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Recidivism as Omission: A Relational Account

Youngjae Lee*

Are repeat offenders more culpable than first-time offenders? In the United States, the most important determinant of punishment for a crime, other than the seriousness of the crime itself, is the offender's criminal history. Despite the popularity of the view that repeat offenders deserve to be treated more harshly than first-time offenders, there is no satisfactory retributivist account of the "recidivist premium." This Article advances a retributivist defense of the recidivist premium and proposes that the recidivist premium be thought of as punishment not, as sometimes suggested, for a defiant attitude or a bad character trait, but as punishment for an omission. The culpable omission that justifies the recidivist premium is, this Article argues, the repeat offender's failure, after his conviction, to arrange his life in a way that ensures a life free of further criminality. This Article argues that, although how individuals conduct their lives as a general matter is not properly the business of the state, once offenders are convicted of a crime, they enter into a thick relationship with the state and that this relationship gives rise to an obligation for the offenders to rearrange their lives in order to steer clear of criminal wrongdoing. This theory, "recidivism as omission," offers a firm theoretical foundation to justify the recidivist premium because it does not rely on unwarranted inferences from repeat offenders' criminal histories that they are "bad people" or that they are "defiant of authority." Rather, this account focuses on the significance of conviction and punishment themselves and the ways in which they alter an offender's relationship to the state. In addition, this Article argues that obligations between the state and offenders run in both directions and that we should recognize the ways in which the state may be a responsible actor that should share the blame for recidivists' reoffending.

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I. Introduction

Are repeat offenders more culpable than first-time offenders?\(^1\) In the United States, the most important determinant of punishment for a crime, other than the seriousness of the crime itself, is the offender's criminal history.\(^2\) There may be many reasons for this practice. Some argue that repeat offenders have demonstrated a propensity not to be deterred by ordinary sanctions and must be threatened with especially harsh consequences to prevent them from reoffending.\(^3\) Others argue that the point of harsh punishments on repeat offenders is to keep those most likely to reoffend away from the public so that they can no longer pose a danger to others.\(^4\) Criminal history may also be considered relevant in the way an offender's general

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1. This Article uses the terms “repeat offender,” “recidivist,” “offender with prior record,” and “offender with criminal history” interchangeably and as a way of describing only those who reoffend after being convicted for previous offenses. While this is the most common understanding of the terms, it is not the only way to define them. For example, if a person commits multiple crimes but is sentenced separately for them, that person may be sentenced as a “repeat offender” in every sentencing that follows the first one. That is, if an offender is sentenced in the morning for a crime and then sentenced in the afternoon for the second crime, it is possible for the second sentence to be enhanced on the basis that the offender accumulated a “criminal record” that morning. This Article is not about those with “criminal records” in this latter sense, although arguments discussed in this Article have implications for such cases as well. See Markus Dirk Dubber, Recidivist Statutes as Arational Punishment, 43 BUFF. L. REV. 689, 706 (1995); Ronald F. Wright, Three Strikes Legislation and Sentencing Commission Objectives, 20 LAW & POL’Y 429, 443 (1998) (both making a similar distinction). For more on the meanings of “prior” and “history” in the terms “prior record” and “criminal history,” see, for example, BUREAU OF JUSTICE ASSISTANCE, DEP’T OF JUSTICE, NATIONAL ASSESSMENT OF STRUCTURED SENTENCING 71 (1996); cf. Nils Jareborg, Why Bulk Discounts in Multiple Offence Sentencing?, in FUNDAMENTALS OF SENTENCING THEORY 129, 129 (Andrew Ashworth & Martin Wasik eds., 1988) (distinguishing between “recidivists” and “multiple offenders”).


4. E.g., John J. Dilulio, Jr., Instant Replay: Three Strikes Was the Right Call, AM. PROSPECT, Summer 1994, at 12, 12.
personal background and character are considered relevant during the sentencing stage. If rehabilitation is considered to be an important purpose of punishment, then it seems to follow that sentencing should take into account whatever information may aid the legal system in deciding what type and what amount of punishment are appropriate to reform individual offenders. These three rationales—deterrence, incapacitation, and rehabilitation—are prima facie plausible as justifications for the practice of considering criminal history in sentencing, at least in theory.

However, once we ask whether repeat offenders deserve more condemnation than first-time offenders for the same offense, the picture turns fuzzy. It is commonly, and casually, assumed that repeat offenders deserve more punishment than first-time offenders. The Federal Sentencing Guidelines, for instance, justify their heavy reliance on criminal history partly on the argument that "[a] defendant with a record of prior criminal behavior is more culpable than a first offender and thus deserving of greater punishment." The political rhetoric surrounding California’s three-strikes law frequently included the language of desert and retribution, with some people saying that repeat offenders deserve draconian prison sentences for being recidivists. Public perceptions of a crime’s seriousness appear to vary according to the criminal record of the offender as well.

