The Punishment Should Fit *the Crime*— Not the Prior Convictions Of *the Person* That Committed the Crime: An Argument for Less Impact Being Accorded to Previous Convictions in Sentencing

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I. INTRODUCTION

A. Overview of Article

Criminal sentencing is the realm where the state acts in its most coercive manner against its citizens. Sanctions range from life imprisonment—and, in some parts of the United States, the death penalty[1]—to the mere

1. The United States and Japan are the only two developed democratic countries that still impose the death penalty. *See Death Penalty Fast Facts*, CNN, http://www.cnn.com/2013/07/19/us/death-penalty-fast-facts (last updated May 31, 2014, 5:40 PM).

formal censure in the form of a good behavior bond or probation. There are multiple considerations relevant to the determination of a penalty. The most important is the seriousness of the crime. Jurisprudentially, this position is persuasive despite pragmatic difficulties associated with matching the harshness of the sanction to the severity of the crime.[2]

However, sentencing practice over the past two decades has overwhelmed sentencing jurisprudence. Often, the main consideration in determining offense severity has little to do with the severity of the crime and nearly everything to do with the profile of the offender.[3] In common law countries, the prior criminal history of an offender is the most important sentencing consideration, after offense seriousness, and can be so significant that it means the difference between receiving a small fine or many years in jail.[4] The issue is pervasive given that most offenders have at least one prior conviction.[5] This has resulted in a large increase in imprisonment numbers despite the fact that, somewhere along the way, a sound justification has not been provided for pulverizing recidivists.

Punishing recidivists more harshly than first-time offenders is intuitively appealing.[6] Most people, including lawyers and judges, share the view

2. *See generally* JESPER RYBERG, THE ETHICS OF PROPORTIONATE PUNISHMENT: A CRITICAL INVESTIGATION (2004) (discussing using the seriousness of crimes to determine punishment levels).

3. *See* Ted Sampsell-Jones, *Preventative Detention, Character Evidence, and the New Criminal Law*, 2010 UTAH L. REV. 723, 723 (2010) (noting "the criminal law increasingly focuses on the characteristics of the offender rather than the characteristics of the offense").

4. *See* Julian V. Roberts, *The Role of Criminal Record in the Sentencing Process*, *in* 22 CRIME AND JUSTICE: A REVIEW OF RESEARCH 303, 303 (Michael Tonry ed., 1997). The recidivist premium extends beyond the common law world to countries such as China, Ghana, Israel, and Korea. *See* JULIAN V. ROBERTS, PUNISHING PERSISTENT OFFENDERS: EXPLORING COMMUNITY AND OFFENDER PERSPECTIVES 115 (2008); Roberts, *supra*, at 309.

5. *See* Richard S. Frase, *Prior-Conviction Sentencing Enhancements: Rationales and Limits Based on Retributive and Utilitarian Proportionality Principles and Social Equality Goals*, *in* PREVIOUS CONVICTIONS AT SENTENCING: THEORETICAL AND APPLIED PERSPECTIVES 117, 133 (Julian V. Roberts & Andrew von Hirsch eds., 2010); Kevin R. Reitz, *The Illusion of Proportionality: Desert and Repeat Offenders*, *in* PREVIOUS CONVICTIONS AT SENTENCING: THEORETICAL AND APPLIED PERSPECTIVES, *supra*, at 137, 137; *see also infra* Part IV (discussing data regarding prior convictions).

6. This has been described as a deeply held intuition. *See* Thomas Mahon, *Justifying the Use of Previous Convictions as an Aggravating Factor at Sentencing*, CORK ONLINE L. REV. 85, 96 (Mar. 13, 2012), http://www.corkonlinelawreview.com/editions/2012/JustifyingTheUseOfPreviousConvictionsAsAnAggravatingFactorAtSenten

that repeat offenders deserve additional punishment.[7] There is, however, no settled justification for this practice and, in particular, there is no tenable theory which suggests that recidivists should be punished considerably more severely than offenders without a criminal history. Principally, the punishment should fit the crime, not the antecedent actions of the person who committed the crime.

This Article examines the manner in which prior convictions should influence penalty severity. The issue is complex; it has been described as "one of the most contested questions in the field of criminal sentencing."[8] This Article undertakes a thorough examination of the key normative issues and relevant empirical data with the aim of informing legislatures of appropriate ways in which to deal with prior convictions when sentencing.

There are three broad approaches that can be used to deal with prior convictions. First, they may be ignored and, hence, not affect the severity of the sanction.[9] Second, at the other end of the spectrum, prior convictions may be used as a basis for imposing progressively more severe sanctions for each new offense.[10] This is called the cumulative principle and, in some jurisdictions, it was the dominant approach to sentencing recidivists during the second half of the nineteenth century.[11] Third, and in the middle, there is what is termed the *progressive loss of mitigation theory*, which is the view that a degree of mitigation should be accorded to first-time offenders

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cing.ThomasMahon.pdf; *see also* Ralph Henham, *Anglo-American Approaches to Cumulative Sentencing and the Implications for UK Sentencing Policy*, 36 HOWARD J. CRIM. JUST. 263, 266 (1997) (noting that retributivists "deserve[]" to be punished for repeated criminal law violations).

7. *See* Michael Tonry, *The Questionable Relevance of Previous Convictions to Punishments for Later Crimes*, *in* PREVIOUS CONVICTIONS AT SENTENCING: THEORETICAL AND APPLIED PERSPECTIVES, *supra* note 5, at 91, 107; *see also* Julian V. Roberts, *First-Offender Sentencing Discounts: Exploring the Justifications*, *in* PREVIOUS CONVICTIONS AT SENTENCING: THEORETICAL AND APPLIED PERSPECTIVES, *supra* note 5, at 17 (discussing that first-time offenders deserve less harsh sentences than repeat offenders).

8. PREVIOUS CONVICTIONS AT SENTENCING: THEORETICAL AND APPLIED PERSPECTIVES, *supra* note 5, at vi.

9. This is called *flat-rate sentencing*. *See* ANDREW ASHWORTH, SENTENCING AND CRIMINAL JUSTICE 198 (5th ed. 2010). A principal proponent of this approach is George Fletcher. *See, e.g.*, GEORGE P. FLETCHER, RETHINKING CRIMINAL LAW 466 (1978). More than a decade ago this Author too, argued for flat-rate sentencing. Mirko Bagaric, *Double Punishment and Punishing Character: The Unfairness of Prior Convictions*, 19 CRIM. JUST. ETHICS 10, 10 (2000). However, this Author has since changed his stance on flat-rate sentencing due to the emerging empirical data regarding the efficacy of incapacitation in reducing crime. *See infra* Part III.C.3.

10. *See* ASHWORTH, *supra* note 9, at 198.

11. *See id.*; Henham, *supra* note 6, at 266.

or those with a minor criminal record.[12] This mitigation is used up by offenders who repeatedly come before the courts, thereby resulting in increased penalties for recidivists.[13] However, unlike the case of the cumulative principle, there is a limit, set by the principle of proportionality, to the extent to which recidivists can be punished more harshly.[14]

Part II of this Article illustrates how prior convictions are often the cardinal consideration in the sentencing calculus. Part III examines the correct approach to punishing recidivists from the perspective of the main theories of punishment—retributivism and utilitarianism. The Part argues that within a retributive construct there is no basis for imposing severer sanctions on retributivists. From the utilitarian perspective, the deterrence rationale that is often advanced for the recidivist loading is unsound.[15] However, evidence does suggest that the theory of general incapacitation does result in penalty reduction for the serious offenses.[16] This provides a valid basis for somewhat harsher penalties for offenders who have prior convictions for serious crimes. The penalty loading that is appropriate is, however, modest compared to the significant enhancements that are often currently imposed.[17] The discriminatory impact of a recidivist premium is discussed in Part IV of this Article.

The reform and policy implications of this Article's findings are considerable. Part V of this Article suggests that there is a need for fundamental reform of the criminal sentencing law. To the extent that prior convictions are relevant at all, this should be informed by the objectives of sentencing and their relevance to attaining these objectives. The upshot is that prior convictions should have considerably less weight in sentencing outcomes, which would result in greater coherence and transparency in sentencing law and practice and a considerable drop in imprisonment numbers.[18] It would also put an end to the gratuitous

12. *See* Jesper Ryberg, *Recidivism, Retributivism and the Lapse Model of Previous Convictions*, *in* PREVIOUS CONVICTIONS AT SENTENCING: THEORETICAL AND APPLIED PERSPECTIVES, *supra* note 5, at 37, 37.

13. As noted in Part III.B.1. of this Article, some versions of this theory limit the discount to first offenders.

14. *See* Ryberg, *supra* note 12, at 37.

15. *See infra* Part III.C.

16. *See infra* Part III.C.3.

17. *See infra* Part III.C.3.

18. *See infra* Part V.

cruelty, in the form of pointless prison time inflicted on millions of individuals.[19]

Prior to turning to substantive matters, the fundamental tension that underpins the key hypothesis considered in this Article must be addressed.

B. Further Explanation of the Paradox: Crime Severity Turns on the Damage Caused to the Victim; Penalties Are Increasingly Determined By the Antecedents of the Offender

All law is complex—this is necessarily the case given the multi-faceted nature of the human condition and the infinite range of human interactions. Sentencing law is particularly complex. There are four main reasons for this: (1) the objectives of sentencing law—which are typically community protection, rehabilitation, deterrence, retribution and denunciation—are not settled;[20] (2) the objectives which are pursued are often conflicting;[21] (3) the efficacy of sentencing to achieve key objectives is not empirically validated and, in some cases, is empirically contradicted;[22] and (4) in some jurisdictions there are more than one hundred discrete considerations which can influence sentencing outcomes.[23]

However, among this chaos there are two relatively settled aspects of sentencing law and practice; one is theoretical and the other is pragmatic. They contradict each other and it is this contradiction that sets the theme for this Article.

There is considerable disparity in the penalties imposed on offenders across jurisdictions and within jurisdictions.[24] Yet, there is one principle that has widespread acceptance regarding setting the appropriate penalty: the principle of proportionality.[25] In its simplest—and arguably most persuasive—form, it is the view that the punishment should equal the crime.

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19. *See infra* Part V.

20. *See* Albert W. Alschuler, *The Changing Purposes of Criminal Punishment: A Retrospective on the Past Century and Some Thoughts About the Next*, 70 U. CHI. L. REV. 1, 1 & n.1 (2003).

21. *See* MIRKO BAGARIC, PUNISHMENT AND SENTENCING: A RATIONAL APPROACH 11 (2001).

22. *See the discussion in* Part V of this article.

23. Joanna Shapland identified 229 factors. *See* JOANNA SHAPLAND, BETWEEN CONVICTION AND SENTENCE: THE PROCESS OF MITIGATION 55 (1981).

24. *See* MARVIN E. FRANKEL, CRIMINAL SENTENCES: LAW WITHOUT ORDER 8–9, 103 (1973); BAGARIC, *supra* note 21, at 191–213.

25. *See* RYBERG, *supra* note 2, at 12–13; Richard G. Fox, *The Meaning of Proportionality in Sentencing*, 19 MELB. U. L. REV. 489, 491 (1994) (quoting Andrew von Hirsch, *Proportionality in the Philosophy of Punishment*, 16 CRIME & JUST. 55, 56, 68 (1992)) (describing the principle of proportionality).

The principle of proportionality, at least in theory, operates to "restrain excessive, arbitrary and capricious punishment"[26] by requiring that punishment not exceed the gravity of the offense, even where it seems certain that the offender will immediately reoffend.[27]

The proportionality principle strikes a strong impressionistic cord[28] and transcends numerous other areas of the law.[29] The notion that the response must be commensurate with the harm caused—or threatened—is at the core of the criminal defenses such as self-defense[30] and necessity.[31] It is also at the foundation of civil law damages for injury, which aim to compensate for the actual loss suffered and provide equitable remedies that are proportional to the detriment sought to be avoided.[32] In the international law arena, the concept of proportionality dictates the nature of retaliatory measures that can be taken in response to breaches of free trade agreements,[33] and the extent of force that can be taken in self-defense against an aggressor.[34] In the human rights realm, proportionalism is often invoked as a basis for limiting or negating rights in order to promote the common good or achieve governmental objectives.[35]

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26. Fox, *supra* note 25, at 492.

27. *See* RYBERG, *supra* note 2, at 12–13. The principle is sometimes termed *proportionalism*. *See id.*

28. *See id.* at 2.

29. *See* Thomas Poole, *Proportionality in Perspective* 16–17 (LSE Law, Society and Economy Working Paper Series, Paper No. 16/2010, 2010), *available at* http://ssrn.com/abstract=1712449.

30. *See, e.g.*, Larry Alexander, *Self-Defense, Punishment, and Proportionality*, 10 LAW & PHIL. 323, 328 (1991).

31. For a thorough examination of this defense, see *In re* A, [2000] EWCA (Civ) 254, [2001] Fam. 147 (Eng.), *available at* http://www.bailii.org/ew/cases/EWCA/Civ/2000/254.html.

32. *See* Fox, *supra* note 25, at 491 (citing *Commonwealth v Verwayen* (1990) 170 CLR 394, 417, 441 (Austl.); HAROLD LUNTZ, ASSESSMENT OF DAMAGES FOR PERSONAL INJURY AND DEATH 3–5 (3d ed. 1990)).

33. SHERZOD SHADIKHODJAEV, RETALIATION IN THE WTO DISPUTE SETTLEMENT SYSTEM 42–45 (2009).

34. *See* Adil Ahmad Haque, *Proportionality (in War)*, *in* 7 THE INTERNATIONAL ENCYCLOPEDIA OF ETHICS 4168, 4169–70, 4172–73 (Hugh LaFollette ed., 2013); *see also* Evan J. Criddle, *Proportionality in Counterinsurgency: A Relational Theory*, 87 NOTRE DAME L. REV. 1073, 1075–78 (2012) (discussing the proportionality principle in regard to international counterinsurgency operations).

35. *See* Xenophon Contiades & Alkmene Fotiadou, *Social Rights in the Age of Proportionality: Global Economic Crisis and Constitutional Litigation*, 10 INT'L J. CONST. L. 660, 665–66 (2012); Charles-Maxime Panaccio, *In Defence of Two-Step Balancing and Proportionality in Rights Adjudication*, 24 CANADIAN J.L. & JURISPRUDENCE 109, 109–

The importance of proportionality in sentencing is underlined by the fact that it is one of the few principles of sentencing where there appears to be a significant degree of consensus among lawyers and philosophers regarding its relevance and significance, notwithstanding the gulf that normally exists between sentencing and theories of punishment.[36]

The key aspect of the principle is that it has two limbs. The first is the seriousness of the crime; the second is the harshness of the sanction.[37] Further, the principle has a quantitative component—the two limbs must be matched.[38] In order for the principle to be satisfied, the seriousness of the crime must be equal to the harshness of the penalty.

The relevance of proportionalism is undermined by the fact that there is considerable uncertainty regarding the exact measures by which the punishment can be matched to the crime.[39] For present purposes, the key issue relates to factors that properly inform the assessment of offense severity. Although there is some uncertainty in this regard, the principal consideration is the harm caused by the offense, as measured by the extent to which it sets back the interests of the victim.[40] It is for this reason that, in most societies, the most serious crimes are homicide offenses, given that they result in the destruction of human life, and it is universally accepted that other offenses that cause considerable damage to victims, such as sexual and violent offenses, should be severely punished.[41]

Thus, crime severity, which is the main consideration that should determine the harshness of the sanction, is mainly contingent upon the level of harm caused to the victim.[42] The antecedents of the offender are irrelevant to this matter.

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10 (2011); Denise Réaume, *Limitations on Constitutional Rights: The Logic of Proportionality* 2–3 (Univ. of Oxford Legal Research Paper Series, Paper No. 26/2009, 2009), *available at* http://ssrn.com/abstract=1463853.

36. *See* BAGARIC, *supra* note 21, at 1–10 (discussing the gaps between punishment theories and sentencing).

37. *See* RYBERG, *supra* note 2, at 12.

38. *See id.*

39. As noted by Professor Jesper Ryberg, one of the key criticisms of the theory is that it "presupposes something which is not there, namely, some objective measure of appropriateness between crime and punishment." RYBERG, *supra* note 2, at 184.

40. *See* Andrew von Hirsch & Nils Jareborg, *Gauging Criminal Harm: A Living-Standard Analysis*, 11 OXFORD J. LEGAL STUD. 1, 32–33 (1991).

41. Homicide and rape are considered some of the most serious offenses in America. *See* Franklin E. Zimring, *American Youth Violence: A Cautionary Tale*, *in* 42 CRIME AND JUSTICE IN AMERICA: 1975-2025, at 265, 268 (Michael Tonry ed., 2013). Generally, the most severe crimes should receive the most severe punishment. *See* BARBARA MACKINNON & ANDREW FIALA, ETHICS: THEORY & CONTEMPORARY ISSUES 367 (8th ed. 2014).

42. *See* von Hirsch & Jareborg, *supra* note 40, at 33 ("[T]he extent of the injury can ordinarily be gauged by the impact on the standard victim's living standard.").

Whether a person is killed or raped by a first-time offender or a career criminal, the level of harm is identical. It is for this reason that the orthodox view is that prior convictions are not relevant to the proportionality principle.[43] Yet, increasingly, an offender's prior convictions are assuming a considerable role in the determination of the penalty.[44] Ostensibly, this makes sentencing more about the character and background of the offender than the harm caused by the offense: the focus moves from ensuring that the punishment fits the crime to the punishment fitting the person.

This approach is not necessarily flawed; there may be a justification for it. However, the doctrinal oddity associated with this approach commands a concrete explanation and justification, and the main objective of this Article, therefore, is to examine whether such a justification exists.

II. THE RELEVANCE OF PRIOR CONVICTIONS TO SENTENCING: CURRENT PRACTICE

A. Recidivist Premium and Imprisonment Rates

By way of background, this Article now examines the extent to which prior convictions currently influence sentencing outcomes in four jurisdictions, which, to varying degrees, reflect the different main theoretical approaches. I start with the jurisdiction that penalizes recidivists most harshly—the United States—and end with the jurisdiction that accords the least weight to prior convictions—Sweden. The United Kingdom and Australia are considered because their treatment of recidivists falls somewhere between that accorded in the United States and in Sweden. The Article proceeds in the order of most to least punitive.

As an interesting aside, given that most offenders have prior convictions, one would expect that the weighting of the recidivists' premiums would

43. *See* Mirko Bagaric, *Injecting Content into the Mirage That Is Proportionality in Sentencing*, 25 NEW ZEALAND U. L. REV. 411, 434 (2013); *see also* Dir. of Pub. Prosecutions v. G.K., [2008] IECCA 110 (C.C.A.) (Ir.) (holding that prior convictions inform proportionality, but only where they are of a similar nature to that of the current offense); Dir. of Pub. Prosecutions v. P.S., [2009] IECCA 1 (C.C.A.) (Ir.) (seemingly overruling Dir. of Pub. Prosecutions v. G.K., [2008] IECCA 110 (C.C.A.) (Ir.)); Mahon, *supra* note 6, at 85, 87–89 (discussing these cases).

44. *See* Brian M. Hoffstadt, *Common-Law Writs and Federal Common Lawmaking on Collateral Review*, 96 NW. U. L. REV. 1413, 1416 (2002); *see also* Carissa Byrne Hessick, *Why Are Only Bad Acts Good Sentencing Factors?*, 88 B.U. L. REV. 1109, 1109 (2008) ("American jurisdictions universally consider an offender's prior bad acts as an aggravating sentencing factor.").

correlate closely to the incarceration rate in the respective jurisdictions. This is one instance where theory and practice align.[45] The United States has the highest incarceration rate in the world—nearly 750 per 100,000 persons;[46] Sweden has one of the lowest—67 per 100,000 persons;[47] and Australia and the United Kingdom have similar rates—168 per 100,000 persons[48] and 132 per 100,000 persons,[49] respectively. This order, in fact, precisely accords with the respective weight accorded to previous convictions in sentencing.

B. United States—Considerable Weight Given to Prior Convictions

As noted above, the United States is the jurisdiction where prior convictions aggravate sentences most significantly. The main trend of sentencing reform in the United States since the 1970s has been a move towards mandatory sentencing laws and presumptive guidelines;[50] both of which are severe on recidivists. The backdrop is a growing intolerance towards repeat offenders and emerging evidence of high recidivism rates.[51] This is succinctly summarized by Justice O'Connor in the U.S. Supreme Court decision of *Ewing v. California*:

> Recidivism is a serious public safety concern in California and throughout the Nation. According to a recent report, approximately 67 percent of former inmates released from state prisons were charged with at least one "serious" new crime within three years of their release. In particular, released property offenders . . .

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45. Although it is not suggested that this is solely—nor, indeed, even principally—attributable to the manner in which prior convictions are dealt with. As indicated in Part I.B, *supra*, sentencing is a complex process and many variables contribute to incarceration rates.

46. This reflects a near doubling in the past twenty years. *See* LAUREN E. GLAZE & ERIKA PARKS, BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, CORRECTIONAL POPULATIONS IN THE UNITED STATES, 2011, at 1, 8 (2012), *available at* http://www.bjs.gov/content/pub/pdf/cpus11.pdf.

47. ROY WALMSLEY, INT'L CTR. FOR PRISON STUDIES, WORLD PRISON POPULATION LIST 5 (10th ed. 2013), *available at* http://www.apcca.org/uploads/10th_Edition_2013.pdf.

48. *See* AUSTL. BUREAU OF STATISTICS, PRISONERS IN AUSTRALIA: 2012 REISSUE 8 (2013), *available at* http://www.ausstats.abs.gov.au/Ausstats/subscriber.nsf/0/24B61FAA213E5470CA257B3C000DCF8A/$File/45170_2012reissue.pdf.

49. *See* WALMSLEY, *supra* note 47, at 5. Twenty-seven percent of prisoners were sentenced for violent offenses. GAVIN BERMAN & ALIYAH DAR, PRISON POPULATION STATISTICS 7 (2013), *available at* www.parliament.uk/briefing-papers/sn04334.pdf. More wide-ranging comparisons are found in this publication. Weekly population figures for the United Kingdom are updated at *Prison Population Figures: 2013*, MINISTRY JUST., http://www.justice.gov.uk/statistics/prisons-and-probation/prison-population-figures (last updated Jan. 10, 2014).

50. *See, e.g.*, MICHAEL TONRY, SENTENCING MATTERS 146 (1996).

51. *See* Mike C. Materni, *Criminal Punishment and the Pursuit of Justice*, 2 BRIT. J. AM. LEGAL STUD. 263, 294 (2013) (noting the United States has nearly double the recidivism rate of other countries such as Sweden and Norway).

