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Prior Record Enhancements at Sentencing: Unsettled Justifications and Unsettling Consequences

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ABSTRACT

The consequences of a person's prior crimes remain after the debt to society is paid and the sentence is discharged. While the practice of using prior convictions to enhance the severity of sentence imposed is universal, prior record enhancements (PREs) play a particularly important role in US sentencing, and especially in guidelines jurisdictions. In grid-based guidelines, criminal history constitutes one of the two dimensions of the grid. The enhancements are hard to justify. Retributive theories generally reject the use of robust, cumulative record-based enhancements. Research into recidivism suggests that the preventive benefits of PREs have been overstated. The public support the consideration of prior convictions at sentencing, but there is convincing evidence that people are less punitive in their views than are many US guideline schemes. PREs exacerbate racial disparities in prison admissions and populations, result in significant additional prison costs, undermine offense-based proportionality, and disrupt prison resource prioritization.

The consequences of a person's past crimes remain long after the debt to society has been paid and the sentence discharged. Prior convictions af-

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fect one's life for decades by impairing job prospects, limiting eligibility for social programs and benefits, and imposing social stigma. Individuals pay for their crimes once and then pay over and over again. Nowhere is the impact of prior convictions more direct or more palpable than at sentencing for a new offense. People with histories of prior crimes are sent to prison more often and for longer, practices we refer to as prior record enhancements (PREs).[1] Sometimes offenders are punished for the past under three-strikes, habitual offender, and career criminal laws that mandate starkly harsher punishments for repeat offenders. In other instances this increased punishment for past actions occurs because sentencing guidelines systems weight criminal history heavily.

Prior record enhancements are not unique to the United States, although like current punishment practices generally, the extent of additional punishment from PREs in the United States is exceptional. In other countries, prior convictions normally carry only a modest enhancement relative to the punishment imposed on first offenders (e.g., Roberts and Pina-Sánchez 2014, 2015). In countries without formal guidelines (most jurisdictions) it is hard to determine how much weight prior convictions carry at sentencing or which dimensions of criminal history are influential. Most jurisdictions (including New Zealand, Canada, and Australia) leave the interpretation of an offender's record, and the weight it should carry, to the discretion of trial courts (see Roberts 2008). This is also true in US states without guidelines, which constitute slightly more than half of US jurisdictions. As with nonguidelines nations, it is difficult to gauge the magnitude of PREs in US nonguidelines states because of a lack of data. There are, however, some indications that PREs are more pronounced under guidelines, at least in terms of multiplying prison sentence lengths (as opposed to their effect on in-out decisions; Hester 2017).

In many US states, sentencing guidelines provide detailed rules regulating the ways prior convictions should be counted, as well as the specific weight they should have on sentence outcomes; judicial discretion is curbed in the interests of promoting greater consistency across cases. The quest for uniformity and consistency led to mechanical quantification of many of the factors important to sentencing, such as the circumstances

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[1] We interchangeably use the term "criminal history enhancements."

of the crime and characteristics of the offender, including his or her prior record. Guidelines create rules for scoring this information; the majority of guidelines jurisdictions use a sentencing matrix or grid to recommend a sentence based on the severity of the current offense and the offender's prior record. Offenders with the highest criminal history scores receive prison recommendations that are often many times greater than the sentences recommended for first-time offenders convicted of the same offense. On average, across all guidelines systems, record-based prison length enhancements produce a sixfold increase in punishment, although there is considerable variation among the systems (Frase and Hester, forthcoming *b*). At the high end, some state grids impose over a 10-fold average increase. For some offense categories the multiplier is an astounding 30.[2] When the multiplier is that high, only 3 percent of individuals' current sentence can be considered punishment for the crime they are being convicted of; 97 percent is allocated for prior behavior for which they have already been convicted and sentenced and for which they have already satisfied their debt to society.

Despite the universal nature of record-based sentencing enhancements and the significant effects they have on sentencing outcomes, the subject attracted little attention from scholars until relatively recently.[3] For many observers, PREs may seem like an uncontroversial element of contemporary sentencing, as unproblematic as increasing the severity of punishment to reflect the seriousness of the current crime. But on closer inspection enhancements raise important and unsettling issues.

There is no uniform concept of "criminal history" or "prior record," and jurisdictions vary widely in the factors they mechanically incorporate in prior record scores. A "prior record" can mean a plethora of different things: A person with a single, 30-year-old misdemeanor; an individual

[2] This example comes from seriousness level III of the Washington guidelines. Offenders with an offender score of 0 are recommended for 2 months' incarceration while offenders in the highest offender score category of 9+ are recommended for 59.5 months—just short of 5 years. These are main-grid average multipliers; on some specialized grids and offense levels, the high-low ratios are even higher (e.g., on level VII of the Maryland property crimes grid, the multiplier is 96).

[3] For a recent survey of all US guidelines systems employing some sort of criminal history score, see Frase et al. (2015). This survey is part of a major research project at the University of Minnesota's Robina Institute of Criminal Law and Criminal Justice (http://robinainstitute.umn.edu/areas-expertise/criminal-history-enhancements). Several other recent works have examined the rationales for PREs (see, e.g., Roberts and von Hirsch 2010; Tamburrini and Ryberg 2012).

with a few drug and property felonies; a person with a string of robbery and attempted murder convictions; and an individual with scores of burglary and theft crimes over the course of decades—all have "a record." Second, intuition aside, articulating the justifications for PREs—on both retributive and risk-based grounds—proves a more difficult task than many people might imagine. As we discuss in detail below, retributive sentencing theorists have failed to agree on a justification for PRE policies that garners widespread endorsement (Roberts and von Hirsch 2010). And while consequentialist theories posit that sanctions might rehabilitate, deter, or incapacitate, the empirical literature suggests that more severe sanctions are ineffective in reducing crime (Nagin 2013). Third, PRE practices have significant unintended consequences: exacerbating race disparities, confounding offense-based proportionality, and disrupting prison resource prioritization. As a result, prison populations are full of older, less violent offenders who are more likely to be persons of color—all at great cost and little benefit to the public.

A generation ago, *Crime and Justice* published the first review of the research and practice of prior record enhancements, with a focus on US systems (Roberts 1997*b*). In this essay we revisit these important issues, drawing on a resurgence of writing and research. Over the past two decades, retributive theorists have revisited the relevance of prior convictions. Several early retributive writers took the position that prior convictions do not affect the seriousness of the crime or the offender's culpability and therefore have no place in the sentencing equation (e.g., Fletcher 1978; Singer 1979). But von Hirsch (1976) set forth a retributive argument for enhancing punishment on the basis of prior record; his view, that culpability increased along with the number of prior convictions, influenced the earliest sentencing guidelines commissions in states such as Minnesota and Washington (Parent 1988; Boerner and Lieb 2001). A recent wave of scholarship has reopened the debate. Von Hirsch subsequently amended his earlier view and now endorses a more limited role for enhancing sentences on retributive grounds (von Hirsch 2010). Others continue to struggle to articulate retributivist justifications (see, e.g., Roberts 2008; Lee 2009, 2010; Frase 2010, 2013).

The empirical literature on the relationship between prior and future offending has grown significantly in recent years, yielding many new insights. The link between past and future crime could justify PREs on utilitarian, preventive grounds. Here, too, received wisdom has evolved.

It is likely that some priors, and some dimensions of criminal history, have more predictive power than others (Frase 2015*a*). An important line of research has documented the declining significance of prior convictions for the purposes of predicting future crime: after a number of years, the predictive power of a criminal conviction declines (e.g., Kurleycheck, Brame, and Bushway 2006, 2007; Blumstein and Nakamura 2009; cf. Bushway, Nieuwbeerta, and Blokland 2011). Analyses have also questioned the complacent assumption that repeat offenders always represent a higher risk of reoffending, and research has led to a more nuanced evaluation of which dimensions of an offender's criminal history score predict reoffending most reliably. This research has had modest influence on sentencing commissions. For example, the US Sentencing Commission removed its "recency premium," which had imposed additional punishment when the priors were committed in a relatively short period prior to the current offense, because it contributed little to the predictive accuracy of the criminal history score (US Sentencing Commission 2010). Mostly, though, state commissions have made little effort to examine or evaluate their PRE policies.

Furthermore, even if a criminal history score successfully predicts a higher likelihood of future offending, the question of the appropriate enhancement is far from settled. What utilitarian purpose is served by doubling, tripling, or imposing a sixfold increase in prison time on an individual who is actuarially more likely (though not certain) to reoffend in the future? The most obvious answers are that increasing the penalty should specifically deter the person being punished and should reduce crime through incapacitation. We address these issues for the first time in the context of PREs, drawing on a growing body of literature that finds no specific deterrent effect of longer prison terms and that frequently reports modest effects in the opposite direction: that prison tends to increase, not reduce, a person's likelihood of reoffending. We also discuss serious problems in justifying PREs across the board on the basis of incapacitation. Lower-level, nonviolent offenders have higher rates of recidivism; since prison is such an expensive endeavor, it is doubtful that the costs of additional years in prison are worth the benefits in preventing low-level property, drug, and public order offenses through incapacitation.

As a consequence of new public opinion research, we are now better placed to understand social reaction to prior record enhancements. One

barrier to revising criminal history enhancements has long been public support for the practice (Roberts 2008). We are learning that public support may be less robust than was previously thought and founded on unrealistic expectations of the preventive efficacy of PREs. Finally, research has exposed a number of adverse, unintended consequences of PREs. They have a clearly disproportionate impact on racial minorities. Frase (2009) has demonstrated that most of the racial disparity introduced at the sentencing phase in Minnesota arises as a result of the criminal history axis of the Minnesota grid. Similar effects exist in other guidelines states (Frase and Hester 2015). This disproportionate impact is but one unintended consequence of PREs and serves as a salutary reminder that apparently race-neutral sentencing practices can have very different effects on certain profiles of offenders (Tonry 2011).

Here is how this essay is organized. In Section I we provide an overview of PREs, how they are defined and used, and how scores differ across jurisdictions. We also discuss the considerable variation in the levels of additional punishment imposed for a prior record. In Section II we review the literature on the justifications of punishment in the context of PREs. Despite the intuitive appeal of PREs, the articulation of a convincing retributive-based account of the punishment enhancements has proven elusive. While some severity premium may be appropriate on desert grounds, retributive theory also imposes a limitation on the degree of prior record enhancement in a way that is not currently recognized by most sentencing guidelines jurisdictions. We further conclude, on the best current evidence, that PREs as presently conceived cannot be justified on consequentialist grounds of rehabilitation or deterrence. Across-the-board, nonselective incapacitation is also a poor fit. In Section III, we turn to the adverse impacts of PREs, which include exacerbating racial disparities, undermining offense-based proportionality, confounding prison use priorities, and imposing severe financial impacts on the strained prison system. Section IV concludes with suggestions for future research and a brief sketch of a model approach to PREs. We identify troubling components that should not be included in criminal history scores, suggest upper limits on the effect that prior record should have on sentence lengths, describe several appropriate first-offender mitigation rules, and propose that judges should have express authority to depart from recommended sentences in light of case-specific prior record circumstances. If guidelines systems were to adopt these provisions, jurisdictions could substantially reduce costs and reshape their sentenc-

ing systems to be fairer, more proportional, and more efficient—all without detriment to public safety.

I. Use of Prior Record Enhancements

An offender's criminal history is frequently considered an important factor for sentencing in both determinate and indeterminate sentencing systems, and criminal history has been built into every sentencing guidelines scheme as one key dimension (Roberts 1997*a*; Frase et al. 2015; Tonry 2016). For jurisdictions that use a sentencing grid, criminal history represents one axis on the grid while offense severity forms the other, and the presumptive sentence lies at the intersection of the two. For guidelines jurisdictions that do not use a grid, criminal history is usually computed on a worksheet, and the resulting points, when added to points relating to offense severity, determine the recommended sentence.

The universal use of prior record in guidelines masks great diversity. Variation exists on the dimensions included in the score, in how items are weighted, and on the magnitude of increased punishment based on higher criminal history scores. Prior record is universally used, but how it is used is far from universal.

