways in which each party to that relationship has failed."[124]

As I will argue in the remainder of this paper, these barriers not only undermine the rationale for the recidivist sentencing premium, but also give us reason to treat prior convictions as a presumptive mitigative factor at sentencing—what I call the recidivist sentencing discount.

III. THE PARADOX

Criminal convictions have severe and lasting civil, social, and economic consequences apart from the terms of formal sentences imposed by criminal courts.[125] People who have been convicted of a crime in the past face huge barriers to finding legitimate employment, becoming self-sufficient, and earning the esteem of others when they attempt to reenter the community. These "collateral consequences" of punishment give people with prior convictions much stronger incentives to commit crime in the future than they would otherwise have.[126]

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[123] Lee, *supra* note 10, at 620.

[124] *Id.* at 620.

[125] *See generally* DEVAH PAGER, MARKED: RACE, CRIME, AND FINDING WORK IN AN ERA OF MASS INCARCERATION (2009); MARGARET COLGATE LOVE, COLLATERAL CONSEQUENCES OF CRIMINAL CONVICTIONS: LAW, POLICY AND PRACTICE (2013); JOAN PETERSILIA, WHEN PRISONERS COME HOME: PAROLE AND PRISONER REENTRY 105–38 (2003). More limited contact with criminal justice systems can often have seriously damaging effects as well. The consequences of being arrested or charged with a crime—without being convicted, and even when those charges are dismissed—can sometimes be devastating. *See, e.g.*, Eisha Jain, *Arrests as Regulation*, 67 STAN. L. REV. 809, 820 (2015). I focus on the consequences of criminal convictions because of the way that prior convictions are used at sentencing.

[126] Joshua Kaiser, among others, argues that the distinction between "direct" and "collateral" consequences of punishment is both doctrinally and normatively suspect. *See* Joshua Kaiser, *Revealing the*

As I show below, because of these incentives, we are left with comparatively less evidence of ill will when people with prior convictions return to crime than when people commit otherwise similar crimes for the first time. Judges and sentencing commissions, as such, have moral reason to treat prior convictions as a presumptive mitigating factor—precisely the opposite of what human societies have done for millennia. The conclusion I defend is politically unpalatable, but it is morally unavoidable. This is the paradox of recidivism.

A. Barriers to Reentry and the Causes of Recidivism

The argument that leads us to this paradox is partly normative and partly empirical. Before turning to the normative core of the argument, I lay out the wide range of barriers that people with prior criminal convictions face to finding employment, beginning careers, and getting welfare, housing, education, and other basic goods.

1. Stigma for Job Applicants

Future employment and earning are the strongest predictors of future crime.[127] Employers are much less likely to hire a job applicant who they know or suspect to have a criminal record than one with a clean record because they believe that record to be a mark of untrustworthiness.[128] Criminal convictions for even a single low-level, nonviolent offense can have a devastating effect on one's employment prospects.[129] This holds true regardless of whether the conviction is for a drug crime or a property crime, and regardless of any other characteristics of the potential job applicants or employers.[130]

Hidden Sentence: How to Add Transparency, Legitimacy, and Purpose to "Collateral" Punishment Policy, 10 HARV. L. & POL'Y REV. 123, 130–31 (2016) [hereinafter Kaiser, *Revealing the Hidden Sentence*]; Joshua Kaiser, *We Know It When We See It: The Tenuous Line Between Direct Punishment and Collateral Consequences*, 59 HOW. L.J. 341, 343 (2016). So, I use the term "collateral consequences" with some hesitation, albeit in line with the current scholarly literature and legal doctrine.

[127] *See generally* Christopher Uggen, *Work as a Turning Point in the Life Course of Criminals: A Duration Model of Age, Employment, and Recidivism*, 65 AM. SOC. REV. 529 (2000); Bruce Western, *The Impact of Incarceration on Earning*, 67 AM. SOC. REV. 526 (2002).

[128] *See generally* Amanda Agan & Sonja Starr, *The Effect of Criminal Records on Access to Employment*, 107 AM. ECON. REV. 560 (2017); JOHN SCHMITT & KRIS WARNER, EX-OFFENDERS AND THE LABOR MARKET (2010).

[129] Christopher Uggen, Mike Vuolo, Sarah Lageson & Ebony Ruhland, *The Edge of Stigma: An Experimental Audit of the Effects of Low-Level Criminal Records on Employment*, 52 CRIMINOLOGY 627, 627 (2014); Agan & Star, *supra* note 128, at 560.

[130] Agan & Starr, *supra* note 128, at 560.

These effects are stronger for Blacks than for whites. Prior criminal convictions reduce the likelihood of a call-back by 50% for white job applicants, and 64% for Black applicants.[131] Interestingly, this disparity may be exacerbated when prospective employers' access to information about applicants' criminal records is limited by "Ban the Box" legislation.[132]

In every U.S. state, the stigma of a criminal conviction is both legally facilitated and legally enforced.[133] Prospective employers have easy access to job applicants' criminal record information, often including arrest records for which criminal charges were either dismissed or never filed.[134] And every state has statutory restrictions or bans on public sector employment, occupational licenses, and entire professional fields.[135] Thirty-three states, as well as Washington, D.C., impose legal restrictions on public sector employment for ex-convicts.[136] Six of those states do not allow people with felony convictions to take any kind of public employment whatsoever.[137] Every state restricts occupational licenses for individuals with prior convictions; and these restrictions have become more stringent over time.[138]

Some of these restrictions have obvious rationales—for example, barring sex offenders whose victims were underage from working in K–12 schools and day-care centers. But many obstacles to employment for the formerly incarcerated have little connection to profession-specific risk factors. For example, ex-offenders in some states are barred from employment as septic tank cleaners, embalmers, billiard room staff, real estate agents, plumbers, eyeglass dispensers, and barbers.[139] And it isn't as if the categorical bars on employment in these professions are limited to those convicted of crimes involving scissors, toilet plungers, or pool sticks.

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131 PAGER, *supra* note 125, at 67, 69. *But see* Agan & Starr, *supra* note 128, at 561 (finding a stronger effect for whites than Blacks).

132 Agan & Starr, *supra* note 16, at 195.

133 NAT'L INVENTORY OF COLLATERAL CONSEQUENCES OF CONVICTION, https://niccc.nationalreentryresourcecenter.org/#about (last visited June 17, 2021) ("Collateral consequences are legal and regulatory restrictions that limit or prohibit people convicted of crimes from accessing employment, business and occupational licensing, housing, voting, education, and other rights, benefits, and opportunities.").

134 Jain, *supra* note 125, at 824–25, 862.

135 *Consequences*, NAT'L INVENTORY OF COLLATERAL CONSEQUENCES OF CONVICTION, https://niccc.nationalreentryresourcecenter.org/consequences (last visited June 17, 2021) (cataloguing employment-based collateral consequences of conviction in every state and the District of Columbia).

136 Kathleen M. Olivares, Velmer S. Burton & Francis T. Cullen, *The Collateral Consequences of a Felony Conviction: A National Study of State Legal Codes 10 Years Later*, 60 FED. PROBATION 10, 13 (1996).

137 *Id.*

138 PETERSILIA, *supra* note 125, at 113–15.

139 Elena Saxonhouse, *Unequal Protection: Comparing Former Felons' Challenges to Disenfranchisement and Employment Discrimination*, 56 STAN. L. REV. 1597, 1613 (2004).

These restrictions have a disparate impact on African Americans, who are disproportionately represented among the prison population, and who are otherwise more likely to find work in the restricted occupations—another example of how the stigma of incarceration has a disproportionate impact on the Black community.[140]

2. Interrupting the Life Course

Not everyone who is convicted of a crime serves time in prison. But for those who do, periods of incarceration can undermine the development of human and social capital that prisoners might otherwise have enjoyed during late adolescence and early adulthood.[141]

People (mostly men) entering prison for the first time are typically around the same age as college students or those first entering the workforce.[142] Young people outside of prison build most of their human capital during these years—either through higher education or through apprenticeships and on-the-job training. Most young, male, full-time workers enjoy steady income increases throughout their 20s and 30s.[143] But for those convicted of and incarcerated for a first offense, much of this time is spent behind bars.

Incarceration at a young age often permanently severs the transition from adolescence to stable careers, as such. Upon being released, former convicts are often unable to secure jobs with opportunities for advancement, if they can find work at all, since private sector employers often prefer to hire younger job applicants for those positions.[144] Finding employment after serving time in prison is difficult, and those who do succeed tend to be relegated to jobs with little chance of climbing a career ladder.[145]

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[140] PAGER, *supra* note 125, at 33–34.

[141] Bruce Western, Jeffrey R. Kling & David F. Weiman, *The Labor Market Consequences of Incarceration*, 47 CRIME & DELINQ. 410, 413 (2001); Joel Waldfogel, *The Effect of Criminal Conviction on Income and the Trust "Reposed in the Workmen"*, 29 J. HUM. RES. 62, 66–67 (1994).

[142] Western, *supra* note 127, at 528.

[143] *Id.*

[144] *Id.* at 529; HARRY J. HOLZER, WHAT EMPLOYERS WANT: JOB PROSPECTS FOR LESS-EDUCATED WORKERS (1996).

[145] Daniel Nagin & Joel Waldfogel, *The Effect of Conviction on Income Through the Life Cycle*, 18 INT'L REV. L. & ECON. 25 (1998).