> had higher recidivism rates than those released after committing violent, drug, or public-order offenses. Approximately 73 percent of the property offenders released in 1994 were arrested again within three years, compared to approximately 61 percent of the violent offenders, 62 percent of the public-order offenders, and 66 percent of the drug offenders.[52]

All states in the United States have habitual offender laws,[53] and many states and the federal jurisdiction have advisory or presumptive sentencing grid guidelines that use a criminal history score[54] and offense seriousness to calculate the appropriate penalty.[55] None of these policies and practices emanated from a clear theoretical foundation, but rather stemmed from "back-of-an-envelope calculations and collective intuitive judgements."[56]

A relatively well-known presumptive sentencing system is the grid system in Minnesota,[57] which utilizes two core variables in arriving at a sentence. The vertical axis of the grid lists the severity levels of offenses in descending order—there are eleven different levels.[58] The horizontal axis provides a—seven level—criminal history score that reflects the offender's criminal record.[59] The presumptive sentence appears in the

52. 538 U.S. 11, 26 (2003) (citing PATRICK A. LANGAN & DAVID J. LEVIN, BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, RECIDIVISM OF PRISONERS RELEASED IN 1994 1, 8 (2002)), *available at* http://www.bjs.gov/content/pub/pdf/rpr94.pdf.

53. Sarah French Russell, *Rethinking Recidivist Enhancements: The Role of Prior Drug Convictions in Federal Sentencing*, 43 U.C. DAVIS L. REV. 1135, 1149 (2010) (citing Michael G. Turner et al., *"Three Strikes and You're Out" Legislation: A National Assessment*, 59 FED. PROBATION 16, 17 (1995)).

54. The criminal history score is based mainly on the number, seriousness, and age of the prior conviction. *See, e.g.*, OFFICE OF GEN. COUNSEL, U.S. SENTENCING COMM'N, CRIMINAL HISTORY PRIMER 1, 5 (2013), *available at* http://www.ussc.gov/Legal/Primers/Primer_Criminal_History.pdf.

55. *See* Russell, *supra* note 53, at 1149.

56. Tonry, *supra* note 7, at 93.

57. The Sentencing Guidelines Grid is located at *Sentencing Guidelines Grid*, MINN. SENT'G GUIDELINES COMMISSION (Aug. 1, 2012), http://mn.gov/sentencing-guidelines/images/2012%2520Standard%2520Grid.pdf [hereinafter *Guidelines Grid*]. An explanation of the operation of the Guidelines Grid is located at *Minnesota Sentencing Guidelines and Commentary*, MINN. SENT'G GUIDELINES COMMISSION (Aug. 1, 2012), http://mn.gov/sentencing-guidelines/images/2012%2520Guidelines.pdf [hereinafter *Guidelines and Commentary*]. In the United States, over a dozen other states also utilize sentencing grids. *See* Richard S. Frase, *Sentencing Guidelines in Minnesota and Other American States: A Progress Report*, *in* THE POLITICS OF SENTENCING REFORM 169, 171 (Chris Clarkson & Rod Morgan eds., 1995).

58. *See Guidelines Grid*, *supra* note 57.

59. *See id.* at 57. This is determined according to a criminal history score, with each felony carrying a predetermined number of points, with felonies more than fifteen years old not being included. *See Guidelines and Commentary*, *supra* note 57, at 10–12.

cell of the grid at the intersection of the offense score and the offender score.[60] Where the sentence is one of imprisonment, a precise period is indicated, as is a range within which a court can sentence an offender without it being regarded as a departure.[61] The range allows for the operation of aggravating and mitigating circumstances other than those relating to an offender's prior criminal history.[62] Sentences may be imposed outside the range only when substantial and compelling circumstances exist.[63] Thus, prior criminal history ranks alongside the seriousness of the instant offense as the most important sentencing consideration. In Minnesota, prior convictions can mean a considerable difference in ultimate disposition.[64] For example, a first-time offender convicted of theft over $5000 or nonresidential burglary, a court may impose a noncustodial sentence.[65] However, when an offender with "a criminal history score" of six or more commits the same crimes, the presumptive sentences become twenty-three months and thirty months, respectively.[66]

The federal sentencing guidelines place even more weight on prior convictions. The guidelines are no longer mandatory in nature after the U.S. Supreme Court decision in *United States v. Booker*;[67] however, sentences within guideline ranges are still imposed in approximately sixty percent of cases.[68] In relation to most offenses, a poor criminal history can approximately double the presumptive sentence. For example, for an

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60. *See Guidelines Grid*, *supra* note 57.

61. *See id.* If the court departs from the range, the court must complete a departure report and submit it to the Sentencing Guidelines Commission with fifteen days of the sentence. *See Guidelines and Commentary*, *supra* note 57, at 3, 38–39.

62. *See* Andrew von Hirsch, *Proportionality and Parsimony in American Sentencing Guidelines: The Minnesota and Oregon Standards*, *in* THE POLITICS OF SENTENCING REFORM, *supra* note 57, at 149, 151.

63. *See Guidelines and Commentary*, *supra* note 57, at 38. For a more detailed explanation of the Minnesota sentencing grid system and a comparison to the Oregon grid system, see generally *id.*

64. By comparison to other jurisdictions, the Minnesota grid system is relatively soft on prior convictions, and the weight accorded to previous criminal history has reduced in recent years. *See id.* at 10–11 cmt. 2.B.01.

65. *See Guidelines Grid*, *supra* note 57. However, the presumptive penalty is imprisonment for one year and one day. *See id.*

66. *See id.*

67. 543 U.S. 220, 226–27, 245–46 (2005) (holding that aspects of the guidelines that were mandatory were contrary to the Sixth Amendment, which guarantees a trial by jury); *see also* Irizarry v. United States, 553 U.S. 708, 713 (2008) (noting that the *Booker* Court found the mandatory requirement of the federal sentencing guidelines unconstitutional); Gall v. United States, 552 U.S. 38, 46 (2007) (noting that the *Booker* Court rendered the federal sentencing guidelines advisory instead of mandatory); Rita v. United States, 551 U.S. 338, 354 (2007) (noting that the *Booker* Court found the mandatory requirement of the federal sentencing guidelines unconstitutional).

68. *See* Russell, *supra* note 53, at 1160.

offense level of fourteen, the presumptive penalty for a first-time offender is a term of imprisonment of fifteen to twenty-one months,[69] which increases to thirty-seven to forty-six months for an offender with thirteen or more criminal history points.[70] For an offense at level thirty-six, a first-time offender has a presumptive penalty of 188–235 months, which increases to 324–405 months for an offender with the highest criminal history score.[71] Thus, a bad criminal history can add between 136 months to 170 months—over fourteen years—to a jail term.

Some of the harshest types of mandatory sentencing laws are the three-strikes laws, which have been adopted in over twenty states.[72] The California three-strikes laws,[73] which were reformed in 2012,[74] are the most well-known.[75] Prior to the reforms, offenders convicted of any felony who had two or more relevant previous convictions were required to be sentenced to between twenty-five years and life imprisonment.[76] The importance attributed to the offender's prior convictions was exemplified by the fact that the current offense did not have to be for a serious and violent felony—any felony would do.[77] This meant that some offenders were sentenced to grossly disproportionate sentences. Defendants have been sentenced to twenty-five years to life where their last offense was for a

69. *See* U.S. SENTENCING COMM'N, GUIDELINES MANUAL 395 (2013), *available at* http:// www.ussc.gov/sites/default/files/pdf/guidelines-manual/2013/manual-pdf/2013_Guidelines_Manual_Full.pdf. The offense levels range from one—least serious—to forty-three—most serious. *See id.* Examples of level fourteen offenses may include: criminal sexual abuse of a ward, failure to register as a tier II sex offender, and bribery. *See id.* at 63, 67, 129.

70. *See id.* at 395. The criminal history score ranges from zero—the least offending record—to thirteen or more—the worst offending record. *See id.*

71. *See id.*

72. *See* James Austin et al., *The Impact of "Three Strikes and You're Out,"* 1 PUNISHMENT & SOC'Y 131, 132 (1999); Kelly McMurry, *"Three-Strikes" Laws Proving More Show Than Go*, TRIAL, Jan. 1997, at 12, 12; Tonry, *supra* note 7, at 93.

73. *See* CAL. PENAL CODE § 667 (West 2013).

74. *See* ELECTION DIV., CAL. SEC'Y OF STATE, OFFICIAL VOTER INFORMATION GUIDE FOR TUESDAY, NOVEMBER 6, 2012 CALIFORNIA GENERAL ELECTION 105–10 (2012) [hereinafter VOTER INFORMATION GUIDE], *available at* http://repository.uchastings.edu/cgi/viewcontent.cgi?article=2319&context=ca_ballot_props.

75. The U.S. Supreme Court has held that the three-strikes laws do not violate the Eighth Amendment of the United States Constitution—the amendment that prohibits cruel and unusual punishment. *See* Lockyer v. Andrade, 538 U.S. 63, 77 (2003); Ewing v. California, 538 U.S. 11, 30–31 (2003).

76. *See* VOTER INFORMATION GUIDE, *supra* note 74, at 106.

77. *See id.*

minor theft—which, prior to the three-strikes regime, would normally have resulted in a noncustodial sentence.[78] For example, Jerry Dewayne Williams, a twenty-seven-year-old Californian was ordered imprisoned for twenty-five years to life without parole for stealing a slice of pepperoni pizza from a group of four youths, based on his previous convictions.[79] Gary Ewing was sentenced to twenty-five years to life for shoplifting three golf clubs, each of which was worth $399.[80] Prior to that he had been convicted of four serious or violent felonies.[81]

The California three-strikes law was somewhat softened in 2012, such that a term of at least twenty-five years imprisonment would only be required where an offender's third offense was a serious or violent felony.[82] However, in the event an offender's third offense is not a serious or violent felony, the offender will still receive a significant premium—they must be sentenced to double the term they would have otherwise received for the instance offense.[83] Thus, despite the softening of the laws, they still provide severe penalties for serious and violent offender third-strikers.

C. Australia—Moderate Weight Given to Previous Convictions

Australia is also an unfriendly jurisdiction for recidivists, but it is not as harsh as the United States. In Australia, there are over 200 aggravating and mitigating considerations relevant to the sentencing calculus.[84] The importance of the offender's prior criminality is underlined by the fact that it is only a consideration that a sentencer must be informed of prior to imposing a sentence.[85]

As is the case in the United States, recidivism rates are high.[86] The most wide-ranging study of the trajectory of offenders in Australia was

78. *See* Phil Reeves, *"Life" for Pizza Theft Enrages Lawyers*, INDEPENDENT (Mar. 4, 1995), http://www.independent.co.uk/news/world/life-for-pizza-theft-enrages-lawyers-1609876.html.

79. *See id.*

80. *See Ewing*, 538 U.S. at 18–20.

81. *See id.* This sentence was appealed to the U.S. Supreme Court, which upheld the validity of the legislation. *See id.* at 30–31. For a discussion of the case, see Sara Sun Beale, *The Story of* Ewing v. California*: Three Strikes Laws and the Limits of the Eighth Amendment Proportionality Review*, *in* CRIMINAL LAW STORIES (Donna Coker & Robert Weisburg eds., 2013).

82. *See* CAL. PENAL CODE § 667(e)(2)(C) (West 2013).

83. *See id.* This is the manner in which offenders are generally dealt for second strikes. *See* CAL. PENAL CODE § 667(e)(1) (West 2013).

84. *See* SHAPLAND, *supra* note 23, at 55; GUILTY, YOUR WORSHIP: A STUDY OF VICTORIA'S MAGISTRATES' COURTS (1980).

85. *See R v Gamble* (1983) 72 FLR 352, 357 (Austl.).

86. *See* JESSICA ZHANG & ANDREW WEBSTER, AUSTL. BUREAU OF STATISTICS, AN ANALYSIS OF REPEAT IMPRISONMENT TRENDS IN AUSTRALIA USING PRISONER CENSUS

undertaken by the Australian Bureau of Statistics and released in August 2010 in a report titled *An Analysis of Repeat Imprisonment Trends in Australia Using Prisoner Census Data from 1994 to 2007*.[87] In total, the report monitored the trajectories of over 50,000 former prisoners and noted that most of the prison population is made up of people who had been in prison before.[88] Further, it emerged that prisoners with prior imprisonment records were twice as likely as first-time offenders to return to prison—approximately fifty percent compared to approximately twenty-five percent imprisonment rates, respectively, ten years after release.[89]

When it comes to sentencing recidivists, at common law, there is "no principle of sentencing that demands increasingly more severe sanctions be administered to persons who persist in their criminality."[90] However, recidivists[91] are treated more harshly for several reasons. First, the courts take the view that prior convictions disentitle them from leniency, which is normally accorded to a first-time offender.[92]

In *Veen v The Queen (No. 2)*, the High Court of Australia set out three other grounds for imposing harsher penalties on recidivists:

> The antecedent criminal history is relevant . . . to show whether the instant offence is an uncharacteristic aberration or whether the offender has manifested in his commission of the instant offence a continuing attitude of disobedience of the law. In the latter case, retribution, deterrence and protection of society may all indicate that a more severe penalty is warranted. It is legitimate to take account of the antecedent criminal history when it *illuminates the moral culpability* of the offender in the instant case, or *shows his dangerous propensity* or shows

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DATA FROM 1994 TO 2007, at 19 (2010), *available at* http://www.ausstats.abs.gov.au/ausstats/subscriber.nsf/0/26D48B9A4BE29D48CA25778C001F67D3/$File/1351055031_aug%202010.pdf; *supra* note 46 and accompanying text.

87. ZHANG & WEBSTER, *supra* note 86.

88. *See id.* at i–iii.

89. *See id.* at 19.

90. RICHARD FOX & ARIE FREIBERG, SENTENCING: STATE AND COMMONWEALTH OFFENDERS 269 (2d ed. 1999).

91. The discussion above relates to prior conviction in a strict sense, namely, matters that were dealt with before the commission of the instant offense and, to a lesser extent, criminal offenses for which the offender is sentenced after the commission of the instant offense. *See, e.g.*, *DPP (Tas) v Broadby* [2010] TASCCA 13; *R v Wilson* [2009] SASC 92 (Austl.); *R v MAK* (2006) 167 A Crim R 159 (Austl.); *R v Smith* (2000) 114 A Crim R 8 (Austl.).

92. *See, e.g.*, *Baumer v The Queen* (1988) 166 CLR 51, 57 (Austl.).

> a need to impose condign punishment to *deter the offender and other offenders* from committing further offences of a like kind.[93]

It has also been held that a prior criminal history is relevant by showing that the offender's prospects of rehabilitation are poor.[94]

However, irrespective of the reason that prior convictions are said to be relevant, at common law they cannot be used as a basis for imposing a sentence that is disproportionate to the gravity of the immediate offense.[95] Thus, prior convictions determine where, within the limits of the proportionality principle,[96] the sentence should be imposed.[97]

Accordingly, the progressive loss of mitigation theory is, effectively, the guiding principle regarding the relevance of prior convictions at common law in Australia.[98] Thus, prior convictions operate to increase

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93. (1988) 164 CLR 465, 477 (Austl.) (emphases added). The connection between prior convictions and moral culpability was also raised in *R v Mulholland* (1991) 102 FLR 465, 466 (Austl.). In *R v O'Brien* (1997) 2 VR 714 (Austl.), the court held that an adverse criminal record may serve as an indicator of the offender's culpability and the community's need for protection. *See also R v Scholes* (1998) 102 A Crim R 510, 521–22 (Austl.). In *R v Maxwell* (1998) 102 A Crim R 374, 379 (Austl.), the court held that a prior criminal history indicates a continuing attitude of disobedience that enhances the gravity of the offense.

94. If an offender has a criminal record, but there is a gap in the offending pattern, this can indicate potential for rehabilitation, and hence, be mitigatory. *See Ryan v The Queen* (2001) 206 CLR 267, 288 (Austl.). However, this is not invariably the case, especially when the crimes are serious. *See R v Johnson* [2004] NSWCCA 76 at [29] (Austl.). In *Saunders v The Queen* [2010] VSCA 93, (Unreported, Maxwell P and Buchanan JA, 15 Apr. 2010) ¶ 16 (Austl.), the court also noted that mitigation, which can stem from a deprived social background, is diminished as the list of prior convictions grows.

95. Prior convictions are not part of the proportionality calculus. *See Veen v The Queen (No. 2)* (1988) 164 CLR 465, 472 (Austl.) (citing *Veen v The Queen (No. 1)* (1979) 143 CLR 458, 467–68 (Austl.)).

96. Given the unclear nature of the proportionality principle, there is a tenable view that this limit is more abstract than real. *See* Bagaric, *supra* note 43, at 413, 440–41.

97. *See Veen v The Queen (No. 2)* (1988) 164 CLR 465, 477 (Austl.); *R v McNaughton* (2006) 66 NSWLR 566, 573–76 (Austl.); *see also Lang v The Queen* [2013] NSWCCA 29, (Unreported, McClellan CJ at CL and Rothman J, 19 Feb. 2013) ¶¶ 34–38 (Austl.) (summarizing the use made of prior convictions in the sentencing calculus).

98. This principle was endorsed by the Australian Law Reform Commission. *See* AUSTL. LAW REFORM COMM'N, SAME CRIME, SAME TIME: SENTENCING OF FEDERAL OFFENDERS ¶¶ 6.177–6.179 (2006), *available at* http://www.alrc.gov.au/sites/default/files/pdfs/publications/ALRC103.pdf. To this end, the courts have expressly stated prior convictions cannot be applied in a manner where they result in an offender being punished again for the same offenses. *See Ryan v The Queen* (2001) 206 CLR 267, 287–88 (Austl.) (citing *R v McInerney* (1986) 42 SASR 111, 113 (Austl.)) ("The 'cardinal rule' is said to be that, whilst 'good character' may operate in mitigation, 'bad character' cannot operate in aggravation because a person is not to be punished or punished again for crimes other than that for which sentencing is passed."); *see also Regina v Field* [2011] NSWCCA 13, (Unreported, McClellan CJ at CL, Hall J, and Garling J, 16 Feb. 2011) ¶¶ 29, 33–38 (noting that good character could mitigate an offender's sentence).

sanction severity by either diminishing the role of mitigating factors—namely, rehabilitation and good previous character—or by attracting the operation of aggravating factors, especially retribution, deterrence, and community protection.[99] However, the sum effect of these considerations cannot be so significant as to take the penalty beyond the limits of a proportionate sanction.[100]

Despite the position at common law, most jurisdictions in Australia now have statutory provisions that substantially increase the importance of prior convictions, especially where the prior conviction is for a similar offense to the current offense, which cuts across the principle of proportionality.[101]

The harshest provisions apply in relation to serious violent and sexual offenders who are regarded as being a danger to the community.[102] In several Australian jurisdictions, such offenders can be sentenced to indefinite terms of imprisonment.[103] Theoretically, the provisions can even apply to first-time offenders, but in reality that does not occur given that the prior criminal history of the offender is an important relevant consideration in assessing the level of risk presented by an offender.

There are also numerous provisions that impose less severe but nevertheless harsh penalties on recidivists. Although in Western Australia the *Sentencing Act 1995* states that prior convictions are not to be regarded as aggravating in relation to particular offenses, prior convictions can

99. *See supra* notes 97–98.

100. For an example of where considerable weight was given to an offender's criminal history, see *R v Hawdon* [2011] QCA 219, (Unreported, White JA, 2 Sept. 2011) ¶¶ 21–22 (Austl.).

101. *See infra* notes 103–07 and accompanying text.

102. *See infra* note 103 and accompanying text.

103. *See Dangerous Prisoners (Sexual Offenders) Act 2003* (Queensl.) s 13 (Austl.); *Sentencing Act 1997* (Tas.) s 19 (Austl.); *Sentencing Act 1995* (N. Terr.) ss 65–78 (Austl.); *Sentencing Act 1995* (W. Austl.) ss 98–101; *Penalties and Sentences Act 1992* (Queensl.) ss 162–79 (Austl.); *Sentencing Act 1991* (Vict.) ss 18A–18P (Austl.); *Criminal Law (Sentencing) Act 1988* (S. Austl.) ss 21–29; *see also Crimes (Serious Sex Offenders) Act 2006* (N.S.W.) ss 14–20 (Austl.) (offering the state of New South Wales the option to seek continuing detention orders against certain sex offenders). For an overview of the operation of these provisions, see N.S.W. SENTENCING COUNCIL, HIGH-RISK VIOLENT OFFENDERS: SENTENCING AND POST-CUSTODY MANAGEMENT OPTIONS 12–16 (2012), *available at* http://www.sentencingcouncil.lawlink.nsw.gov.au/agdbasev7wr/sentencing/documents/pdf/online%20final%20report%20hrvo.pdf.

considerably aggravate the penalty.[104] For example, recidivist burglars must be sentenced to a minimum of twelve months' imprisonment.[105]

In a similar vein, sentencing legislation in New South Wales (NSW) and South Australia states that prior convictions are aggravating as a general matter.[106] Habitual offender legislation in NSW allows for significantly harsher penalties to be imposed on certain repeat offenders.[107]

Several Australian jurisdictions also have "serious offender" provisions that allow for lengthy sentences to be imposed on recidivist serious offenders.[108] In Victoria, for example, protection of the community is the principal purpose of sentencing in relation to offenders who commit certain types of sexual, violent, drug, or arson offenses—serious offenses—*and* have one—or in the case of certain sexual offenses, two—previous convictions for similar offenses.[109] In order to achieve this purpose, the *Sentencing Act 1991* (Vict.) expressly provides that a sentence longer than one that is proportionate to the gravity of the instant offense may be imposed.[110] Offenders who commit serious property offenses[111] are liable to a maximum term of imprisonment of twice the length of the maximum term prescribed for the instant offense or twenty-five years—whichever is lower—for a third similar offense.[112] Serious offender provisions exist in other jurisdictions as well.[113]

The prior criminality provisions in South Australia are the most sweeping. Offenders who are convicted of certain offenses after having two, or in some cases three, prior convictions for offenses of the same

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104. *See Sentencing Act 1995* (W. Austl.) s 7(2)(b) (stating that prior offenses do not aggravate an instant offense).

105. *See Criminal Code Act Compilation Act 1913* (W. Austl.) s 401(4).

106. *See Crimes (Sentencing Procedure) Act 1999* (N.S.W.) s 21A(2)(d) (Austl.); *see also Criminal Law (Sentencing) Act 1988* (S. Austl.) s 10(1)(b) (requiring that a court sentencing a federal offender take into account the offender's antecedent crimes); *Crimes Act 1914* (Cth) s 16A(2)(m) (Austl.) (noting that the Commonwealth's courts must consider a federal offender's antecedents when sentencing the offender for the offense); *Weininger v The Queen* (2003) 212 CLR 629, 640 (Austl.) (noting that taking into account the antecedents of an offender during sentencing is a well-established practice).

107. *See Habitual Criminals Act 1957* (N.S.W.) s 4(1) (Austl.).

108. *See Sentencing Act 1995* (N. Terr.) ss 65–78 (Austl.); *Sentencing Act 1991* (Vict.) ss 6A–6D (Austl.).

109. *See Sentencing Act 1991* (Vict.) ss 6A–6D (Austl.).