A. Scoring Criminal History

Criminal history scores are composed of multiple elements that vary from jurisdiction to jurisdiction. Criminal history almost always includes some accounting of prior felonies and misdemeanors, but these offenses are not simply tallied pursuant to a universally agreed-on formula. In most jurisdictions, felony points are added on the basis of severity level or offense classification, with different point weights assigned to different classifications. For example, in Arkansas possible point values are .25, .5, or 1; in Minnesota .5, 1, 1.5, 2, or 3; in North Carolina 1, 2, 4, 6, 9, or 10; under the Florida worksheet system, point values range from .2 to 29 (Hester 2015). Misdemeanors likewise are assigned points, almost always valued lower than felonies, and often several misdemeanors are required to garner one criminal history point. Some jurisdictions incorporate "patterning" rules under which similar priors are given even greater weight (Wright 2002; Roberts 2015*b*).

Prior record scores often include factors such as current custody status (whether the offender was under some type of supervision or incarcera-

tion when the offense was committed) or prior probation violations (Roberts 1997*b*). Some jurisdictions broadly define prior offenses so that when multiple current offenses are sentenced, each is included in the criminal history on the next offense to be sentenced (Frase 2015*c*). In contrast, a few jurisdictions incorporate decay or gap rules that wash out or eliminate prior offenses from the criminal history score if they are very old or if the individual was crime-free for a specified number of years (Mitchell 2015).

Almost all states include juvenile adjudications in criminal history scores, although for other purposes courts are increasingly being influenced by research demonstrating the different cognitive functioning of adolescents (Monahan, Skeem, and Lowenkamp 2017). North Carolina is the only state that does not include juvenile adjudications in the prior record score, but juveniles are processed in adult court once they reach age 16 (N.C. Gen. Stat. Ann. § 7B-1604 [2016]). In some jurisdictions juvenile priors are underweighted or points are capped so that they do not weigh as heavily as adult convictions. Important court decisions have declared juveniles to be less culpable on the basis of the research that shows, for instance, that parts of the brain in the frontal lobe associated with regulating aggression, long-range planning, abstract thinking, and perhaps even moral judgment are not fully formed until adulthood (*Roper v. Simmons*, 543 U.S. 551 [2005]; *Graham v. Florida*, 560 U.S. 48 [2010]; *Miller v. Alabama*, 567 U.S. 460 [2012]). Whether the cognitive research cited in the *Roper-Graham-Miller* line of cases will influence how guidelines deal with prior juvenile offenses remains an open question. The moral justification for enhancing punishment on the basis of acts committed as a juvenile may be on more tenuous grounds than for PREs imposed for adult convictions. Moreover, juvenile proceedings generally have fewer procedural safeguards (no right to a jury trial, limited presence and effectiveness of counsel) and are designed for a different purpose (rehabilitation) than adult proceedings. Juvenile adjudications may thus not be as reliable or factually accurate as adult convictions (see, generally, Feld [2003]). However, individuals who begin offending at an early age tend to have longer criminal careers and to commit more offenses on average than individuals who begin offending later in their lives (Farrington 2012). Thus, age at onset may be highly relevant to the risk and public safety calculus, thereby justifying the inclusion of some recognition of the juvenile record in the criminal history score.

These criminal history scoring rules operate behind the scenes: in the texts of statutes or guidelines, on case worksheets, and in case management software. They are not apparent from a given grid, which simply refers to an aggregate score or category. As a result, these various scoring, weighting, limitation, exclusion, and inclusion rules are out of public view and likely get taken for granted. The point we stress is that not all criminal history scores are the same. Jurisdictions include many factors that can inflate scores—guidelines policy decisions that translate into substantial increases in the punishment imposed.

B. Magnitude of Criminal History Enhancements

Separate from how scores are calculated is the issue of how enhancements based on those scores are implemented. We refer to this as the "magnitude" of prior record enhancement. The magnitude of a PRE is the amount of additional punishment imposed at sentencing solely attributable to criminal history. Enhancement magnitude affects both dispositions (when a person receives a prison sentence rather than probation) and durations (when a person receives a longer prison term). To illustrate, consider figure 1, which shows two rows of the Minnesota standard grid.

The numbers in the grid cells represent the recommended punishment in months. At some levels, as represented by severity level 7, the grid addresses both the prison disposition decision and sentence duration. The three shaded cells on the far left side of row 7 indicate a recommendation of a stayed prison sentence, meaning the guidelines recom-

		Criminal History Score						
OFFENSE SEVERITY LEVEL (Illustrative offenses)		0	1	2	3	4	5	6 or more
Aggravated robbery, 1st degree; burglary, 1st degree (with weapon or assault)	8	48 *41-57*	58 *50-69*	68 *58-81*	78 *67-93*	88 *75-105*	98 *84-117*	108 *92-129*
Felony DWI; financial exploitation of a vulnerable adult	7	36	42	48	54 *46-64*	60 *51-72*	66 *57-79*	72 *62-84*

FIG. 1.—Excerpt from the Minnesota Sentencing Guidelines grid. Source: Minnesota Sentencing Guidelines Commission (2017, p. 79).

mend probation; the durations shown in these cells of 36, 42, or 48 months indicate the prison sentence that should be imposed if the offender does not successfully complete probation. For severity level 7, an offender with a criminal history score of 2 would receive probation and a suspended 48-month prison sentence while an offender with a criminal history score of 3 would receive a 54-month executed prison sentence. In a metaphorical sense, the difference in outcomes is night and day. In a literal sense, the difference is 1,620 nights and days in prison rather than on probation, all because of a single additional criminal history point.

For higher rows on the grid (e.g., severity level 8), all convicted offenders are recommended for executed prison sentences, regardless of criminal history. At all offense severity levels, higher criminal history scores receive longer recommended prison terms. An individual guilty of a level 8 offense who has a criminal history score of 6 or more is recommended for 108 months, which is 2.25 times longer than the 48 months recommended for a criminal history score of 0 (108/48 = 2.25). We refer to this durational measure as the "multiplier" and use it to quantify how much more prison time is imposed because of prior record. We average the multipliers for all of the severity levels on a grid to produce an overall multiplier figure for the grid as a whole.

Using this method, we compared 12 US grid-based guidelines systems and found a remarkable degree of variation in overall enhancement multipliers, which ranged from 1.7 to 14.4 with an average across all of the systems of 6.4 (Frase and Hester 2015). Figure 2 provides a bar chart with the results of this 12-jurisdiction comparison. In Washington, DC, offenders in the highest criminal history category have recommended prison terms 70 percent longer than offenders in the lowest history category, while in Kansas the high-history recommendation is 1,340 percent longer. The average multiplier of 6.4, for all 12 systems, represents a 540 percent increase from lowest to highest.

One can also look at these multipliers in terms of months and years in prison. The average multiplier of 6.4 means that, if a first offender is recommended for a particular crime to 18 months in prison, the high-history offender attracts a recommended sentence of 115 months for the same offense. The additional 97 months is attributable to the second offender's prior record—offenses for which he has already been found guilty, been sentenced, and satisfied his debt to society. Yet those past satisfied debts account for 84 percent of his total sentence.

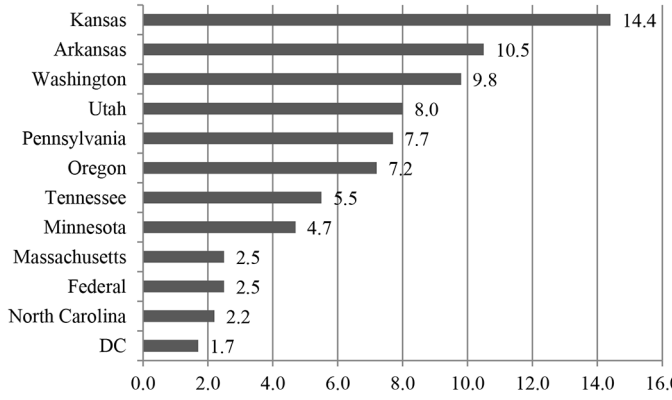

FIG. 2.—Criminal history enhancements, 12 jurisdictions. Calculations are based on published grids as of 2012. For jurisdictions with multiple grids, only the primary grid is reported. Source: Frase and Hester (2015).

Given this diversity of magnitudes, we question whether PREs can be justified as currently conceived and implemented in these 12 jurisdictions. If PREs can be supported on retributive grounds, surely some jurisdictions are fundamentally under- or overpunishing offenders with prior records. Similarly, if PREs are justified on utilitarian harm-prevention grounds, the vast magnitude of the ranges suggests that some jurisdictions must be under- or overpunishing in the name of risk reduction. But invoking an appropriate limit on PREs assumes that the imposition of a prior record enhancement is indeed justifiable. Despite the widespread intuitive appeal of PREs, convincingly articulating a justification for their imposition is a challenge.

In addition to the guidelines criminal history enhancements discussed above, it is important to keep in mind that prior convictions can also enhance sentence severity—often with an even greater magnitude—through policies such as three-strikes and habitual offender laws. For example, in three-strikes jurisdictions, offenders convicted of specified offenses can receive sentences as severe as 25 years to life, or life without parole, when they have the requisite prior felony record (see, e.g., *Ewing v. California*, 538 U.S. 11 [2003]). In many places the present and past felonies have to be serious violent offenses, but other places include drug offenses and nonviolent felonies. Habitual offender laws work in a similar way, though they usually target a specific category of repeat offending (e.g., burglaries).

Regardless of the mechanism—whether a three-strikes statute, habitual offender law, or guidelines criminal history score—the decision to enhance a penalty on the basis of past convictions must be supported by one or more accepted purposes of punishment. Such justification is often weak or entirely lacking.

II. Questioning the Justifications

In this section we examine the justifications for criminal history enhancements. We first review attempts to justify enhancements using retributive punishment theory. We then turn to consequentialist theories and discuss how, even if a guidelines system's criminal history score is empirically validated as predictive of reoffending, the resulting increases in punishment must be tied to reductions in offending. We review the literature in this area and show that committal to prison and longer prison terms do not rehabilitate and do not seem to deter (specifically or generally). Worse, the prison experience may actually make some offenders more likely to reoffend than they would have been without a prison term. For some offenses such as drug trafficking, incapacitation does not reduce crime because of replacement effects. For other offenses, incapacitation may reduce crime but at significant cost and, often, with declining crime control benefits due to offender aging. In short, an across-the-board policy to enhance punishment for recidivists at all offending levels cannot be justified on either retributive or consequentialist grounds.

A. The Unsettled Retributive Justifications

A retributive rationale for prior record enhancements is commonly assumed or asserted by sentencing commissions, judges, and other policy makers (Roberts 2015*a*), but the specific reasons for this rationale are rarely expounded. In this section we review the work of sentencing philosophers whose ideas have been widely divergent. Writers who accept a retributive justification for prior record enhancements disagree about whether and to what extent prior record can be viewed as an aggravating factor, or whether it should be only a mitigating factor for offenders with little or no criminal record. Some writers maintain that there is no convincing retributive justification at all.

Most desert theorists agree that a person's desert, or moral blameworthiness, depends on two basic factors (von Hirsch 1993, pp. 29–33). First

is the seriousness of the harms that person has caused or risked by his criminal acts (offense factors). Second is the person's individual culpability in committing those acts (offender factors), as measured by such things as his or her degree of culpable intent (*mens rea*); good or bad motives; situational pressures; mental or emotional conditions that may diminish the offender's capacity to obey the law; and, for multi-offender crimes, that offender's greater or lesser role in the crime. Most desert-based theories have assumed that prior record enhancements must be justified by variations in the second (offender culpability) factor, though a few writers have suggested a harm-based retributive rationale.

Any retributive prior record enhancement theory must establish that prior convictions make the offender more blameworthy, in terms of increased offender culpability or increased offense harm, for the current offense. An offender with many prior convictions may very well be more blameworthy in an overall sense, but he cannot now be given more punishment for his prior crimes because he has already been punished for those; added punishment for these priors would be inconsistent with the values that underlie constitutional double jeopardy principles. The task for the retributive theorist is to articulate why an individual's past convictions, for which he has already been punished and satisfied his debt, now make that individual more culpable for the current offense.

1. *Reduced Culpability of Offenders with Little or No Prior Record.* Most of the retributive theories we discuss regard prior record as an aggravator: culpability increases with the number of past convictions. However, we first discuss theories that view the issue from the opposite angle: theories of mitigation that propose that offenders with few or no prior convictions deserve less punishment than would otherwise attach to a crime of this nature. Rather than aggravating for the recidivist, these theories mitigate for the novice. There are two basic varieties of this theory. One grants mitigation only to first offenders; the other grants a steadily declining degree of mitigation as offenders acquire more prior convictions, until at some point no mitigation applies (the latter version is sometimes referred to as progressive loss of mitigation; von Hirsch 2010). The basic distinction is whether a person gets a second chance or instead perhaps a third, fourth, or fifth chance, with the punishment increasing each time up until the point the offender receives the fully deserved punishment with no mitigation.