3. Welfare, Housing, and Other Goods

There are over 1,000 statutory restrictions in state and federal law on ex-offenders' access to public benefits.[146] These restrictions are especially stringent for people found guilty of drug offenses.[147] People convicted of drug distribution are ineligible for all federal benefits for five years after a first conviction, for ten years after a second conviction, and for life after a third conviction.[148] The Personal Responsibility and Work Opportunity Reconciliation Act of 1996 (the Clinton Administration's "welfare reform") imposed a lifetime ban on anyone convicted of a drug-related felony from the Temporary Assistance to Needy Families (TANF) and the Supplemental Nutrition Assistance Program (SNAP) program ("food stamps").[149] These bans increased recidivism.[150] And although all but two states have opted out of the drug felony provision,[151] many have imposed modified versions of the ban mandating people with felony convictions to participate in drug testing, treatment, or rehabilitation to be eligible for benefits.[152] "In most states with modified bans, failing to comply with drug treatment or testing means the loss of benefits entirely."[153]

Close to 1,000 other sanctions restrict ex-offenders' access to both public and private housing.[154] Public housing agencies and owners of federally assisted housing are required to exclude households with a member who they think is illegally using a controlled substance or abusing alcohol.[155] Changes in tort doctrine and public nuisance laws over the last fifty years have also incentivized (and in some cases required) landlords to conduct criminal background checks on prospective tenants.[156] For example, in 1970, a federal appeals court ruled in

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146 *Consequences*, NAT'L INVENTORY OF COLLATERAL CONSEQUENCES OF CONVICTION, https://niccc.nationalreentryresourcecenter.org/consequences (last visited June 17, 2021) (cataloguing 1,207 collateral consequences of conviction relating to public benefits).

147 21 U.S.C. § 862.

148 *Id.*

149 Personal Responsibility and Work Opportunity Reconciliation Act, Pub. L. No. 104-193, 110 Stat. 2105, 2180 (1996).

150 *See, e.g.*, Cody Tuttle, *Snapping Back: Food Stamp Bans and Criminal Recidivism*, 11 AM. ECON. J.: ECON. POL'Y 301 (2019).

151 Brittany T. Martin & Sarah K.S. Shannon, *State Variation in the Drug Felony Lifetime Ban on Temporary Assistance for Needy Families: Why the Modified Ban Matters*, 22 PUNISHMENT & SOC'Y 439, 458 n.6 (2020).

152 *Id.* at 443–45.

153 *Id.* at 444.

154 *Consequences*, NAT'L INVENTORY OF COLLATERAL CONSEQUENCES OF CONVICTION, https://niccc.nationalreentryresourcecenter.org/consequences (last visited June 17, 2021) (cataloguing seventy-two collateral consequences of conviction relating to public benefits).

155 42 U.S.C § 13661.

156 Barbara Glesner, *Landlords as Cops: Tort, Nuisance and Forfeiture Standards Imposing Liability on*

favor of a tenant who sued her landlord for damages after she was robbed in the hallway of her apartment building.[157] This set a precedent that shifted responsibility for public safety toward landlords, who responded in part by screening prospective tenants to avoid future premise liability suits.[158]

Similarly, people convicted of drug offenses are disqualified from a wide range of federal financial aid programs for higher education, including grants, loans, and work assistance.[159] For some years, the Anti-Drug Abuse Act allowed judges to suspend eligibility for federal financial aid as part of a criminal sentence.[160]

The list does not stop here: prior convictions often bar people from obtaining driver's licenses, business licenses, credit union memberships, service contracts with government agencies, and car insurance policies.[161] In short, having a criminal conviction on one's record makes it very hard to get things that just about anyone would want.

Incarceration (along with other types of contact with criminal justice systems) also exacerbates many of the preexisting mental health problems that inmates bring to prison and can also cause new ones.[162]

There are a number of other serious collateral consequences of criminal convictions—perhaps most notably, disenfranchisement.[163] I focus on the collateral consequences of criminal convictions canvassed above, however, because they incentivize those who face them to commit future crimes in a particular way, which is central to the normative argument below.

Landlords for Crime on the Premises, 42 CASE W. RES. L. REV. 679 (1992).

157 Kline v. 1500 Mass. Ave. Apartment Corp., 439 F.2d 477 (D.C. Cir. 1970).

158 David Thatcher, *The Rise of Criminal Background Screening in Rental Housing*, 33 LAW & SOC. INQUIRY 5 (2008).

159 *See, e.g.*, Higher Education Amendments of 1998, Pub. L. No. 105-244, § 483(f)(1), 112 Stat. 1581, 1736 (1998).

160 21 U.S.C. § 862; Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, § 5301, § 115, 102 Stat. 4181, 4310.

161 *See, e.g.*, 12 U.S.C. §§ 1772d, 1786; 15 U.S.C. § 78c(39)(F); CONN. GEN. STAT. § 1-57b (2014); CAL. INS. CODE § 11629.73 (2015).

162 Naomi Sugie & Kristin Turney, *Beyond Incarceration: Criminal Justice Contact and Mental Health*, 82 AM. SOC. REV. 719, 722–23 (2017).

163 *Consequences*, NAT'L INVENTORY OF COLLATERAL CONSEQUENCES OF CONVICTION, https://niccc.nationalreentryresourcecenter.org/consequences (last visited June 17, 2021) (cataloguing seventy-two collateral consequences of conviction relating to public benefits).

B. Inequality, Incentives, and Criminal Responsibility

Let us now turn to the normative core of the argument for the paradox of recidivism. Below, I argue that we cannot justifiably blame or punish repeat offenders for breaking the law as harshly as we would if they didn't face such strong incentives to reoffend. Therefore, judges and sentencing commissions have reason in principle to treat prior convictions as a presumptive mitigating factor—giving repeat offenders a recidivist sentencing discount.

1. Moral Blame and Legal Punishment

As Judge Thurman Arnold once said, "[o]ur collective conscience does not allow punishment where it cannot impose blame."[164] This is true, according to prevailing views, because criminal punishment has an "expressive" or "communicative" function—and (one of) the things that it expresses or communicates is blame.[165] So, if punishment automatically comes with blame, then the blame must be justified for the punishment to be justified.[166]

Consider some of the basic phenomenological features of interpersonal moral blame.[167] Blame is often a response to the perception that someone else

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[164] Holloway v. United States, 148 F.2d 665, 666–67 (D.C. Cir. 1945).

[165] Feinberg put it this way: "[p]unishment is a conventional device for the expression of attitudes of resentment and indignation, and of judgments of disapproval and reprobation, either on the part of the punishing authority himself or of those 'in whose name' the punishment is inflicted." Feinberg, *supra* note 115, at 400. Feinberg does not use the term "blame," but the dominant view about the psychological nature of blame is that it is constituted by the same "attitudes of resentment and indignation" and "judgments of disapproval and reprobation" he says that punishment expresses. *See, e.g.*, P.F. Strawson, *Freedom and Resentment*, 48 PROC. BRIT. ACAD. 1 (1962); R. JAY WALLACE, RESPONSIBILITY AND THE MORAL SENTIMENTS (1994); *cf.* T.M. SCANLON, MORAL DIMENSIONS: PERMISSIBILITY, MEANING, AND BLAME (2008); GEORGE SHER, IN PRAISE OF BLAME (2006).

[166] The underlying justification for blame or punishment need not be deontological. *See, e.g.*, HART, *supra* note 18, at 25; PAUL ROBINSON, DISTRIBUTIVE PRINCIPLES OF CRIMINAL LAW: WHO SHOULD BE PUNISHED HOW MUCH 175–212 (2008); Charles Fried, *Moral Causation*, 77 HARV. L. REV. 1258, 1268 (1964).
I do not endorse this standard view of the conceptual relationship between moral blame and legal punishment. But I do believe that examining the normative principles that govern our ordinary interpersonal practice of moral blame can nonetheless provide some useful heuristics for understanding the justification of state-imposed punishment under criminal law. My own view, which I defend elsewhere, is that legal punishment does not necessarily express or communicate interpersonal moral blame. But comparative sentencing severity should nonetheless track the relative quantum of ill will manifested by any given crime, because that is the fair way to distribute the burdens of upholding a deterrent system of criminal justice between those who violate the rules of that system. For the purposes of this Article, the difference between my own view and the prevailing "expressive" and "communicative" views is of little matter—they both entail the same conclusions with respect to the issues currently at hand.

[167] The concept of "blame" is also sometimes used to express a merely causal relationship between events—for example, I might say I "blame" the fact that my car's engine has a rough idle on a failed spark plug. But this Article is concerned with the nature and norms of moral blame in particular, which is what is relevant

has done something morally wrong. But we also blame *ourselves* for things we've done. We blame people for doing the *right* thing for the wrong *reasons*.[168] And we blame people for things we think they *believe* or *feel*, not just for things they *do*.[169] So blame is different from a judgment of wrongdoing: it is a response to the perception of "ill will"—a morally objectionable attitude or motivation.[170] Because blame is a response to a *perception* of ill will, we must have good *evidence* of ill will to be justified in blaming.[171] The severity with which we are justified in blaming or punishing one another, as such, depends on our assessment of one another's "quality of will."[172]

The quality of will that a crime manifests depends upon the facts about what the offender's mind state and motivations were at the time of the crime (assuming he actually committed it). But there is no mechanism through which criminal justice officials can directly access that information.[173] The evidence we have for attributing motives and mental states to one another is inevitably circumstantial.[174] So the best we can do is to assess the possible motives that a defendant may have had for committing an offense, and to assess the likelihood that they acted on one or more of those motives.[175]

Below, I show that we have less evidence of ill will when people with prior convictions reoffend than we would if they were appearing in criminal court for the first time. This entails the paradox of recidivism: that judges and sentencing commissions ought to treat prior convictions as a presumptive mitigating factor, as politically unpalatable as that might be.