110. *Id.* s 6D(b); *see also R v LD* [2009] VSCA 31, (Unreported, Maxwell P, Redlich JA, and Vickery AJA, 18 Dec. 2009) ¶¶ 21–22 (applying the *Sentencing Act (1991)* (Vict.)).

111. Serious property offenses are termed "continuing criminal enterprise offences." *See Sentencing Act (1991)* (Vict.) ss 6H–6I, sch 1A (Austl.).

112. *See Sentencing Act (1991)* (Vict.) s 6I (Austl.)

113. *See, e.g., Sentencing Act 1997* (Tas.) s 19 (Austl.); *Penalties and Sentences Act 1992* (Queensl.) s 9 (Austl.); *Criminal Law (Sentencing) Act 1988* (S. Austl.) ss 20A–20B.

class are liable to be sentenced to disproportionately severe terms.[114] Unlike the disproportionate sentencing provisions in the other states, the South Australian model is not necessarily targeted at offenders who commit particularly serious crimes.[115]

Thus, prior convictions are overall a weighty consideration in the Australian sentencing domain. This is best underlined by a Victorian study which showed that offenders with prior convictions are six times more likely than first-time offenders to be sentenced to imprisonment.[116]

D. United Kingdom—Moderate to Little Weight Given to Previous Convictions

Recidivism is also a major problem in the United Kingdom.[117] Empirical data supports the view that most offenders are recidivists.[118] A United Kingdom Ministry of Justice report on offenders sentenced in 2005 revealed that eighty-eight percent of those convicted of an indictable offense and seventy-six percent of those convicted of summary offenses had prior convictions.[119] A more recent report, published by the Ministry of Justice in 2009, showed that one-quarter of offenders had fifteen or more convictions.[120]

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114. *See Criminal Law (Sentencing) Act 1988* (S. Austl.) ss 20A, 20B, 20BA.

115. Qualifying offenses include home invasions and firearm crime. *See id.* s 20A(1).

116. SENTENCING ADVISORY COUNCIL, COMPARING SENTENCING OUTCOMES FOR KOORI AND NON-KOORI ADULT OFFENDERS IN THE MAGISTRATES' COURT OF VICTORIA 44 (2013), *available at* https://sentencingcouncil.vic.gov.au/sites/sentencingcouncil.vic.gov.au/files/comparing_sentencing_outcomes_for_koori_and_non-koori_adult_offenders_in_in_the_ magistrates_court_of_victoria.pdf.

117. *See, e.g.*, Alan Travis, *Reoffending Rates Top 70% in Some Prisons, Figures Reveal*, GUARDIAN (Nov. 4, 2010, 10:31 AM), http://www.theguardian.com/uk/2010/nov/04/jail-less-effective-community-service.

118. *See* ROBERTS, *supra* note 4, at 95 (citing MINISTRY OF JUSTICE, SENTENCING STATISTICS 2007, ENGLAND AND WALES (2008)) (noting that the "majority of persons sentenced in England and Wales in 2005 had previous convictions").

119. The findings are discussed in ROBERTS, *supra* note 4, at 95 (citing MINISTRY OF JUSTICE, *supra* note 118).

120. *See* MINISTRY OF JUSTICE, SENTENCING STATISTICS 2009: ENGLAND AND WALES 83 (2009), *available at* https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/218034/sentencing-stats2009.pdf. The report is discussed in Martin Wasik, *Dimensions of Criminal History: Reflections on Theory and Practice*, *in* PREVIOUS CONVICTIONS AT SENTENCING: THEORETICAL AND APPLIED PERSPECTIVES, *supra* note 8, at 161, 167.

Overall, the treatment of recidivists in the United Kingdom is slightly less punitive than in Australia, even though the common law positions in these jurisdictions are similar. In the United Kingdom, formally, offenders with a criminal history are not said to be punished any more severely because of their record; however, they lose good character as a source of mitigation, and hence, are effectively dealt with more harshly.[121] A limit to just how much more harshly they can be punished is set by the principle of proportionality, which fixes the upper ceiling for the offense.[122] In *R. v. Queen*, the Court of Appeal stated that:

> The proper way to look at the matter is to decide a sentence which is appropriate for the [instant] offence . . . . Then in deciding whether that sentence should be imposed or whether the court can extend properly some leniency to the prisoner, the court must have regard to those matters which tell in his favour, and equally to those matters which tell against him; *in particular his record of previous convictions*.[123]

However, as Andrew Ashworth points out, the failure by the courts to set precise ceilings or give an indication regarding the extent of deductions that should be made for a previous good record[124] means that, in practice, prior convictions have a far more important bearing on sentence: "the plasticity of 'ceilings' in English sentencing practice enables the courts to declare that progressive loss of mitigation is the principle, while handing down sentences on recidivists which veer towards the cumulative principle."[125]

Legislation in the United Kingdom entrenches the aggravating nature of previous convictions. The *Criminal Justice Act 2003* expressly provides that in considering the seriousness of the current offense committed by an offender with previous convictions:

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121. *See* ASHWORTH, *supra* note 9, at 203 (noting the United Kingdom's practice of progressive loss of mitigation does not work in practice).

122. *See* R v. Queen, (1981) 3 Cr. App. R.(S). 245, at 246 (Eng.) (indicating that the offense should put the sentence in a certain range).

123. *Id.* (emphasis added).

124. As an example, he cites the case of *R v. Bailey*, (1988) 10 Cr. App. R.(S). 231 (Eng.), where an offender with an extensive criminal history was sentenced to consecutive prison terms of two years for the theft of women's nightdresses from a shop and eighteen months for the burglary of four packets of frozen fish fillets from a hospital freezer. ASHWORTH, *supra* note 9, at 203–04. The Court of Appeal reduced these sentences to fifteen months and three months, respectively—but still consecutively—after commenting that prior criminal history cannot be permitted to impose a disproportionate sentence. *See id.* As Andrew Ashworth notes, however, fifteen months for "a rather feeble theft of nightdresses" hardly seems proportionate. *See id.* at 204.

125. ASHWORTH, *supra* note 9, at 159.

> [T]he court must treat each previous conviction as an aggravating factor if . . . the court considers that it can reasonably be so treated having regard, in particular, to—(a) the nature of the offence to which the conviction relates and its relevance to the current offence, and (b) the time that has elapsed since the conviction.[126]

The *Criminal Justice Act 2003* also contains dangerous offender provisions that empower courts to impose indefinite sentences on offenders who present a significant risk of causing death or serious injury to people.[127] In making this assessment, the prior convictions of the offender are an important consideration.[128]

In addition, the United Kingdom has its own versions of three-strike laws, but they are less severe than those in the United States; the United Kingdom's three-strike laws apply to a much more limited range of offenses and the penalty enhancements are less harsh and not always imposed.[129] For example, the *Crime (Sentences) Act 1997* introduced presumptive minimum terms of three and seven years' imprisonment for third convictions of domestic burglary and class A drug trafficking, respectively.[130] Prior to this, mandatory sentences had been absent from the United Kingdom since 1891.[131] However, Martin Wasik notes that these provisions do not operate in a mandatory manner.[132] In 2007, only forty-eight percent of the 581 offenders who fell within this section received at least the minimum sentence, with fifteen percent avoiding a custodial sentence of any length as

126. Criminal Justice Act, 2003, c. 44, § 143(2) (U.K.). For discussions regarding this section of the *Criminal Justice Act 2003*, see Estella Baker & Andrew Ashworth, *The Role of Previous Convictions in England and Wales*, *in* PREVIOUS CONVICTIONS AT SENTENCING: THEORETICAL AND APPLIED PERSPECTIVES, *supra* note 8, at 185, 186–88, 192–96; Wasik, *supra* note 120, at 161–62.

127. *See* Criminal Justice Act, 2003, c. 44, §§ 224–229 (U.K.).

128. *See id.* § 229.

129. *Compare id.* § 151 (allowing a court to increase the sanction for an offense where a fine would normally be warranted for to a community sentence), *with* CAL. PENAL CODE § 667 (West 2013) (imposing a minimum sentence of twenty-five years or three times the term normally provided as punishment, whichever is greatest, when convicted of three or more serious or violent felonies).

130. *See* Crime (Sentences) Act, 1997, c. 43, §§ 1, 3–4 (U.K.); *see also* Powers of Criminal Courts (Sentencing) Act, 2000, c. 6, §§ 110–11 (U.K.) (imposing same term minimums).

131. D. A. Thomas, *The Crime (Sentences) Act 1997*, 1998 CRIM. L. REV. 83, 83. For an overview of this act, see generally Ralph Henham, *Making Sense of the Crime (Sentences) Act 1997*, 61 MOD. L. REV. 223 (1998) (discussing the legislation's inception and impact).

132. *See* Wasik, *supra* note 120, at 175–76.

a result of a wide reading of the term "particular circumstances" in the provisions.[133] More generally, it has been noted that offenders with extensive prior convictions are incarcerated at around double the rate of first-timers. In all courts in the United Kingdom in 2007, forty percent of offenders with fifteen or more previous convictions received a custodial sentence, compared to twenty-eight percent of first-time offenders.[134]

As in Australia, dangerous offender provisions also exist in the United Kingdom.[135] These provisions enable and sometimes require the court to impose enhanced terms—in some cases of up to life imprisonment—for serious sexual and violent offenders who are assessed as being dangerous. In assessing dangerousness, prior convictions for serious offenses are a relevant consideration, but are not necessarily determinative.[136]

E. Sweden—Little Weight Give to Prior Convictions

The Swedish criminal justice system is interesting because the country has managed to achieve the twin goals of low crime rates and low incarceration levels.[137] In Sweden, little weight is accorded to prior convictions in sentencing.[138] The extent to which criminal justice policies and programs—and, in particular, the approach to prior convictions—have contributed to this is unclear.[139]

The main rationales underpinning Swedish sentencing laws are proportionality and equivalence.[140] The seriousness of an offense—its "penal value"—is determined by reference to "the harm, offence or risk which the conduct involved, what the accused realized or should have

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133. *See id.* (referencing Powers of Criminal Courts (Sentencing) Act, 2000, c. 6, §§ 110-11 (U.K.)).

134. *See* MINISTRY OF JUSTICE, *supra* note 120, at 138. For a discussion of these statistics, see Wasik, *supra* note 120, at 181.

135. *See* Criminal Justice Act, 2003, c. 44, §§ 224–229 (U.K.). For a discussion of these provisions, see Wasik, *supra* note 120, at 178–80. Recent changes to these provisions have been made by the Legal Aid, Sentencing and Punishment of Offenders Act, 2012, c. 10, §§ 122–128 (U.K.).

136. *See* Criminal Justice Act, 2003, c. 44, § 229 (U.K.).

137. *See* JOHN PRATT & ANNA ERIKSSON, CONTRASTS IN PUNISHMENT: AN EXPLANATION OF ANGLOPHONE EXCESS AND NORDIC EXCEPTIONALISM 25–26 (2013); Tapio Lappi-Seppälä & Michael Tonry, *Crime, Criminal Justice, and Criminology in the Nordic Countries*, *in* 40 CRIME AND JUSTICE IN SCANDINAVIA 1, 1–2 (Michael Tonry & Tapio Lappi-Seppälä eds., 2011).

138. *See* Petter Asp, *Previous Convictions and Proportionate Punishment Under Swedish Law*, *in* PREVIOUS CONVICTIONS AT SENTENCING: THEORETICAL AND APPLIED PERSPECTIVES, *supra* note 5, at 209 n.1.

139. *See* PRATT & ERIKSSON, *supra* note 137, at 26. Nordic countries also have comparatively high levels of welfare, ensuring that even the financially worst-off live relatively well. *See id.* at 66.

140. Asp, *supra* note 138, at 209.

realized about it, and the intentions and motives of the accused."[141] This penal value is mapped onto a scale ranging from a small fine to life imprisonment.[142]

There is a presumption against imprisonment which can be rebutted in a number of circumstances, one of which is that the offender has previous convictions, especially if they occurred within the last four years, are similar to the current offense, both in terms of offense type and gravity, and there is more than one previous offense.[143] Thus, prior convictions can influence the choice of sanction, and, further, can also affect the length of a prison sentence.[144] However, when this does occur, the increase in length is "usually not excessive."[145] Andrew von Hirsch believes that the Swedish system effectively adopts the progressive loss of mitigation theory regarding recidivists.[146] To the extent that this is true, it is clear that the starting point for sentences, even when no discount is accorded, is moderate by comparison to countries such as the United States.[147]

F. Overview of Current Legal Relevance of Prior Convictions

Offenders with prior convictions are dealt with more severely than first-timers in all cases in the above jurisdictions.[148] Where the jurisdictions vary markedly is the degree of harshness with which repeat offenders are dealt. In Sweden, and pursuant to the common law in the United Kingdom and Australia, the extent to which a penalty is enhanced for prior offending is kept in check—at least theoretically[149]—by the principle of proportionality.[150] Legislation in Australia and the United Kingdom

141. ASHWORTH, *supra* note 9, at 105 (quoting BROTTSBALKEN [BrB] [Criminal Code] 29:1 (Swed.)).

142. *See* SWEDISH PRISON & PROB. SYS., THE SWEDISH SYSTEM OF SANCTIONS (Adam Cowburn trans., n.d.), *available at* https://www.kriminalvarden.se/upload/Informationsmaterial/Sanctionssyst.pdf.

143. *See* Asp, *supra* note 138, at 212–13.

144. *See id.* at 209.

145. *See id.* at 215.

146. *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 5, at 1, 14.

147. *See id.*

148. *See supra* Parts II.B–II.E.

149. For a discussion of the conceptually challenged nature of the proportionality thesis as it is currently applied, see Bagaric, *supra* note 43.

150. *See Veen v The Queen (No. 2)* (1988) 164 CLR 465, 472 (Austl.); R v. The Queen, (1981) 3 Cr. App. R.(S). 245, at 246 (U.K.); Asp, *supra* note 138, at 209.

provides for a considerably higher sentencing premium for certain forms of offenders, notably, those convicted of serious offenses.[151] The offenses to which a legislative recidivist premium attaches in Australia are broader than in the United Kingdom.[152]

The United States deals with recidivism more harshly than other jurisdictions. This is because the breadth of offenses in relation to which legislative enhancements apply is very wide; the enhancements are large in objective terms and there is often little judicial discretion to not impose the enhancement.[153]

The difference in the way recidivists are treated compared to ordinary offenders is so pronounced regarding certain offenders in Australia and the United Kingdom and for many offenders in the United States that we now effectively have a bifurcated, or twin-track, sentencing system: one track provides harsh penalties for offenders with prior convictions, and the other treats first-timers leniently.[154] The next Part examines whether there is a sound doctrinal justification for this approach.

III. THE DOCTRINAL BASIS FOR PUNISHING RECIDIVISTS MORE HARSHLY

A. Two Main Theories of Punishment

Punishing recidivists more than first-time offenders is, as noted above, widespread and instinctively appealing.[155] This provides an explanation for the practice, but not a justification. This subpart examines whether there is a rational doctrinal basis for the recidivist premium. This subpart is, effectively, in two parts because there are two main theories of punishment.[156] Utilitarianism is the view that punishment is inherently bad due to the pain it causes the wrongdoer but is ultimately justified

151. *See supra* notes 108–13 and accompanying text for a discussion of Australia's serious offender provisions. For the United Kingdom's serious offender provisions, see Criminal Justice Act, (2003) §§ 224–229 (U.K.), *available at* http://www.legislation.gov.uk/ukpga/2003/44/pdfs/ukpga_20030044_en.pdf.

152. *See supra* notes 114–15 and accompanying text for a discussion of Australia's sweeping recidivist premium.

153. *See supra* Part II.B.

154. The bifurcation phrase is normally used in relation to offenders with prior convictions for serious offenses. *See* A.E. Bottoms, *Reflections of the Renaissance of Dangerousness*, 16 HOWARD J. PENOLOGY & CRIME PREVENTION 70, 87–90 (1997). But, as we have seen often, even prior convictions for not so serious offenses are sufficient to invoke vastly different treatment. *See supra* Parts II.B–II.F.

155. *See supra* notes 6–7 and accompanying text.

156. *See* JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW 14–19 (6th ed. 2012).

because it is outweighed by the good consequences stemming from it.[157] The good consequences are traditionally thought to come in the form of incapacitation—imprisoning offenders and thereby preventing them from further offending, deterrence—discouraging further offending—and rehabilitation—inducing positive attitudinal reform.[158] The utilitarian theory of punishment has fallen out of favor for two main reasons. The first is the perceived inability of the sentencing process to achieve the utilitarian penal objectives of incapacitation, deterrence, and rehabilitation.[159] The second is the view that utilitarianism supposedly commits us to abhorrent practices, such as punishing the innocent.[160]

The competing theory, and one which enjoys the most contemporary support, is retributivism. Retributive theories of punishment are not clearly defined, and it is difficult to isolate a common thread running through all theories carrying this label.[161] All retributive theories assert that offenders deserve to suffer, and that the institution of punishment should inflict the suffering they deserve;[162] however, they provide different accounts of why criminals deserve to suffer.[163] Despite this, there are, broadly, three similarities shared by retributive theories.[164]

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157. *See id.* at 14.

158. *See* Mirko Bagaric & Kumar Amarasekara, *The Errors of Retributivism*, 24 MELB. U. L. REV. 124, 134–37 (2000).

159. *See id.* As noted below, this has shown to be only partially correct. There is no evidence showing that incarcerating high numbers of offenders results in less crime, and there are no punitive measures that have been shown to reduce recidivism. *See* BAGARIC, *supra* note 21, at 132–34, 142. However, punishment does result in some good; it deters many people from committing crime. *See id.* at 151. Absent the threat of criminal sanctions, it is likely that there would be an enormous increase in the crime rate. *See id.* The efficacy of punishment to attain absolute general deterrence arguably justifies punishment. *See id.* It follows that the reason why we should punish offenders is because the good consequences in the form of deterring others from engaging in crime outweigh the pain inflicted through the punishment of the offender. *See id.* at 149–51. The three utilitarian pillars of rehabilitation, incapacitation, and deterrence collapse into one: general deterrence. *See id.* at 127–28.

160. *See* BAGARIC, *supra* note 21, at 92.

161. *See id.* at 38. *See generally* TED HONDERICH, PUNISHMENT: THE SUPPOSED JUSTIFICATIONS REVISITED (Pluto Press 4th rev. ed. 2006) (1969) (discussing the different retributivist theories).

162. DRESSLER, *supra* note 156, at 16 (quoting Russell L. Christopher, *Deterring Retributivism: The Injustice of "Just" Punishment*, 96 NW. U. L. REV. 843, 860 (2002)).

163. *See* Antony Duff & Andrew von Hirsch, *Responsibility, Retribution and the "Voluntary": A Response to Williams*, 1997 CAMBRIDGE L.J. 103, 107 (1997).

164. *See* Jami L. Anderson, *Reciprocity as a Justification for Retributivism*, 16 CRIM. JUST. ETHICS 13, 13–14 (1997).

The first is that only those who are blameworthy deserve punishment, and that blameworthiness is the principal justification for punishment.[165] Thus, punishment is only justified, broadly speaking, in cases of deliberate wrongdoing.[166] The second is that punishing criminals is just in itself—it cannot be inflicted as a means of pursuing some other aim.[167] Accordingly, the justification for punishment does not turn on the likely achievement of desirable outcomes; it is justified even when "we are practically certain that" attempts to attain consequentialist goals such as deterrence and rehabilitation "will fail."[168] This begs the question, is it conventionally understood that retributive theories are backward looking, merely focusing on past events in order to determine whether punishment is justified, in contrast to utilitarianism, which is concerned only with the likely future consequences of imposing punishment? The third unifying aspect of most retributive theories is the claim that punishment must be equivalent to the level of wrongdoing.[169] Thus, the proportionality principle is a built-in definitional aspect of many retributive theories.

While retributivism is the orthodox theory of punishment, it has been argued that it is doctrinally flawed.[170] There remains considerable academic controversy in this area.[171] However, resolution of the issue is not necessary for the purposes of this Article, given that the orthodox view is that the recidivist premium has a prominent role within both theories.[172]

The following subpart considers the rationale for a recidivist premium first in the context of a retributive theory. This Article then examines the rationale from the perspective of the utilitarian theory of punishment. It

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165. *See id.* at 13.

166. *See id.* at 13–14.

167. *See id.* at 14. Some retributive theories assert that punishment has an instrumental component. *See* Bagaric & Amarasekara, *supra* note 158, at 128–29. For example, von Hirsch claims that deterrence is one goal of punishment, but all retributive theories at least assert that any incidental aim should be a subsidiary goal and that punishment is justifiable even if the incidental aim cannot be achieved.

168. R.A. DUFF, TRIALS AND PUNISHMENTS 7 (1986).

169. *See* Anderson, *supra* note 164, at 14.

170. A common criticism of retributive theories is that they cannot justify the need for punitive measures without resort to consequential considerations. *See* S.I. BENN & R.S. PETERS, SOCIAL PRINCIPLES AND THE DEMOCRATIC STATE 175–76 (1959).

171. *See* DRESSLER, *supra* note 156, at 22–23.

172. It has also been argued that severe penalties are justified on the basis that they are consistent with community expectations. *See* Paul G. Cassell, *Too Severe?: A Defense of the Federal Sentencing Guidelines (and a Critique of Federal Mandatory Minimums)*, 56 STAN. L. REV. 1017, 1023 (2004). However, public opinion is generally regarded as a poor guide to sentencing policy. *See* Julian V. Roberts, *The Future of State Punishment: The Role of Public Opinion in Sentencing*, *in* RETRIBUTIVISM HAS A PAST: HAS IT A FUTURE? 101, 101 (Michael Tonry ed., 2011).

turns out that only utilitarianism offers a tenable basis for punishing recidivists more harshly.

B. Retributive Rationale for Recidivist Premium

1. Progressive Loss of Mitigation Theory

a. The Theory Is Projected in Terms of a Discount but in Reality Amounts to a Recidivist Loading

The progressive loss of mitigation theory is the best known, and probably most widely accepted, retributive rationale for the recidivist premium.[173] The theory contends that we should punish recidivists more harshly, but denies that it is *because of* their prior convictions; rather, it is because they are disentitled from leniency that is accorded to first-time offenders or offenders with minor records.[174] The theory extends limited patience to wrongdoers. After the offender accumulates several convictions, the mitigation is used up and he or she is sentenced to the penalty that reflects the ceiling for the offense.[175] Further transgressions are met with the same penalty.[176] The theory contends that it would be wrong to continue to impose increasingly severe penalties for each new offense because it would give too much weight to persistence and violate the principle of proportionality.[177] Although the theory does not purport to justify *significantly* sterner sanctions for repeat offenders—such as those found in three-strikes laws—it nevertheless allows for more than a marginal degree of disparity between sentences for first offenders and recidivists.

Before evaluating the substantive merit of this argument, it is necessary to examine more closely its logical form. The focus of the theory is on giving first-time offenders a discount, but in reality this is identical to inflicting

173. *See* Ehud Guttel & Doron Teichman, *Criminal Sanctions in the Defense of the Innocent*, 110 MICH. L. REV. 597, 634 (2012).