Both versions of this theory argue that first offenders can plausibly claim that their offense was out of character and that society should

be less willing to fully convert its condemnation of the offender's criminal act into condemnation of the actor (von Hirsch 1985; Wasik and von Hirsch 1994; Ashworth 2005; Roberts 2010). Von Hirsch (1985, pp. 83–85) argues that, given human frailty, some sympathy and understanding are due to an offender's first "lapse" (although this argument seems more like an appeal to mercy than a claim of reduced culpability). Some writers would continue to permit mitigation for a third offense, or even a fourth, although the rationale for mitigation becomes strained at that point (Roberts 2010).

Each version of mitigation theory has advantages and disadvantages. Broader versions are more congruent with actual law and practice, which often call for a continuing escalation of penalties for each additional prior conviction. But, as noted above, such theories are unconvincing when applied to an offender with several prior convictions. The desert grounds for granting leniency to first offenders seem more convincing, and such leniency enjoys widespread acceptance among scholars (e.g., O'Neill, Maxfield, and Harer 2004). But an approach that considered only prior record when sentencing first offenders may confront strong opposition from practitioners and policy makers because it would invalidate much of current sentencing law and practice. Both kinds of reduced-desert theory have been criticized as inappropriate when sentencing serious crimes or crimes that involve extensive planning (Roberts 2012).

However, reduced-desert theories have one very important advantage over "aggravation" rationales, all of which posit enhanced culpability for second and subsequent crimes. The reduced-desert approach has a clear upper limit, based on desert factors associated with the current offense, whereas the logic of enhanced-desert theories seems to permit an open-ended escalation of sanction severity (von Hirsch 2010). The idea that the current offense should set an upper limit on sanction severity finds support in sentencing guidelines systems, all of which recognize an offense-based "cap" beyond which criminal history no longer raises the guidelines recommended sentence. For example, under the Minnesota guidelines the criminal history point score is capped at "6 or more" (see fig. 1). Thus, while an offender could potentially accumulate 10, 20, or more criminal history points, the PRE enhancement ceases after 6. Consider again the example offered in the introduction in which 97 percent of an offender's sentence is attributable not to the current criminal act but to prior record: at some point, an ever-increasing criminal history

enhancement leads to absurdity. The next five sections examine "aggravation" theories, positing that repeat offenders become increasingly blameworthy with each additional prior conviction.

2. *Bad Character.* Character theories of enhanced punishment for repeat offenders seem to be based on the idea that such offenders have shown themselves to be more and more wicked and indifferent to the rights of others with each additional crime (Lee 2009, 2010). But punishing bad character violates the fundamental principle that people are punished for what they have done (and with what intent), not for who or what they are (Bagaric 2000; Tonry 2010). Indeed, punishment simply for one's status (e.g., being an addict) is unconstitutional (*Robinson v. California*, 370 U.S. 660 [1962]).

There are also practical problems in applying this approach: how much more blameworthy does the offender become with each additional crime, and is there any upper limit to penalty enhancements? Character theories can eventually lead to the conclusion that the offender is such an outlaw that he has forfeited any right to have his punishment limited by retributive, human rights, or other deontological principles. Such an open-ended forfeiture concept may indeed be the core rationale of three-strikes and repeat and career offender statutes, which almost all retributive scholars oppose.

3. *Heightened Notice and Defiance.* Two other aggravated-blame theories—notice and defiance—posit enhanced culpability for offenders who, after receiving formal condemnation of their prior criminal acts, ignore society's explicit warning and commit further crime in open defiance of these warnings and the law (Lee 2009). Both types of theory appear to assume that the current offense was committed after conviction and sentence for the prior crime; notice theory may also assume substantial similarity between the prior and the current offense. The offender was previously warned: "don't commit this crime." However, criminal record enhancement rules are often much broader in each of these respects. Thus, many sentencing guidelines systems count as "priors" convictions that were entered after the current offense was committed (Frase 2015*b*). And almost all courts consider prior convictions even if they were for very different kinds of crimes (although similar priors sometimes receive extra weight; Roberts 2015*b*). Notice theory also seems inapplicable to very serious crimes such as murder and armed robbery, as to which moral values and legal prohibitions are not seriously in doubt. And the theory provides no clear rationale to impose

further enhancement of punishment severity for a third, fourth, or fifth offense.

As for defiance theories, there is considerable doubt that such a rationale is acceptable in a legal system in which people are punished for their acts, not their thoughts and attitudes (von Hirsch 1985, pp. 79–80). One possible answer to this criticism might invoke an expressive theory (e.g., Hampton 1984) according to which offenders are punished to repudiate their false moral claim to act without regard to the rights of others or of society; arguably, such false claims grow more offensive with each additional crime. As we discuss below, a version of this rationale for enhancement can also be supported under a consequentialist, "denunciation" theory. But under either type of defiance theory it is entirely unclear how much enhancement is allowed, and with what limits.

4. *Omission Theories.* This theory is elaborated in detail by Youngjae Lee (2009, 2010) and has also been advocated by other writers (MacPherson 2002; Bennett 2010, 2012; Dagger 2012). It argues that a repeat offender's culpability is enhanced because he has failed to take appropriate action to control his criminal tendencies in light of his earlier crime, conviction, and punishment. Lee's theory seems to assume that, because of the prior convictions, the offender is or ought to be aware of his or her heightened risk of offending. From this actual or constructive awareness Lee derives a heightened duty on the parts of offenders to rearrange their lives in ways that ensure they will avoid further criminality. Christopher Bennett (2010) restates Lee's theory in terms of a communicative theory; on this view, punishment symbolizes how sorry an offender ought to feel and, therefore, how strong an obligation he or she has not to offend again.

Compared to some of the desert theories previously discussed, this theory has the potential to better explain rules that steadily escalate sentence severity as the number of prior convictions increases: the duty of the offender to control his criminal tendencies becomes steadily more important and obvious. This theory also offers a workable formula for determining how much to enhance the repeat offender's sentence and when to discontinue further enhancement for additional prior convictions: since the theory blames offenders for failing to address their manifest risk of reoffending and since risking harm is less culpable than actually causing harm, the added penalty for the former should not exceed the penalty for the latter (Lee 2010, p. 67). In practical terms, this translates into a rule of thumb that prior record, no matter how extensive, should

never account for more than half of the total sentence. Stated differently, offenders with the longest records should not receive penalties more than twice as severe as penalties given to first offenders who commit the same offense (Frase 2013, p. 185).

However, omission theory suffers from some of the defects of aggravation theories discussed above: it seems to apply mainly to offenders whose past and current crimes are similar, or at least caused by the same risk factors, and it seems to explain only prior record enhancements involving a conviction entered before the current offense was committed. In addition, such a theory might require courts to engage in difficult assessments of the extent to which the offender tried but was unable to control his criminal tendencies. More fundamentally, the theory does not convincingly explain why convicted offenders should be deemed to have a higher duty than anyone else to avoid committing crimes. Finally, the theory violates the general principle that liability for an omission is exceptional in the criminal laws of the United States and other common law countries and can exist only where a duty to perform the required act has previously been clearly established by statute, case law, or other means (Tonry 2010).

5. *Reserved-Desert Theory.* Other writers have suggested an enhancement rationale based on the idea that, if the offender did not receive all of his deserved punishment in one or more prior sentencings, the unimposed "reserved" severity is available to enhance his punishment for the current crime (Morris 1982, p. 185; Roberts 1997*b*, pp. 353–54; 2008, p. 226). However, this theory finds no support in traditional recidivist enhancements, which have never been scaled or limited by a reserved-desert concept. Offenders receive prior record enhancements without regard to the degree of leniency given them in prior cases (Davis 1985, p. 41). Moreover, the theory yields perverse results; it would dictate that offenders who were so culpable that they were fully punished in prior sentencings cannot receive any recidivist premium. This theory would also be quite difficult to put into effect and, for both practical and legal reasons, could operate only prospectively (Frase 2010). Courts would have to begin making express findings of full desert and reserved desert at each sentencing; until this became routine, a later court would have no way of knowing how much desert was reserved in prior sentencings. Such findings would also be needed to avoid double jeopardy issues in order to make clear that later sentence enhancements are not additional punishment for prior crimes; added punishment would be deemed to have

already been imposed, but suspended, for the earlier crimes. And until the new system was fully in place, "old system" convictions lacking any express finding of reserved desert might have to be ignored.

6. *Greater-Harm Theory.* Most desert theorists seem to assume that variations in the actual or threatened harm caused by a new offense do not explain or justify prior record enhancements; the harm to the victim of the current offense, burglary, for example, is deemed to be the same regardless of the offender's prior conviction record (Roberts 2010). But some writers have suggested that an offender's prior record of crime may affect how we view his most recent criminal acts (Durham 1987; Frase 2010; Tamburrini 2012). The repeat offender's current burglary is perhaps more disturbing, to both the victim and society, in light of—and in proportion to—his prior crimes. We may conclude that this offender poses a heightened threat to all of us, and heightened to a degree roughly proportional to his prior record. This conclusion makes us fearful and reduces our level of trust in others; it also forces victims and public officials to take extra precautions against this offender, which may be expensive or inconvenient. These are real harms associated with the current offense, foreseeably caused by the offender's past and current crimes.

One problem in applying this theory is that the supposed greater harms associated with a recidivist's crime may be too speculative to permit a proportionately scaled sentence enhancement. Another problem is the theory's potential to justify a limitless escalation of sentence severity: our feelings of fear and distrust, and the extra precautions that victims and officials feel compelled to take, could continue and accelerate with increases in the offender's prior record, eventually yielding a penalty far in excess of the seriousness of the actual crime being sentenced. The greater-harm theory does not provide any practical formula for deciding how much to enhance for each additional prior offense and when to stop adding enhancements.

7. *Rejection of Any Retributive Rationale.* A number of writers have argued that an offender's prior conviction record is unrelated to his desert and should have no bearing on the severity of his current sentence (Fletcher 1978; Singer 1979; Davis 1985; Duff 2001; Tonry 2010; Dagger 2012; Bagaric 2014). Another group of writers have argued that many offenders with extensive conviction records are actually less culpable than offenders with fewer priors, since the former suffer from psychological, social, or economic handicaps that make it much more difficult for them to obey the law, even after being repeatedly punished

(Corlett 2012; Petersen 2012; Lippke 2015). Indeed, many of these handicaps are due to unjust societal conditions, and some are the predictable result of prior punishments imposed on the offender. In short, these writers conclude that desert is unaffected (or may even be mitigated) by prior convictions.

The view that desert is not increased by prior convictions has much to commend it given the problems with desert-based enhancement theories. But when combined with a strict view of desert, this approach seems to rule out any consideration of prior record in determining sentence severity, even as a basis to mitigate penalties for first offenders. This view is thus likely to be ignored by sentencing policy makers and practitioners and might even discredit desert theory so much as to lead them to ignore desert principles entirely (Frase 2010, 2013).

8. *Intuition and Public Opinion.* Finally, we address the apparent intuition among the public that prior crimes make a person more blameworthy.[4] As Tonry (2004, p. 117) notes, "Many people have an intuition that offenders who have previously been convicted of a crime should be dealt with more harshly." Research in this area has generated important insights into community attitudes, but there are also a number of unanswered questions. It seems that the public supports prior record enhancements within limits, but the reasons for the support are an unknown mix of intuition, retribution, and perceived crime control benefits. Consequently, the fundamental takeaways are that the public supports prior record enhancements but also supports limiting them to an extent not reflected in most guidelines systems.

Studies across the United States and other nations including Canada, the United Kingdom, Australia, Japan, and Russia have found that the public would impose harsher sentences when the offender has prior convictions (e.g., Knight 1965; Doob and Roberts 1983; Mande and English 1989; Sanders and Hamilton 1992; Doble 1995; Applegate et al. 1996; Mattinson and Mirrlees-Black 2000; Tufts and Roberts 2002; for a review of the research, see Roberts [2008, chap. 8]).[5] This finding

[4] When asked about important sentencing factors, respondents in Britain, Canada, Australia, Belgium, and the United States all place previous convictions high on the list of factors, usually just behind the seriousness of the crime (e.g., Doob and Roberts 1983; Indermaur 1990; Roberts and Hough 2011).