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to the ethics of legal punishment.

168 Some accounts of action-individuation in moral philosophy entail that "doing the right thing for the wrong reasons" is not even possible—if, for example, the moral rightness and wrongness of our actions are determined at least in part by our reasons for acting. *See, e.g.*, Steven Sverdlik, *Motive and Rightness*, 106 ETHICS 327 (1996). But I take this phenomenon to be part of our normal understanding of our everyday moral landscape.

169 It is possible to conceptualize both belief and feelings or emotions as kinds of action. But I take it that the distinction between actions and beliefs or feelings is, again, part of our normal phenomenological landscape.

170 There is some disagreement about what *kind* of response to ill will blame might be. I do not take a position here in that debate.

171 Christopher Lewis, *Incentives, Inequality, Criminality, and Blame*, 22 LEGAL THEORY 153, 157–59 (2016).

172 I borrow this term from Strawson, *supra* note 165, at 14.

173 Lewis, *supra* note 171, at 168.

174 *Id.*

175 *Id.* at 165–70.

2. *Kinds of Incentives*

Only certain kinds of incentives to commit crime—those associated with the objective benefits or payoffs of breaking the law in question—warrant a mitigated punishment. Consider the following cases:

> *Boardwalk Dreams*: Thimble and Shoe are twin brothers who grew up in the same working-class household on Baltic Avenue in Atlantic City. They have the same job at the Water Works, the same income ($200 a week), and roughly equivalent net assets (around $1,500 worth). Both of them have dreams of moving up the career ladder and buying a hotel on Boardwalk. For Thimble, that dream is almost an obsession—one he yearns to realize by any means necessary. For Shoe, the dream is much less all-consuming; he'd settle for a cozy house on St. James Place if the only way to buy the hotel on Boardwalk were truly unsavory. Horse, a local "wise guy," tips the twins off to an elaborate scheme to rob an armored truck. Shoe is worried that someone might get hurt in the process. Thimble could not care less.

There is a sense in which Thimble has a stronger incentive to rob the local bank than Shoe here—the payoffs of committing (and getting away with) the crime would be greater for Thimble, given his personality and values. But the fact that Thimble is greedy cannot be a justification or an excuse for the crime in itself. If anything, committing a crime out of greed, like committing crime out of hatred or malice, gives us a reason to more severely blame and punish the offender. And we have little way of knowing the extent to which these "subjective" incentives play into an offender's motivation for any given crime anyway. Consider a second case:

> *Park Place*: Iron and Boot are best friends who grew up on Mediterranean Avenue, around the corner from Thimble and Shoe, and who work alongside the twins at Water Works. Like Thimble, they both dream, almost obsessively, about owning their own hotels. Horse approaches them with plans for another armored car heist. Iron thinks the plan is bulletproof and is eager to make a quick buck—his uncle is the police commissioner, and he figures that his family ties give him a degree of impunity in their small city. Boot is more skeptical that the plan will succeed and has no ties to law enforcement or the legal profession.

There is a sense in which Iron has a stronger incentive to take part in the heist than Boot here. He thinks that they have a lower chance of getting caught than Boot does, and he thinks that if they do get caught, his uncle might be able to protect him from being punished. But this has no bearing on how severely we should blame or punish either of the two friends if they do go ahead with the

heist. The fact that Iron thought that they could get away with it, or figured that he wouldn't get punished even if he did get caught, does not excuse or justify the crime even partially. So, incentives related to the expected *costs* of committing a crime should not figure into how we calculate our moral response to crime either.

Incentives related to the objective *benefits* or payoffs of committing crime are a different story. Consider a third case that illustrates this:

> *Pennsylvania Avenue:* On an otherwise quiet Tuesday night on leafy Pennsylvania Avenue, two elderly couples are robbed at gunpoint under more or less identical circumstances. Their assailants escape with a few hundred dollars each. Both couples are well-heeled, so the financial loss is not nearly as significant to them as the trauma of the robbery itself. One of the stickup artists is Wheelbarrow, a day laborer in the construction trade who has been unable to find work over the last several months, has no savings or assets, and has been sleeping in his broken-down van in the Free Parking lot. The other is Top Hat, a mid-career law professor who makes a six-figure salary and lives in a newly renovated mid-century Colonial in sunny Marvin Gardens. Neither one of the robbers is mentally ill or incompetent; nor does either present any special mitigating circumstances to explain why they committed the crime.

Without knowing anything else about either of the two robbers, it may seem intuitive that Wheelbarrow had a much stronger incentive to commit the crime than Top Hat. After all, it is hard to imagine a well-off, mid-career law professor committing an armed robbery. When we do, the first association that is likely to come to mind is mental illness. But we have already ruled out mental illness as a motivation for, or cause of, the crime here by stipulation. What other explanation can we come up with—what kind of motive can we impute to the rogue Professor Top Hat?

No obvious story is even mildly exculpatory. Perhaps Top Hat did it for the thrill; maybe he even did it for the money, despite being financially secure. Either way, absent some special explanation, it seems he must have weighted an extremely trivial interest of his own over the much more fundamental interests of his victims in their property rights, their right to bodily integrity, and their right to be free of harm, trauma, and the risk of those things. In order to place such disproportionately strong weight on his own interests relative to others', Top Hat must have some extremely loathsome moral attitudes—callousness, cruelty, or lack of empathy.

It is much easier to imagine an irregularly employed day laborer committing an armed robbery. Some of this may have to do with the implicit psychological association of crime with disfavored groups.[176] But much of it likely has to do with it being easier to give reasons why someone in those straits would do such a thing. He has an immediate and strong incentive to commit the robbery—he has no money and is afraid of being homeless. Now it may be that this doesn't give him an all-things-considered moral *justification* for the offense; perhaps there are other things he could have done within the bounds of the law to keep a roof over his head; or perhaps his interest in having a roof over his head just doesn't outweigh his victims' interests in being left alone. But we need not impute any extreme immoral attitude to Wheelbarrow in order to understand why he likely committed the crime. He might not have been sufficiently caring or respectful of his victim's rights, but there is little reason to think he has the kinds of morally abhorrent attitudes we are likely to impute to Top Hat.

3. Measuring Incentives

The difference between Top Hat's incentives to rob the elderly couple, and Wheelbarrow's, has to do with the objective benefits that each of the two associates with the crime in question. It does not stem from their respective personalities, values, or assessments of the risks or expected costs of committing that crime.

But the objective benefits of that crime also seem to be identical—at least in some sense. Both Top Hat and Wheelbarrow rob elderly couples under similar circumstances in a similar area. And both get away with a few hundred dollars.

Yet it also makes sense to think that the objective benefit or payoff to the crime is exponentially greater for Wheelbarrow than it is for Top Hat. After all, a few hundred extra dollars can make a huge difference in the life of someone who is destitute and without realistic hopes or plans to escape poverty; while it would make little objective difference in the life of a well-off, mid-career law professor on a six-figure salary.

One way to explain the difference in strength between Top Hat and Wheelbarrow's incentives to commit the crime in question would be to appeal to the diminishing marginal utility of income and wealth. In general, the more income and wealth people have, the less any additional financial gains contribute

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[176] *See, e.g.*, Ted Chiricos, Kelly Welch & Marc Gertz, *Racial Typification of Crime and Support for Punitive Measures*, 42 CRIMINOLOGY 359, 363–64 (2004).

to their subjective sense of wellbeing.[177] We could stipulate that Top Hat and Wheelbarrow have identical utility curves with respect to income and wealth, and so Wheelbarrow is likely to realize greater subjective utility from robbing the bank than Top Hat.

But this explanation alone gives us no reason to think that we should blame or punish Wheelbarrow any less than Top Hat. For if Top Hat has more of a greedy personality than Wheelbarrow—and thus a different utility curve—then he stands to gain more subjective utility from the robbery, even if we would expect most people in his circumstances not to.

Another way to quantify the difference between Wheelbarrow and Top Hat's incentives to rob the elderly couples would be to take a view about what is objectively good for people, and then show how the crime would bring about a greater quantum of good for Wheelbarrow than it would for Top Hat. But there is no clear consensus on the true nature of wellbeing.[178] And there may be good reasons for governments and government officials to remain neutral between competing conceptions of the good.[179] This kind of neutrality between conceptions of the good is likely to be especially important for the judiciary, and perhaps doubly so in the context of criminal courts. Judges could render wildly different sentencing decisions depending on their own views about the good life or the nature of wellbeing.[180] So political liberalism—state neutrality between competing conceptions of the good—is likely to go hand in hand with the rule of law in the context of criminal adjudication.[181]

Luckily, there are at least two plausible ways to explain the difference in strength between Top Hat and Wheelbarrow's incentives to commit the crime here, without appealing to subjective utility or relying on a theory of objective wellbeing. First, we could measure the strength of their incentives in terms of what Rawls called the "primary goods"—things that anybody would want, regardless of whatever else they wanted—including freedom of thought, liberty

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177 Ed Diener & Robert Biswas-Diener, *Will Money Increase Subjective Well-Being? A Literature Review and Guide to Needed Research*, 57 SOC. INDICATORS RSCH. 119, 145 (2002).