174. *See supra* notes 12–13 and accompanying text.

175. In terms of exactly how many prior convictions it takes to exhaust the mitigation, Andrew von Hirsch frankly admits he has no answer: "How many repetitions may occur before the discount is lost entirely? I have no ready answer, as this seems a matter of judgment even in everyday acts of censure." ANDREW VON HIRSCH, PAST OR FUTURE CRIMES: DESERVEDNESS AND DANGEROUSNESS IN THE SENTENCING OF CRIMINALS 87 (1985).

176. *See id.*

177. *See* Andrew J. Ashworth, *Sentencing in England: The Struggle for Supremacy*, 7 FED. SENT'G REP. 281, 282 (1995).

harsher punishment on recidivists. From the normative perspective, treating people less harshly is less likely to attract criticism than inflicting pain—in this case in the form of state sanctioned punishment—or additional pain on them. However, in evaluating the progressive loss of mitigation theory, it is important to focus on its effect, not the manner in which it is presented.

Logically, "the corollary of allowing credit for good character should be the principle of punishing bad character."[178] The objective point of reference in relation to the progressive loss of mitigation theory is ascertained by asking whether offenders with criminal records who commit identical offenses to offenders without criminal records receive harsher sentences. The answer is clearly yes. Thus, the theory does, in fact, seek to justify harsher sentences for recidivists. What is important is not the formal way in which the practice of punishing recidivists is promoted, but the *reasons* that are advanced to justify the practice. With this behind us we can now deal with the substantive issue.

b. Justifications: Lapse and Failure To Respond Appropriately To Censure

Andrew von Hirsch, the main proponent of the progressive loss of mitigation theory, claims that going soft on first offenders and offenders with a small number of previous convictions is justified by the notion of *lapse*, which is supposedly part of our everyday moral judgments.[179] He believes that this has its genesis in the fallibility of human nature and the view that a temporary breakdown of human control is the kind of frailty for which some understanding should be shown.[180] Martin Wasik and von Hirsch note that in sentencing, the "lapse is an infringement of criminal law, rather than a more commonplace moral failure, but the logic of the first offender discount remains the same—that of dealing with a lapse more tolerantly."[181]

Thus, the concept of lapse has the virtue of forgiveness at its core, and von Hirsch claims that this moral norm ought to be reflected in our

178. Ralph Henham, *Cumulative Sentencing and Penal Policy*, 59 J. CRIM. L. 420, 426 (1995).

179. Andrew von Hirsch sets out his theory in numerous publications. *See, e.g.*, VON HIRSCH, *supra* note 175, at 83–84; von Hirsch, *supra* note 146, at 2; Andrew von Hirsch, *Desert and Previous Convictions*, *in* PRINCIPLED SENTENCING: READINGS ON THEORY AND POLICY 191, 194 (Andrew von Hirsch & Andrew Ashworth eds., 2d ed. 1998) [hereinafter von Hirsch, *Desert and Previous Convictions*]; Andrew von Hirsch, Commentary, *Criminal Record Rides Again*, 10 CRIM. JUST. ETHICS 2, 55 (1991).

180. *See* VON HIRSCH, *supra* note 175, at 83–84.

181. Martin Wasik & Andrew von Hirsch, *Section 29 Revised: Previous Convictions in Sentencing*, 1994 CRIM. L. REV. 409, 410.

sentencing system. Further, he believes that the practice of partial and temporary tolerance for human frailty is particularly appropriate in the area of criminal punishment due to the onerous nature of criminal sanctions and the capacity for the law to formalize such judgments.[182]

Von Hirsch recently elaborated on certain aspects of his theory. He notes further that the censure inherent in a conviction requires the offender to "try to comply better [with the law] in [the] future."[183] In pragmatic terms, he notes that Anthony Bottoms identified two ways in which an offender could try to refrain from reoffending.[184] The first is to avoid situations that increase the chance of offending—this strategy is referred to as diachronic; the other is to exhibit attitudinal improvement by displaying a determination not to reoffend—this is called synchronic.[185] According to von Hirsch, it does not necessarily matter which of these methods, or combination of them, the offender elects, the important thing is that the offender makes an effort of will to desist from further offending.[186]

Von Hirsch accepts that the failure to make an effort cannot of itself provide a basis for a wrong that is penalizable by the law, but the failure to make the *effort of will*, as he terms it, justify a sterner punishment for reoffending because, as a responsible moral agent, the offender has not altered his or her behavior despite the condemnation reflected by the earlier sentence.[187] The discount conferred initially is supposedly grounded in the assumed recognition of the offender's capacity to desist from further offending.[188] If this turns out to be incorrect, then the discount is not appropriate.[189] Von Hirsch contends that the offender "should receive the full discount initially, in the expectation that he will respond by desisting. If he does not, he (gradually) loses the discount, depending [on] the frequency of his subsequent reoffending."[190] This supposedly complements the lapse theory. Von Hirsch emphasizes that the theory is

182. *See* VON HIRSCH, *supra* note 175, at 85.
183. Von Hirsch, *supra* note 146, at 8.
184. *See id.*
185. *See id.*
186. *See id.* at 8–9.
187. *See id.* at 9.
188. *See id.* at 10.
189. *See id.*
190. *Id.*

not about personal culpability; the rationale relates to "affording a limited tolerance for human fallibility."[191]

Thus, according to von Hirsch, the progressive loss of mitigation theory is justified as "a limited tolerance accorded to human tendency to err, but to also the human capacity to make moral efforts at subsequent self-restraint."[192]

However, this argument fails for several reasons. First, it misrepresents the nature of tolerance and forgiveness for misdeeds. Second, indeterminate forgiveness has no role in a system of law that aims to protect important human interests. Third, the theory misconceives the purpose and effect of a criminal sanction—there is no validity to the claim that it assumes offenders will put in place stronger attempts in the future to be law-abiding citizens.

c. Forgiveness Is Not a Legal Imperative

Von Hirsch is correct that we often accord some level of forgiveness to those who infrequently transgress. However, this is a discretionary practice, not a mandatory moral practice. People can seek forgiveness, but they are never entitled to it; forgiveness cannot be commanded. This is the reason that few would condemn the wife who leaves her husband after he has cheated on her "only" once, and why those who break friendships following a single instance of betrayal are not criticized. The practice of forgiveness is not as pervasive or obligatory as von Hirsch suggests. In order for a moral norm to form the foundation of a legal imperative—such as, all first offenders should get a discount—it should first have almost universal acceptance in the moral domain. "Virtues" that can normatively be so readily disregarded are incapable of grounding discretionary legal indulgences. This is evident when the supposed ideal of tolerance for human frailty is compared to ideals such as respecting the property, freedom, and physical integrity of others.[193]

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191. *Id.* at 11 (footnote omitted).

192. *Id.* at 15.

193. An insistence that tolerance for human frailty is indeed a settled moral prescription would run head-on into the objection that this premise entails that we are born with a certain amount of credit points that we progressively lose. If this were so, there would be no logical reason as to why tolerance should kick in only at the sentencing stage. Surely, it would provide each of us with immunity from prosecution and guilt in the first place.

d. No Tolerance for Serious Offenses

Even if one takes the view that, socially, forgiveness toward people who have not previously breached moral norms is widespread, it is generally only the case in relation to breaches of relatively minor prescriptions.[194] The less serious the violation, the more likely it is that forgiveness will be forthcoming. People are rarely ostracized for their first white lie or breaking their first minor promise, but it can be quite a task patching up matters after being caught cheating with a friend's partner. The key distinction between criminal law prescriptions and moral prescriptions is precisely that the former relate to more important and precious human interests, such as the right to life, liberty, and property. In the social sphere, where a friend intrudes on those rights, he or she is unlikely to be showered with personal understanding. Why, then, should the law be *more* lenient? The reason that the state is justified in imposing the severe deprivations that follow from breaches of the criminal law is because the criminal law is concerned with guarding important human concerns.[195] Once this threshold has been crossed, there is no room for subjective judgments between the types of breaches that are bad and those that are *really* bad. They are all really bad; if they are not, they should not be criminal offenses.[196] The opportunity of making such fine distinctions is lost in the decision to make certain conduct a crime.[197]

In *R v. Turner*, Lord Justice Lawton stated that, "the fact that a man has not much of a criminal record, if any at all, is not a powerful factor to be taken into consideration when the court is dealing with cases of this

194. *See generally* Roberts, *supra* note 7 (discussing leniency for first-time offenders).

195. *See* DRESSLER, *supra* note 156, at 1, 112–13.

196. This follows from the claim that the purpose of criminal law is to prevent people from doing acts that cause, or seriously threaten, harm to others. There is no doubt that there is a distinction between offenses that violate fundamental human concerns and those that impinge less significantly on other human interests, but most conduct that is proscribed by criminal law involves a minimum threshold of invasiveness upon the interests of others. Thus, criminal law in most western jurisdictions is becoming less concerned with regulating the self-regarding conduct of individuals or enforcing public standards of decency. In most jurisdictions there are still obvious exceptions to this, but, in this Author's view, such conduct should not be prohibited by criminal law.

197. *See* JOHN KLEINIG, PUNISHMENT AND DESERT 91–92 (1973) (arguing that punishing—to the full extent of one's desert—is not inconsistent with forgiveness: "For to forgive is to refuse to nurse resentment, to perpetuate the anger, to allow the matter to constitute a barrier in or to relationships, to take pleasure in the punishment. This is why it is quite appropriate for a person to ask, after he has been punished, 'Will you forgive me?'").

gravity."[198] This point is also endorsed by Wasik and von Hirsch: "Where the gravity of the offence is great enough, even a first offence would seem to fall outside the scope of ordinary human fallibility . . . ."[199] Although these comments recognize that there should be no allowance for human frailty for serious missteps, they draw the line too far—all criminal offenses are on the wrong side of the tolerance threshold. Of course, there are both less and more serious criminal offenses, but these distinctions are irrelevant to the issue of where tolerance ceases. All criminal offenses have in common the fact that they are thought to be sufficiently serious to violate or threaten to infringe upon an important personal or community interest and, hence, are more serious than the type of behavior that commonly precludes forgiveness in other contexts, even for first offenders.

e. Crimes Under Temptation or Pressure, and Double Dipping Tolerance

In elaborating on the progressive loss of mitigation theory, von Hirsch argues that "tolerance is granted on the grounds that some sympathy is due human beings for their fallibility and their *exposure to pressures and temptations*."[200] Thus, he claims that offenders who commit crimes under extreme or unusual circumstances—where people steal due to hunger or because they find a pile of money—are less culpable. However, this cannot be used as an argument to support tolerance in sentencing *only* toward offenders with a small number of convictions. A person who steals food out of hunger is worthy of mitigation, no matter how many times he or she does it.[201] And, given that there is no evidence to suggest that first-timers are more likely to commit crimes under temptation or pressure than recidivists, favorable treatment of first-timers cannot be justified on

198. R v. Turner, (1975) 61 Crim. App. 67 at 91 (Lord Lawton L.J.) (Eng.) (armed bank robberies); *see also* Regina v. Billam, (1986) 1 W.L.R. 349 at 352 (Eng.) (stating that prior good behavior only has minor relevance in a sentencing decision for a person convicted of rape).

199. Wasik & von Hirsch, *supra* note 181, at 415–16. Ralph Henham argues that an approach that regards the absence of mitigating factors as an aggravating factor that disappears completely when serious crimes are concerned is logically inconsistent. *See* Henham, *supra* note 178, at 426.

200. VON HIRSCH, *supra* note 175, at 85 (emphasis added); *see also* von Hirsch, *Desert and Previous Convictions*, *supra* note 179, at 193 (discussing further the idea of tolerance for human frailty). *But see* Ryberg, *supra* note 12, at 47 (noting correctly that not all crimes are necessarily committed under temptation).

201. To this end, the notion of lapse is inherently obscure.

this basis because it is not a circumstance that is peculiarly applicable to all members of this class.[202]

Moreover, where it so happens that first-timer offenders are motivated by pressure or temptation to commit crime, there is no need for a first offense discount to mitigate their sentences. Human weakness is already catered to by the law of criminal defenses, such as duress, provocation, and necessity, and sentencing law and practice.[203] To extend additional mercy to first-timer offenders beyond these laws and practice unjustifiably allows the offenders to double—or triple—dip on account of their frailty.

f. Capacity for People To Respond To Censure Does Not Impose an Obligation Justifying Punishment

The second limb to the progressive loss of mitigation theory is that we should give first-time offenders a discount because criminal punishment should recognize the capacity of people to respond to censure—the blame conveyed by criminal guilt and criminal sanctions—and change their behavior in response.[204] A repeat offender, in this view, loses the discount because he "has chosen to disregard the disapproval visited on him through his punishment, and thus seems not to have made the requisite additional effort at self-restraint."[205]

However, even if we accept that the principal justification for punishment is censure, and that punishment addresses offenders as moral agents thereby giving them the *opportunity* to respond by acknowledging their wrongdoing and showing greater self-restraint in the future, it does not follow that the failure to grasp this opportunity provides a basis for treating recidivists more severely. In order for us to be justified in imposing a hardship on

202. Von Hirsch touches on this issue by stating that "arguably, there might" be a case for increasing the number of lapses in situations of reduced culpability. *See* von Hirsch, *Desert and Previous Convictions*, *supra* note 179, at 196–97. He uses the examples of repeat offenders who have limited intelligence and recidivists who are socially deprived, but indicates that greater tolerance in the latter case is more questionable. *See id.*

203. Offenses that are committed impulsively, suddenly, or opportunistically are treated less seriously than those that are planned and premeditated. *See* ASHWORTH, *supra* note 9, at 169–70; FOX & FREIBERG, *supra* note 90, at 304 (quoting *Neal v The Queen* (1982) 149 CLR 305, 324–25 (Austl.)). Offenses committed under exceptional stress or emotional pressure are also regarded as being less serious. *See* ASHWORTH, *supra* note 9, at 170.

204. *See* VON HIRSCH, *supra* note 175, at 84.

205. Von Hirsch, *Desert and Previous Convictions*, *supra* note 175, at 195.

others—in this case in the form of additional punishment—a necessary condition is that they have violated some duty or obligation—be it legal or moral. A mere failure to avail oneself of an opportunity may inspire others to pity or even mock us for failing to seize our chance, but it cannot justify their harming us.

It could be countered that punishment *aims* to elicit moral reform and, hence, offenders are *expected* and *required* to make stronger efforts at self-restraint.[206] But this argument is not open to von Hirsch because reliance on such an overtly consequentialist objective as rehabilitation would threaten to destabilize his retributive account of punishment.

Von Hirsch contends that the principal justification of punishment is censure, that is, to convey blame or reprobation to those who have committed a wrongful act.[207] Von Hirsch believes that censuring holds offenders responsible and accountable for their actions and that by giving them an opportunity to respond to their misdeeds through acknowledging their wrongdoing in some form, it recognizes their moral agency.[208]

In fact, for von Hirsch, punishment has a dual objective. The other justification is to prevent crime.[209] He believes that human nature is such that the normative reason for compliance must be complemented with a prudential one, otherwise "victimizing conduct would become so prevalent as to make life nasty and brutish,"[210] and that "[i]t is the threatened penal deprivation that expresses the censure as well as serving as the prudential disincentive."[211] Although von Hirsch believes that deterrence is not a sufficient reason for punishment, he claims it is a necessary one: "Had punishment *no* usefulness in preventing crime, there should . . . not be a criminal sanction."[212] Instead, there should be other means adopted to express censure.[213]

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206. Expectations, as opposed to hopes, are grounded in obligations, which in turn are derived from voluntary or inadvertent participation in goal-oriented practices or transactions. Obligations occur because they are necessary to facilitate the objectives of the relevant practice or transaction. Thus, if punishment does not aim to reform, there can be no expectation that offenders should show greater restraint after being subjected to it.

207. *See* ANDREW VON HIRSCH, CENSURE AND SANCTIONS 9–10 (1993).

208. *See id.* A little over one decade later, Andrew von Hirsch and Andrew Ashworth advanced the same three premises with inconsequential changes to the first premise. *See* ANDREW VON HIRSCH & ANDREW ASHWORTH, PROPORTIONATE SENTENCING: EXPLORING THE PRINCIPLES (2005).

209. *See* VON HIRSCH, *supra* note 175, at 48.

210. *See id.*

211. Andrew von Hirsch, *Censure and Proportionality*, *in* A READER ON PUNISHMENT 112, 127 (R.A. Duff & David Garland eds., 1994).

212. *See* VON HIRSCH, *supra* note 175, at 53.

213. *See id.*

Von Hirsch is careful to point out that punishment "gives the actor the opportunity for . . . responding [in a morally appropriate manner], but it is not a technique for *evoking* specified sentiments."[214] In his earlier writings, at one point, he did flirt with the notion that offenders are obliged to respond positively to punishment: "*Perhaps* . . . the offender has a *duty* to attend to the censure [of punishment] and make extra efforts at self-restraint."[215] Von Hirsch denies that this makes him a rehabilitationist[216] because the first-offender discount is not aimed at inducing future compliance; "instead, [it reflects] an *ethical* judgment: it is a way of showing respect for any person's capacity, as a moral agent, for attending to the censure in punishment."[217] He continues that the discount is lost only because subsequent offending reveals that offenders do not "take condemnation of their acts seriously."[218] However, this turns the debate full circle. If morality requires that people ought to be given a chance to learn from their errors in response to condemnation, why should this opportunity be confined to only their first few transgressions? Repeated wrongdoing may reveal deep rooted attitudinal defects, but the notion of lapse is not a stand-alone moral prescription; it, supposedly, has the virtue of forgiveness at its core, and we are still not told why this should be conferred in limited doses.

Ultimately, the flaw with von Hirsch's progressive loss of mitigation theory is that he fails to advance a concrete basis for punishing recidivists more harshly. Criminal punishment is harsh. In order for the community to be justified in its deliberate infliction of pain, there is a need for it to be underpinned by a concrete and clear rationale that is known in advance to offenders and potential offenders. The assertion that criminal punishment imposes an obligation on offenders to improve is one person's invention of how punishment should not operate; it is not a legal—or moral—imperative.

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214. VON HIRSCH, *supra* note 207, at 10 (emphasis added).
215. Von Hirsch, *Desert and Previous Convictions*, *supra* note 179, at 196 (emphasis added).
216. *Id.* at 195.
217. *Id.* (emphasis added).
218. *Id*. at 196.

2. Other Retributive Theories in Support of Recidivist Premium

a. Recidivism By Omission—No Justification for Obligation Not To Reoffend

Numerous other retributive accounts have been advanced in a bid to justify the recidivist enhancement. A similar—communicative—theory to counter that offered by von Hirsch is called *recidivism as omission*.[219] According to Youngjae Lee, the receipt of an earlier penalty places offenders in a special situation that imposes a burden on them to take steps to not reoffend.[220] Failure to take these steps supposedly justifies a harsher penalty.[221] His rationale is dependent on the view that punishment has a communicative aspect that imposes on offenders an obligation[222] to reflect on the matters that resulted in their committing an offense. Failure to put in place mechanisms to prevent reoffending is blameworthy and therefore worthy of additional punishment.[223] Lee believes that "the recidivist premium is not about what an offender does or reveals at the moment a crime is committed; rather, the recidivist premium is additional punishment directed at the previous steps taken by him that *enabled* the later crime to be committed."[224] He adds, "once offenders are convicted of a crime, they enter into a thick relationship with the state, and that relationship gives rise to an obligation for the offenders to rearrange their lives in order to steer clear of criminal wrongdoing."[225]

However, Lee does not explain the source of the obligation. This is a point noted by Thomas Mahon, who observed that Lee's theory "fails to explain why the process of conviction confers a legally binding obligation on the offender to take steps to reform."[226]

Moreover, the nature of the supposed duty imposed by a sanction on criminal offenders is too obscure to justify the imposition of additional punishment. [227] This obscurity is noted by von Hirsch, who believes that Lee's theory is deficient because there is no specification of what duty is imposed on an offender as a consequence of the previous conviction, and there is no clear connection between the omission and the next offense—

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219. *See* Youngjae Lee, *Repeat Offenders and the Question of Desert*, *in* PREVIOUS CONVICTIONS AT SENTENCING: THEORETICAL AND APPLIED PERSPECTIVES, *supra* note 5, at 49, 50.
220. *See id.* at 61.
221. *See id.*
222. Lee terms this an *associative obligation*. *See id.*
223. *See id.* at 60.
224. *Id.*
225. *Id.* at 69.
226. Mahon, *supra* note 6, at 92.
227. *See* Tonry, *supra* note 7, at 105.

an offender who changes the behavior that prompted the previous offense may still reoffend.[228] There are infinite numbers of situational settings that can provide a spur to offending, such as alcohol use, poverty, and an agitated mental state, and it is not conceivable that a person can avoid all of them.[229]

b. Failure To Apologize Cannot Justify the Recidivist Premium

Another communicative theory that supposedly justifies the recidivist premium is that advanced by Christopher Bennett.[230] Like Lee, Bennett believes that previous offending imposes an obligation on the offender to put in place measures to avoid further offending; however, Bennett attempts to detail the source of the obligation.[231] Bennett believes that the obligation stems from the fact that punishment is a means for expressing "condemnation by symbolizing how sorry the offender ought to be for the offence," and the process of apologizing and saying sorry includes a duty to reform.[232] He concludes: "[Ho]w can an act of condemnation fully express that an act is wrong if it does not also say that the person who does it has an obligation not to do it again?"[233] For Bennett, repeat offenders are more culpable because in addition to committing the instant offense, they have also violated the obligation to apologize and reform.[234]

Current orthodoxy suggests that remorse is a mitigating factor in sentencing; this Author has argued that this is mistaken.[235] Offenders who are penitent for their acts are behaving in a minimally decent manner by acknowledging their mistake. People who do what is expected should not be rewarded. It is only those who exceed expectations that should be treated in such a manner. Accordingly, Bennett's theory has some appeal.

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228. *See* von Hirsch, *supra* note 146, at 6–7.

229. *See* Mahon, *supra* note 6, at 93. A similar point is made by von Hirsch in von Hirsch, *supra* note 146, at 6–7.

230. *See* Christopher Bennett, *"More to Apologise For": Can a Basis for the Recidivist Premium Be Found Within a Communicative Theory of Punishment?*, *in* PREVIOUS CONVICTIONS AT SENTENCING: THEORETICAL AND APPLIED PERSPECTIVES, *supra* note 5, at 73, 73.

231. *See id.* at 88.

232. *Id.*

233. *Id.*

234. *See id.* at 87.

235. *See* Mirko Bagaric & Kumar Amarasekara, *Feeling Sorry?—Tell Someone Who Cares: The Irrelevance of Remorse in Sentencing*, 40 HOW. J. OF CRIM. JUST. 364 (2001) (arguing that remorse should not merit offenders a sentencing discount).