[5] The basic finding that people support prior record enhancements needs to be seen in context. Research in several countries has shown that people overestimate criminal recidivism rates and underestimate the proportion of offenders who appear for sentencing for

alone establishes that the "flat rate" desert model, which excludes prior crimes, is inconsistent with public opinion but fails to resolve the question of whether the public endorses the progressive loss of mitigation model or an aggravation theory, or is using prior record as a proxy for consequentialist, risk-based reasons.

A sample of respondents in the United Kingdom were randomly assigned to read one of three descriptions of a case in which the offender had no, two, or five previous convictions and then impose a sentence (Roberts 2008). The results were consistent with an aggravation theory, but the premiums did not increase in a linear fashion. The clearest distinctions emerged between the first and the second scenarios. Respondents sentencing the first offender assigned, on average, a sentence of 28.6 months, compared to 40.9 months for the offender with two priors. Thus sentence lengths increased by almost half for two prior convictions. However, the increase between the second and third scenarios was only 12 percent (from 40.95 to 46.22 months). That the magnitude of the recidivist premium is far more modest at higher levels of criminal history suggests that the public is sensitive to the threat to conviction offense proportionality if sentences escalate indefinitely to reflect the number of prior crimes. The public would appear to favor a modified version of aggravation in which sentence severity rises to reflect the number of prior convictions but is subject to proportional limits. The importance of proportionality emerges from a number of other studies. The results can also be interpreted as consistent with a progressive loss of mitigation argument.

Several surveys have found that as the recidivist premium results in increasingly disproportionate punishments, public support declines. Subjects in research by Finkel et al. (1996) were asked to sentence a number of cases, some of which involved first offenders, others recidivists. Responses suggested that people sentenced according to a proportionality-based logic that assigned some limited role to the offender's previous convictions. The researchers concluded that "past priors matter and are taken into account in a punishment calculus: Participants did not limit their punishment to the last [i.e., instant] offense when they knew there

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the first time (Roberts and White 1986; Stalans and Diamond 1990; Redondo, Luque, and Funes 1996; Roberts 1996). Support for these enhancements also likely reflects an unjustified faith in the effectiveness of individual deterrence and a lack of awareness of the costs associated with robust prior record sentencing enhancements.

were six priors, but neither did they dramatically, geometrically, or exponentially escalate their punishments because of priors. What we did find is that they sentence in an additive way, with retribution and proportionalism in mind, but refraining from excess" (pp. 481–82).[6]

In a more recent study we investigated two key questions relating to prior record enhancements using a national US-based sample (Hester et al. 2017). We examined whether there should be "look-back" limits on prior crimes and whether criminal history scores should include juvenile priors. Public responses related to both research questions suggested that most guidelines are more punitive and less forgiving than the general public.

Respondents were asked whether they would favor a new law that would prevent judges from considering "old offenses" for the purposes of sentencing for a current crime. Sixty-five percent of respondents supported the policy while 35 percent preferred to count all offenses, regardless of their age. Respondents who were in favor of a temporal limit were asked a follow-up question of how long they thought a prior conviction should remain relevant for the purposes of enhancing subsequent sentences, with potential responses of 5, 10, 15, and 20 years. Almost one-quarter of the subsample chose 5 years with a further 53 percent selecting 10 years. Look-back limits vary considerably across the United States, but this pattern of responses is more forgiving than current guideline systems. These responses demonstrate clear public support for look-back limits on prior crimes.

We also asked respondents to sentence hypothetical cases. For instance, we asked respondents to sentence an offender and, using a within-subjects design, asked them how changing aspects of the prior record would change their sentence recommendations. This vignette involved a current conviction for possession of stolen property; the respondents first sentenced the offender on the basis of information that he was a first-time offender and then received follow-up questions asking how their sentence would change if he had a prior auto theft conviction 1 year earlier. The question was repeated two more times with the age of the prior auto theft changing to 9 and then 14 years. Fifty-six percent of respondents would have increased the sentence for the 1-year-old prior,

[6] See also Applegate et al. (1996) for research showing the limits on public support for recidivist statutes.

but that fell significantly to 21 percent and then 13 percent when the respondents were asked to assume the prior was 9 and 14 years old. The public was less punitive as the age of the prior offense increased. Again, this suggests that the guidelines approach that assigns the same weight to all priors is inconsistent with, and more punitive than, public opinion.

In addition, we asked respondents about limitations on juvenile crimes. Seventy-one percent were in favor of a policy that would restrict the use of sentencing enhancements for prior offenses committed while a juvenile and 29 percent against. Taken together these findings suggest that current guidelines in many states are inconsistent with public attitudes: they count prior crimes that the public would disregard, and they assign full weight to previous convictions that the public would discount.

Overall, the public opinion research suggests that the public overestimates both recidivism rates and the effectiveness of deterrent sentencing strategies and underestimates the influence of environmental causes of crime (Roberts and White 1986; Redondo and Funes 1996). Public sentencing preferences become more punitive when the offender has prior convictions. There are limits, however; the public are sensitive to proportionality in sentencing, and they oppose the more robust enhancements. The public support the use of look-back limits and restricting the inclusion of juvenile priors. They also enhance punishment based on older prior crimes less than for recent crimes. In all these respects, most guidelines show some inconsistencies with public attitudes.

We recognize that proposals for drastic changes to PRE practices may be met with strident opposition based in large part on the strong intuition associated with their use. Both scholars and policy makers must think carefully about the proper counsel to take from intuition. As Tonry (2010, pp. 108–9) observes, in the not-so-distant past, common intuitions supported the right of husbands to discipline wives, the treatment of homosexuality as a mental disorder, and the belief "that the sky would fall if black people had equal access to public accommodation." The better approach would be to treat intuition as a philosophical proposition or an implicit hypothesis. We should then be able to offer logical proofs that bear out the proposition for retributive rationales, or engage in empirical hypothesis tests, where appropriate, for consequentialist positions.

9. *Summary.* Of all the desert-based theories, the grant of leniency to first offenders offers the most persuasive arguments and has the broadest support, at least when the current crime is not very serious. In exceptional

cases these arguments may also support leniency for an offender with a single prior conviction. In our view, developed more fully below, sentence enhancements for repeat offenders should be limited because desert is increased only modestly, if at all, as the number of prior convictions increases. Desert principles also require such enhancements to be reduced or eliminated if the offender has manifestly taken steps to try to address the causes of his or her criminality. And because desert principles give predominant weight to the goal of making punishment severity proportional to the seriousness of the conviction offense, recidivist enhancements must be "capped," as is done in almost all sentencing guidelines systems; at some point, additional prior convictions should not further increase sentence severity.[7]

Indeed, we would go further than most guidelines systems in this respect in order to reduce the number of cases in which repeat offenders receive penalties more severe than offenders convicted of more serious crimes. Our position is designed to be consistent with the view that retributive principles define just punishment, within a fairly narrow minimum-to-maximum range. Of course, if one adopts a more flexible, "limiting retributive" model (see, e.g., Morris 1974; Morris and Tonry 1990; Frase 2013; American Law Institute 2017), first offenders and repeat offenders may be subject to a broader range of deserved penalties. But even under that model, prior record enhancements must be much more limited than they are now to maintain offense-based sentence proportionality.

B. Consequentialist Justifications

Apart from retributive rationales, it is possible that consequentialist (or utilitarian) theories of punishment justify the imposition of PREs. Punishment in the name of rehabilitation, specific deterrence, general deter-

[7] Of course, the benefit of PRE "caps" depends on how they are structured; statutory maximums also provide a kind of offense-based severity cap, yet these maximums are often so high (because they are based on the worst-imaginable case) and so haphazard (because they are enacted at different times) that they do little to promote sentencing proportionality. In most guidelines systems, however, recommended sentence ranges for offenders in the highest criminal history category fall short of applicable statutory maximums, and they fall well below those in systems with low or moderate PRE multipliers (highest-history vs. lowest-history sentence severity). Granted, some systems have very high multipliers; but many of those multipliers would be even higher if PREs were not capped. Finally, in most guidelines systems the capped highest-history ranges are not haphazard; they are scaled in at least rough proportion to offense severity ranking under the guidelines.

rence, incapacitation, and denunciation all share the same goal of reducing offending—of either the person being punished or other would-be offenders. If a punishment strategy systematically fails to reduce the harm from crime from one of these or similar mechanisms, then the punishment is gratuitous and cannot be justified on consequentialist grounds. Assuming that a given criminal history score distinguishes among different levels of recidivism risk,[8] the question is then, How does the additional punishment imposed because of prior record reduce crime or harm?

1. *Prison Does Not Rehabilitate.* Sentencing offenders to prison in and of itself, of course, does nothing to rehabilitate them, although some programs administered in prison may do so. As currently designed, PRE policies are simply unrelated to rehabilitation since criminal history increases punitiveness, and any assignment to programming occurs separately. In some instances, the offender might be sentenced to a treatment program consistent with guidelines recommendations, but such decisions are not triggered by PREs; if anything, having a prior offense (or a certain type of prior offense) is more likely to make the offender ineligible for treatment programs.

2. *Longer Prison Terms Do Not Deter.* There is very little research on the deterrent effects of PRE-based marginal increases in punishment severity. However, studies of non-PRE increases in punishment are instructive. Nagin, Cullen, and Jonson (2009) conducted a comprehensive review of 73 empirical studies that examined whether the experience of punishment served to deter future offending. They concluded that while the "scientific jury is still out . . . the great majority of studies point to a

[8] This assumption warrants investigation. Criminal history scores may not account for different levels of risk of reoffending among groups based on their prior records (e.g., are offenders with a criminal history score of 4 more likely to reoffend than those with a criminal history score of 3?). For the most part, criminal history scores were developed in an ad hoc, "back-of-the-envelope," fashion (Tonry 2010). The one exception is the federal system, which based its criminal history score on two validated risk assessment instruments (US Sentencing Commission 2004; Frase et al. 2015). For other jurisdictions, since scores were not developed through empirical analysis, whether the cutoffs that divide categories of offenders represent differences in the likelihood of reoffending is anybody's guess: empirical validation of the score is the only way to assess predictive validity. Given the diverse practices in what factors are included and how they are weighted, it seems likely that not all criminal history scores are created equally for purposes of prediction. This research gap needs attention. Surely the highest-history offenders will be more likely to recidivate than first offenders, but whether each step up in prior record score (1 to 2, 2 to 3, etc.) represents distinctions among classes of offenders is a more dubious proposition; since those distinctions directly translate to more punishment, jurisdictions should undertake the task to validate their scores.

null or criminogenic effect of the prison experience on subsequent offending" (p. 178).[9] Nagin, Cullen, and Jonson discuss several reasons why the experience of prison may not serve as an effective deterrent. Under an economic model that explains behavior as the product of cost-benefit analyses, the prison experience may not be so unpleasant as to alter subsequent behavior. Offenders may also engage in a version of the "gambler's fallacy," believing that since they were previously caught and punished it is highly unlikely they would be so unlucky as to get caught and punished again. In addition, if a person's decision-making is not guided by a cost-benefit analysis, but by emotions or other mechanisms instead (see Katz 1988), then the negative effects of the prison experience would be irrelevant to future unlawful behavior. Whatever the mechanics, neither receiving a prison sentence rather than a nonprison sentence nor getting a longer sentence rather than a shorter one appears to reduce the reoffending of the person punished. What is worse, the prison experience may make individuals more likely to reoffend than they would otherwise have been with a nonprison (or shorter prison) sentence (Nagin, Cullen, and Jonson 2009; Travis, Western, and Redburn 2014).