178 *See, e.g.*, RICHARD KRAUT, AGAINST ABSOLUTE GOODNESS (2011); DANIEL HAUSMAN, VALUING HEALTH: WELLBEING, FREEDOM, AND SUFFERING (2015); *cf.* ANNA ALEXANDROVA, A PHILOSOPHY FOR THE SCIENCE OF WELL-BEING (2017).

179 *See, e.g.*, JOHN RAWLS, POLITICAL LIBERALISM (1993); CHARLES LARMORE, PATTERNS OF MORAL COMPLEXITY (1987); RONALD DWORKIN, TAKING RIGHTS SERIOUSLY (1977); *cf.* JOSEPH RAZ, THE MORALITY OF FREEDOM (1986).

180 Richard A. Posner, *The Role of the Judge in the Twenty-First Century*, 86 B.U. L. REV. 1049, 1066 (2006).

181 Richard C. Sinopoli, *Liberalism and Contested Conceptions of the Good: The Limits of Neutrality*, 55 J. POL. 644, 646 (1993).

of conscience, freedom of movement, free choice of occupation, income and wealth as means for achieving a wide range of other ends, and, importantly, "the social bases of self-respect."[182] Second, we could also measure the strength of those incentives in terms of what Amartya Sen and Martha Nussbaum called the "capabilities approach" in development economics.[183] On this metric, we could measure the relative strength of Top Hat and Wheelbarrow's incentives according to the likelihood that committing the crime would enhance their respective opportunities to live a life they have reason to value.

I am agnostic between these two approaches. Both give judges the normative basis for rendering consistent sentencing decisions, regardless of their own views about the nature of the good life or the basis of human wellbeing. And when we measure the strength of one's incentives to commit any given crime in terms of the capabilities-related (or primary good-related) payoffs associated with that crime, we should be able to see why having a stronger incentive to break the law can mitigate the extent to which one is liable to moral blame and criminal punishment.

4. Evidence of Ill Will

Leaving aside "victimless" crimes and crimes against the self, paradigmatic cases of *malum in se* crime generally pit the interests of a wrongdoer against the interests of one or more victims. An offender who acts knowingly or intentionally, rather than recklessly or negligently, takes their own interests in committing the crime—whatever they might be—to outweigh the victim's interests in being free from harm, or having their rights violated.[184]

If the offender has weaker incentives to commit the crime—measured in terms of primary goods or capabilities—they need to weigh their own interests more heavily relative to the interests of the victim in order to go through with the crime. Someone with strong incentives to commit the crime need not place as heavy a weight on their own interests relative to the interests of the victim, compared to an offender whose incentives are weaker.

The way that an offender would have to weigh his own interests relative to the interests of his victim gives us some information about how we ought to

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[182] JOHN RAWLS, JUSTICE AS FAIRNESS: A RESTATEMENT 58–61 (Erin Kelly ed., 2001).

[183] *See, e.g.*, MARTHA NUSSBAUM, CREATING CAPABILITIES: THE HUMAN DEVELOPMENT APPROACH (2011); AMARTYA SEN, THE IDEA OF JUSTICE 225–91 (2009).

[184] He may also take his interests to outweigh some collective interests of the society at large, but we can set that to the side here for the sake of simplicity.

evaluate his motives for the crime. In *Pennsylvania Avenue*, we have less evidence of ill will in Wheelbarrow's case than we do in Top Hat's case. Because Wheelbarrow had much stronger incentives to commit the robbery than Top Hat, we need not impute the same degree of ill will to his crime that we do to Top Hat's.

It is possible, however unlikely, that Wheelbarrow could have committed the robbery out of the same kind of extremely unsavory motives that we initially imputed to Top Hat.[185] For example, Wheelbarrow may have placed no weight on the fact that he was homeless in deciding to rob the elderly couple. He might instead have been motivated by thrill-seeking, or the prospect of seizing momentary power and control over someone else, or a sadistic urge to scare the wits out of a pair of old people.

This kind of far-fetched possibility does not undermine the main import of the account given above. When we seek to evaluate the motives of wrongdoers in a criminal context, the kind of evidence we have available is inevitably circumstantial and imperfect.[186] We have no direct mechanism through which we can, with complete certainty, find out why people commit crime. There is no way, for example, to use fMRI technology or other neuroscience techniques to retroactively find out whether someone committed an armed robbery for the thrill of it, or out of desperation.

Perhaps the most natural way to proceed, given the circumstantial nature of this evidence, would be to simply assess the range of possible motives that an offender might have had, and evaluate the likelihood that he or she might have acted on one or more of those motives. But we might add some normative constraints to this inquiry as well, as Gideon Yaffe and Alex Sarch argue we ought to.[187]

Yaffe and Sarch separately defend variants of what they call the "principle of lenity." In Yaffe's formulation, the principle of lenity "requires us to determine what the defendant's conduct says about his [motives] under the assumption that he is as little different from the law-abiding citizen as possible, given his behaviour."[188]

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[185] *But see, e.g.*, Peter Chau, *Temptation, Social Deprivation and Punishment*, 30 OXFORD J. LEGAL STUD. 775 (2010) (arguing against this logic).

[186] *See, e.g.*, James Morsch, *The Problem of Motive in Hate Crimes: The Argument Against Presumptions of Racial Motivation*, 82 J. CRIM. L. & CRIMINOLOGY 659, 661 (1992).

[187] GIDEON YAFFE, THE AGE OF CULPABILITY: CHILDREN AND THE NATURE OF CRIMINAL RESPONSIBILITY (2018); ALEX SARCH, CRIMINALLY IGNORANT: WHY THE LAW PRETENDS WE KNOW WHAT WE DON'T (2019).

[188] YAFFE, *supra* note 187, at 89.

In Sarch's formulation, under the principle of lenity, "*D*'s action, *A*, only manifests *the least amount* of insufficient regard for legally protected interests or values (*i.e.*, the least amount of error in weighing the legal recognized reasons that is needed to explain why a rational and otherwise well-motivated person would do *A* (*i.e.*, what *D* did under the relevant description) in the circumstances as *D* believed them to be."[189]

The argument here does not rely on a normative constraint like Yaffe or Sarch's lenity principle. In the *Pennsylvania Avenue* hypothetical sketched above, for example, it is not even possible that Top Hat could have committed the robbery out of desperation or need; whereas for Wheelbarrow that seems like the easiest conclusion to draw from the evidence available. But such a principle would likely make the argument here even stronger. For if we take the most charitable possible interpretation of why any given offender might have committed a crime, we can rule out the more unsavory possible motivations that people with prior convictions might have for returning to crime, and simply assume that they do so because their incentives are so strong.

We can presume that in most cases, we will have less evidence of ill will when people with prior convictions reoffend than when others are convicted for the first time, *ceteris paribus*. It is possible, but unlikely, that any given individual places no weight on the incentives to break the law that the collateral consequences of his or her prior convictions give rise to. In some criminal cases, we will have additional evidence (beyond the presence or absence of prior convictions) that the defendant acted out of extreme malice, hatred, or disregard for the interests of others. So prior convictions should not serve as an automatic or indefeasible mitigating factor. [190] But criminal courts have limited resources; we have imperfect and inevitably circumstantial evidence of other peoples' quality of will; and the collateral consequences of past criminal convictions strongly incentivize future crime. So, judges and sentencing commissions should treat prior convictions as a *presumptive* mitigating factor.

5. Incentives and Deterrence Once More

One might immediately wonder why the incentives that people with prior convictions have to return to crime don't bolster the deterrence-based rationale for the recidivist sentencing premium, even if they also underlie a backward-

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[189] SARCH, *supra* note 187, at 51.

[190] *Cf., e.g.*, Miriam Gohara, *Grace Notes: A Case for Making Mitigation the Heart of Noncapital Sentencing*, 41 AM. J. CRIM. L. 41 (2013) (arguing that noncapital sentencing should include the kind of individualized consideration of mitigating factors that is routine in capital cases).

looking rationale for the Recidivist Sentencing Discount. After all, if the collateral consequences of a first conviction do so much to strengthen one's incentives to reoffend, then wouldn't it be wise to balance those incentives out to prevent future crime?

I have two responses to this worry.

The first is primarily empirical. The recidivist sentencing premium is likely to be an extremely inefficient way to compensate for the incentives that people with prior criminal convictions have to return to crime. Given the fact that the perceived certainty of apprehension, not the perceived severity of potential penalties, drives deterrence from crime,[191] we should probably look to electronic monitoring and policing if we wanted to find a way to offset those incentives efficiently.[192]

The second, and more fundamental, response to this worry is primarily normative. The fact that the collateral consequences of conviction give people stronger incentives to commit crime than they would otherwise have should make us reconsider the moral limitations of how severely we can permissibly punish them—not just the economic efficiency of our sentencing severity.

Consider an analogous case. We know that young teens (say, between fourteen and sixteen) are much harder to deter from crime than older adults (say, between fifty and sixty-five).[193] But the courts and criminal law theorists agree that the former are less culpable, all else equal.[194] And one would be hard-pressed to find a justification for punishing a young teen more harshly than a fully formed adult were the two convicted of identical crimes.

Similarly, if we cannot blame people with prior convictions for reoffending as severely as we could blame first-time wrongdoers convicted of the same kinds of crime, then we cannot punish the former more severely than the latter, even if doing so *would* serve the aim of crime control—and it is unclear whether it would.