However, it fails because it confuses a community aspiration and, arguably, a moral imperative with a legal imperative. The requirement to be sorry and behave accordingly is not one mandated by the criminal law. Sure, society would prefer if offenders became nicer people after their transgressions and punishments, but this cannot be forced on them. Thus, the failure to apologize cannot itself form the basis of a punitive disposition.[236]

c. Additional Awareness of Wrongfulness of Crime—Potentially Justifies a Discount

Julian Roberts suggests that the recidivist premium is justified because recidivists are more blameworthy than other offenders.[237] He believes that the extra culpability stems from the additional awareness that offenders have of the wrongfulness of their behavior stemming from the previous convictions.[238] Roberts points out that first-time offenders can "point to a lifetime of law-abiding conduct to contextualise their current lapse . . . [and can] argue . . . that they had failed to fully appreciate the wrongfulness of their conduct until they were convicted and censured."[239]

To this end, Roberts adds that recidivists "are regarded as more culpable, more blameworthy, to the extent that their life choices embrace offending."[240] He believes that "[h]aving been convicted and sentenced, a person should desist from offending; committing further offences is evidence that the offender has elected an alternate moral course to that of a law-abiding citizen."[241]

This additional culpability stemming from prior convictions, he believes, enhances culpability in a manner similar to premeditation.[242] He further notes that the case for any discount is far harder to make for serious offenses because, in such cases, the utter wrongness of the crime and inappropriateness of the crime is manifest.[243]

The analogy Roberts makes between the supposed increased culpability of recidivists and premeditation is not strong given that, as von Hirsch points out, many repeat offenses are committed spontaneously.[244] Despite this, Roberts's theory is arguably the most persuasive retributive account

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236. *See* Tonry, *supra* note 7, at 107.
237. *See* ROBERTS, *supra* note 4, at 208–09.
238. *See id.*
239. Roberts, *supra* note 4, at 32.
240. ROBERTS, *supra* note 4, at 220.
241. *Id.* at 88.
242. *Id.* at 66.
243. *See id.* at 56.
244. *See* von Hirsch, *supra* note 146, at 5.

of the first-time offender premium. His approach is more binary than that of von Hirsch. An advantage of Roberts's theory is that it is clear at what point the discount evaporates. He advocates a discount only for first-time offenders and, as he notes, this coheres with the widely accepted belief that first-time offenders should be dealt with more leniently.[245] Further, there is considerable intuitive appeal in the claim that repeat offenders are more blameworthy than first-time offenders because they have been through the system and even that has not made them change their behavior.[246]

The claim that recidivists are more culpable because they are given notice of the wrongness of a crime by the previous penalty is challenged by Youngjae Lee on the basis that there is widespread knowledge of the criminal law and it is not feasible to identify offenders who were aware of the full details of their crime from those that were not.[247] In this regard, Lee is only partially correct. The appeal of Roberts's theory lies in the perception that people are shaped by their experiences. Concrete experience seems to be more formative than abstract knowledge. Many people are aware that there is a risk of being burgled or involved in a road accident, but experience of these events often leads to people making much greater steps to avoid the experience than they had before the event.

The fact that recidivists still fail to avoid crime after having had the "benefit" of going through the criminal system once and seeing firsthand its oppressive operation makes them—so the argument runs—more blameworthy than people who have not been subjected to this experience.[248] Recidivists seem to be more wickedly defiant than first-time offenders and, hence, more blameworthy. This is what, in my view, places Roberts's theory in its strongest possible light, and for its justification requires empirical data showing that experiences are, in fact, often determinative of people's beliefs and future behaviors.

But the question then becomes exactly what is the offender being punished for? Reduced to its core, the reason Roberts believes that recidivists are more blameworthy than first-time offenders is that their

245. *See* ROBERTS, *supra* note 4, at 208–09, 220.
246. *See id.*
247. *See* Lee, *supra* note 219, at 57.
248. *See* ROBERTS, *supra* note 4, at 208–09, 220.

disposition to commit crime is greater; quite simply, they are of bad character.[249]

This gets to the bottom of why tolerance is shown to people who only infrequently violate moral norms: such behavior is not "truly" reflective of their character.[250] The converse also applies: at the core of the impulse to punish recidivists more harshly is the sentiment that bad people deserve to suffer. In our daily lives we often view character as being inherently worthy of praise or blame, and we make judgments and decisions in accordance. It is generally the dominant consideration in determining whom we befriend, marry, be nice to, ignore, or try to avoid. In assessing character we give weight not only to past deeds, but also to the values and norms a person holds. Some retributivists think these sentiments should be extrapolated into legal standards: "One visits censure or reproof on people, not acts—and it is this feature that makes prior misconduct relevant to an actor's deserts."[251]

If a recidivist premium is to be conferred, a strong justification is needed. Additional punishment beyond that merited for the instant offense is the logical and moral equivalent of punishing the innocent unless the extra hardship can be accounted for within a coherent legal construct.[252] It is not clear that bad character—no matter what level of legal defiance the offender has displayed through failing to respond "properly" to other convictions—can justify this loading. People should be punished only for what they do, not according to the type of people we think they are. To do otherwise "assumes a superhuman level of insight into the individual."[253] In a community governed by the rule of law, terms such as goodness and badness must be defined. And they are, in the only verifiable way possible: people are judged by their actions, not their values or beliefs,[254] and the only relevant actions are those that infringe legal proscriptions. To punish

249. A similar point is made in Tonry, *supra* note 7, at 110–11.

250. Von Hirsch makes a similar point: punishing recidivists more severely does not amount to penalizing them twice for their past crimes *if* "some feature of having been previously convicted affects the basis for his present punishment." Von Hirsch, *supra* note 179, at 191. Once the principle of lapse is excluded, logically, there is only one other distinguishing feature between recidivists and first-timers: their previous convictions evince a character defect.

251. VON HIRSCH, *supra* note 175, at 82. However, he later suggests that the progressive loss of mitigation theory does not call into question the offender's entire career or character. *See id.* at 83.

252. The proscription against punishing the innocent is not necessarily absolute, but can only be violated in rare situations. *See* BAGARIC, *supra* note 21, at 93.

253. NIGEL WALKER, PUNISHMENT, DANGER AND STIGMA: THE MORALITY OF CRIMINAL JUSTICE 138–39 (1980).

254. *See* Wasik & von Hirsch, *supra* note 181, at 410.

character is to engage in "moral book-keeping . . . using previous records as an index of total moral worth[.]"[255]

Thus, it would seem that character is too nebulous a trait to underpin criminal punishment, and that any attempt to define character solely in terms of the number and type of prior convictions is arbitrary and an inapposite criterion by which to inflict punishment.

In summary, it would seem that all retributivist arguments to justify a recidivist enhancement are unsound. As noted by Michael Tonry, "arguments about omissions, apologies, intuitions and bad character that have been made [in support of a recidivist premium] so far are unpersuasive."[256]

C. Utilitarian Arguments for Recidivist Premium: Logically Sound—Empirically Challenged

The utilitarian theory of punishment can readily justify a recidivist premium, at least in theory. Consistent with the utilitarian theory, it could be contended that the good consequences stemming from imposing sterner punishment on recidivists in the form of incapacitation and deterrence outweigh the extra hardship endured by them.[257]

This is manifest at the theoretical level, and the courts have also commonly cited these justifications as a basis for imposing harsher penalties on repeat offenders. For example, in *Ewing v. California*, where the United States Supreme Court upheld the validity of the Californian three-strikes laws, Justice O'Connor stated:

> The State's interest in deterring crime also lends some support to the three strikes law. We have long viewed both incapacitation and deterrence as rationales for recidivism statutes: "A recidivist statute's . . . primary goals are to deter repeat offenders and, at some point in the life of one who repeatedly commits criminal offenses serious enough to be punished as felonies, to segregate that person from the rest of society for an extended period of time."[258]

As noted above, in *Veen v The Queen (No. 2)*, the High Court of Australia noted that general and specific deterrence and community protection might justify heavier sentences for recidivists.[259] In a similar vein in the

255. WALKER, *supra* note 253, at 127.
256. Tonry, *supra* note 7, at 111.
257. *See* ANDREW ASHWORTH, SENTENCING AND PENAL POLICY 217–19 (1983).
258. 538 U.S. 11, 27 (2003) (quoting Rummel v. Estelle, 445 U.S. 263, 284 (1980)).
259. (1988) 164 CLR 465, 477 (Austl.).

United Kingdom, the Court of Appeal in *R v. Gilbertson* stated: "One thing is certain, that if she goes on committing offences, the periods of imprisonment which will be imposed on her, merely to protect the shopkeepers, will become longer and longer."[260]

The utilitarian argument in favor of sentencing recidivists more harshly potentially justifies according far more weight to prior convictions than the progressive loss of mitigation theory. Under the utilitarian model, there is no ceiling to cap the importance that should be attributed to previous convictions, and hence, there is nothing to stop a cumulative principle being invoked.[261]

Although the utilitarian argument is logically valid, it is not clear that it is empirically validated. As discussed below, the deterrence rationale is misguided; however, there is some plausibility to the incapacitation argument.

This Part analyzes the efficacy of punishment to attain the goals of specific and general deterrence and incapacitation. There is a vast body of literature in relation to each of these sentencing objectives. These topics have been the subject of extensive recent analysis.[262] The discussion below summarizes the main studies in relation to each relevant sentencing objective and current state of knowledge.[263] This is made easier by the fact that there is a relatively clear consensus in relation to each of the areas, with the exception of incapacitation.[264]

Specific deterrence aims to discourage crime by punishing individual offenders for their transgressions and thereby convince them that crime does not pay.[265] In effect, it attempts to dissuade offenders from reoffending by inflicting an unpleasant experience on them—normally imprisonment—that they will seek to avoid in the future.[266] General deterrence seeks to dissuade potential offenders with the threat of

260. (1980) 2 Cr. App. R.(S). 312, at 313 (Eng.).

261. For a retributive argument in favor of the cumulative principle, see Mahon, *supra* note 6.

262. *See, e.g.*, Mirko Bagaric & Theo Alexander, *The Capacity of Criminal Sanctions To Shape the Behaviour of Offenders: Specific Deterrence Doesn't Work, Rehabilitation Might and the Implications for Sentencing*, 36 CRIM. L.J. 159 (2012) [hereinafter *Specific Deterrence Doesn't Work*]; Mirko Bagaric & Theo Alexander, *The Fallacy That is Incapacitation: An Argument for Limiting Imprisonment Only to Sex and Violent Offenders*, J. COMMONWEALTH CRIM. L. 95 (2012) [hereinafter *The Fallacy That is Incapacitation*]; Mirko Bagaric & Theo Alexander, *(Marginal) General Deterrence Doesn't Work—and What It Means for Sentencing*, 35 CRIM. L.J. 269 (2011).

263. *See infra* Parts III.C.1–III.C.3.

264. *See infra* Part III.C.3.

265. *See* DRESSLER, *supra* note 156, at 15.

266. *See id.* at 15.

anticipated punishment from committing similar offenses by illustrating the harsh consequences of offending.[267]

As noted above, courts have invoked both forms of deterrence as a justification for the recidivist loading.[268] This theoretical rationale is only valid if the empirical evidence establishes the efficacy of state imposed punishment to achieve these aims. The evidence is to the contrary.

1. Specific Deterrence Does Not Work

The available data suggests that specific deterrence does not work; inflicting harsh sanctions on individuals does not make them less likely to reoffend in the future. The level of certainty of this conclusion is very high—so high that it has been suggested that specific deterrence be abolished as a sentencing consideration.[269]

There have been numerous studies across a wide range of jurisdictions and different time periods that come to this conclusion. Daniel Nagin, Francis Cullen, and Cheryl Jonson provide a very recent extensive literature review regarding specific deterrence.[270] They reviewed separately the impact of custodial sanctions versus noncustodial sanctions and the effect of the length of sentence on reoffending.[271] The review examined five experimental studies where custodial versus noncustodial sentences were randomly assigned;[272] eleven studies that involved matched pairs;[273] thirty-one studies that were regression based;[274] and seven other studies which did not neatly fit into any of those three categories, and included naturally occurring social experiments that allowed inferences to be drawn regarding the capacity of imprisonment to deter offenders.[275]

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267. *See id.* at 15.
268. *See, e.g.*, *Veen v The Queen (No. 2)* (1988) 164 CLR 465, 477 (Austl.).
269. *See Specific Deterrence Doesn't Work*, *supra* note 262, at 161.
270. *See* Daniel S. Nagin et al., *Imprisonment and Reoffending*, *in* 38 CRIME AND JUSTICE: A REVIEW OF RESEARCH 115, 145 (Michael Tonry ed., 2009). The main studies are summarized in DONALD RITCHIE, VICTORIAN SENTENCING ADVISORY COUNCIL, SENTENCING MATTERS: DOES IMPRISONMENT DETER? A REVIEW OF THE EVIDENCE (2011) and DON WEATHERBURN ET AL., THE SPECIFIC DETERRENT EFFECT OF CUSTODIAL PENALTIES ON JUVENILE REOFFENDING (2009), *available at* http://www.aic.gov.au/documents/A/3/D/%7bA3DB5DEB-2A53-4272-87CF-CE510D13481B%7dtbp33.pdf.
271. *See* Nagin et al., *supra* note 270, at 144–47.
272. *See id.*
273. *See id.* at 145–53.
274. *See id.* at 154–55.
275. *See id.* at 155.

The last category included a study based on clemency granted to over 20,000 prisoners in Italy in 2006.[276] A condition of release was that if those who were released reoffended within five years, they would be required to serve the remaining sentence plus the sentence for the new offense. It was noted that there was a 1.24 percent reduction in reoffending for each month of the residual sentence.[277] This observation can be explained on the basis that the threat of future imprisonment discouraged imprisonment. However, it was also noted that offenders who had served longer sentences prior to being released had higher rates of reoffending, supporting the view that longer prison terms reduce the capacity for future imprisonment to shape behavior.[278]

Nagin, Cullen, and Jonson conclude that offenders who are sentenced to imprisonment do not have a lower rate of recidivism than those who are not, and in fact, some studies show that the rate of recidivism is higher. They conclude that:

> Taken as a whole, it is our judgment that the experimental studies point more toward a criminogenic rather than preventive effect of custodial sanctions. The evidence for this conclusion, however, is weak because it is based on only a small number of studies, and many of the point estimates are not statistically significant.[279]

The review suggests that not only do longer jail terms not deter, but neither do tougher jail conditions.[280] Studies also show that offenders who are sentenced to maximum-security prisons as opposed to minimum-security prisons do not reoffend less.[281]

These findings are supported by a more recent experimental study by Donald Green and Daniel Winik.[282] They observed the reoffending of 1003 offenders who were initially sentenced for drug related offenses between June 2002 and May 2003 by a number of different judges whose sentencing approaches varied significantly—some were described as *punitive*, others as *lenient*—resulting in differing terms of imprisonment and probation.[283] The study concluded that neither the length of imprisonment nor probation

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276. *See id.*
277. *See id.*
278. *See id.*
279. *Id.* at 145.
280. *Id.*
281. *See, e.g.*, M. Keith Chen & Jesse M. Shapiro, *Do Harsher Prison Conditions Reduce Recidivism? A Discontinuity Based Approach*, 9 AM. L. & ECON. REV. 1, 1 (2007).
282. *See* Donald P. Green & Daniel Winik, *Using Random Judge Assignments To Estimate the Effects of Incarceration and Probation on Recidivism Among Drug Offenders*, 48 CRIMINOLOGY 357 (2010).
283. *See id.* at 357.

had an effect on the rate of reoffending during the four-year follow up period.[284]

Accordingly, the weight of evidence supports the view that subjecting offenders to harsh punishment is unlikely to increase the prospect that they will become law abiding citizens in the future, just as there is no evidence to support the argument that imposing increasingly severe hardship on recidivists will increase the likelihood that they will finally become law abiding citizens.

Although imposing harsher penalties does not increase legal compliance, does it have the opposite effect? Some commentators have suggested that prisons harden offenders by concentrating maladaptive, socially destructive, and rebellious attitudes, thereby leading to a greater inclination to commit crime.[285] If this is true, then it would, in fact, provide a reason against the recidivist premium. But this hypothesis, too, is not supported by empirical data—imprisonment does not increase reoffending.

In a recent analysis, Don Weatherburn compared reoffending rates for people convicted of burglary and nonaggravated assault.[286] The study compared ninety-six "matched pairs" of burglars and 406 matched pairs of offenders convicted of nonaggravated assault.[287] The study looked at offenders who were convicted in the years 2003 and 2004, and each matched pair was followed for five years or until he or she was convicted of another offense—whichever came first.[288]

The study noted that "prison exerts no significant effect on the risk of recidivism for burglary," and "[t]he effect of prison on those who were convicted of non-aggravated assault seems to have been to increase the risk of further offending."[289] However, this increase was only minor and inconclusive.[290] The study found that:

284. *See id.* at 358.

285. *See, e.g.*, Chuck Colson, *Justice that Restores: A Paradigm-Shift in Criminal Justice Practices*, 36 GEO. L.J. ANN. REV. CRIM. PROC. iii, iii (2007) ("Prisons have become graduate schools of crime.").

286. Don Weatherburn, *The Effect of Prison on Adult Re-Offending*, NEW S. WALES BUREAU CRIME STAT. & RES. CRIME & JUST. BULLETIN (Aug. 2010), http://www.lawlink.nsw.gov.au/lawlink/bocsar/ll_bocsar.nsf/vwFiles/cjb143.pdf/$file/cjb143.pdf.

287. *Id.* at 1.

288. *Id.* at 5.

289. *Id.* at 10.

290. *See id.* at 1.

> There is no evidence that prison deters offenders convicted of burglary or non-aggravated assault. There is some evidence that prison increases the risk of offending amongst offenders convicted of non-aggravated assault but further research with larger samples is needed to confirm the results.[291]

This conclusion can only be tentative because it relates to only two offense categories, but it is made more compelling by the fact that it is consistent with the trend of research and literature reviews in this area.[292]

One of the most wide ranging studies that has been conducted regarding the effectiveness of specific deterrence is a 1999 literature review by Paul Gendreau, Claire Goggin, and Francis Cullen involving a review of fifty different studies that related to a sample of 336,052 offenders—dating back to 1958—that provided 325 comparisons.[293] The study compared the recidivism rate of people who were sentenced to imprisonment as opposed to community service, and those who were sentenced to longer and shorter terms of imprisonment.[294]

The review established that recidivism rates for offenders who were sent to prison were similar to those who received a community-based sanction.[295] Longer terms of imprisonment also did not reduce reoffending and, in fact, resulted in a very small increase in recidivism.[296] The authors concluded:

> The data in this study represents the only quantitative assessment of the relationship between time spent in prison and offender recidivism. The database consisted of 325 comparisons involving 336,052 offenders. On the basis of the results, we can put forth one conclusion with a good deal of confidence. None of the analysis conducted produced any evidence that prison sentences reduce recidivism. Indeed, combining the data from the more vs. less and incarceration vs. community groupings resulted in 4% . . . and 2% . . . *increases* in recidivism.[297]

Accordingly, the weight of evidence supports the view that sending offenders to prison has no or little impact on their likelihood of reoffending; therefore, specific deterrence or the potential corrupting effect of imprisonment cannot be used as a basis for either supporting or rejecting three-strikes laws.

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291. *Id.*

292. In the Australian context, similar conclusions have been reached in relation to juvenile offenders. *See* J. Kraus, *A Comparison of Corrective Effects of Probation and Detention on Male Juvenile Offenders*, 14 BRIT. J. CRIMINOLOGY 49, 61 (1974); Don Weatherburn et al., *supra* note 270, at 5.

293. Paul Gendreau et al., *The Effects of Prison Sentences on Recidivism*, DEP'T SOLIC. GEN. CAN., http://www.prisonpolicy.org/scans/e199912.htm (last visited June 16, 2014).

294. *See id.*

295. *See id.*

296. *See id.*

297. *Id.*

2. General Deterrence—also—Does Not Work

In any event, the main form of deterrence used to justify the recidivist premium is general, not specific deterrence.[298] The data regarding general deterrence, however, reveals a similar picture.

There are two forms of general deterrence.[299] *Marginal general deterrence* concerns the correlation between the *severity* of the sanction and the prevalence of an offense.[300] *Absolute general deterrence* concerns the threshold question of whether there is any connection between criminal sanctions, of whatever nature, and the incidence of criminal conduct.[301]

It seems that marginal general deterrence does not work and absolute general deterrence does work.[302] The findings regarding general deterrence are relatively settled.[303] The existing data show that in the absence of the threat of punishment for criminal conduct, the social fabric of society would fray, crime would escalate, and the capacity of people to lead happy and fulfilled lives would be frustrated. Thus, general deterrence works in the absolute sense: there is *a connection* between criminal sanctions and criminal conduct.[304] However, there is insufficient evidence to support a direct correlation between more severe penalties and a reduction in the crime rate.[305]

The failure of even the death penalty to act as a marginal deterrence is exemplified by the experience in New Zealand.[306] Between 1924 and 1962, there were periods when the death penalty—for murder—was in force, then abolished, then revived, and abolished again.[307] The changes generally followed some level of public debate and were well publicized.[308] Although the murder rates fluctuated during this period, they bore no correlation to

298. DRESSLER, *supra* note 156, at 15.
299. *See* RITCHIE, *supra* note 270, at 3.
300. *See id.* at 12.
301. *See id.* at 24; *see also* FRANKLIN E. ZIMRING & GORDON J. HAWKINS, DETERRENCE: THE LEGAL THREAT IN CRIME CONTROL 14 (1973) (discussing marginal and absolute general deterrence).
302. *See* RITCHIE, *supra* note 270, at 12, 17.
303. For an overview of the literature, see *id.*
304. *See id.* at 12, 17.
305. *See id.*
306. *See* NIGEL WALKER, SENTENCING IN A RATIONAL SOCIETY 60–61 (1st Am. ed. 1971).
307. *See id.*
308. *See id.* at 61.

the prevailing penalty, whether it was capital punishment or life imprisonment.[309]

Similar findings have emerged in the United States.[310] The absence of a link between lower homicide rates and the death penalty in the United States has, however, been challenged by some commentators.[311] The evidence used in support of a connection between lower homicide rates and capital punishment, however, has been debunked on the basis that the data upon which it is based is statistically insignificant and the evidence goes against the overwhelming trend of the data. As Richard Berk pointed out, the main findings in support of the hypothesis that capital punishment is a deterrent are based on eleven findings out of a sample size of 1000 observations, where the homicide rate dropped in a U.S. state following an execution in the previous year.[312] The data are statistically meaningless and contrary to the trend of ninety-nine percent of the observations.[313] Berk states:

> Whatever one makes of those 11 observations, it would be bad statistics and bad social policy to generalize from the 11 observations to the remaining 989. So, for the vast majority of states for the vast majority of years, there is no evidence for deterrence in these analyses. Even for the remaining 11 observations, credible evidence for deterrence is lacking.[314]

Berk concludes that what clearly emerges from the literature is that "it is apparent that for the vast majority of states in the vast majority of years, there is no evidence of a negative relationship between executions and homicides."[315]

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309. *See id.* at 60–61, 191; *see also* ROGER HOOD & CAROLYN HOYLE, THE DEATH PENALTY: A WORLDWIDE PERSPECTIVE *passim* (4th ed. 2008) (noting that the death penalty does not necessarily deter to any greater degree than imprisonment).