Similarly, increased punishment does not appear to have a general deterrent effect. Several recent reviews of studies covering a range of methodological approaches come to this same conclusion (Durlauf and Nagin 2009; Nagin 2013; Travis, Western, and Redburn 2014; Frase and Roberts, forthcoming). As Nagin (2013) observes, there is especially little evidence that increasing already long prison sentences yields any general deterrent effects, which leads him to question three-strikes statutes, life without the possibility of parole sentences, and other long mandatory sentencing policies. We would add PRE policies to this list: they mechanically make sentences longer without any evidence that they make the public safer. Ultimately, Durlauf and Nagin (2009, p. 81) conclude, "The key empirical conclusion . . . is that there is relatively little reliable evidence of variation in the severity of punishment . . . having a substantial deterrent effect." Accordingly, to the extent that sentencing guidelines impose increasing sanctions on the basis of higher prior records,

[9] Subsequent studies on the specific deterrent effects of punishment continue to support these conclusions (Meade et al. 2013; Nagin and Snodgrass 2013; Cochran, Mears, and Bales 2014; Mitchell et al. 2016).

for reasons of deterrence, they do so without support of empirical evidence. Perhaps there are contexts within the criminal law in which the interactions of population type, punishment type, and dosage converge for beneficial deterrent effect. But these potential micro-specifications aside, the takeaway from the current state of the research is that enhancing punishment—through PREs or by other means—does not enhance deterrence.

3. *The Costs of Incapacitation Mostly Outweigh the Benefits.* By definition, longer prison terms resulting from PREs incapacitate individuals for longer. Undoubtedly, some crime is averted on this basis. But attempting to justify linear, incremental prior record enhancements for all but the most serious and high-rate offenders stretches incapacitation theory beyond the bounds of its logic.

It is questionable whether the evidence supports incapacitation as a crime reduction policy at all—even in a highly selective form—because of the difficulty in establishing any larger effects on crime rates. Research findings that attempt to measure the crime control effects of incapacitation vary. The National Academy of Sciences panel on mass incarceration (Travis, Western, and Redburn 2014) concluded that the preponderance is that increasing the size of prison populations does lead to less crime. But at some point the marginal effect flattens out: after the quintupling of the prison population over the past half century, US jurisdictions are probably past that point of diminishing returns.

At the very least, it is difficult to assess any current crime control value of incarceration. Studies usually frame results as elasticities, meaning they estimate the percentage of crime reduction for every 1 percent increase in the imprisonment rate. Elasticity estimates vary by study, from as high as −.69 or −.93 to as low as −.06 (Abrams 2013; Travis, Western, and Redburn 2014). An elasticity of −1 would indicate a 1 percent decrease in crime for every 1 percent increase in imprisonment; an elasticity of −.2 would indicate a decrease of 0.2 percent in crime for every increase of 1 percent in prison—or, by extrapolation, a 1 percent decrease in crime for every 5 percent increase in imprisonment. As the National Academy review discusses, simulation studies suggest an elasticity range of −.1 to −.3 while econometric studies range from findings of no difference to −.4. If, for example, the true effect were −.2 (the midpoint of both of those ranges), that would mean a 5 percent increase in the prison population would be required to achieve a corresponding 1 percent decline in the crime rate. However, as the National Academy of

Sciences recently reported, "we cannot arrive at a precise estimate, or even a range of estimates, of the magnitude of the effect of incarceration on crime rates" (Travis, Western, and Redburn 2014, p. 141).

The academy panel reviewed several reasons why incapacitation appears to have a modest (and potentially null) effect on crime. First, for some crimes, we should expect no crime savings through incapacitation due to replacement effects (Piquero and Blumstein 2007). When one individual is imprisoned for drug distribution, another simply steps up to fill the market vacuum. Second, many crimes involve co-offending—especially among young offenders. If a criminal act is a group effort, removing one group member will not necessarily result in any crime savings. Third, as the scale of incarceration increases, the crime prevention returns of incapacitation diminish because the highest-rate offenders will already have been skimmed off (Travis, Western, and Redburn 2014).

Incapacitation is also an overly broad mechanism in that it captures some lower-rate offenders for whom the costs of societal removal fail to match the benefits and holds many once violent or high-rate offenders for far too long, well past the ages when they would have naturally desisted from crime. For most, the frequency of criminal behavior peaks in the teens and early 20s and declines steadily thereafter (Hirschi and Gottfredson 1983; Sampson and Laub 1995; Piquero, Farrington, and Blumstein 2007). By the time offenders reach their 40s and 50s, their rates of offending will have substantially declined and most will have desisted entirely, or soon will. Even the small subset of "chronic," "career," or "life course persistent" offenders display this pattern and eventually desist, albeit more slowly (Sampson and Laub 1995; US Sentencing Commission 2004, p. 28). Moreover, many guidelines PRE rules largely or entirely ignore recent gaps or declines in offending. Yet the emerging "redemption" literature shows that, on average, once an offender goes approximately 7 years without an arrest, his or her likelihood of being subsequently rearrested is roughly the same as that of the population that has never been arrested (Kurlycheck, Brame, and Bushway 2006, 2007; Blumstein and Nakamura 2009; but see Bushway, Nieuwbeerta, and Blokland 2011).

For all of these reasons, incapacitation is a poor theoretical justification for prior record enhancements, at least when they are mechanically and incrementally applied to all repeat offenders. The logic of incapacitation, which may or may not hold up for high-rate recidivists, simply does not extend to broad-based PRE policies. For the vast majority of offenders—

those convicted of low- and medium-severity offenses—attempts to justify PREs through incapacitation are misplaced. Imposing a 30-year sentence on all first-time misdemeanants would also prevent some future criminal activity, but with absurd consequences to individual offenders, their families, and communities, and the criminal justice infrastructure as well. Any differences between such a policy and the use of PREs to incapacitate offenders at every level of a guidelines regime are differences in degree, not in kind. Incapacitation fails to provide a convincing rationalization for existing PREs; the magnitude and frequency of these enhancements are vastly greater than needed to achieve legitimate incapacitation goals in a cost-effective manner.

4. *Any Crime Control Benefits of Denunciation Are Uncertain.* Many writers have argued that punishment prevents crime through processes quite different from those examined above, processes that depend on internalized values rather than fear of punishment, physical restraint, or addressing criminogenic factors. This theory is most often called denunciation, but it has also been referred to as moral education, positive general prevention, or the communicative, educative, or expressive function of punishment (Ewing 1929; Hart 1958; Andenaes 1966; Feinberg 1970; Greenawalt 2001; Robinson 2008). The theory posits that criminal penalties serve to reinforce important social norms of law-abiding behavior and relative crime seriousness: punishment conveys the wrongfulness of the crime and also the degree of wrong and harm relative to other crimes and offenders. These norms guide and restrain behavior even when the chances of detection, conviction, and serious punishment are slight.[10]

Although denunciation theory has traditionally focused entirely on the seriousness of the offender's conviction offense, a version of this theory might provide a further crime control rationale for criminal history enhancements. The question becomes, What norms are being rein-

[10] Denunciation theory has also been justified on nonconsequentialist grounds—as something that is the right thing to do even if it has no demonstrable beneficial effects (von Hirsch 1976, 1985, 1993; Duff 1986, 2001; Kleinig 1998; Markel 2009). Whether consequentialist or not, most versions of the theory see it as a positive goal and justification for punishment. But under both the original and the recently revised *Model Penal Code* sentencing provisions, this concept is viewed as a negative, limiting principle. See American Law Institute (1962), sec. 7.01(1)(c); (2017), sec. 6.06(2) (a sentence of incarceration may be imposed when a lesser penalty would "depreciate the seriousness" of the offender's crime).

forced when we punish recidivists more severely? The most plausible recidivist-denunciation theory would seem to be that we need to counter the destructive messages that repeat offenders are sending. Such offenders, by their disregard for the censure and penalties imposed at the time of their prior sentences, risk lowering respect for the law and the courts, undercutting the positive expressive functions of conviction and sentencing.

However, there are several problems with extending denunciation theory in this way. Part of the appeal of denunciation is its tacit reassurance that if an offender shows disrespect for the law through repeated offending, the legal system will answer in kind by elevating punishment. A counter to that implicit need to elevate punishment is for society simply to accept the transaction: if we set an appropriate punishment range for an offense and a particular offender chooses to reoffend and receive that punishment, the law has done its job and no further escalation is needed. The offender will get the appropriate and deserved punishment each time. Because he is being punished, the public will not perceive an erosion in respect for the rule of law, and accordingly there is no need for escalated punishment. In addition, this extended denunciation could undercut traditional denunciation by reducing the proportionality of the punishment of the current crime. We could end up contradicting the positive expressive value of punishment by imposing longer sentences for less serious offenses due to PREs. In any case, the crime control effects of denunciation are diffuse and long-term, which makes those effects difficult if not impossible to measure with any precision (or to separate from crime control benefits produced by other mechanisms). In short, denunciation theory does not provide a convincing crime control rationale for recidivist enhancements.

5. *Summary.* Despite the intuitive appeal of PRE policies, it is difficult to justify them on retributive grounds except perhaps to justify mitigation for first offenders. There is certainly no cohesive, prevailing retributive theory of aggravation that would justify the linear increases in PREs found in guidelines systems. Nor does rehabilitation or deterrence provide strong justification for these increases. The best current evidence suggests that, if anything, offenders become more likely to recidivate when exposed to more severe sanctions, not less. Some view incapacitation as a compelling policy when used selectively for a small subpopulation of violent and high-rate offenders, but incapacitation does

not justify increasing the punishment of all repeat offenders in the manner effected by PREs.

III. Adverse Consequences

While the intended crime-reduction effects of PREs are not realized or achievable, a number of undesirable unintended consequences carry widespread impacts. PREs exacerbate racial disparities, confound offense-based proportionality, undermine prison-resource prioritization, and compound issues related to fiscal strains on the prison system and taxpayers. We explore each of these in turn.

A. Racial Disproportionality

Criminal history enhancements contribute significantly to racial disproportionality in prison populations. Prior research, from both guidelines and nonguidelines jurisdictions, has found consistent racial differences in prior record (Frase 2009; Frase and Hester, forthcoming *a*). And prior record, in turn, has consistently been found to exert a strong effect on sentencing severity (Weidner, Frase, and Schultz 2005; Wang et al. 2013; Ulmer, Painter-Davis, and Tinik 2016). First, PREs cause higher proportions of black offenders to be sentenced to prison rather than a community sentence (Frase 2009; Frase and Hester, forthcoming *a*). Second, criminal history affects decisions such as sentence length and the likelihood of receiving a favorable departure from a guidelines recommendation (Frase 2009). All told, the combined effects of prison commitment and sentence length decisions work to the substantial disadvantage of black offenders. Research from Minnesota, for example, shows that the percentage of black individuals receiving an executed prison term is almost 50 percent greater than the percentage for white individuals, and well over half of this racial difference is due to black individuals having higher criminal history scores (the remainder is due to differences in offense severity and eligibility for mandatory prison terms; Frase and Hester, forthcoming *a*). The average length of executed prison sentences for black Minnesota offenders is about 20 percent longer than the average for white offenders. The average prison months imposed on black offenders in Minnesota for 2012–14 was 73 percent greater than the average for white offenders (16.7 vs. 9.7, respectively). About half of the racial differences in executed prison durations and prison months were due to black individuals having higher criminal history scores.

B. Undermining Offense-Based Proportionality

Sentencing proportionality is an important goal of almost all guidelines reforms; that is, more serious crimes should receive more severe sanctions. Offense-based proportionality is particularly important under a retributive theory of punishment, but it also has crime control value (Frase 2013). Penalties that increase with crime seriousness send valuable standard-setting and norm-reinforcing messages about the relative gravity of different crimes. Under guidelines, sentence severity depends primarily on two factors: the severity of the conviction offense and the magnitude of the offender's criminal history score. Accordingly, the greater the magnitude of criminal history enhancements, the less the sentence depends on the severity of the offense being sentenced, lowering the proportionality of punishment for that offense.

Frase and Hester (forthcoming *b*) examine levels of proportionality on guidelines grids using a method that measures how much criminal history enhancements undercut offense proportionality through overlapping sentencing ranges, that is, when low-level offenses carry more severe punishment than higher-severity offenses because of criminal history enhancements. For example, in Minnesota the highest-history offenders convicted at severity level 1 on the main grid (e.g., fleeing a police officer) have a recommended executed prison sentence of 19 months, which is more severe than the recommended 18-month suspended sentence specified for lowest-history offenders convicted at severity level 5 (e.g., residential burglary), four levels higher on the grid. Of the Minnesota main grid's 77 total cells, only 23 percent are what Frase and Hester define as "fully proportionate," meaning that the recommended sentences for offenders convicted in those cells are more severe than all recommended sentences at lower offense severity levels on the grid and are also less severe than all recommended sentences at higher levels on the grid. Notably, most of these fully proportionate cells are at the top of the Minnesota grid, where few offenders are sentenced (because most offenders are convicted of lower-severity crimes). In 2014, only 2 percent of Minnesota offenders sentenced on that grid were convicted in a cell with a fully proportionate prison duration as defined above.