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191 *See supra* Part I.B.2 and accompanying footnotes.

192 *See supra* Part I.B.3 and accompanying footnotes.

193 W.G. Jennings & J.M. Reingle, *On the Number and Shape of Developmental/Life-Course Violence, Aggression, and Delinquency Trajectories: A State-of-the-Art Review*, 40 J. CRIM. JUST. 472, 473 (2012).

194 This observation usually attributed to the stages of neurological development. *See, e.g.*, Miller v. Alabama, 567 U.S. 460, 465 (2012). Gideon Yaffe argues that it is due to minors being denied the vote. YAFFE, *supra* note 187.

C. Violence and Victims

The argument for treating prior convictions as a presumptive mitigating factor is most intuitive in cases where the crime in question (1) has a clear financial payoff, and is (2) financially motivated, (3) intentional, and (4) committed with full awareness of the consequences for the victim. But the theory can be extended to a broader range of offenses, including violent crimes committed recklessly or negligently and for no financial gain.[195]

1. Violent Crime

Consider the following scenario as an illustration of this broader application:

> *Warning Shots:* Across town from one another in the wee hours of a Saturday evening or Sunday morning, Battleship, a thirty-year-old graduate student in economics, and Cannon, a thirty-year-old line cook at Chipotle, are each walking home after a long day of work. Battleship's Ventnor Avenue neighborhood is a tony community of academics and young professionals. Cannon's neighborhood around Oriental Avenue, on the other hand, is stricken with concentrated poverty and violence. On this night, both Battleship and Cannon encounter groups of mildly inebriated young men coming out of their respective local bars, who proceed to hassle and taunt them—assaults that turn physical when each the two groups proceed to surround Battleship and Cannon, pushing them around and roughing them up. Drunken bystanders at both locations watch attentively and laugh, some beginning to record the altercations on their cell phones. Battleship and Cannon both respond quickly, pulling pistols from their waistbands and firing warning shots into the air, which puts an immediate halt to each of their respective altercations. Neither one of them anticipates the kickback when he fires, however, and in both cases an innocent bystander is struck and injured (but not killed).

In *Warning Shots*, we can assume that neither Battleship nor Cannon intentionally or knowingly hurt the bystanders who they accidentally end up shooting. Their actions certainly seem reckless, or at least negligent, however. We can also assume that there was no perceived financial payoff for either crime. Battleship, as such, would seem not to have any substantial reason for acting as recklessly as he did, other than avoiding temporary embarrassment and discomfort. Cannon, on the other hand, may have had more serious concerns in mind (either consciously or unconsciously).

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[195] Lewis, *supra* note 171, at 165–70.

In neighborhoods where poverty is concentrated and violence is common, mutual respect often becomes a zero-sum game, leaving residents with incentives to adopt a threatening demeanor and to behave in ways that are often unfriendly, uncivil, and disrespectful—sometimes breaking the law in doing so. Violent crime, and the reputation it often comes with, can sometimes be the best (or the only) way to secure one's social standing, especially in response to other acts or threats of violence.[196] So Cannon could have been worried that being perceived as weak could make him a target for further (and perhaps more serious) victimization, humiliation, or ostracism long into the future—especially if video recordings of him being pushed around without standing up for himself were to go viral or spread in his community.

Insofar as the collateral consequences of punishment cause (or themselves constitute) social and economic disadvantage, as such, they will in turn incentivize crime—including, in many cases, violent crime without any clear financial payoff, like we see in *Warning Shots*.

2. Sexual Violence

It is doubtful that the collateral consequences of conviction incentivize sexual violence in the way that matters here, however. Only certain kinds of incentives to break the law—namely, those related to the objective benefits of crime—mitigate the extent to which we can justifiably blame and punish people for doing so. The strength of those incentives should be measured in terms of either the Rawlsian Primary Goods[197] or the Sen Capabilities Approach[198]—not in terms of the offender's own preferences or tastes.

Across the social and behavioral sciences, empirical research shows that the vast majority of sexual violence is motivated by a desire to dominate, demean, humiliate, hurt, or exploit the victim (most often a woman or girl), rather than a desire for intimacy or sexual gratification.[199] And while intimacy and sexual

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[196] This is especially, but not exclusively, true for men (in particular, young men), because neighborhood violence can threaten their sense of masculinity. Elijah Anderson documents this phenomenon in detail in his book THE CODE OF THE STREET: DECENCY, VIOLENCE, AND THE MORAL LIFE OF THE INNER CITY. ELIJAH ANDERSON, THE CODE OF THE STREET: DECENCY, VIOLENCE, AND THE MORAL LIFE OF THE INNER CITY 66–107 (1999).

[197] JOHN RAWLS, A THEORY OF JUSTICE (1971).

[198] Amartya Sen, *Equality of What?*, *in* TANNER LECTURES ON HUMAN VALUES 197 (Sterling McMurrin ed., 1979).

[199] *See, e.g.*, David Lisak & Susan Roth, *Motivational Factors in Nonincarcerated Sexually Aggressive Men*, 55 J. PERSONALITY & SOC. PSYCH. 795, 796 (1988); David Lisak & Susan Roth, *Motives and Psychodynamics of Self-Reported, Unincarcerated Rapists*, 60 AM. J. ORTHOPSYCHIATRY 268, 269 (1990); Sarah K. Murnen, Carrie Wright & Gretchen Kaluzny, *If "Boys Will Be Boys," Then Girls Will Be Victims? A*

gratification could perhaps be thought of as Primary Goods (things that anyone would want, regardless of whatever else they wanted) or Capabilities (things that we have good reason to value, or which make a life worth living), the domination, subordination, demeaning, humiliation, or exploitation of others cannot. Those are not the kinds of things that anyone would want, regardless of whatever else they wanted; and they are not the kinds of things that make a life worth living, or which the Capabilities Approach is meant to capture. So, the perceived "payoff" to sexual violence is not likely to increase, in terms of either the Capabilities or the Primary Goods, as a result of a first criminal conviction.

Sex crime that has a clear financial payoff, or a payoff in social standing, could be a potential exception to this. Pimping and sex trafficking are more likely to be motivated by financial considerations than rape or sexual assault, for example. And in settings where extreme forms of "rape culture" or "toxic masculinity" are the norm, boys and men may face pressure to commit acts of sexual violence to secure their own social standing—pressures that could be exacerbated by the difficulty of finding alternative paths to social standing when one has a criminal record.

Given the abject moral disgust many of us—including myself—associate with sexual violence, the implication that people with prior criminal convictions could be less blameworthy than first-time offenders for a crime of sexual violence is likely to seem repugnant. But the repugnance of the implication should be softened by noticing that the argument at hand entails only that a repeat sex offender ought to be punished less severely (and perhaps not *much* less severely) than a first-time sex offender convicted of an otherwise similar offense. This is compatible with the thought that our penal systems ought to respond more harshly to crimes of sexual violence overall—though that is a question that falls outside of the scope of this paper.

3. Victims' Rights

One might also worry that a recidivist sentencing discount would express a lack of sufficient concern for the rights or interests of the victims of repeat offending, or otherwise unfairly devalue those rights and interests.[200] But here

Meta-Analytic Review of the Research That Relates Masculine Ideology and Sexual Aggression, 46 SEX ROLES 359, 364 (2002); Neil Malamuth, *Predictors of Naturalistic Sexual Aggression*, 50 J. PERSONALITY & SOC. PSYCH. 953, 954 (1986).

[200] *See, e.g.*, Press-Enter. Co. v. Superior Court of Cal., Riverside Cnty., 464 U.S. 501, 509 (1984) (describing the "concerns of the victims . . . in knowing that offenders are being brought to account for their criminal conduct").

again it is important to emphasize the comparative nature of the argument at hand. People with prior criminal convictions have stronger incentives to commit just about any kind of crime than those without any prior convictions. So, compared to a person with prior convictions, a first-time offender would need to weigh their own interests more heavily relative to the rights and interests of the victim in order to go through with almost any otherwise similar crime. As such, thinking clearly about the weight of victims' rights and interests tells in favor of the argument I have defended above, not against it.

In sum, the core argument I have advanced likely does not apply to crimes of sexual violence, except when those crimes are driven by financial gain or social status. But it should certainly extend to just about any other kind of criminal offense, including (1) violent offenses that lack any financial motive or payoff and (2) crimes that are committed recklessly or negligently rather than intentionally, and without knowing what the likely consequences are for the victims. This does not disrespect or unfairly devalue the rights or interests of victims. Rather, it puts victims' rights and interests in proper balance with the interests of offenders and the quality of will that their offenses reveal to us.

IV. COLLATERAL CONSEQUENCES: OBJECTIONS AND RESPONSE

Here, I respond to two of the most important potential objections to this account—both of which relate to the nature of, and justification for, collateral consequences. These objections both fail for the same reason. So, my strategy here will be to lay these two objections out, show how they depend on a crucial shared premise—namely, that collateral consequences are a justified part of how we punish people, rather than mere civil sanctions that are triggered by criminal convictions—and then show that this premise is false.

A. Option Luck

Perhaps the most obvious and powerful objection to the argument thus far is that repeat offenders are themselves responsible for the incentives they have to return to crime, given that the collateral consequences that those incentives arise from are a result of their own previous choices. As such, we might think that people with prior convictions have obligations to resist the incentives they have to reoffend, and that these incentives cannot exculpate them from punishment in the present.[201] Call this the "Option Luck" objection.[202]

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[201] I am grateful to Patrick Tomlin for forcefully articulating this objection to me.