310. *See, e.g.*, John K. Cochran et al., *Deterrence or Brutalization? An Impact Assessment of Oklahoma's Return to Capital Punishment*, 32 CRIMINOLOGY 107, 129 (1994).

311. *See, e.g.*, Dale O. Cloninger & Roberto Marchesini, *Execution and Deterrence: A Quasi-Controlled Group Experiment*, 33 APPLIED ECON. 569, 576 (2001); Paul R. Zimmerman, *State Executions, Deterrence, and the Incidence of Murder*, 7 J. APPLIED ECON. 163, 190 (2004).

312. Richard Berk, *New Claims About Executions and General Deterrence: Déjà Vu All Over Again?*, 2 J. EMPIRICAL LEGAL STUD. 303, 311–13 (2005). Each observation is the homicide rate in a U.S. state over the period of one year. *See id.* at 311. The negative relationship between the number of homicides and executions—consistent with deterrence—is only present in situations in which more than five executions occurred in a state in a single year. *See id.* at 311–12.

313. *See id.* at 303.

314. *Id.* at 328.

315. *Id.* at 313. For a more wide ranging study with similar conclusions, see Dieter Dölling et al., *Is Deterrence Effective? Results of a Meta-Analysis of Punishment*, 15 EUR. J. ON CRIM. POL'Y & RES. 201 (2009); *see also* Anthony N. Doob & Cheryl Marie Webster, *Sentence Severity and Crime: Accepting the Null Hypothesis*, *in* 30 CRIME AND

The strongest evidence in support of the theory of marginal general deterrence stems from the considerable drop in serious crime levels in the United States over the past twenty years.[316] As noted in the discussion below, the drop coincided with a significant increase in the imprisonment rate. The rate of violent crime in the United States dropped by more than sixty percent from 1993 to 2010.[317]

These figures, at face value, suggest that imprisoning even greater numbers of offenders effectively reduces the crime rate.[318] A number of detailed studies have been undertaken to examine and explain this causal connection. One analyst, Steven Levitt, has stated that up to twenty to thirty-five percent of crime reduction may be attributable to the increased rate of imprisonment.[319] However, it is not clear whether this reduction is attributable to the incapacitation of offenders—who are thereby prevented from committing crimes while imprisoned—or to the salutary effects of marginal deterrence.[320] Clearly, removing more than one million offenders

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JUSTICE: A REVIEW OF RESEARCH 143 (Michael Tonry ed., 2003) (finding no conclusive evidence that general deterrence—through stricter sentences—decreases crime).

316. *See, e.g.*, Raymond Paternoster, *How Much Do We Really Know About Criminal Deterrence?*, 100 J. CRIM. L. & CRIMINOLOGY 765, 787–89 (2010).

317. *See* JANET L. LAURITSEN & MARIBETH L. REZEY, MEASURING THE PREVALENCE OF CRIME WITH THE NATIONAL CRIME VICTIMIZATION SURVEY 3–4 (2013), *available at* http://www.bjs.gov/content/pub/pdf/mpcncvs.pdf. The rate of decline in other forms of crime was similar. *See id.* at 11–13. This is discussed further below in the context of the discussion on general incapacitation. *See infra* Part III.C.3.

318. *See* William Spelman, *What Recent Studies Do (and Don't) Tell Us About Imprisonment and Crime*, *in* 27 CRIME AND JUSTICE: A REVIEW OF RESEARCH 419, 420 (Michael Tonry ed., 2000).

319. *See* Steven D. Levitt, *Understanding Why Crime Fell in the 1990s: Four Factors That Explain the Decline and Six That Do Not*, 18 J. ECON. PERSP. 163, 186 (2004); *see also* William Spelman, *The Limited Importance of Prison Expansion*, *in* THE CRIME DROP IN AMERICA 97, 108 (Alfred Blumstein & Joel Wallman eds., 2000) (estimating prison expansion is responsible for an approximate thirty-five percent reduction in the violent crime rate); Spelman, *supra* note 318 (discussing the elasticity of incarceration).

320. On balance, studies show that a ten percent increase in imprisonment rates produce a two to four percent reduction in the crime rate, most of which is in relation to nonviolent offenders. *See* Roger K. Warren, *Evidence-Based Sentencing: The Application of Principles of Evidence-Based Practice to State Sentencing Practice and Policy*, 43 U.S.F. L. REV. 585, 594 (2009) (citing DON STEMEN, RECONSIDERING INCARCERATION: NEW DIRECTIONS FOR REDUCING CRIME 5 (2007), *available at* http://www.vera.org/sites/default/files/resources/downloads/veraincarc_vFW2.pdf.

from the community makes it impossible for them to participate in crime, and hence, add to the crime statistics during their period of incarceration.[321]

Further, it has been noted that similar crime reduction trends occurred in the United States' nearest neighbor, Canada, over approximately the same period.[322] During that period, the imprisonment rate in Canada actually fell.[323]

Empirical evidence not only questions the causal link between higher penalties and lower crime, but also provides strong evidence of alternative explanations for falling crime rates. For example, it has been argued that the fall in the United States crime rate is partially the result of an increased number of women from disadvantaged groups—teenagers, the poor and minority groups—whose children would have been most likely to commit crimes as adults, being able to abort unwanted pregnancies after legalization of abortion in the 1970s.[324] It has been suggested that "legalized abortion appears to account for as much as 50 percent of the recent drop in crime".[325] In commenting on the research on the causal link between increased abortions and reduced crime, Steven Levitt states:

> The five states that allowed abortion in 1970 (three years before *Roe v. Wade*) experienced declines in crime rates earlier than the rest of the nation. States with high and low abortion rates in the 1970s experienced similar crime trends for decades until the first cohorts exposed to legalized abortion reached the high-crime ages around 1990. At that point, the high-abortion states saw dramatic declines in crime relative to the low-abortion states over the next decade. The magnitude of the differences in the crime decline between high- and low-abortion states was over 25 percent for homicide, violent crime and property crime. . . . Panel data estimates confirm the strong negative relationship between lagged abortion and crime. An analysis of arrest rates by age reveal[s] that only arrests of those born after abortion legalization are affected by the law change.[326]

Recent empirical research from Germany is consistent with the United States findings regarding the failure of marginal general deterrence.[327] At the Goethe University Frankfurt, Horst Entorf reviewed twenty-four years of criminal sentencing practices in West German states for

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321. As noted below, some of this reduction is also attributable to more police. *See infra* notes 335–52 and accompanying text.

322. *See* Paternoster, *supra* note 316, at 803.

323. *See id.*

324. *See* Levitt, *supra* note 319, at 182–84.

325. *See* John J. Donohue III & Steven D. Levit, *The Impact of Legalized Abortion on Crime*, 116 Q. J. ECON 379, 379 (2001).

326. *See id.* at 182.

327. *See* Horst Entorf, *Crime, Prosecutors, and the Certainty of Conviction* 4 (IZA, Discussion Paper No. 5670, 2011), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1835309. For a recent study supporting the inability of sanctions to deter domestic violence, see Frank A. Sloan et al., *Deterring Domestic Violence: Do Criminal Sanctions Reduce Repeat Offenses?*, 46 J. RISK & UNCERTAINTY 51 (2013).

correlations to the crime rate.[328] Entorf sought to examine the effect of each stage of the prosecution process, from investigation to conviction, on the commission rates of two specific crimes—*property* crimes and *major violent* crimes—in order to assess their relative contribution to the overall effect of the criminal prosecution process on crime rates.[329] The results were analyzed by the theoretical econometric analysis methodology, which considered the deterrent effects of formal and informal, as well as custodial and noncustodial sanctions.[330]

The results of the research further debunked the theory of marginal general deterrence. It was discovered that a deterrent effect was found at "the first two stages of the criminal prosecution process"—charge and conviction—rather than at the "less robust" severity of punishment stage sentencing.[331] Entorf also found that:

> Results presented in this article suggest that crime is particularly deterred by the certainty of conviction. Here, contrary to popular belief, neither police nor judges but public prosecutors play the leading role. Extending the severity of sentences, however, does not seem to provide a suitable strategy for fighting crime. In particular, the *length of the imprisonment term proves insignificant.*[332]

As a consequence, he suggests that the public policies pursued by courts and legislatures in the name of marginal deterrence must be reconsidered.[333] The role of deterrence must be redefined:

> 'General deterrence' is still capable of curbing crime rates, but just by a more rigorous application of existing penal laws rather than by reforms extending the severity of measures. The latter strategy, followed in the U.S., might bear the risk that the prison population increases without any effect of deterrence.[334]

By contrast, the evidence relating to absolute general deterrence is much more positive. There have been several natural social experiments where there has been a drastic reduction in the likelihood, perceived or real,

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328. *See* Entorf, *supra* note 327, at 4.
329. *See id.*
330. *See id.* Theoretical econometrics studies the statistical properties of econometric procedures, including power of hypothesis tests and the efficiency of survey sampling methods of experimental designs and of estimators. *See generally* ROBERT S. PINDYCK & DANIEL L. RUBINFELD, ECONOMETRIC MODELS AND ECONOMIC FORECASTS (3d ed. 1991).
331. *See* Entorf, *supra* note 327, at 30.
332. *Id.* at 4 (emphasis added).
333. *See id.* at 30.
334. *Id.*

that people would be punished for criminal behavior.[335] The key aspect of these events is that the change occurred abruptly and the decreased likelihood of the imposition of criminal sanctions was apparently the only changed social condition.[336]

Perhaps the clearest instance of this was the police strike in Melbourne in 1923, which led to over one-third of the entire Victorian police force being sacked.[337] Once news of the strike spread, mobs of thousands of people poured into the city center and engaged in widespread property damage, looting of shops, and other acts of civil disobedience, including assaulting government officials and torching a tram.[338] The civil disobedience lasted for two days and was only quelled when the government enlisted thousands of citizens, including many ex-servicemen, to act as "special" law enforcement officers.[339] This behavior was in complete contrast to the normally law abiding conduct of the citizens of Melbourne.[340] Similar civil disobedience followed the police strike in Liverpool in 1919 and the internment of the Danish police force in 1944.[341]

The strongest empirical evidence in support of absolute deterrence comes from the United States, which over the past two decades has seen a marked increase in police numbers and a sharp decrease in crime.[342] The near universal trend of data that has outlined this link supports the view that more police, and hence, the greater actual and perceived likelihood of detection has contributed to the reduction in crime.[343]

The connection is complex due to the multifaceted nature of the changes that occurred during this period, which may also have had an effect on the crime rate. The changes include such things as better police methods, a generally improving economy, and other variables such as abortion trends

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335. *See, e.g.*, Carolyn Massingham, *When Police Strike: The Victorian Police Strike of 1923*, *in* POLICE IN AUSTRALIA: DEVELOPMENT, FUNCTIONS AND PROCEDURES 287 (Kerry L. Milte & Thomas A. Weber eds., 1977) (describing a strike by members of Victoria's police that temporarily left Victorian society without police).

336. *See id.* at 287–88 (noting authorities were completely surprised by the strike).

337. *See id.* at 287–92.

338. *See id.* at 288.

339. *See id.* at 288–89.

340. *See id.* at 288.

341. *See* Andrew Ashworth, *Introduction to Chapter 2 of* PRINCIPLED SENTENCING: READINGS ON THEORY AND POLICY, *supra* note 179, at 51 (discussing both the Liverpool and Danish strikes); WALKER, *supra* note 306, at 65 (discussing the Danish strike).

342. *See* Levitt, *supra* note 319, at 177 (estimating the increase in officers at about fourteen percent and positing that the increase might explain between ten and twenty percent of the crime decrease).

343. For a discussion, see John E. Eck & Edward R. Maguire, *Have Changes in Policing Reduced Violent Crime? An Assessment of the Evidence*, *in* THE CRIME DROP IN AMERICA, *supra* note 319, at 207.

and the greater use of imprisonment.[344] It has been noted that the greatest reductions in crime numbers occur where police are highly visible.[345]

This accords with the ostensible success of "zero tolerance"[346] policing in locations such as New York City, which saw the greatest number of extra police employed and the sharpest decline in crime.[347] This trend was evident well over a decade ago.[348] In a period of only several years following the introduction of zero tolerance policing, the rates of violent and property crime fell by approximately sixteen to thirty-two percent.[349]

After evaluating the large number of surveys analyzing the connection between more police and the crime rate, Raymond Paternoster concludes:

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344. *See id.* at 248; *see* Levitt, *supra* note 319, at 182–84.

345. *See* Robert Apel & Daniel S. Nagin, *General Deterrence: A Review of Recent Evidence*, *in* CRIME AND PUBLIC POLICY 411, 421 (James Q. Wilson & Joan Petersilia eds., 2011).

346. Zero tolerance policing is founded on the "broken windows" theory, which provides that strict enforcement of minor crime and restoring physical damage and decay, such as broken windows and graffiti, would prevent the fostering of an environment conducive to the commission of more serious offenses. *See* James Q. Wilson & George L. Kelling, *Broken Windows*, ATLANTIC MONTHLY, Mar. 1982, at 29, 31. The reduction in the New York City crime rate has largely been attributed to this policy. *See* JAMES AUSTIN & MICHAEL JACOBSON, HOW NEW YORK CITY REDUCED MASS INCARCERATION: A MODEL FOR CHANGE? 6 (2013), *available at* http://www.vera.org/sites/ default/files/resources/ downloads/how-nyc-reduced-mass-incarceration.pdf.

347. *See* FRANKLIN E. ZIMRING, THE GREAT AMERICAN CRIME DECLINE 150–51 (2007).

348. *See id.*

349. *See id.* at 151. Grabosky notes that zero tolerance policing is not solely responsible for the drop in crime. P.N. GRABOSKY, AUSTL. INST. OF CRIMINOLOGY, ZERO TOLERANCE POLICING 2 (1999). He suggests that there are numerous contributing factors, including sustained economic growth, a reduction in the use of crack cocaine, the aging of the baby-boomer generation beyond the crime-prone years, restricting the access of teenagers to firearms, and longer sentences for violent criminals. *See id.*; *see also* Hope Corman & H. Naci Mocan, *A Time-Series Analysis of Crime, Deterrence, and Drug Abuse in New York City*, 90 AM. ECON. REV. 584 (2000) (analyzing decades of data to find relationships between deterrence, crime, and drugs); Thomas B. Marvell & Carlisle E. Moody, *Specification Problems, Police Levels, and Crime Rates*, 34 CRIMINOLOGY 609, 609 (1996) (using the Granger causality test and eventually determining a significant relationship between police number and crime); Daniel S. Nagin, *Criminal Deterrence Research at the Outset of the Twenty-First Century*, *in* 23 CRIME AND JUSTICE: A REVIEW OF RESEARCH 1, 30–32 (Michael Tonry ed., 1998) (discussing research regarding tough policing); Robert J. Sampson & Jacqueline Cohen, *Deterrent Effects of the Police on Crime: A Replication and Theoretical Extension*, 22 L. & SOC'Y REV. 163 (1988) (discussing aggressive law enforcement); Kirk R. Williams & Richard Hawkins, *Perceptual Research on General Deterrence: A Critical Review*, 20 L. & SOC'Y REV. 545 (1986) (reviewing perceptual studies on general deterrence and attempting to engender new research on the topic).

> What we are left with, then, is that clearly police presence deters crime, but it is probably very difficult to say with any degree of precision how much it deters. Let us take Levitt's estimate as a reasonable guess that increasing the size of the police force by 10% will reduce crime by about 4% or 5%.[350]

The link between lower crime rates and higher perceptions of being caught support the theory of absolute deterrence because the reason why the likelihood of being detected acts as a retardant to crime is the underlying assumption that *if* caught, some hardship awaits.[351] If rather than punishing offenders police handed out lollipops or movie tickets, the presence of more police would result in more crime.[352]

Thus, general deterrence does work, at least to the extent that if there was no real threat of punishment for engaging in unlawful conduct the crime rate would soar.[353] It follows that the threat of punishment discourages potential offenders from committing crime.[354] This justifies the punishment of wrongdoers.[355] The evidence does not support the view, however, that this relationship operates in a linear fashion; that is, the deterrent effect of sanctions does not increase in direct proportion to the severity of sanctions.[356]

Thus, although the objective of deterrence justifies imposing punishment, it is at best a remote consideration when it comes down to the question of how much punishment should be imposed.[357] Absolute general deterrence provides a justification for imposing punishment, but it does not justify the imposition of penalties that exceed the objective gravity of the offense.[358] It follows that the pursuit of general deterrence cannot justify the imposition of harsh penalties for recidivists, nor indeed any offenders.[359]

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350. Paternoster, *supra* note 316, at 799 (citing Levitt, *supra* note 319, at 177). *But see* Eck & Maguire, *supra* note 343 (arguing that these conclusions are not valid, principally because of the incomplete nature of the data and cursory analysis involved).

351. *See* RITCHIE, *supra* note 270, at 7.

352. RICHARD EDNEY & MIRKO BAGARIC, AUSTRALIAN SENTENCING: PRINCIPLES AND PRACTICE 64 (2007).

353. *Id.* at 65; RITCHIE, *supra* note 270, at 7.

354. EDNEY & BAGARIC, *supra* note 352, at 65; *see* RITCHIE, *supra* note 270, at 7.

355. EDNEY & BAGARIC, *supra* note 352, at 65.

356. *Id.*; *see* RITCHIE, *supra* note 270, at 23.

357. EDNEY & BAGARIC, *supra* note 352, at 65.

358. *See* JUDICIAL COMM'N OF N.S.W., SENTENCING BENCH BOOK 5503 (2006) (explaining the proportionality principle).

359. *See id.*

3. Incapacitation

a. Selection Incapacitation

Incapacitation is the most obvious rationale for the recidivist premium.[360] It is also the rationale where the evidence is most complex and ambiguous. Incapacitation aims to protect the community by confining offenders to imprisonment, during which time they can no longer commit offenses.[361] The effectiveness of incapacitation cannot be judged by the height of the prison wall.[362] Imprisonment as a means of community protection is only effective if *but for* being imprisoned, the offender would have committed a further offense.[363] With this in mind, two forms of incapacitation have been advanced.[364] The first is selective incapacitation, which focuses on the individual offender, and its success is contingent upon distinguishing between offenders who will reoffend from those who will not.[365]

The existing evidence suggests that there are no techniques that can accurately predict the likelihood that a particular offender will commit another serious crime in the foreseeable future.[366] In the context of attempting to predict future criminal behavior, people who commit serious violent and sexual offenses are often labeled as "dangerous offenders."[367]

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360. *See* Roberts, *supra* note 4, at 331, 349.

361. *See* DRESSLER, *supra* note 156, at 15.

362. *See* Kevin Bennardo, *Incarceration's Incapacitative Shortcomings*, 54 SANTA CLARA L. REV. 1, 12–13 (2014) (arguing that prison might not necessarily prevent an offender from committing more crime).

363. *See id.* at 14–18 (noting that some incapacitative models assume that prison is not part of society); *see also* Colin Murray, *"To Punish, Deter and Incapacitate": Incarceration and Radicalisation in UK Prisons after 9/11*, in PRISONS, TERRORISM AND EXTREMISM 16 (Andrew Silke ed., 2012) (noting that for incapacitation to work, it is important that inmates do not corrupt other prisoners).

364. Alex R. Piquero et al., *The Criminal Career Paradigm*, 30 CRIME AND JUSTICE: A REVIEW OF RESEARCH 359, 380–81 (Michael Tonry ed., 2003).

365. *See id.* at 381.

366. *See* Andrew von Hirsch, *Recent Trends in American Criminal Sentencing Theory*, 42 MD. L. REV. 6, 11–12 (1983). It is possible to predict that offenders who have a long history of minor offending will recidivate, but as discussed below, it is almost not economically viable to imprison offenders with this profile. *See* Murat C. Mungan, *The Law and Economics of Fluctuating Criminal Tendencies and Incapacitation*, 72 MD. L. REV. 156, 179 (2012) (noting that imprisonment is costly).

367. There is no generally accepted definition of this term, but a suitable definition is "the repetitively violent criminal who has more than once committed or attempted to commit homicide, forcible rape, robbery, or assault." Simon Dinitz & John P. Conrad, *Thinking About Dangerous Offenders*, 10 CRIM. JUST. ABSTRACTS 99, 99 (1978); *see also*

A wide-ranging analysis in the 1990s of the data regarding the capacity of any discipline to predict future criminal behavior noted that predictive techniques "tend to invite overestimation of the amount of incapacitation to be expected from marginal increments in imprisonment."[368] In fact, the ability to predict which offenders will likely reoffend is so poor that some academics estimated the increase in the crime rate from the reduction or abolition of imprisonment to be as low as five percent.[369]

The heightened terrorism threat over the past decade has resulted in an increase in the techniques used to predict dangerousness.[370] Actuarial tools score a person's level of risk by mapping their profile to variables that are known risk factors.[371] Structured professional judgment and criminogenic assessment tools also use a range of variables,[372] but they are designed to be more nuanced than actuarial tools because they aim to not only predict the likelihood of violence but also the imminence, severity, and possible targets of the risk.[373] Despite this, more recent attempts to accurately predict dangerousness in the context of violent and sexual offenses have proven to be deficient.[374]

In relation to the specific use of prior convictions, many predictive tools use prior criminal history as a key variable.[375] From the perspective of

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Jessica Black, *Is the Preventive Detention of Dangerous Offenders Justifiable?*, 6 J. APPLIED SECURITY RES. 317, 325 (2011) (citing the same definition of dangerous offender).

368. FRANKLIN E. ZIMRING & GORDON HAWKINS, INCAPACITATION: PENAL CONFINEMENT AND THE RESTRAINT OF CRIME 86 (1995).

369. *See* Jacqueline Cohen, *The Incapacitative Effect of Imprisonment: A Critical Review of the Literature*, *in* DETERRENCE AND INCAPACITATION: ESTIMATING THE EFFECTS OF CRIMINAL SANCTIONS ON CRIME RATES 187, 188 (Alfred Blumstein et al. eds., 1978).

370. *See* Catherine R.L. Lawson, *The Utility of Predicting Dangerousness in the War on Terror*, 22 DUKE J. COMP. & INT'L L. 407, 419, 423 (2012).

371. *See* N.S.W. SENTENCING COUNCIL, *supra* note 103, at 21–22.