C. Undermining Prison-Use Priorities

Many jurisdictions give higher priority to incarceration of offenders convicted of violent crimes and use community-based options to sanc-

tion nonviolent offenders.[11] But nonviolent offenders often have high recidivism rates (Langan and Levin 2002), so they tend to accumulate higher criminal history scores. PREs thus greatly increase the number of nonviolent offenders who receive recommended prison sentences, while also increasing the lengths of their prison terms, undermining the violent crimes priority policy.

To demonstrate the effect of criminal history on prison commit recommendations, it is useful to focus on offenders in what we refer to as "zone 2" of a guidelines grid; these are offenders convicted of low- or medium-severity crimes who are recommended for a prison sentence only because their criminal history score pushed them across the grid (Frase and Hester 2015). Frase and Hester (forthcoming *b*) report that in Minnesota, North Carolina, and Washington in 2014, at least two-thirds of the zone 2 offenders were sentenced for a non–person offense. Moreover, even many of the "person" crimes were not particularly violent. For example, 80 percent of Minnesota main-grid zone 2 person offenders convicted in 2014 were ranked at severity level 4 or lower on that grid (out of 11 levels) and were not charged with having a dangerous weapon. Yet most of these offenders were sent to prison because of their prior record status.

Targeting high-risk offenders for imprisonment is another commonly endorsed sentencing priority (Frase 2015*a*; Roberts 2015*a*), although, as we discussed above, it is easy to exaggerate the crime-preventive benefits of such a policy. Criminal history enhancements might help achieve this goal if prior record closely approximated an offender's recidivism risk and if the additional punishment imposed were effective in counteracting that higher risk. But many offenders with higher criminal history scores are already well past their peak offending years or will pass that peak before they finish serving a prison term. These aging offenders become increasingly costly to support in prison (Fellner and Vinck 2012). High-magnitude criminal history enhancements thus are likely to contribute to an aged, low-risk, high-cost inmate population; sending many older offenders to prison results in a mismatch between criminal history enhancement and efficient risk management. At the same time PREs overpredict risk for some younger offenders, further increasing the num-

[11] See, e.g., Minnesota Sentencing Guidelines Commission (1984, pp. v, 97); Delaware Sentencing Accountability Commission (2015, p. 22; goal of "incapacitation of the violence-prone offender"); Kansas Sentencing Commission (2009, p. 2; goal of "promoting public safety by incarcerating violent offenders").

bers of low-risk offenders sent to or kept in prison. This occurs because these enhancements are imposed according to a formula that disregards the lower risk level of some offenders.

Finally, it is important to clarify what risk is being examined. Presumably, the greatest public and policy maker concerns would be over violent, sexual, and other traumatizing and physically harmful offenses (Gottfredson and Gottfredson 1990; Vigorita 2003). But recidivism analysis almost always examines offending in much broader terms, often defining recidivism as rearrest (regardless of whether a conviction follows) for any nontraffic offense. Thus, many offenders who are designated as "high-risk" are likely to commit only additional drug crimes, low-level property crimes, or public order offenses; they are not likely to commit crimes that involve violence or traumatizing victimization. The public and policy makers would do well to consider carefully whether sound policy demands that these likely low-level recidivists be imprisoned at a cost of tens of thousands of dollars per inmate per year.

D. Fiscal Impacts

Because PREs increase the number of individuals going to prison and the lengths of their prison terms, they come with a substantial fiscal cost. Frase and Hester (forthcoming *b*) estimated the costs attributable to PREs in Kansas, Minnesota, and North Carolina for 2014. They found a wide range of the bed needs imposed in 2014 that were attributable to the zone 2 offenders (high-history, low and medium offense severity). In Kansas, 36 percent of all prison commits came from zone 2; in Minnesota it was 51 percent and in North Carolina 18 percent. The corresponding bed needs attributable to zone 2 were 20 percent for Kansas, 36 percent for Minnesota, and 13 percent for North Carolina.[12] Frase and Hester estimate the fiscal impacts in 2014 were $28 million for Kansas, $160 million for Minnesota, and $131 million for North Carolina. These are prison beds occupied by medium- to low-severity offenders who are recommended to prison only because of their prior convictions.

Frase and Hester also examined the fiscal costs in Minnesota that flow from the other problematic criminal history effects noted above: race

[12] The percentage of bed needs from zone 2 should be lower than the percentage of total prison commitments from zone 2 because, by definition, zone 2 does not include the highest-severity offenders who receive the longest prison terms, often measured in decades.

disproportionality, confounded prison bed prioritization, and the age-crime issue. They estimated that racial overrepresentation due to criminal history amounts to $25 million per year in prison operation costs, that over $90 million per year is allocated for zone 2 non–person offenders, and that almost $50 million per year is spent on zone 2 offenders who were 40 or older at sentencing.

In many guidelines jurisdictions, governments are allocating tens of millions of dollars per year to imprison aging low-risk offenders; these "investments" are yielding greater racial disparities. For many readers, moral and ethical concerns will be paramount to fiscal considerations, particularly concerning an issue like racial disparity. Nevertheless, given the salience of fiscal responsibility for some policy makers, it is worth emphasizing both the underlying adverse outcomes and the concomitant steep price tag. There may be justifiable reasons for imposing PREs, though we have struggled to find a convincing retributive or consequentialist rationale that would even remotely support the linear, multiplicative, aggravation-style PRE policies currently in place. Since the moral and financial consequences are so weighty, any such justifications for PREs should be carefully examined and convincingly articulated.

IV. Conclusion

Offenders pay again and again for their prior crimes, and so do their families, their communities, and the general public. There are many serious collateral consequences of criminal convictions, but paying again for past crimes is especially pronounced in the United States. The "recidivist premium" exists in almost all modern sentencing regimes, but it is particularly strong—or, at least, much more visible—in American state and federal jurisdictions that have implemented sentencing guidelines. Almost all of these guidelines regimes incorporate criminal history scoring formulas that greatly increase the recommended and imposed penalties for offenders with prior convictions.

The high cost and adverse effects of prior record sentence enhancements might be tolerable if they served important punishment purposes, but all of the potential justifications for these enhancements are weak. Despite repeated and diverse scholarly effort, the retributive justification—that a repeat offender's latest crime is more blameworthy because of his prior convictions—is unpersuasive except perhaps as a basis to mitigate sentences for some first offenders. The crime control ratio-

nale—that a repeat offender poses a higher risk of further crime, thus justifying more severe punishment—is unproven and, in many respects, implausible. Almost no American guidelines system has empirically validated the risk-predictive accuracy of its criminal history score and score components (and the formulas and components vary widely across guidelines systems; Frase et al. 2015). Moreover, even if a particular formula predicts risk fairly accurately, with limited under- and overprediction, the more severe penalties imposed under these formulas are not likely to have cost-effective crime-reducing effects. Longer prison terms do not rehabilitate or specifically deter most offenders, and they make many of them more crime-prone. The general deterrent claims of longer terms seem particularly implausible given what we know about the marginal deterrent effects of higher penalties.

Prisons sometimes prevent crime by mere incapacitation, but routine prior record enhancements seem guaranteed to overpredict risk for many offenders (especially older offenders) while underpredicting risk for others. Although opinion research consistently shows public support for giving higher penalties to repeat offenders, popular views are largely intuitive and not based on particular punishment goals and rationales. New research does show, however, that the public endorses limits on the magnitude of these enhancements, on the use of very old convictions, and on the counting of offenses committed when the offender was a juvenile. In each of those respects, the public would place greater limits on prior record enhancements than are found in many guidelines systems.

Much is still unknown about these important sentencing policy issues, and we need further research in one or more guidelines systems on the following topics:

- How well does the criminal history score and each score component predict future crime, especially serious and violent crime, and how do nonscore factors (e.g., current offense, offender age) affect prediction accuracy?
- What are the crime control benefits of the more severe sentences imposed because of prior record?
- What are the fiscal costs and adverse impacts (racial disparate impact, offense disproportionality, increased numbers of nonviolent and aging inmates) of prior record enhancements?
- Which components of each system's prior record formula have major racial impacts, and do those components have strong justification?

- To what extent is public support for prior record enhancements based on assumptions of higher levels of desert, higher risk, or other specific rationales?

Reform cannot wait until all of these questions are answered. On the basis of current knowledge, here is how we would design a model system of prior record enhancement under sentencing guidelines:

1. Criminal history scores should include only components with the strongest normative and empirical justifications. Many existing formulas include troubling components, including juvenile court adjudications; adult misdemeanor convictions; adult convictions from many years earlier (many systems have no look-back limits at all or have limits that formally or in practice do not exclude convictions entered many decades earlier); custody status points (which double-count the prior conviction and, in case of release revocation, triple-count the current offense; this should just be a factor judges may consider, particularly on the question of "disposition" noted below); heavy weighting of prior crimes according to severity (there is little evidence tying prior severity to future risk); and "patterning" enhancements for offenders previously convicted of the same crime (this is sometimes a valid factor for courts to consider, but temporal and other variations do not support routine, formulaic enhancement).
2. Recommended custody-duration enhancements should not increase at a steady or uniform rate as the criminal history score rises. Retributive and risk-based rationales justify a substantial difference in penalty severity, between first offenders and low-history repeat offenders (e.g., history score of 1); however, the pace of enhancement should be much more modest as offender scores continue to rise.[13]
3. To limit the costs and other adverse effects of prior record enhancements and, in particular, to maintain proportionality be-

[13] Rather than having straight linear increases in prison length by criminal history score, as current guidelines do, PREs should follow a two-stage or bent-line approach that roughly resembles the shape of a hockey stick held with the blade pointing down (Frase and Roberts, forthcoming). For low-history offenders the PRE should reflect the first-offender discount, meaning that PRE would rise sharply at first (the blade end of the stick). Subsequently, PREs should follow a modest line with little slope.

tween sentence severity and conviction offense seriousness, the recommended duration for highest-history offenders should not be more than two times greater than the recommended sentence for no-history (or lowest-history) offenders. This "doubling" limit ensures that an offender's prior record never counts more than his current crime.[14]

4. Offense proportionality should be promoted by providing that the ranges of recommended (typical-case) sentences for adjoining offense severity levels do not overlap: high-history offenders should not be recommended for prison terms that are more severe than recommended terms for low-history offenders committing more serious crimes (excluding first offenders, to accommodate the mitigations we propose above).
5. Additional mitigation for first offenders should be expressly authorized. First-offender mitigation has the strongest retributive rationale and also a strong crime control basis: these offenders deserve a second chance, and most of them will not be seen again in criminal court. At least one guidelines system expressly recognizes the special status of these offenders (Boerner and Lieb [2001, pp. 84–86], discussing Washington's first-offender "waiver" provision). Finally, the public strongly supports mitigation for first offenders (Hester et al. 2017).
6. Judges should have authority to adjust the sentence upon a finding that the offender's criminal history score does not accurately reflect the risk of serious recidivism; judges already have authority to depart based on atypical offense facts, and the same should be true for offender-related factors.
7. A particularly strong basis to mitigate sentences, even for offenders with a number of prior convictions, would exist in which the court finds that, notwithstanding his most recent crime, the offender has made substantial efforts to address the causes of his offending. Such mitigation should almost always be recognized if the current offense is not very serious and was preceded by a substantial crime-

[14] Tonry (2017) has recently suggested the premium should never be over 1.5. Although selecting a maximum premium is somewhat arbitrary, we offer an upper limit of 2.0, which, to us, has an inherent, natural appeal: however much the past counts, surely it should not count more than the present criminal act. And 2.0 is the upper bound; in most cases, it should count much less.

> free period since the offender's last conviction. Another strong case for discretionary (or even presumptive) mitigation would be for older offenders, especially those whose recent crimes are declining in frequency or seriousness. One of the most serious defects of current prior record enhancement formulas is that they ignore the well-documented lower risk of aging offenders.

In most existing guidelines systems, adoption of the model provisions above would substantially reduce the costs and adverse impacts of prior record enhancements. The result would be a sentencing system that is fairer, more proportional, and more efficient but no less effective in controlling crime.