[202] I borrow the term "option luck" from Ronald Dworkin, who viewed the distinction between option

The mere fact that someone chose to commit a crime is not enough to show that they alone are responsible for bearing the burdens of the collateral consequences associated with that offense, however. For that to be true, the collateral consequences attached to the offense need to be justified themselves first. Individual offenders do not unilaterally create the barriers they face to reentering society. Rather, those barriers are a joint product of the choices that offenders make, the legislative and regulatory landscape our governments create, and the general conditions of our society and economy. Consider the following (admittedly strange) hypothetical illustration of this:

> *Bubblegum:* In the year 2090, federal law criminalizes the use or possession of bubblegum. Judges have wide discretion in sentencing bubblegum-law offenders, and are generally lenient, preferring probation or community service to imprisonment. But the collateral consequences of violating the bubblegum law are extremely harsh: anyone caught with bubblegum on their person receives a lifetime ban from subsidized housing, government assistance, and employment of any kind.

It is nearly impossible to imagine a legitimate state interest in criminalizing the use or possession of bubblegum or in imposing such extreme collateral consequences on bubblegum-law offenders. So, it makes little sense to say that offenders who break the law are responsible for bearing the burdens of that choice simply by virtue of the fact that it was a choice. The burdens that the law attaches to different choices are in need of justification themselves.[203]

Furthermore, collateral consequences need to be justified *as part of the punishment* for the crime in question for the "Option Luck" objection to work. For if collateral consequences were justified as a purely preventive measure—without reference to the crime committed—then there would be no reason to think that the offender is responsible for bearing the burdens associated with those consequences himself.[204] In that case, collateral consequences would have a similar underlying normative justification to the law of eminent domain. Under the law of eminent domain, the state can unilaterally and coercively "condemn" (take ownership of) private property for public use without the previous owner's consent.[205] But the burdens of eminent domain fall on the state, rather than the

luck ("how deliberate and calculated gambles turn out") and "brute luck" ("how risks fall out that are not in that sense deliberate gambles") as central to the nature of distributive justice. *See* RONALD DWORKIN, SOVEREIGN VIRTUE 73 (2000).

[203] *See, e.g.*, DOUGLAS HUSAK, OVERCRIMINALIZATION 6–7 (2008).

[204] *See* Sandra G. Mayson, *Collateral Consequences and the Preventive State*, 91 NOTRE DAME L. REV. 301, 303–04 (2015) (defending—with caveats—collateral consequences as a regulatory mechanism of this kind).

[205] Chicago, Burlington & Quincy R.R. v. City of Chicago, 166 U.S. 226, 258 (1897).

previous owner of the condemned property—whom the state is required under the Fifth Amendment to pay "just compensation" for the property that it takes.[206]

So, the "Option Luck" objection only has force against the argument for the recidivist sentencing discount if the collateral consequences we impose on criminal offenders are justified *as part of the punishment* for their crimes. Below, I show that the other central objection to my argument also depends on this same premise. Then, I show that this premise is almost certainly false.

B. Declining Severity

David Dana argues that recidivist sentencing enhancements can be at least partially justified by the fact that collateral consequences have "declining marginal severity."[207] Collateral consequences, that is, often have an extremely severe effect after a first conviction, and little to no further effect after a second, third, or fourth conviction. The collateral consequences one faces after a first conviction can often ruin careers, relationships, opportunities, and dreams—putting those things beyond the point of repair in one's lifetime. Progressively increasing the marginal severity of formal sentences could be justified as a way of "balancing out" the declining marginal severity of their collateral consequences, as such.[208] According to Dana's model, this balancing effect should promote both optimal deterrence and proportional punishment.[209]

Acknowledging the declining marginal severity of collateral consequences tells neither in favor of, nor against, the recidivist sentencing premium *per se*. In principle, that is, we could punish first-time offenders primarily with the sanctions we now call "collateral consequences," and punish repeat offenders primarily with imprisonment, while adjusting the severity with which we punish them—compared to one another—in any way we like. The means by which we punish people does not by itself determine *how harshly* we punish them.

But one way to put this as an objection to this paper's argument would be to say that, even if we think that judges and sentencing commissions should treat prior convictions as a presumptive mitigating factor, as I have argued, we would still be justified in imposing harsher criminal sentences on repeat offenders than we do on first-time convicts because the effects of the collateral consequences of a first conviction are so much more severe than those of a second, third, or

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206 *Id*. at 228–29.

207 Dana, *supra* note 58, at 773.

208 *Id.*

209 *Id.*

fourth conviction. And it is at least plausible that the collateral effects of a first conviction are more severe than the additional prison or jail time that might be triggered by existing recidivist sentencing enhancements for a second, third, or fourth conviction.

So, if we take the declining marginal severity of collateral consequences into account, then this paper might give us a reason to think about the *justification* of our current regimes differently, without giving us a reason to actually change existing sentencing practices.[210]

One problem with this inference is that recidivist sentencing enhancements in most jurisdictions—especially those with guidelines-based sentencing regimes—often take the form of incremental, ladder-style increases in the recommended range of severity for any given offense, the more prior convictions the offender in question has on his or her record (and the more severe the prior offenses were).[211] The severity of collateral consequences seems to decline precipitously after a first conviction, by contrast. To put it somewhat hyperbolically, one's life could be ruined in some respects after a first conviction, and subsequent convictions can do little to make things worse in those respects. As such, even "three strikes" legislation likely could not "balance out" the declining marginal severity of collateral consequences in the way that Dana suggests.[212] Recidivist sentencing enhancements could do so only if they took the form of an extremely generous one-time discount for first-time offenders—or, less appealingly, an ultra-punitive "two strikes"-style regime. So, Dana's reasoning may not be able to vindicate statutory or guidelines-based recidivist sentencing enhancements as we know them today but could potentially vindicate some form of the recidivist sentencing premium.

Some courts have held, consonant with Dana's way of thinking, that under federal law, judges are permitted to give first-time offenders much more lenient sentences than would otherwise be advised under relevant guidelines, on the grounds that the collateral consequences of the conviction must be considered part of the punishment.[213] In *United States v. Nesbeth*, for example, the defendant was convicted of both possession with intent to distribute, and

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210 *Id.*

211 *See, e.g.*, FRASE ET AL., *supra* note 2, at 22–25.

212 Dana, *supra* note 58, at 773.

213 Courts are divided as to the permissibility of this approach, however. *See, e.g.*, United States v. Musgrave, 647 Fed. App'x 529, 532 (6th Cir. 2016); United States v. Stefonek, 179 F.3d 1030, 1038 (7th Cir. 1999); United States v. Morgan, 635 Fed. App'x 423, 450 (10th Cir. 2015); United States v. Kuhlman, 711 F.3d 1321, 1329 (11th Cir. 2013).

importation of, cocaine.[214] But the court justified a non-custodial sentence on the grounds that "the collateral consequences [she] will suffer, and is likely to suffer—principally her likely inability to pursue a teaching career and her goal of becoming a principal[]—has compelled me to conclude that she has been sufficiently punished, and that jail is not necessary. . . ."[215] Similarly, in *United States v. Pauley*, the defendant (a West Virginia high school art teacher) was convicted of possessing child pornography.[216] But the Fourth Circuit found that the lower court was permitted in imposing a sentence thirty-six months shorter than the very bottom of the range recommended by the sentencing guidelines on the grounds that he would lose his teaching certificate and state pension as a result of the conviction.[217] And in *United States v. Stewart*, another comparable case, the Second Circuit has remarked that "[i]t is difficult to see how a court can properly calibrate a 'just punishment' if it does not consider the collateral effects of a particular sentence."[218]

There are reasons to be skeptical of the idea that courts should include the likely effects of collateral consequences in how they calculate sentencing severity.[219] But even if we assume that this approach is justified, it does not follow that sentencing judges ought to make the severity with which we punish first-time offenders the baseline from which they derive the severity of punishment for repeat offenders. Consider the *Bubblegum* thought experiment detailed above once again to see why. In *Bubblegum*, the collateral consequences of a harmless and extremely trivial offense are exceptionally severe. Judges faced with sentencing first-time "bubblegum offenders" might thus include the likely effects of those collateral consequences in how they calculate sentencing severity, like the *Nesbeth*, *Pauley*, and *Stewart* courts.[220] But how should they sentence *repeat* bubblegum offenders? Consider two possible options:

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214 United States v. Nesbeth, 188 F.Supp.3d 179, 180 (E.D.N.Y. 2016).

215 *Id.* at 194.

216 United States v. Pauley, 511 F.3d 468, 469 (4th Cir. 2007).

217 *Id.*

218 United States v. Stewart, 590 F.3d 93, 141 (2d Cir. 2009).

219 Perhaps the most obvious reason for skepticism in this context is that the effects of collateral consequences are likely to be felt most acutely by those who are the most socially and economically advantaged beforehand. As Judge Posner commented in *United States v. Stefonek*—a case where the Seventh Circuit rejected the approach in question: "It is natural for judges, drawn as they (as we) are from the middle or upper-middle class, to sympathize with criminals drawn from the same class. But in this instance, we must fight our nature. Criminals who have the education and training that enables people to make a decent living without resorting to crime are more rather than less culpable than their desperately poor and deprived brethren in crime." *Stefonek*, 179 F.3d at 1038.

220 *See Nesbeth*, 188 F.Supp.3d at 180; *Pauley*, 511 F.3d at 469; *Stewart*, 590 F.3d at 14.