372. The LSI-R model, which is used in New South Wales, has fifty-four variables. *See id.* at 23.

373. For a discussion of these tools, see *id.* at 20–24.

374. *See* Black, *supra* note 367, at 317. *See generally* BERNADETTE MCSHERRY & PATRICK KEYZER, DANGEROUS PEOPLE: POLICY, PREDICTION, AND PRACTICE (2011) (containing articles that discuss preventive measures towards dangerous offenders); BERNADETTE MCSHERRY & PATRICK KEYZER, SEX OFFENDERS AND PREVENTIVE DETENTION: POLITICS, POLICY AND PRACTICE (2009) (discussing preventive measures in regard to sex offenders). Most recently, it has been suggested that habitual criminals and serious offenders have a different brain anatomy than other people. In *The Anatomy of Violence*, Adrian Raine states that neuroimaging of the brain shows that such offenders have less brain activity in areas of the brain—the ventral prefrontal cortex and dorsal prefrontal cortex—associated with self-awareness, learning from past experience, and emotions. *See* ADRIAN RAINE, THE ANATOMY OF VIOLENCE passim (2013).

375. *See, e.g.*, Michael E. Ezell, *The Effect of Criminal History Variables on the Process of Desistance in Adulthood Among Serious Youthful Offenders*, 23 J. CONTEMP. CRIM. JUST. 28 (2007) (examining "the effects of prior criminal activity . . . on the risk of continued criminal offending").

the goal of incapacitation, the prior conviction premium is, in effect, a crude predictor of future propensity to commit crime.[376] Ostensibly, it is a poor vehicle, especially in relation to violent offenses.[377]

A New South Wales study focused on offenders who committed serious violent offenses in 1994 and were released from custody no later than 2009.[378] There were 435 such offenders, and the tracking showed that by September 2011 seventy-three of the 435 offenders committed another offense involving a serious degree of violence—meaning that 83.2 percent did not commit another serious violent offense.[379]

The results are similar to those from an earlier New Zealand study.[380] A study tracked the offending behavior of 613 offenders released from prison in New Zealand for a two-and-a-half year period.[381] The study revealed that those who would be classified as serious offenders[382] were no more likely to receive a further conviction within two-and-a-half years after release than ordinary offenders, and were, in fact, less likely to be imprisoned within that time.[383] It was also found that of all serious offenses committed by the entire sample group, the vast majority were committed by offenders who were imprisoned for non-serious—ordinary—offenses.[384] In total, only thirty of the sample of 613 offenders committed a serious offense within the follow up period.[385] And, it was noted that there is very little hope of achieving crime control through altering the definition of a serious offense.[386]

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376. *See id.* at 44.

377. For a summary of the literature, see MICHAEL E. EZELL & LAWRENCE E. COHEN, DESISTING FROM CRIME: CONTINUITY AND CHANGE IN LONG-TERM CRIME PATTERNS OF SERIOUS CHRONIC OFFENDERS (2005); Kathleen Auerhahn, *Conceptual and Methodological Issues in the Prediction of Dangerous Behavior*, 5 CRIMINOLOGY & PUB. POL'Y 771 (2006); Ezell, *supra* note 375; Lila Kazemian, *Assessing the Impact of a Recidivist Sentencing Premium on Crime and Recidivism Rates*, *in* PREVIOUS CONVICTIONS AT SENTENCING: THEORETICAL AND APPLIED PERSPECTIVES, *supra* note 5, at 227, 231–36.

378. This included sexual offenses. *See* N.S.W. SENTENCING COUNCIL, *supra* note 103.

379. *Id.* at 31.

380. *See* Mark Brown, *Serious Violence and Dilemmas of Sentencing: A Comparison of Three Incapacitation Policies*, 1998 CRIM. L. REV. 710, 714.

381. *Id.*

382. On the basis of the current definition in the Criminal Justice Act 1985 (N.Z.), this relates to crimes of serious violence, such as manslaughter, wounding, and robbery.

383. Brown, *supra* note 380, at 713–14.

384. *Id.* at 714.

385. *Id.*

386. *Id.* at 715.

The fact that there are so many false positives in a process of selective incapacitation does not necessarily mean it is flawed.[387] Even if the practice is only, say, one-fifth accurate, it still thwarts a large number of crimes in absolute terms.[388] It is potentially an attractive proposition to the utilitarian eye.[389] However, the cost in terms of unnecessarily imprisoning offenders is arguably too high; imprisoning five people to prevent one person from committing a crime offends against deeply and widely held libertarian beliefs.[390] There is a strong moral repugnance to imprisoning individual offenders for any longer than is commensurate with their wrongdoing.[391] In fact, any additional punishment is akin to punishing the innocent.[392] Thus, the goal of selective incapacitation has pragmatic and normative obstacles so far as serious offenses are concerned.

However, predicting *minor offending* is easier. If one focuses solely on the total *number*—as opposed to type—of previous convictions, there is a far greater ability to predict future offenders.[393] Studies in the United Kingdom have shown that male offenders with five or more previous convictions have an eighty-seven percent chance of being convicted of another offense within six years.[394] Similar findings have also been reported in Australia.[395] According to the Australian Institute of Criminology, approximately two-thirds of sentenced offenders received into prison

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387. *See* KATHLEEN AUERHAHN, SELECTIVE INCAPACITATION AND PUBLIC POLICY 67 (2003) (citing PETER W. GREENWOOD & ALLAN ABRAHAMSE, SELECTIVE INCAPACITATION 27, 92 (1982)).

388. *See id.* at 68.

389. *See* Michael Tonry, *Selective Incapacitation: The Debate over Its Ethics*, *in* PRINCIPLED SENTENCING: READINGS ON THEORY AND POLICY, *supra* note 179, at 128, 136.

390. *See* MURRAY N. ROTHBARD, THE ETHICS OF LIBERTY 85–96 (1998), *available at* http://mises.org/rothbard/ethics/ethics.asp; Erik Luna, *Traces of a Libertarian Theory of Punishment*, 91 MARQ. L. REV. 263, 264, 293–94 (2007).

391. *See* Joseph E. Kennedy, *Making the Crime Fit the Punishment*, 51 EMORY L.J. 753, 759 (2002).

392. This is illustrated most profoundly by the maxim that "it is better that ten guilty persons escape than that one innocent suffer." 4 WILLIAM BLACKSTONE, COMMENTARIES 352 (1769). But, for arguments in support of limited forms of preventive detention, see VON HIRSCH & ASHWORTH, *supra* note 208, at 55–56 (limiting it to offenders who have been convicted previously of serious offenses); Black, *supra* note 367, at 322–23.

393. *See* ASHWORTH, *supra* note 9, at 199. Other predictive factors for recidivism are unemployment and drug history. *See* Andrew von Hirsch, *Selective Incapacitation: Some Doubts*, *in* PRINCIPLED SENTENCING: READINGS ON THEORY AND POLICY, *supra* note 179, at 121, 125.

394. *See* G.J.O. PHILLPOTTS & L.B. LANCUCKI, STATISTICAL DEP'T, HOME OFFICE, PREVIOUS CONVICTIONS, SENTENCE AND RECONVICTION: A STATISTICAL STUDY OF A SAMPLE OF 5000 OFFENDERS CONVICTED IN JANUARY 1971, at 16 (1979).

395. *See* JOHN WALKER, AUSTL. INST. OF CRIMINOLOGY, PRISON SENTENCES IN AUSTRALIA: ESTIMATES OF THE CHARACTERISTICS OF OFFENDERS SENTENCED TO PRISON IN 1987–88, at 6 (1989).

already served a sentence of imprisonment.[396] The results also indicated that previous detention is not a strong indicator regarding future propensity to commit serious offenses.[397] About half of those convicted of serious offenses had not previously served a prison term.[398] However, about ninety percent of those sent to prison for "other good order" offenses and almost eighty percent of those sent to prison for "justice/security offences"—mainly breaches of court orders—were serving a repeat term.[399]

Thus, for repeat minor offenses, the normative obstacles to enhanced prison terms are less significant but the pragmatic concerns are elevated. Although we can predict with a high degree of confidence that such offenders will continue to cause a nuisance to the community, detaining them for a period significantly longer is likely to be grossly disproportionate to the financial cost of the detention.[400] The cost of imprisonment varies considerably in each jurisdiction.[401] In the United States, it costs approximately $34,000 per inmate per year.[402] The cost in Australia is much higher; it cost approximately $79,000 per year to detain each

396. *Id.*; *see also* ZHANG & WEBSTER, *supra* note 86, at 32 (noting that offenders previously in jail were nearly twice as likely to be imprisoned following release).

397. *See* WALKER, *supra* note 404, at 6.

398. *See id.*

399. *See id.*

400. It was essentially for this reason that the Australian Law Reform Commission rejected the use of incapacitation—and general deterrence—as a proper objective of sentencing. AUSTL. LAW REFORM COMM'N, SENTENCING xix (1988). About a decade later, however, the New South Wales Law Reform Commission considered incapacitation an appropriate rationale for sentencing. N.S.W. LAW REFORM COMM'N, SENTENCING 330–32 (1996).

401. In England, a prisoner may cost between £26,000 and £37,000 a year. MINISTRY OF JUSTICE, COSTS PER PLACE AND COSTS PER PRISONER BY INDIVIDUAL PRISON 4 (2011), *available at* https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/218347/prison-costs-summary-10-11.pdf. In California, the cost in 2008 to 2009 was approximately $47,000. *See California's Annual Costs To Incarcerate an Inmate in Prison*, LEGIS. ANALYST'S OFF., http://www.lao.ca.gov/PolicyAreas/CJ/6_cj_inmatecost (last visited June 22, 2014).

402. AM. CIVIL LIBERTIES UNION, AT AMERICA'S EXPENSE: THE MASS INCARCERATION OF THE ELDERLY VII (2012), *available at* https://www.aclu.org/files/assets/elderlyprisonreport_20120613_0.pdf.

prisoner between 2010 and 2011.[403] It is illogical for any community to expend nearly $80,000 per year in order to punish minor crime.[404]

b. General Incapacitation

Although selective incapacitation does not work, general incapacitation is more effective in reducing crime.[405] General incapacitation involves imprisoning offenders simply because they have committed a criminal offense on the basis that while in prison they cannot inflict harm in the general community.[406] Little or no effort is normally made to predict future offending patterns, whether on the basis of previous criminal history or other considerations.[407] There is no bright line between selective and general incapacitation, and the difference is often a simply one of degree.[408] Once large numbers of offenders are imprisoned on the basis of predictive criteria, which are demonstrably inaccurate, a process that may have initially had the appearance of selective incapacitation turns into a system of general incapacitation.[409] In reality, the practice of imposing a large recidivist premium has evolved into a scheme of general incapacitation.[410]

There are two theoretical reasons why general incapacitation should work. First, the more people who are in prison, the fewer people there will necessarily be who could commit crime in the general community. Accordingly, it should follow that this will reduce the crime rate in absolute terms. It should also reduce crime in a relative sense. This is because, as expanded upon in Part IV below, people who commit crime are disproportionately from one sector of the community: the lower socioeconomic group.[411] Poor people are grossly over represented in jails

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403. STEERING COMM. FOR THE REVIEW OF GOV'T SERV. PROVISION, AUSTL. GOV'T PRODUCTIVITY COMM'N, 1 REPORT ON GOVERNMENT SERVICES 2012 Table 8A.7 (2012), *available at* http://www.pc.gov.au/__data/assets/pdf_file/0019/114940/24-government-services-2012-chapter8.pdf.

404. *See* Mirko Bagaric, *Instant Justice? The Desirability of Expanding the Range of Criminal Offences Dealt With on the Spot*, 24 MONASH U. L. REV. 231, 270–71 (1998). A similar conclusion was reached in Rucker Johnson & Steven Raphael, *How Much Crime Reduction Does the Marginal Prisoner Buy?*, 55 J.L. & ECON. 275, 302–03 (2012). There are no accurate recent studies measuring the cost of crime. For the results of earlier studies, see Cassell, *supra* note 172, at 1032–35.

405. For a discussion regarding the distinction between special and collective incapacitation, see ZIMRING & HAWKINS, *supra* note 368, at 60–75.

406. *See id.* at 60.

407. *See id.* An exception is the Dutch law discussed below, which is aimed at recidivists with ten prior convictions. *See infra* notes 442–47 and accompanying text.

408. *See* ZIMRING & HAWKINS, *supra* note 368, at 67.

409. *See id.* at 69–70.

410. *See id.* at 70.

411. *See infra* Part IV.

across the world.[412] Thus, imprisoning large numbers of poor people should reduce not only the number of criminal offenses, but also the number of crimes per non-prison population.

Most of the research regarding testing the general incapacitation model was undertaken in the United States, presumably because of its unprecedented increases in prison populations over the past thirty years.[413] Early findings were not positive.[414]

Following the introduction of tougher sentencing laws, the prison population in California in the ten-year period from 1980 to 1990 "more than tripled," representing an increase of 120,000 prisoners.[415] This increase was "without precedent in the statistical record of imprisonment in the Western world."[416] Franklin Zimring and Gordon Hawkins compared California's movements in crime rates and incarceration levels between 1980 and 1990 with those of sixteen other American states that contain metropolitan areas with populations in excess of 350,000.[417] This was done in order to control temporal trends in California that are not connected to changes in incarceration policy.[418] The data failed to show a general causal connection between an increased use of incarceration and a reduction in crime, and in particular, there was no meaningful evidence of such a connection in California.[419] It was found that the "correlation

412. *See* STEVEN BOX, RECESSION, CRIME AND PUNISHMENT 96 (1987) (concluding that income inequality is strongly related to crime after reviewing sixteen major studies between income inequality and crime); Pat Carlen, *Crime, Inequality, and Sentencing*, *in* A READER ON PUNISHMENT, *supra* note 211, at 306, 311. Prison numbers illustrate this quite graphically. In Australia, the rate of indigenous imprisonment is fourteen times higher than that of the general population. *See* AUSTL. BUREAU OF STATISTICS, CORRECTIVE SERVICES 6 (2011), *available at* http://www.ausstats.abs.gov.au/ausstats/subscriber.nsf/0/9A0865837AEBACA9CA2578AF0011B147/$File/45120_mar%202011.pdf.

413. *See Incarceration*, SENT'G PROJECT, http://www.sentencingproject.org/template/page.cfm?id=107 (last visited June 22, 2014).

414. *See infra* notes 424–40 and accompanying text.

415. Linda S. Beres & Thomas D. Griffith, *Do Three Strikes Laws Make Sense? Habitual Offender Statutes and Criminal Incapacitation*, 87 GEO. L.J. 103, 109 (1998) (citing ZIMRING & HAWKINS, *supra* note 368, at 104). It may be argued that three-strikes statutes, in fact, pursue a policy of selective incapacitation, in that they attempt to take out of circulation the small percentage of the criminal population whom it is assumed commit most of the crimes. *See id.* at 103. However, the net is cast so widely that, in effect, they represent a system of general incapacitation. *See id.* at 131–33.

416. ZIMRING & HAWKINS, *supra* note 368, at 104.

417. *Id.* at 103–04.

418. *Id.* at 105.

419. *See id.* at 107.

between variations in incarceration and in aggregate crime is –0.09, a minute (and statistically insignificant) negative correlation."[420]

These findings extended to early assessments of the three-strikes laws in California.[421] A study published in the mid-1990s by Lisa Stolzenberg and Stewart D'Alessio analyzed the impact of California's three-strikes laws in the ten largest cities in the state.[422] California was chosen as an ideal location because (a) it was one of the first places to implement mandatory three-strikes laws; (b) over 3000 people were charged under the California three-strike laws; and (c) it had implemented one of the toughest three-strike laws in the United States.[423]

It was anticipated that these laws, by effectively removing career criminals from society, would result in a significant reduction in crime.[424] A 1994 RAND Corporation study, for example, predicted that serious crime in California would drop by twenty-eight percent, reaching a peak reduction of approximately 400,000 violent crimes in 2000.[425] However, another study showed that, at that time, California's three-strikes law had no observable influence on the serious crime rate and "did not achieve its objective of reducing crime, through either deterrence or incapacitation."[426] Only one city, Anaheim, exhibited a substantial reduction in the serious crime rate, but even that was regarded as possibly being an aberrant finding.[427]

"Most studies of incapacitation suggest that prison exerts a significant suppression effect on crime; however, the estimated effects appear to

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420. *Id.* at 107.

421. *See, e.g.*, Lisa Stolzenberg & Stewart J. D'Alessio, *"Three Strikes and You're Out": The Impact of California's New Mandatory Sentencing Law on Serious Crime Rates*, 43 CRIME & DELINQUENCY 457, 464–65 (1997). Three-strikes laws were first introduced in Washington in 1993, and they have now been adopted in more than twenty states. *See* Elsa Y. Chen, *Impacts of "Three Strikes and You're Out" on Crime Trends in California and Throughout the United States*, 24 J. CONTEMP. CRIM. JUST. 345, 345, 349 (2008); Kevin E. McCarthy, *Recent Developments on Washington State's "Three Strikes" Law*, CONN. GEN. ASSEMBLY (Jan. 8, 2009), http://www.cga.ct.gov/2009/rpt/2009-R-0006.htm.

422. *See* Stolzenberg & D'Alessio, *supra* note 421, at 459.

423. *See id.* Initially, California's three-strike laws covered twenty-eight different "serious" felonies, including burglary, and seventeen "violent" felonies, including robbery in an inhabited house. *See* Mark W. Owens, *California's Three Strikes Law: Desperate Times Require Desperate Measures—But Will It Work?*, 26 PAC. L.J. 881, 891 nn.62–63 (1995).

424. *See* Stolzenberg & D'Alessio, *supra* note 421, at 458.

425. *See* PETER W. GREENWOOD ET AL., THREE STRIKES AND YOU'RE OUT: ESTIMATED BENEFITS AND COSTS OF CALIFORNIA'S NEW MANDATORY-SENTENCING LAW 18, 23, 26 (1994). It was estimated that most of the drops would be in burglary and assault. *See id.* at xii.

426. Stolzenberg & D'Alessio, *supra* note 421, at 467; *see also* JAMES AUSTIN ET AL., THREE STRIKES AND YOU'RE OUT: THE IMPLEMENTATION AND IMPACT OF STRIKE LAWS 103 (2000) (finding California's three-strikes law had limited effect).

427. *See* Stolzenberg & D'Alessio, *supra* note 421, at 465.

vary markedly from study to study."[428] For example, a 1986 study by the National Research Council (NRC) found that the rate of imprisonment prevailing in the United States during the 1970s would have had an incapacitation benefit of twenty percent.[429] On the other hand, a United Kingdom study of incapacitation by Roger Tarling estimated the incapacitation benefit of imprisonment in the United Kingdom in the mid-1980s between 7.3 and 9.0 percent.[430] "Although the estimates reported by [the NRC] and Tarling differ significantly, most incapacitation studies conclude that large increases in the prison population only produce fairly modest reductions in crime."[431] For example, research suggests that in a majority of the states in the United States, the prison population would have to be more than doubled to obtain a ten percent reduction in crime.[432]

However, more recent studies have suggested that the continued practice of tough sentencing can reduce crime.[433] This is especially in relation to studies undertaken over a longer period. In the United States, between 1993 and 2010, the rate of violent crime in the United States dropped by more than sixty-three percent, with most of the decline recorded after 1996, and the violent victimization rates per 1000 people aged twelve years or older dropped seventy-six percent.[434]

During this period the imprisonment rate rose from approximately 1.37 million to 2.27 million prisoners.[435] At face value, these figures suggest

428. Don Weatherburn et al., *How Much Crime Does Prison Stop? The Incapacitation Effect of Prison on Burglary*, 2 INT'L J. PUNISHMENT & SENT'G 8, 13 (2006).

429. *Id.* (citing NAT'L RESEARCH COUNCIL, 1 CRIMINAL CAREERS AND CAREER CRIMINALS 123 (Alfred Blumstein et al. eds., 1986)).

430. *Id.* (citing ROGER TARLING, ANALYSING OFFENDING: DATA, MODELS AND INTERPRETATIONS 145 (1993)).

431. *Id.*

432. *Id.* (citing Janet Chan, *The Limits of Incapacitation as a Crime Control Strategy*, NEW S. WALES BUREAU CRIME STAT. & RES. CRIME & JUST. BULLETIN (Sept. 1995), http://www.bocsar.nsw.gov.au/agdbasev7wr/bocsar/documents/pdf/cjb25.pdf).

433. *See* LAURITSEN & REZEY, *supra* note 317, at 3–4.

434. *See id.*

435. *Compare* TRACY L. SNELL, BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, EXECUTIVE SUMMARY TO CORRECTIONAL POPULATIONS IN THE UNITED STATES, 1993, at 1 (1995), *available at* http://www.bjs.gov/content/pub/pdf/cpus93ex.pdf (citing a 1.37 million figure that includes inmates in both local jails and State and federal prisons), *with* LAUREN E. GLAZE, BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, CORRECTIONAL POPULATIONS IN THE UNITED STATES, 2010, at 3 (2011), *available at* http://www.bjs.gov/content/pub/pdf/cpus10.pdf (citing a 2.27 million figure that also includes inmates in both local jails and State and federal prisons).

a causal link between imprisoning greater numbers of offenders and an effective reduction in the crime rate.

William Spelman has calculated that up to twenty percent of crime reduction is attributable to the increased rate of imprisonment.[436] Other studies support the success of incapacitation, but remain equally unclear about its precise impact. According to literature examined by Roger Warren, a ten percent increase in imprisonment rates produces a two to four percent reduction in the crime rate; however, most of this relates only to nonviolent offenses.[437]

Although general incapacitation seems to have some validity, one constant finding is that it is usually most effective in relation to minor crime,[438] However, some success might also be achieved in relation to more serious forms of offending.

The effectiveness of general incapacitation for relatively minor offenses is supported by an Australian study published in 2006 by Don Weatherburn et al., entitled *How Much Crime Does Prison Stop? The Incapacitation Effect of Prison on Burglary*.[439] The study measured the impact of imprisonment on burglary rates and concluded that:

> [A]t least so far as burglary is concerned, prison does seem to be an effective crime control tool. Our best estimate of the incapacitation effect of prison on burglary (based on the assumption that burglars commit an average of 38 burglaries per year when free) is 26 per cent. This estimate does not appear to be overly sensitive to the value of offending frequency we assume. . . .
>
> These percentage effects might not seem large but in absolute terms an incapacitation effect of 26 per cent is equivalent to preventing over 44,700 burglaries per annum.[440]

However, the report then noted that the cost associated with using imprisonment as a tool to reduce the burglary rate was too high:

> The fact that prison is effective in preventing a large number of burglaries raises the question of whether increased use of imprisonment would be an effective way of further reducing the burglary rate. Our findings on this issue, like those of incapacitation studies in Britain and the United States, are not that encouraging. They suggest that a doubling of the sentence length for burglary would cost an additional $26 million per annum but would only reduce the annual number of burglaries by about eight percentage points. A doubling of the proportion of convicted burglars would produce a larger effect (about 12 percentage points) but only if those who are the subject of our new penal policy offend as frequently as

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436. *See* Spelman, *supra* note 318, at 469*; see also* Alfred Blumstein & Joel Wallman, *The Recent Rise and Fall of American Violence*, *in* THE CRIME DROP IN AMERICA, *supra* note 319, at 2 (discussing that the crime drop correlates to an increase in imprisonment).