While our primary focus in this essay has been on prior record enhancements under sentencing guidelines, in almost every instance our arguments carry the same or greater force for other types of record-based enhancements such as three-strikes and repeat-offender statutes. These enhancements often involve additional imprisonment for decades or for life; yet their relationship to valid punishment purposes, whether retributive or consequentialist, is as dubious, if not more so, than the justifications for substantial guidelines PREs. Likewise, the undesirable consequences of three-strikes and repeat-offender laws are as serious as or more serious than the consequences we have examined in this essay. All substantial prior record enhancements worsen racial disparities, reduce the proportionality of punishment relative to the crime being sentenced, and increase the size and cost of prison populations. When such enhancements, whether under guidelines or repeat-offender statutes, are applied to aging and other low-risk offenders or to those convicted of nonviolent crimes, they also undermine prison resource priorities.

Like the larger problems of mass incarceration and mass supervision, prior record enhancements have been overused and underevaluated. All of these policies need to be reexamined and substantially cut back to levels that are more fair and more cost-effective.

REFERENCES

Abrams, David S. 2013. "The Imprisoner's Dilemma: A Cost-Benefit Approach to Incarceration." *Iowa Law Review* 98:905–69.

American Law Institute. 1962. *Model Penal Code*. Proposed official draft. Philadelphia: American Law Institute.

———. 2017. *Model Penal Code: Sentencing*. Tentative Draft no. 5. Philadelphia: American Law Institute.

Andenaes, Johannes. 1966. "The General Preventative Effects of Punishment." *University of Pennsylvania Law Review* 114:949–83.

Applegate, Brandon K., Francis T. Cullen, Michael G. Turner, and Jody L. Sundt. 1996. "Assessing Public Support for 3-Strikes and You're Out Laws: Global versus Specific Attitudes." *Crime and Delinquency* 42:517–34.

Ashworth, Andrew J. 2005. *Sentencing and Criminal Justice*. Cambridge: Cambridge University Press.

Bagaric, Mirko. 2000. "Double Punishment and Punishing Character: The Unfairness of Prior Convictions." *Criminal Justice Ethics* 19:10–28.

———. 2014. "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." *San Diego Law Review* 51:343–418.

Bennett, Chris. 2010. "More to Apologize For." In *Previous Convictions at Sentencing: Theoretical and Applied Perspectives*, edited by Julian V. Roberts and Andrew von Hirsch. Oxford: Hart.

———. 2012. "Do Multiple and Repeat Offenders Pose a Problem for Retributive Sentencing Theory?" In *Recidivist Punishments: The Philosopher's View*, edited by Claudio Tamburrini and Jesper Ryberg. New York: Lexington.

Blumstein, Alfred, and Kiminori Nakamura. 2009. "Redemption in the Presence of Widespread Criminal Background Checks." *Criminology* 47:327–59.

Boerner, David, and Roxanne Lieb. 2001. "Sentencing Reform in the Other Washington." In *Crime and Justice: A Review of Research*, vol. 28, edited by Michael Tonry. Chicago: University of Chicago Press.

Bushway, Shawn D., Paul Nieuwbeerta, and Arjan Blokland. 2011. "The Predictive Value of Criminal Background Checks: Do Age and Criminal History Affect Time to Redemption?" *Criminology* 49(1):27–60.

Cochran, Joshua C., Daniel P. Mears, and William D. Bales. 2014. "Assessing the Effectiveness of Correctional Sanctions." *Journal of Quantitative Criminology* 30(2):317–47.

Corlett, J. Angelo. 2012. "Retributivism and Recidivism." In *Recidivist Punishments: The Philosopher's View*, edited by Claudio Tamburrini and Jesper Ryberg. New York: Lexington.

Dagger, Richard. 2012. "Playing Fair with Recidivists." In *Recidivist Punishments: The Philosopher's View*, edited by Claudio Tamburrini and Jesper Ryberg. New York: Lexington.

Davis, Michael. 1985. "Just Deserts for Recidivists." *Criminal Justice Ethics* 4:29–50.

Delaware Sentencing Accountability Commission. 2015. *Delaware Sentencing Accountability Commission Benchbook*. http://courts.delaware.gov/Superior/pdf/benchbook_2015.pdf.

Doble, John. 1995. *Crime and Corrections: The Views of the People of Oklahoma*. Englewood Cliffs, NJ: Doble Research Associates.

Doob, Anthony, and Julian V. Roberts. 1983. *Sentencing: An Analysis of the Public's View*. Ottawa: Department of Justice Canada.

Duff, R. Antony. 1986. *Trials and Punishments*. Cambridge: Cambridge University Press.

———. 2001. *Punishment, Communication, and Community*. Oxford: Oxford University Press.

Durham, Alexis. 1987. "Justice in Sentencing: The Role of Prior Record of Criminal Involvement." *Journal of Criminal Law and Criminology* 78:614–43.

Durlauf, Steven F., and Daniel S. Nagin. 2009. "The Deterrent Effect of Imprisonment." In *Controlling Crime: Strategies and Tradeoffs*, edited by Philip J. Cook, Jens Ludwig, and Justin McCrary. Chicago: University of Chicago Press.

Ewing, Alfred C. 1929. *The Morality of Punishment*. London: Kegan Paul, Trench Trubner.

Farrington, David P. 2012. "Childhood Risk Factors for Young Adult Offending: Onset and Persistence." In *Young Adult Offenders: Lost in Transition?* edited by Friedrich Lösel, Anthony Bottoms, and David P. Farrington. London: Routledge.

Feinberg, Joel. 1970. *Doing and Deserving: Essays in the Theory of Responsibility*. Princeton, NJ: Princeton University Press.

Feld, Barry C. 2003. "The Constitutional Tension between Apprendi and McKeiver: Sentence Enhancements Based on Delinquency Convictions and the Quality of Justice in Juvenile Courts." *Wake Forest Law Review* 38:1111–1224.

Fellner, Jamie, and Patrick Vinck. 2012. *Old behind Bars: The Aging Prison Population in the United States*. New York: Human Rights Watch.

Finkel, Norman J., Stephen T. Maloney, Monique Z. Valbuena, and Jennifer Groscup. 1996. "Recidivism, Proportionalism, and Individualized Punishment." *American Behavioral Scientist* 39:474–87.

Fletcher, George. 1978. *Rethinking Criminal Law*. Boston: Little, Brown.

Frase, Richard S. 2009. "What Explains Persistent Racial Disproportionality in Minnesota's Prison and Jail Populations?" In *Crime and Justice: A Review of Research*, vol. 38, edited by Michael Tonry. Chicago: University of Chicago Press.

———. 2010. "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*, edited by Julian V. Roberts and Andrew von Hirsch. Oxford: Hart.

———. 2013. *Just Sentencing: Principles and Procedures for a Workable System*. New York: Oxford University Press.

———. 2015*a*. "The Relationship between Criminal History and Recidivism Risk." In *Criminal History Enhancements Sourcebook*, edited by Richard S. Frase, Julian V. Roberts, Rhys Hester, and Kelly Lyn Mitchell. Minneapolis: Robina Institute of Criminal Law and Criminal Justice.

———. 2015*b*. "Timing of Current and Prior Crimes: What Counts as a 'Prior' Conviction?" In *Criminal History Enhancements Sourcebook*, edited by Richard S. Frase, Julian V. Roberts, Rhys Hester, and Kelly Lyn Mitchell. Minneapolis: Robina Institute of Criminal Law and Criminal Justice.

———. 2015*c*. "The Treatment of Multiple Current Offenses." In *Criminal History Enhancements Sourcebook*, edited by Richard S. Frase, Julian V. Roberts, Rhys Hester, and Kelly Lyn Mitchell. Minneapolis: Robina Institute of Criminal Law and Criminal Justice.

Frase, Richard S., and Rhys Hester. 2015. "Criminal History Enhancements as a Cause of Minority Over-representation." In *Criminal History Enhancements Sourcebook*, edited by Richard S. Frase, Julian V. Roberts, Rhys Hester, and Kelly Lyn Mitchell. Minneapolis: Robina Institute of Criminal Law and Criminal Justice.

———. Forthcoming *a*. "Disproportionate Impact on Minority Offenders." In *Criminal History Enhancements*, edited by Richard S. Frase and Julian V. Roberts. New York: Oxford University Press.

———. Forthcoming *b*. "Magnitude of Criminal History Impacts on Sentence Severity." In *Criminal History Enhancements*, edited by Richard S. Frase and Julian V. Roberts. New York: Oxford University Press.

Frase, Richard, and Julian V. Roberts, eds. Forthcoming. *Criminal History Enhancements*. New York: Oxford University Press.

Frase, Richard S., Julian V. Roberts, Rhys Hester, and Kelly Lyn Mitchell, eds. 2015. *Criminal History Enhancements Sourcebook*. Minneapolis: Robina Institute of Criminal Law and Criminal Justice.

Gottfredson, Stephen D., and Don M. Gottfredson. 1990. *Classification, Prediction and Criminal Justice Policy*. Final report to the National Institute of Justice. Washington, DC: US Department of Justice, National Institute of Justice.

Greenawalt, Kent. 2001. "Punishment." In *Encyclopedia of Crime and Justice*, vol. 3, 2nd ed., edited by Joshua Dressler. New York: Macmillan.

Hampton, Jean. 1984. "The Moral Education Theory of Punishment." *Philosophy and Public Affairs* 13:208–38.

Hart, Henry M. 1958. "The Aims of the Criminal Law." *Law and Contemporary Problems* 23:401–41.

Hester, Rhys. 2015. "Prior Offense Weighting and Special Eligibility Rules for High Criminal History Categories." In *Criminal History Enhancements Sourcebook*, edited by Richard S. Frase, Julian V. Roberts, Rhys Hester, and Kelly Lyn Mitchell. Minneapolis: Robina Institute of Criminal Law and Criminal Justice.

———. 2017. "Punishing for the Past (Sometimes): Perspectives on Criminal History Enhancements from Non-guidelines Judges." Working paper, Pennsylvania State University.

Hester, Rhys, Julian V. Roberts, Richard S. Frase, and Kelly Mitchell. 2017. "A Measure of Tolerance: Public Attitudes on Sentencing Enhancements for Old and Juvenile Prior Records." *Corrections: Policy, Practice, and Research*. https://doi.org/10.1080/23774657.2017.1343105.

Hirschi, Travis, and Michael Gottfredson. 1983. "Age and the Explanation of Crime." *American Journal of Sociology* 89(3):552–84.

Indermaur, David. 1990. *Crime Seriousness and Sentencing: A Comparison of Court Practice and the Perceptions of a Sample of the Public and Judges*. Mount Lawley, Australia: Western Australian College of Advanced Education.

Kansas Sentencing Commission. 2009. *Kansas Sentencing Proportionality Recommendations: Report on Proposed Improvements and Modifications to Kansas Sentencing Laws*. http://www.accesskansas.org/ksc/2009proportionality/Proportionality_Report_Updated_1-24-09.pdf.

Katz, Jack. 1988. *Seductions of Crime: Moral and Sensual Attractions in Doing Evil*. New York: Basic Books.

Kleinig, John. 1998. "The Hardness of Hard Treatment." In *Fundamentals of Sentencing Theory: Essays in Honour of Andrew von Hirsch*, edited by Andrew J. Ashworth and Martin Wasik. Oxford: Clarendon.

Knight, Douglas W. 1965. "Punishment Selection as a Function of Biographical Information." *Journal of Criminal Law, Criminology, and Police Science* 56:325–27.

Kurlycheck, Megan C., Robert Brame, and Shawn D. Bushway. 2006. "Scarlet Letters and Recidivism: Does an Old Criminal Record Predict Future Offending?" *Criminology and Public Policy* 5:483–503.

———. 2007. "Enduring Risk? Old Criminal Records and Predictions of Future Criminal Involvement." *Crime and Delinquency* 53(1):64–83.

Langan, Patrick A., and David J. Levin. 2002. "Recidivism of Prisoners Released in 1994." Washington, DC: US Department of Justice, Bureau of Justice Statistics.

Lee, Youngjae. 2009. "Recidivism as Omission: A Relational Account." *Texas Law Review* 87:571–622.

———. 2010. "Repeat Offenders and the Question of Desert." In *Previous Convictions at Sentencing: Theoretical and Applied Perspectives*, edited by Julian V. Roberts and Andrew von Hirsch. Oxford: Hart.