> *Bubblegum 2:* Repeat offenders under the bubblegum law, like first-time offenders, are generally sentenced to probation, a few hours of community service, or whatever the sentencing judge thinks of as the mildest available sanction, on the grounds that the offense itself is trivial.
>
> *Bubblegum 3*: Judges give repeat bubblegum offenders sentences that they consider roughly equivalent in severity to how they would punish a first-time offender for the same crime—perhaps adjusting slightly upward in order to impose a recidivist sentencing premium, or slightly downward, in order to impose a recidivist sentencing discount. But because the collateral consequences of a first conviction for chewing bubblegum are so severe, judges tend to give repeat bubblegum offenders between five and ten years in state prison.

Bubblegum 3 promotes one value better than *Bubblegum 2*—namely, equality between repeat- and first-time bubblegum-law offenders. But just about any sane reader will find *Bubblegum 2* preferable to *Bubblegum 3*. Judges in *Bubblegum 3* compound the injustice of the way first-time offenders are treated in treating repeat offenders equally unfairly.

The mere fact that the marginal effects of collateral consequences decline precipitously after an offender's first conviction cannot justify imposing harsher sentences on repeat lawbreakers to make up for the fact that they no longer feel these effects, given that their lives were already ruined in many respects. Like the "Option Luck" objection, the "Declining Severity" objection would only work if the collateral consequences of criminal conviction are a justified part of how we punish people.

C. Jurisprudence and Justification

The idea that the collateral consequences we impose on people with criminal convictions are a justified part of how we punish them is wildly implausible in the current doctrinal landscape.

Indeed, it is questionable that collateral consequences should be thought of as a form of punishment at all; courts have long treated them as mere civil sanctions that attach to a criminal conviction, but which are not part of the criminal sentence *per se*.[221] If collateral consequences are not—or should not be regarded as—forms of punishment, then the "Option Luck" and "Declining Severity" objections have no leg to stand on from the start. For collateral

[221] For an historical analysis of the development of this doctrine, see Kaiser, *Revealing the Hidden Sentence*, *supra* note 126.

consequences could not be *justified* forms of punishment if they are not punishment at all. There is a large and growing literature examining this question;[222] however, and I do not attempt to adjudicate between competing strains of that literature here. For even if collateral consequences are (or should be regarded as) forms of punishment, they could not plausibly be thought of as *justified* forms of punishment without systematically restructuring current doctrine and legislation.

1. Procedural Safeguards

The primary reason for this is that collateral consequences lack the kinds of procedural safeguards that are necessary for punishment to be justified. The Supreme Court has ruled that collateral consequences are not "punishment" for the purposes of constitutional protections against cruel and unusual punishment, double jeopardy, bills of attainder, and excessive fines.[223] And circuit courts have created the "collateral consequences rule," under which judges and defense attorneys have no duty to inform defendants of the collateral consequences of plea deals or trial convictions.[224] In *Padilla v. Kentucky*, the Supreme Court allowed for an exception to this rule, ruling that defense attorneys must tell noncitizen clients if pleading guilty to a criminal charge could result in deportation. The Court explicitly refused to evaluate the collateral consequences rule in *Padilla*, however, arguing that "[t]he question whether that distinction [between direct and collateral consequences] is appropriate need not be considered in this case because of the unique nature of deportation."[225]

Together, these two doctrines make it impossible to justify collateral consequences, at least as we know them, as a form of punishment. Less than 3% of criminal cases in both our federal and state courts ever go to trial.[226] Over

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[222] *See, e.g.*, Mayson, *supra* note 204 and accompanying text; Gabriel J. Chin, *The New Civil Death: Rethinking Punishment in the Era of Mass Conviction*, 160 U. PA. L. REV. 1789, 1790 (2012); Kaiser, *Revealing the Hidden Sentence*, *supra* note 126 and accompanying text; Carol S. Steiker, *Foreword: Punishment and Procedure: Punishment Theory and the Criminal-Civil Procedural Divide*, 85 GEO. L. J. 775, 777 (1997); Andrew von Hirsch & Martin Wasik, *Civil Disqualifications Attending Conviction: A Suggested Conceptual Framework*, 56 CAMBRIDGE L.J. 599, 599 (1997).

[223] *See, e.g.*, Smith v. Doe, 538 U.S. 84 (2003) (holding that the collateral consequence humiliation resulting from convicted sex offenders filing in a public registry does not constitute *ex post facto* punishment).

[224] United States v. Parrino, 212 F.2d 919, 920–21 (2d Cir. 1954); Meaton v. United States, 328 F.2d 379, 380–81 (5th Cir. 1964); United States *ex rel.* Durante v. Holton, 228 F.2d 827, 830 (7th Cir. 1956); Munich v. United States, 337 F.2d 356, 361 (9th Cir. 1964); Hutchison v. United States, 450 F.2d 930, 931 (10th Cir. 1971).

[225] Padilla v. Kentucky, 559 U.S. 356 (2010).

[226] U.S. SENT'G COMM'N, OVERVIEW OF FEDERAL CRIMINAL CASES—FISCAL YEAR 2018, at 8 (2019); Jed Rakoff, *Why Prosecutors Rule the Criminal Justice System—and What Can Be Done About It*, 111 NW. L. REV. 1429, 1432 (2017).

97% of them, that is, are resolved through a plea-bargaining process. At the same time, on average, each offender is subject to over 2,000 different kinds of legislative and administrative penalties, and collateral consequences are encoded in over 43,000 legislative and administrative provisions.[227] The vast majority of defendants in our criminal courts plead guilty, bargaining away their right to trial in exchange for a reduced sentence, and they do this without having to be informed about any of the collateral consequences that come along with the criminal conviction they have ostensibly agreed to (except, under *Padilla*, if they are at risk of deportation).[228]

The way we adjudicate the vast majority of criminal cases—combined with the fact that we attach so many hidden consequences to criminal convictions—violates the fundamental principle that, in order for punishment to be a justified response to what someone has done, he or she must have had a fair opportunity to avoid that punishment by choosing differently.[229] This principle can be understood as a more general constraint on the justification of any policy decision; as T.M. Scanlon puts it, "If a policy imposes burdens on some people in order to provide some general social benefit, then, wherever possible, individuals must be given adequate opportunity to avoid bearing these burdens by choosing appropriately."[230]

Some scholars argue that the *Padilla* decision will—or at least should—force courts to abandon the collateral consequences rule altogether, giving judges and defense attorneys the duty to inform defendants of a much wider range of consequences that might result from entering a guilty plea or being convicted at trial.[231] The *Padilla* Court's characterization of deportation as "unique" and "particularly severe" rings hollow, they argue, given how severe

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227 Kaiser, *Revealing the Hidden Sentence*, *supra* note 126, at 157.

228 559 U.S. 356 (2010).

229 *See, e.g.*, HART, *supra* note 18, at 22–23 (suggesting that this principle does not require the existence of free will; its main expositors have been free will skeptics who are compatibilists about the relationship between free will and moral responsibility); T.M. Scanlon, *The Significance of Choice*, 8 TANNER LECTURES ON HUMAN VALUES 149 (1986) (discussing the necessity of free will for just punishment).

230 T.M. SCANLON, WHY DOES INEQUALITY MATTER? 123 (2018); *cf.* T.M. SCANLON, WHAT WE OWE TO EACH OTHER 256–94 (1998) (presenting an extended analogy for understanding the social costs and benefits of punishment).

231 Gabriel Chin, *Making* Padilla *Practical: Defense Counsel and Collateral Consequences at Guilty Plea*, 54 HOW. L.J. 675 (2011); Margaret C. Love, *Collateral Consequences After* Padilla v. Kentucky*: From Punishment to Regulation*, 31 ST. LOUIS PUB. L. REV. 87 (2011) (arguing that "[*Padilla*'s] logic extends beyond deportation to many other severe and certain consequences of conviction that are imposed by operation of law rather than by the sentencing court").

and lasting other collateral consequences can be, and how closely those consequences are (and have been) tied to "the criminal process."[232]

But, as courts have recognized, we are far from a world in which we could easily implement even the minimal procedural safeguards necessary—but not sufficient—for the sanctions we currently classify as "collateral consequences" to be justified forms of criminal punishment.[233] Michael Pinard argues that abandoning the collateral consequences rule would be "made even more complicated by the fact that collateral consequences are not centralized, but rather are scattered throughout federal and state statutes, state and local regulatory codes, local rules, and local policies."[234] And even if courts were to universally abandon the collateral consequences rule, criminal defendants would still lack constitutional protections against cruel and unusual punishment, double jeopardy, bills of attainder, and excessive fines. Without minimal procedural safeguards, collateral consequences could not possibly be justified as a form of punishment.

2. Substantive Criteria

Even if we could implement those procedural safeguards, as some argue we can, collateral consequences as we know them—though they could no longer be thought of as "collateral"—would still be extremely difficult to justify as punishment, on substantive grounds.[235]

First, given the strong way in which they incentivize future crime, it is implausible that many of the collateral consequences we impose on people who have been convicted of criminal offenses could serve the aim of crime control. As discussed in Part I.B, increasing the certainty that people will be caught—not the severity with which they will likely be punished on the chance that they are caught—is what deters people.[236] Changing the rules of criminal law or sentencing policy is unlikely to have much, if any, deterrent effect.[237] So collateral consequences are not likely to be good deterrents, regardless of whether we treat them as part of how we formally punish people or not.