437. *See* Warren, *supra* note 320, at 594 (citing STEMEN, *supra* note 320, at 5).

438. *See* Weatherburn et al., *supra* note 428, at 23–24.

439. *See id.*

440. Weatherburn et al., *supra* note 428, at 23.

> those who are currently being imprisoned. Given what we know about the frequency of offending amongst burglars who do not currently receive a prison sentence, this seems highly unlikely.[441]

Similar findings are reported regarding sentence enhancements imposed on offenders in the Netherlands.[442] A law passed in 2001 required increased sentence severity for offenders who had ten or more prior convictions.[443] A key distinction between the enhancements imposed by these laws and those in some other jurisdictions was that they were relatively minor—no typically two years' imprisonment.[444] By 2007, 1400 offenders were sentenced under this regime, most of whom were nonviolent offenders.[445] The result was a dramatic drop in the rate of burglary and car theft in the ten cities in which the law operated.[446] The report concluded:

> We find that sentence enhancements for a carefully selected group of prolific offenders can dramatically reduce the crime rate. . . . Although the group of offenders sentenced under the law accounted for only 5% of the prison population 6 years after its introduction, the sentencing policy lowered the rate of burglary and theft from car by an estimated 25% on average and by 40% in the cities that applied the law most intensively. . . .
>
> On average, we find the benefits of the policy to exceed the costs by a large margin. We find the benefits to go down rapidly with a more intensive use of the law, however. The marginal crime-reducing effect of convicting another prolific offender to a enhanced prison sentence declines by some 25% when going from the 25th to the 75th percentile in the rate of application of the law during 2001–7. The benefits of the policy remained higher than the costs, however, even for the cities which used the law most intensively.[447]

More wide ranging data also supports the link between prior and future offending and confirm that the link is strongest in relation to minor offending. The most wide ranging study of the trajectory of offenders in Australia was undertaken by the Australian Bureau of Statistics and released in August 2010 in a report titled *An Analysis of Repeat Imprisonment*

441. *Id.* at 24.
442. Ben Vollaard, *Preventing Crime Through Selective Incapacitation*, 123 ECON. J. 262 (2012).
443. *Id.* at 264. In absolute terms, the increase was not drastic; the habitual offender law allowed for sentences of imprisonment of two years, as opposed to two months, to be imposed in most cases. *See id.*
444. *See id.*
445. *Id.*
446. *See id.* at 269.
447. *Id.* at 282.

Trends in Australia Using Prisoner Census Data from 1994 to 2007.[448] The report is based on a fourteen-year longitudinal study for the period of July 1, 1994, to June 30, 2007.[449] The study grouped prisoners into two cohorts.[450] The first consisted of 28,584 prisoners released between July 1, 1994, and June 30, 1997.[451] The second was composed of 26,696 prisoners released between July 1, 2001, and June 30, 2004.[452] The study compared recidivism rates from both cohorts within three years from release.[453] It also examined the ten-year reimprisonment rate for the earlier cohort.[454]

The report noted that from 1994 to 2007, the number of prisoners with prior imprisonment grew at an average rate of 3.2 percent each year.[455] However, at the national level, no clear trend was apparent; the rate ranged from fifty-six percent to sixty-two percent during the same period.[456] The data on the portion of released prisoners who return to imprisonment within the respective three-year periods are even more illuminating. The report noted that for the 1994 to 1997 cohort, about twenty percent were reimprisoned within two years, one-quarter were reimprisoned within three years, and forty percent were reimprisoned by the end of the ten-year survey period.[457] A surprising finding was that prisoners released in the later cohort were more likely to be reimprisoned than the earlier cohort over an equivalent three-year follow up period.[458] The reimprisonment rate for the latter cohort was seventeen percent higher than for the earlier one.[459]

Thus, much of the prison population is made up of people who have been in prison before. Moreover, it emerged that prisoners with prior imprisonment were twice as likely as first-timers to return to prison—fifty percent compared to twenty-five percent imprisonment rates, respectively, from ten years after release.[460] When a logistic regression was applied to

448. ZHANG & WEBSTER, *supra* note 86.
449. *Id.* at i.
450. *Id.* at i–ii.
451. *Id.* at 10.
452. *Id.* at ii, 15.
453. *Id.*
454. *Id.*
455. *Id.* at 12.
456. *Id.*
457. *Id.* at 16.
458. *Id.* at 27. For a discussion of these implications, see *infra* Part IV.
459. *Id.* at 25. More recent data, however, indicates that the imprisonment rate is, in fact, even higher. A report by the Australian Government Productivity Commission showed that forty percent of prisoners released during the 2010–2011 financial year returned to prison with two years. *See* STEERING COMM. FOR THE REVIEW OF GOV'T SERV. PROVISION, *supra* note 403, at C.22.
460. ZHANG & WEBSTER, *supra* note 86, at 19.

this data, it emerged that the odds ratio that a prisoner with a number of previous prison terms would be imprisoned was 2.9 times that of a first-time prisoner.[461] Thus, it does appear that first-time offenders are less likely to be reimprisoned than repeat prisoners.

When examining trends by offense type for the 1994 to 1997 release cohort, it was noted that by June 30, 2007, the offenders who were most commonly reimprisoned were those sentenced for burglary—fifty-eight percent—theft—fifty-three percent—and robbery—forty-five percent; least were those convicted of drug offenses—twenty-four percent—and sexual assault—twenty-one percent.[462]

The recidivism levels ascertained by this report are high, but, in reality, are likely considerably higher. The report did not focus on released offenders who committed crimes for which they were not imprisoned and, therefore, not recorded. The report also noted that prisoners who were released after being sentenced for burglary or theft had the highest rate of reimprisonment, whereas those serving time for drug or sex offenses had the lowest reimprisonment rates.[463] Thus, there is a clear link between previous offending and an enhanced risk of future offending. This link justifies extra steps being taken to prevent offenders from committing further offenses. As we have seen, taking large numbers of people with prior convictions out of the community will reduce the crime rate.

4. Discussion Regarding Incapacitation as Justifying Recidivist Enhancement

The complex question then becomes what response is appropriate and can be adapted to the above findings? The matter is complicated by the fact that prior offending is a stronger indicator of future offending in relation to minor, as opposed to serious, offenses.[464] In relation to relatively minor offenses, incapacitation works.[465] Although selectively confining individuals clearly disables them from committing further offenses in the community for a period of time, it almost certainly does not justify the unrestrained use of imprisonment as a prophylactic against crime. These offenders should be subjected to an incapacitative penalty, but governments need

461. *Id.* at 23.
462. *Id.* at 30.
463. *Id.*
464. *See supra* notes 393–99 and accompanying text.
465. *See supra* notes 438–40 and accompanying text.

to develop more intelligent alternatives to imprisonment that can monitor the activities of recidivist minor offenders at a fraction of the cost of imprisonment.[466]

In relation to serious offending, selective incapacitation seems to be flawed given the limits of predicting serious offending on the basis of prior convictions; however, there is stronger evidence that general incapacitation does work in relation to those offenses.[467] Although most serious offenders do not reoffend, individuals with previous convictions for serious offenses commit such crime at a much greater frequency than the rest of the criminal population. Further, offenders with prior convictions for serious offenses reoffend more frequently than first-time offenders.[468]

This leaves policymakers with a difficult choice. Ultimately, the issue comes down to ascertaining the level and nature of risk and the appropriate burden placement—whether it should fall on the offender or prospective victims in the general community.

There is a degree of unfairness associated with imprisoning offenders for longer than is commensurate with the severity of their instant offense.[469] However, it would be remiss of legislatures not to take all reasonable steps to prevent innocent people from being victimized. The fact that potential victims cannot be identified in advance does not negate the need to put in place mechanisms to limit serious encroachments on the human rights of citizens. Thus, the debate about incapacitation as an appropriate sentencing goal is not about balancing the utilitarian benefit of community safety against the right to liberty of offenders. It is about weighing competing rights: the liberty of offenders against the right to sexual and physical integrity of prospective victims.

In relation to risk allocation decisions, the weight of the burden should be disproportionately shouldered by the morally and legally culpable—the offenders—as opposed to the innocent potential victims who have not played any role in creating the dilemma. The rights of the innocent trump those of the guilty, assuming the rights are of approximately equal importance.

Thus, the deprivation of liberty occasioned by longer sentences for recidivists is justified as a means of increasing the protection of the bodily and sexual integrity of other individuals. However, this does not justify greatly enhanced penalties. The balance that is appropriate must be

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466. For suggestions of alternatives, see *The Fallacy That Is Incapacitation*, *supra* note 262, at 123–24.

467. *See supra* Part III.C.3.

468. *See supra* notes 448–63 and accompanying text.

469. *See* JUDICIAL COMM'N OF N.S.W., *supra* note 358, at 5503.

proportionate to the objective that is sought, and not gratuitously overreach to satisfy the instinct to punish repeat offenders.

There is insufficient empirical data to enable accurate and forensic choices to be made about how much extra jail time should be imposed on recidivists. However, at some point there is a diminishing marginal return in terms of offenses prevented for each year of jail time. In addition, in any decisionmaking calculus, certain consequences—in the form of additional jail time—need to carry more weight than speculative outcomes—in the form of whether or not a particular offender would have actually reoffended. Therefore, the recidivist loading for serious offenses should be relatively minor, say twenty to fifty percent,[470] and certainly nowhere near the oppressive levels that are manifest in some sentencing grids and three-strikes regimes.

It is important to note that the relevance of a prior record dissipates over time, such that if an offender remains crime-free for approximately seven years, his or her likelihood of reoffending is approximately the same as for a person without a criminal history.[471] Thus, prior convictions should cease to be taken into account after this period.

IV. INCIDENTAL ADVANTAGE OF LESS WEIGHT BEING ACCORDED TO PRIOR CONVICTIONS

The above discussion recommends less weight being accorded to prior convictions in sentencing determinations. This will have the incidental benefit of diminishing the discriminatory impact of the criminal justice system against offenders from deprived social backgrounds.[472]

The problem of disadvantaged offenders is one of the most perplexing sentencing issues. It is a worldwide phenomenon that people from poor and disadvantaged backgrounds commit far more crime than other citizens.[473] Compliance with legal standards that preserve and entrench existing social institutions and practices is much more difficult for those who are not flourishing under the status quo.[474] Social disadvantage not

470. As shown by the Dutch previous conviction enhancement law, to be effective, the premium does not need to be oppressive. *See* Vollaard, *supra* note 442, at 282.

471. *See* Ezell, *supra* note 375, at 43; Megan C. Kurlycheck et al., *Scarlet Letters and Recidivism: Does an Old Criminal Record Predict Future Offending?*, 5 CRIMINOLOGY & PUB. POL'Y 483, 490 (2006).

472. *See supra* note 466 and accompanying text.

473. *See* BOX, *supra* note 412, at 96–97; Carlen, *supra* note 412, at 309.

474. *See* Carlen, *supra* note 412, at 309–10.

only prompts rebellion, but people from such groups have less to lose from being sentenced to custody, hence the fear of imprisonment is not as great.[475] By punishing people from deprived backgrounds more severely on their next—inevitable—conviction, despite the fact that the reasons for their predicament are largely not of their doing, sentencing law and practice perpetuates the social injustices that such people endure.

The unfair manner in which the criminal justice system works against offenders from deprived backgrounds has led to some of the most eminent commentators on punishment to retract or rethink their theories of punishment.[476] For example, it led both Jeffrie Murphy and von Hirsch to abandon the unfair advantage theory of punishment. Von Hirsch accepted that the theory requires "a heroic belief in the justice of the underlying social arrangements. Unless it is in fact true that our social and political systems have succeeded in providing for mutual benefits for all members including any criminal offender, then the offender has not necessarily gained from others' law-abiding behavior."[477] Murphy stated that punishment on this model was not justified until "we have restructured society in such a way that criminals genuinely do correspond to the only model that will render punishment permissible—make sure that they are autonomous and that they do benefit in the requisite sense."[478]

H.L.A. Hart suggests that, although there should not be a general defense of economic temptation, "[for] those who are below a minimum level of economic prosperity . . . [perhaps] we should incorporate as a further excusing condition the pressure of gross forms of economic necessity."[479] Antony Duff also accepts that his theory of punishment is not suitable in our present inequitable world: "[P]unishment is not justifiable within our present legal system; it will not be justifiable unless and until we have brought about deep and far-reaching social, political, legal and moral changes in ourselves and our society."[480] Duff believes that society's failure to accord all citizens the concern and respect that they deserve provides disadvantaged offenders with the strongest moral basis for resisting punishment not because their actions are justifiable or excusable but because society cannot morally condemn them.[481] And,

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475. *See id.* at 310, 312.

476. The same observation is made by TONRY, *supra* note 50, at 17–18.

477. VON HIRSCH, *supra* note 175, at 58.

478. Jeffrie G. Murphy, *Marxism and Retribution*, 2 PHIL. & PUB. AFF. 217, 243 (1973).

479. H.L.A. HART, *Legal Responsibility and Excuses*, *in* PUNISHMENT AND RESPONSIBILITY: ESSAYS IN THE PHILOSOPHY OF LAW 28, 51 (1968).

480. DUFF, *supra* note 168, at 294.

481. Anthony Duff, *Punishment, Citizenship & Responsibility*, *in* PUNISHMENT, EXCUSES AND MORAL DEVELOPMENT 17, 32 n.17 (Henry Tam ed., 1996).

more recently, Richard Frase stated "it may be both unfair (to vulnerable minorities) and unwise (more costly for society) to impose prior-conviction enhancements which have a strongly disparate impact on racial-minority offenders."[482]

There is no ready solution to what ought to be done to remedy the problem of offenders from deprived backgrounds. Given that the underprivileged do not choose poverty or social deprivation, and the efforts that are required to rise out of their predicament are enormous, there are extremely powerful arguments for treating disadvantaged offenders more leniently.[483] This could be done by making social deprivation a defense or perhaps a concrete mitigating factor at sentencing. Legislators and courts traditionally balk at such solutions,[484] either for fear that they would result in an escalation in the crime rate or because of the difficulty in determining the level of deprivation that would be sufficient to warrant a sentencing discount.[485] Von Hirsch also suggests that socially disadvantaged offenders may be better off not getting a discount due to some notion of diminished responsibility because "[p]ersons deemed incapable of responsibility for their actions tend to be seen as less than fully adult, and can become the target of proactive forms of state intervention that may be still more intrusive than the criminal law."[486] Thus, there may be some pragmatic considerations that militate against *positively* implementing

482. Frase, *supra* note 5, at 132.

483. The argument that social deprivation should not be a defense because there are many people from such backgrounds who lead law-abiding lives—and hence, there is supposedly no necessary link between poverty and crime—is as barren as the argument that smoking does not cause bad health because there are many people who do not experience health problems from smoking.

484. For example, in Australia, coming from a disadvantaged background is not in itself a mitigating factor. *See In re Daniel* (1997) 94 A Crim R 96, 125–26 (Austl.); *In re E (A Child)* (1993) 66 A Crim R 14, 31–32 (Austl.); *Neal v The Queen* (1982) 149 CLR 305, 326 (Austl.).

485. *See In re Daniel*, (1997) 94 A Crim R at 126. For an argument in favor of the defense of economic duress, see Barbara A. Hudson, *Mitigation for Socially Deprived Offenders*, *in* PRINCIPLED SENTENCING: READINGS ON THEORY AND POLICY, *supra* note 179, at 205, 207–08.

486. Andrew von Hirsch, *The Politics of "Just Deserts,"* 32 CANADIAN J. CRIMINOLOGY 397, 409 (1990). Von Hirsch accepts that the extent to which social deprivation diminishes criminal responsibility is a difficult matter, but ultimately finds it difficult to believe that social deprivation renders all law-breakers beyond fault. *See id.* He suggests a penalty discount may be appropriate where an offender from a deprived background can establish particular reasons why the deprivation made it more difficult for compliance with the law. *See* VON HIRSCH, *supra* note 207, at 107–08.

measures in the criminal justice system to claw back some of the disadvantages experienced by such offenders.[487]

Irrespective of the merits of the arguments that have been made against treating offenders from deprived social backgrounds more lightly, it has never been persuasively argued that a rotten social background should serve as an aggravating factor in sentencing. Yet, this is precisely the perverse outcome that follows as a result of giving weight to prior convictions in the sentencing calculus. Socially disadvantaged offenders are far more likely to have prior convictions, and it is they who overwhelmingly bear the brunt of the extra punishment that is meted out for previous misdeeds.[488] For example, an analysis of California correctional statistics found that although African Americans comprise only seven percent of California's population, they represent almost half—forty-three percent—of third-strike inmates.[489] Similar figures come from Washington,[490] where African Americans account for about thirteen percent of the state's population yet represent about forty percent of three-strikes casualties.[491] More widely, the rate of imprisonment of Black non-Hispanic males in the United States is more than six times higher than the general population and three times higher than the male Hispanic population.[492] In Australia, the overrepresentation of indigenous prisoners is even greater, currently reaching a disturbing ratio of fifteen to one when compared to the rest of the community.[493]

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487. *See* von Hirsch, *supra* note 486, at 398.

488. *See* Todd R. Clear, *The Effects of High Imprisonment Rates on Communities*, 37 CRIME AND JUSTICE: A REVIEW OF RESEARCH 97, 100, 102 (Michael Tonry ed., 2008); Frase, *supra* note 5, at 132; Brett E. Garland et al., *Racial Disproportionality in the American Prison Population: Using the Blumstein Method To Address the Critical Race And Justice Issue of the 21st Century*, JUST. POL'Y J. 4–5 (Dec. 18 2008), http://www.cjcj.org/uploads/cjcj/documents/racial_disproportionality.pdf.

489. McMurry, *supra* note 72, at 12–13. More recent data reveal similar trends. *See* Chen, *supra* note 421, at 364–65.

490. However, the number of people sentenced under three-strikes laws is significantly less in Washington—281 offenders under three-strikes laws compared to California's almost 100,000 offenders. *See* Chen, *supra* note 421, at 350–51.

491. *See* McMurry, *supra* note 72, at 13.

492. HEATHER C. WEST ET AL., BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, PRISONERS IN 2009, at 9 (2011), *available at* http://bjs.gov/content/pub/pdf/p09.pdf; *see also* CHRISTOPHER HARTNEY & LINH VUONG, CREATED EQUAL: RACIAL AND ETHNIC DISPARITIES IN THE U.S. CRIMINAL JUSTICE SYSTEM 3 (2009), *available at* http://www.nccdglobal.org/sites/default/files/publication_pdf/created-equal.pdf (noting that nationally, African Americans are six times more likely to be incarcerated than whites). The over-representation of racial minorities in the United Kingdom is similar. *See* PRISON REFORM TRUST, BROMLEY BRIEFINGS PRISON FACTFILE 37 (2013), *available at* http://www.prisonreformtrust.org.uk/Portals/0/Documents/Factfile%20autumn%202013.pdf.

493. AUSTL. BUREAU OF STATISTICS, *supra* note 48, at 8.

Thus, the way that previous convictions are now treated causes the sentencing system to operate in a discriminatory fashion against disadvantaged offenders. Such offenders are more likely to have prior convictions, and on the basis of this irrelevant consideration, to be sentenced more severely.[494] Attaching less weight to prior convictions will not cure the ills that make it more likely that offenders from deprived social backgrounds will commit crime, but the advantage of ignoring prior convictions is that it will ensure that every time such offenders are sentenced, their punishment will be no more than that imposed on the affluent offender who has committed the same crime. Disadvantaged offenders will still appear in court more frequently than other offenders, but unless they have committed a serious sexual or violent offense, their sentence would be determined on the basis of the instant offense, not according to other factors. In some jurisdictions, this could mean the difference between life imprisonment or a small fine.[495]

V. CONCLUSION AND REFORM RECOMMENDATIONS

Criminal law and sentencing are mainly concerned with punishing and preventing harmful acts. The severity of punishment should principally be contingent upon the harm caused by the crime.[496] However, in some jurisdictions over the past few decades, the seemingly instinctive exasperation and intolerance towards those who repeatedly break the law has been fermented in an unbridled and nonreflective manner, resulting in prior criminality assuming a grossly disproportionate weight in sentencing determinations.

It emerges that there is no retributive theory that justifies a recidivist premium. However, on the basis of the current empirical evidence and utilitarian account of punishment, a recidivist premium is justified in limited circumstances and in limited doses. Two of the key utilitarian rationales in support of a recidivist premium are misguided. Harsher penalties do not discourage individual offenders or potential offenders

494. *See* Elaine R. Jones, *The Failure of the "Get Tough" Crime Policy*, 20 U. DAYTON L. REV. 803, 803–05 (1995); Nkechi Taifa, *"Three-Strikes-and-You're-Out"—Mandatory Life Imprisonment for Third Time Felons*, 20 U. DAYTON L. REV. 717, 719 (1995).

495. *See supra* Part II (discussing that the United States punishes recidivists more harshly than Sweden).

496. For another discussion on proportionality, see DRESSLER, *supra* note 156, 49–54.

from committing crime. Specific deterrence and general deterrence, accordingly, cannot support enhanced sentences for recidivists.

However, the evidence regarding the efficacy of punishment to achieve the goal of incapacitation is more positive. The key findings are as follows:[497]

- Prior offending is a good indicator of future offending where there is a large number of prior convictions and the offending relates to nonserious offenses. However, this does not justify a considerable recidivist premium because the cost of imprisonment outweighs the impact of the crime.
- Most people who commit serious sexual and violent offenses do not reoffend.
- Yet, most people who commit serious offenses have a prior conviction for an offense of this nature.
- Serious offenders who have been in jail more than once reoffend at a higher rate than first-time prisoners.
- In order for increased prison terms to reduce crime, there is no need for the enhancements to be oppressive.
- Prior convictions more than seven years old are less relevant.

Thus, although the prior commission of sexual and violent crimes is not a good predictor of future crimes of this nature, there is a link between past and future offending, and this link is stronger in relation to offenders who have been in prison more than once. Even though it is not possible to determine whether an offender who has committed a serious offense in the past will similarly reoffend in the future, we know that a significant portion of any group of such offenders will reoffend. Taking the entire group out of circulation by imprisoning them will reduce the incidence of serious crimes. Hence, the goal of general incapacitation for serious offenders is effective and justifies a recidivist premium.

However, the length of the premium needs to factor in the crudeness of the process and the fact that depriving offenders of their liberty is a considerable impost. Hence, the recidivist premium in such cases should not be excessive—no more than, say, twenty to fifty percent.

Any premium that is accorded to recidivists beyond this is a concession to group instinct in the form of intolerance towards those who transgress the criminal law. However, when it comes to inflicting penalties that fundamentally set back the interests of individuals, in a just society, feelings should not trump moral and doctrinal norms. The current subservience to prior criminality in sentencing determinations subjects

497. The key findings are discussed *supra* Part III.C.3.

most recidivist offenders to imprisonment without justification and harms society by diverting large amounts of public revenue needlessly into prisons. The unfairness and discriminatory impact of such a practice is a stain on the current system of criminal justice.