Lippke, Richard. 2015. "The Ethics of Recidivist Premiums." In *The Routledge Handbook of Criminal Justice Ethics*, edited by Jonathan Jacobs and Jonathan Jackson. New York: Routledge.

MacPherson, Darcy. 2002. "The Relevance of Prior Record in the Criminal Law: A Response to the Theory of Professor von Hirsch." *Queen's Law Journal* 28:177–219.

Mande, Mary, and Kim English. 1989. *The Effect of Public Opinion on Correctional Policy: A Comparison of Opinions and Practices*. Denver: Colorado Department of Public Safety, Division of Criminal Justice.

Markel, Dan. 2009. "Executing Retributivism: Panetti and the Future of the Eighth Amendment." *Northwestern University Law Review* 103:1163–1222.

Mattinson, Joanna, and Catriona Mirrlees-Black. 2000. *Attitudes to Crime and Criminal Justice: Findings from the 1998 British Crime Survey*. London: Home Office.

Meade, Benjamin, Benjamin Steiner, Matthew Makarios, and Lawrence Travis. 2013. "Estimating a Dose-Response Relationship between Time Served in Prison and Recidivism." *Journal of Research in Crime and Delinquency* 50(4):525–50.

Minnesota Sentencing Guidelines Commission. 1984. *The Impact of the Minnesota Sentencing Guidelines: Three Year Evaluation*. St. Paul: Minnesota Sentencing Guidelines Commission.

———. 2017. *Minnesota Sentencing Guidelines and Commentary*. http://mn.gov/msgc-stat/documents/2017Guidelines/2017Guidelines.pdf.

Mitchell, Kelly L. 2015. "Decay and Gap Policies." In *Criminal History Enhancements Sourcebook*, edited by Richard S. Frase, Julian V. Roberts, Rhys Hester, and Kelly Lyn Mitchell. Minneapolis: Robina Institute of Criminal Law and Criminal Justice.

Mitchell, Ojmarrh, Joshua C. Cochran, David P. Mears, and William D. Bales. 2016. "Examining Prison Effects on Recidivism: A Regression Discontinuity Approach." *Justice Quarterly* 34(4):571–96.

Monahan, John, Jennifer L. Skeem, and Christopher T. Lowenkamp. 2017. "Age, Risk Assessment, and Sanctioning: Overestimating the Old, Underestimating the Young." *Law and Human Behavior* 41(2):191–201.

Morris, Norval. 1974. *The Future of Imprisonment*. Chicago: University of Chicago Press.

———. 1982. *Madness and the Criminal Law*. Chicago: University of Chicago Press.

Morris, Norval, and Michael Tonry. 1990. *Between Prison and Probation: Intermediate Punishments in a Rational Sentencing System*. New York: Oxford University Press.

Nagin, Daniel S. 2013. "Deterrence in the Twenty-First Century." In *Crime and Justice in America, 1975–2025*, edited by Michael Tonry. Vol. 42 of *Crime and Justice: A Review of Research*, edited by Michael Tonry. Chicago: University of Chicago Press.

Nagin, Daniel S., Francis T. Cullen, and Cheryl Lero Jonson. 2009. "Imprisonment and Reoffending." In *Crime and Justice: A Review of Research*, vol. 38, edited by Michael Tonry. Chicago: University of Chicago Press.

Nagin, Daniel S., and G. Matthew Snodgrass. 2013. "The Effect of Incarceration on Re-offending: Evidence from a Natural Experiment in Pennsylvania." *Journal of Quantitative Criminology* 29(4):601–42.

O'Neill, Michael Edmund, Linda Drazag Maxfield, and Miles D. Harer. 2004. "Past as Prologue: Reconciling Recidivism and Culpability." *Fordham Law Review* 73:245–95.

Parent, Dale G. 1988. *Structuring Criminal Sentences: The Evolution of Minnesota's Sentencing Guidelines*. Stoneham, MA: Butterworth.

Petersen, Thomas S. 2012. "Less for Recidivists? Why Retributivists Have a Reason to Punish Repeat Offenders Less Harshly than First-Time Offenders." In *Recidivist Punishments: The Philosopher's View*, edited by Claudio Tamburrini and Jesper Ryberg. New York: Lexington.

Piquero, Alex R., and Alfred Blumstein. 2007. "Does Incapacitation Reduce Crime?" *Journal of Quantitative Criminology* 23(4):267–85.

Piquero, Alex R., David P. Farrington, and Alfred Blumstein. 2007. *Key Issues in Criminal Career Research: New Analyses of the Cambridge Study in Delinquent Development*. Cambridge: Cambridge University Press.

Redondo, S., E. Luque, and J. Funes. 1996. "Social Beliefs about Recidivism in Crime." In *Psychology, Law, and Criminal Justice*, edited by Graham Davies, Sally Lloyd-Bostock, Mary McMurran, and C. Wilson. New York: de Gruyter.

Roberts, Julian V. 1996. "Public Opinion, Criminal Record and the Sentencing Process." *American Behavioral Scientist* 39:488–99.

———. 1997*a*. "Refining the Role of Criminal Record in the Federal Sentencing Guidelines: Few Lessons from the States." *Federal Sentencing Reporter* 9:213–15.
———. 1997*b*. "The Role of Criminal Record in the Sentencing Process." In *Crime and Justice: A Review of Research*, vol. 22, edited by Michael Tonry. Chicago: University of Chicago Press.
———. 2008. *Punishing Persistent Offenders*. Oxford: Oxford University Press.
———. 2010. "First Offender Sentencing Discounts: Exploring the Justifications." In *Previous Convictions at Sentencing: Theoretical and Applied Perspectives*, edited by Julian V. Roberts and Andrew von Hirsch. Oxford: Hart.
———. 2012. "Past and Present Crimes: The Role of Previous Convictions at Sentencing." In *Recidivist Punishments: The Philosopher's View*, edited by Claudio Tamburrini and Jesper Ryberg. New York: Lexington.
———. 2015*a*. "Justifying Criminal History Enhancements at Sentencing." In *Criminal History Enhancements Sourcebook*, edited by Richard S. Frase, Julian V. Roberts, Rhys Hester, and Kelly Lyn Mitchell. Minneapolis: Robina Institute of Criminal Law and Criminal Justice.
———. 2015*b*. "Severity Premium for Similar Prior Offending: Patterning Rules." In *Criminal History Enhancements Sourcebook*, edited by Richard S. Frase, Julian V. Roberts, Rhys Hester, and Kelly Lyn Mitchell. Minneapolis: Robina Institute of Criminal Law and Criminal Justice.
Roberts, Julian V., and Michael Hough. 2011. "Custody or Community? Exploring the Boundaries of Public Punitiveness in England and Wales." *Criminology and Criminal Justice* 11:185–202.
Roberts, Julian V., and Jose Pina-Sánchez. 2014. "Previous Convictions at Sentencing: Exploring Empirical Trends in the Crown Court." *Criminal Law Review* 8:575–88.
———. 2015. "Paying for the Past: The Role of Previous Convictions at Sentencing in the Crown Court." In *Exploring Sentencing Practice in England and Wales* edited by Julian V. Roberts. London: Palgrave Macmillan.
Roberts, Julian V., and Andrew von Hirsch. 2010. *Previous Convictions at Sentencing*. Oxford: Hart.
Roberts, Julian V., and Nicholas R. White. 1986. "Public Estimates of Recidivism Rates: Consequences of a Criminal Stereotype." *Canadian Journal of Criminology* 28:229–41.
Robinson, Paul H. 2008. *Distributive Principles of Criminal Law: Who Should Be Punished? How Much?* New York: Oxford University Press.
Sampson, Robert J., and John H. Laub. 1995. *Crime in the Making: Pathways and Turning Points through Life*. Cambridge, MA: Harvard University Press.
Sanders, Joseph, and V. Lee Hamilton. 1992. "Legal Cultures and Punishment Repertoires in Japan, Russia, and the United States." *Law and Society Review* 26:117–40.
Singer, Richard. 1979. *Just Deserts: Sentencing Based on Equality and Desert*. Cambridge, MA: Ballinger.
Stalans, Loretta, and Shari Diamond. 1990. "Formation and Change in Lay Evaluations of Criminal Sentencing: Misrepresentation and Discontent." *Law and Human Behavior* 14:199–214.

Tamburrini, Claudio. 2012. "What's Wrong with Recidivist Punishments?" In *Recidivist Punishments: The Philosopher's View*, edited by Claudio Tamburrini and Jesper Ryberg. New York: Lexington.

Tamburrini, Claudio, and Jesper Ryberg, eds. 2012. *Recidivist Punishments: The Philosopher's View*. New York Lexington.

Tonry, Michael. 2004. *Punishment and Politics*. Cullompton, Devon, UK: Willan.

———. 2010. "The Questionable Relevance of Previous Convictions to Punishments for Later Crimes." In *Previous Convictions at Sentencing: Theoretical and Applied Perspectives*, edited by Julian V. Roberts and Andrew von Hirsch. Oxford: Hart.

———. 2011. *Punishing Race*. New York: Oxford University Press.

———. 2016. *Sentencing Fragments: Penal Reform in America, 1975–2025*. New York: Oxford University Press.

———. 2017. "Making American Sentencing Just, Humane, and Effective." In *Reinventing American Criminal Justice*, edited by Michael Tonry and Daniel S. Nagin. Vol. 46 of *Crime and Justice: A Review of Research*, edited by Michael Tonry. Chicago: University of Chicago Press.

Travis, Jeremy, Bruce Western, and Steve Redburn. 2014. *The Growth of Incarceration in the United States: Exploring Causes and Consequences*. Committee on the Causes and Consequences of High Rates of Incarceration. Washington, DC: National Academies Press.

Tufts, Jennifer, and Julian V. Roberts. 2002. "Sentencing Juvenile Offenders: Public Preferences and Judicial Practice." *Criminal Justice Policy Review* 13:46–64.

Ulmer, Jeffery T., Noah Painter-Davis, and Leigh Tinik. 2016. "Disproportionate Imprisonment of Black and Hispanic Males: Sentencing Discretion, Processing Outcomes, and Policy Structures." *Justice Quarterly* 33(4):642–81.

US Sentencing Commission. 2004. *Release 1: Measuring Recidivism: The Criminal History Computation of the Federal Sentencing Guidelines*. http://www.ussc.gov/Research/Research_Publications/Recidivism/200405_Recidivism_Criminal_History.pdf.

———. 2010. *Computation of "Recency" Criminal History Points under USSG §4A1.1(e)*. http://www.ussc.gov/Research/Research_Publications/2010/20100818_Recency_Report.pdf.

Vigorita, Michael S. 2003. "Judicial Risk Assessment: The Impact of Risk, Stakes, and Jurisdiction." *Criminal Justice Policy Review* 14(3):361–76.

von Hirsch, Andrew. 1976. *Doing Justice*. Boston: Northeastern University Press.

———. 1985. *Past or Future Crimes? Deservedness and Dangerousness in the Sentencing of Criminals*. New Brunswick, NJ: Rutgers University Press.

———. 1993. *Censure and Sanctions*. Oxford: Clarendon.

———. 2010. "Proportionality and the Progressive Loss of Mitigation: Some Further Reflections." In *Previous Convictions at Sentencing: Theoretical and Applied Perspectives*, edited by Julian V. Roberts and Andrew von Hirsch. Oxford: Hart.

Wang, Xia, Daniel P. Mears, Cassia Spohn, and Lisa Dario. 2013. "Assessing the Differential Effects of Race and Ethnicity on Sentence Outcomes under Different Sentencing Systems." *Crime and Delinquency* 59(1):87–114.

Wasik, Martin, and Andrew von Hirsch. 1994. "Section 29 Revised: Previous Convictions in Sentencing." *Criminal Law Review* (June):409–18.

Weidner, Robert R., Richard S. Frase, and Jennifer S. Schultz. 2005. "The Impact of Contextual Factors on the Decision to Imprison in Large Urban Jurisdictions: A Multi-level Analysis." *Crime and Delinquency* 51:400–424.

Wright, Ronald E. 2002. "Counting the Cost of Sentencing in North Carolina, 1980–2000." In *Crime and Justice: A Review of Research*, vol. 29, edited by Michael Tonry. Chicago: University of Chicago Press.