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[232] Love, *supra* note 231, at 103 (quoting *Padilla*, 559 U.S. at 365–66).

[233] *Padilla*, 559 U.S. at 376 (Alito, J., concurring); Fruchtman v. Kenton, 531 F.2d 946, 949 (9th Cir. 1976); United States v. Cariola, 323 F.2d 180, 186 (3d Cir. 1963).

[234] Michael Pinard, *An Integrated Perspective on the Collateral Consequences of Criminal Convictions and Reentry Issues Faced by Formerly Incarcerated Individuals*, 86 B.U. L. REV. 623, 646 (2006).

[235] *Cf.* ZACHARY HOSKINS, BEYOND PUNISHMENT? A NORMATIVE ACCOUNT OF THE COLLATERAL LEGAL CONSEQUENCES OF CONVICTION (2019).

[236] Chalfin & McCrary, *supra* note 48; Nagin, *supra* note 52, at 85.

[237] Nagin, *supra* note 52, at 85.

The fact that collateral consequences have declining marginal severity also suggests that they may encourage more crime than they deter, on balance. The majority of those sentenced to jail or prison terms already have a prior conviction.[238] Since collateral consequences have little to no effect on the second, third, or fourth time one is convicted of a crime, they would not be a deterrent to repeat offenders even if people were deterred by the harshness of potential sanction, rather than the certainty of those sanctions (which they are not). So, the collateral consequences of punishment as we know them almost certainly encourage more crime than they deter, on balance.

Some collateral consequences serve an easily identifiable incapacitation-related purpose, though the vast majority do not. Restrictions on sex offenders from working in daycares, K–12 schools, and other settings with vulnerable populations; removal from public office for officials convicted of bribery; restrictions on access to firearms for people convicted of violent crimes; and the loss of licensure for people convicted of crimes related to the licensed activity are all easy to justify on incapacitation grounds.[239]

But these restrictions alone would not give people with prior convictions much more of an incentive to reoffend than they would have if there were no legal barriers at all to reentry, however—so they are not really what is at stake in the "Option Luck" and "Declining Severity" objections to the argument of this Article. And in any case, there is a whole smorgasbord of restrictions that together make it very difficult for people with prior convictions to live a normal life, and which serve no plausible incapacitation-related purpose.[240] There is no reason to think, for example, that preventing people with a criminal conviction from becoming barbers (one of the trades that is easiest to pick up in prison) stops them from committing crime; the vast majority of criminal offenders are not Edward Scissorhands or Sweeney Todd. Permanent barriers to employment across multiple sectors and industries cannot be justified on an incapacitation rationale.[241] Preventing the formerly convicted from accessing public housing and financial aid for higher education; suspending their driver's licenses; and making their criminal record easily accessible to both public and private-sector

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[238] BRIAN A. REAVES, FELONY DEFENDANTS IN LARGE URBAN COUNTIES, 2009, at 17 (2013) https://jpp.whs.mil/Public/docs/03_Topic-Areas/07-CM_Trends_Analysis/20160122/04_BJS_Report_State_Felony_Sentencing_2009.pdf.

[239] *Cf.* AM. BAR ASS'N, ABA STANDARDS FOR CRIMINAL JUSTICE: COLLATERAL SANCTIONS AND DISCRETIONARY DISQUALIFICATION OF CONVICTED PERSONS 24 (3d ed. 2004).

[240] *See* discussion *supra* Part III.B.

[241] *See, e.g.*, Miriam Aukerman, *The Somewhat Suspect Class: Towards a Constitutional Framework for Evaluating Occupational Restrictions Affecting People with Criminal Records*, 7 J.L. & SOC'Y 18 (2005).

employers, where it is often an automatic bar to being hired (either *de jure* or *de facto*) does not to incapacitate them from returning to crime—rather, it gives them much stronger incentives to do so.

There is little to be said in favor of collateral consequences from a retributivist perspective either. Retributivism is not in principle committed to any particular *form* of punishment, so long as offenders are punished to the extent they deserve. The severity of any given criminal could be thought of as a function of how burdensome or unpleasant it is, and the amount of time for which we impose it. A prison sentence of any given amount of time would be a more severe sanction than imposing the kinds of collateral consequences we currently attach to criminal convictions *for that same amount of time*. But the average prison sentence in our state systems is only 2.6 years, while the median length of time is 1.3 years.[242] Collateral consequences, by contrast, often persist for decades or even indefinitely.[243]

There are reasons internal to the retributivist outlook, however, to favor punishments that are short and sharp over those that are long and gentle.[244] For retributivists, *not* punishing those who deserve punishment is bad.[245] In other words, it is bad when someone who deserves punishment is left unpunished, and the longer they are left unpunished, the worse things get. If that is true, then we ought to punish them as quickly as possible. Another way to put the point is to say that "[i]t is bad that the deserving go unpunished, but as soon as they get their just deserts, all is well with the world (from the perspective of retributive justice)."[246] If that is true, then, *ceteris paribus*, we should prefer forms of punishment that are more likely to deliver the full amount of hard treatment the offender deserves. Forms of punishment that take longer to impose leave open a greater risk that the offender might become ineligible for punishment before the sentence is served in full—for example, by dying or going insane.[247]

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[242] DANIELLE KAEBLE, TIME SERVED IN STATE PRISON, 2016, U.S. DEP'T OF JUST. (Nov. 2018), https://www.bjs.gov/content/pub/pdf/tssp16.pdf.

[243] *See* Love, *supra* note 231.

[244] Patrick Tomlin, *Time and Retribution*, 33 LAW & PHIL. 655 (2014).

[245] *Id.* at 664. As Kant famously put it, "Even if a civil society were to be dissolved…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." IMMANUEL KANT, THE METAPHYSICS OF MORALS 106 (Mary Gregor ed., Cambridge Univ. Press, 1996).

[246] Tomlin, *supra* note 244, at 669.

[247] *See, e.g.*, Ford v. Wainwright, 477 U.S. 399 (1986) (holding that the Eight Amendment protection against cruel and unusual punishment prohibits capital punishment for prisoners who have lost their sanity); Panetti v. Quarterman, 551 U.S. 930 (2007) (holding that capital punishment is prohibited when a prisoner's mental illness prevents them from having a "rational understanding" of the state's reason for executing them). Similarly, both Tomlin and Parfit argue that an offender might also become morally ineligible for punishment

Collateral consequences, as such, cannot be justified as a form of punishment—for both substantive and procedural reasons. So, the "Option Luck" and "Declining Severity" objections cannot be sustained. And it appears that we are stuck with the paradox of recidivism.

CONCLUSION

The argument that led us to this paradox has taken a number of twists and turns, so it is worth looking back at the road we have traveled.

We started from the ubiquitous and abiding principle that we should respond more severely to repeated wrongdoing than we do to first-time misconduct—one of our most deeply held moral and legal principles. We then considered the tremendously intuitive reasons for why we seemingly ought to extend that principle to the criminal law in the form of a recidivist sentencing premium: compared to first-time lawbreakers, repeat offenders are harder to deter, need to be incapacitated for longer, and are more morally culpable.

On closer examination, however, we discovered that these reasons fall apart. We saw that, insofar as the rules of criminal law and sentencing policy have a deterrent effect at all, repeat offenders are in many ways easier to deter than first-time lawbreakers—given what we know about the biases and heuristics that underlie all human decision-making, and the probability that an offender with prior criminal convictions will be detected. We saw that it is unclear at best whether we should "incapacitate" repeat offenders for longer periods of time than first-time offenders, given the extent of crime inside of our prisons and jails, the phenomena of "replacement effects," and the backlash of concentrated incarceration—the latter two of which are likely to be more powerful in the communities that offenders with prior convictions disproportionately come from. And we saw that when someone with prior convictions breaks the law again, we have no more evidence of ill will or bad character than when someone with a clean record commits the same offense for the first time.

In fact, as we found, the opposite is the case. We saw that the collateral consequences of criminal convictions incentivize people to return to crime in a morally significant way. As a result, when people with prior convictions return to crime, we have *less* evidence of ill will or bad character than when others are

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by through a process of personal change—e.g., repentance—so that he no longer deserves to be punished as much punishment as he did before. Tomlin, *supra* note 244, at 680; DEREK PARFIT, REASONS AND PERSONS 326 (1984) ("When some convict is now less closely connected to himself at the time of his crime, he deserves less punishment. If the connections are very weak, he may deserve none.").

caught committing similar offenses for the first time. We did not need to invoke any particular theory of wellbeing to reach this conclusion, and we found that it applies to almost any kind of crime, including violent offenses committed recklessly or negligently—though probably not sexual violence. Finally, we considered the two most important potential objections to this position. We saw that both of them, however, depend on the premise that the collateral consequences we attach to criminal convictions are justified parts of how we punish people. And we saw that this premise is implausible.

Thus, given the way we have structured our social conditions and legal doctrine, judges and sentencing commissions ought to turn one of our most ubiquitous and abiding moral and legal principles upside down. Rather than responding more severely to repeated wrongdoing than we do to first-time misconduct, they should do the exactly the opposite. This may be an incredibly unpalatable conclusion, but there is no easy way to avoid it. Judges and sentencing commissions cannot unilaterally eliminate the incentives that people with prior criminal convictions have to return to crime. That would require sweeping legislative, administrative, and broader social change. And it is not clear that such sweeping changes are even possible, let alone desirable, all things considered. This is the paradox we are left with.