By contrast, desert theorists have been generally critical of sentencing enhancements based on the offender’s criminal history, and they have


6. In practice, there are many unanswered empirical questions about how to arrive at an optimal level of prevention that does not amount to a waste of resources. For some discussions of relevant empirical questions, see ROBERTS, supra note 5, at 30-35; FRANKLIN E. ZIMRING ET AL., PUNISHMENT AND DEMOCRACY: THREE STRIKES AND YOU’RE OUT IN CALIFORNIA 85-105 (2001); and James Austin et al., The Impact of 'Three Strikes and You're Out,' 1 PUNISHMENT & SOC'Y 131, 155-58 (1999).

7. U.S. SENTENCING COMM’N, U.S. SENTENCING GUIDELINES MANUAL § 4A, introductory cmt. (2008) (emphasis added); see also BUREAU OF JUSTICE ASSISTANCE, supra note 1, at 67 ("One reason to consider prior record in sentencing is to ensure awareness of an offender’s increased culpability.").


9. See, e.g., Stephanie Simon, Three Strikes Advocates Passionately Defend Law, L.A. TIMES, July 3, 1996, at A16 (quoting a murder victim’s mother as saying, “When TV gives us this 2½-minute sound bite about the poor soul who stole a piece of pizza, they ask if he deserves to spend 25 years to life in prison. Well, the truth of the matter is, he probably does”).


11. GEORGE FLETCHER, RETHINKING CRIMINAL LAW 462-66 (1978); RICHARD SINGER, JUST DESERTS: SENTENCING BASED ON EQUALITY AND DESERT 67-74 (1979); see also BUREAU OF JUSTICE ASSISTANCE, supra note 1, at 67 ("Those who espouse a just desert or retributive philosophy argue that prior record should play a very limited role or no role in sentencing."); Aaron J. Rappaport, Rationalizing the Commission: The Philosophical Premises of the U.S. Sentencing
criticized recidivist statutes such as California’s three-strikes law on retributivist grounds. A common objection is based on the principle that punishment should be proportional to crime. The seriousness of a crime does not change, the argument goes, depending on the criminal history of the person committing it. A robbery is a robbery, whether it is committed by a first-time offender or a repeat offender; therefore, there should be no difference between the way the state responds to repeat offenders and first-time offenders who commit the same crime. Another common objection starts from the view that one should not be punished twice for the same offense. If offenders have already been punished for their crimes, they have paid their debts to society, and this means that increasing the amount of punishment for second crimes on the basis of their criminal histories results in double jeopardy.

Guidelines, 52 Emory L.J. 557, 595 (2003) ("Just desert theorists have far greater difficulty in explaining why criminal history is a relevant sentencing factor [than utilitarian theorists].")

12. I count myself among such critics. See Youngjae Lee, The Constitutional Right Against Excessive Punishment, 91 Va. L. Rev. 677, 735–36 (2005) (arguing that California’s three-strikes law produces penalties that violate the retributivist constraint); see also Zimring et al., supra note 6, at 121, 120–21 (noting that the penalties under the California three-strikes law are “nonproportional or indeed antiproportional”); Dubber, supra note 1, at 705, 705–07 (“Repeat offender laws . . . penalize an offender’s insufficient obsequiousness and . . . they have nothing to do with the offender’s present moral desert as they punish her not for the present act, but for another act already punished.”); Paul H. Robinson, Punishing Dangerousness: Cloaking Preventive Detention as Criminal Justice, 114 Harv. L. Rev. 1429, 1435–37 (2001) (arguing that much of the time spent in prison by repeat offenders, after an initial period of earned retribution, is “a purely preventative detention that cannot be justified as deserved punishment”); Michael Vitiello, Three Strikes: Can We Return to Rationality?, 87 J. Crim. L. & Criminology 395, 425–32 (1997) (noting that under many habitual-offender statutes “long sentences are imposed without regard to the culpability of the offender or degree of social harm caused by the offender’s behavior”).

13. See Singer, supra note 11, at 68, 67–74 (“[T]he harm imposed by the offense is the same in each instance; the injury inflicted both on the individual victim and, perhaps less clearly, on society appears to be the same.”); see also Mirko Bagaric, Double Punishment and Punishing Character: The Unfairness of Prior Convictions, 19 Crim. Just. Ethics 10, 18, 17–18 (2000) (“[A] consistent retributivist is committed to ignoring prior convictions in determining penalty since they have no bearing on the seriousness of the instant offense.”); Dubber, supra note 1, at 705 (“A person who robs another of $20 at gun point is no more blameworthy simply because she had five years earlier been convicted of burglary.”); Stephen J. Morse, Blame and Danger: An Essay on Preventive Detention, 76 B.U. L. Rev. 113, 146–47 (1996) (“When an offender has served the sentence for a crime, the ‘slate is wiped clean.’ The next offense of a previous offender is no worse per se, the victim is no more harmed, than if the offense were the offender’s first.”); Roberts, supra note 2, at 317 (“Popular conceptions of desert theories would appear to rule out the use of criminal history information, as the focus is on the offense of conviction, and not previous criminal conduct.”).

14. Bagaric, supra note 13, at 13; Rappaport, supra note 11, at 595; James D. Stuart, Retributive Justice and Prior Offenses, 18 Phil. F., Fall 1986 at 40, 43 (“On a just deserts or retributive theory, it would seem that it is wrong to punish an offender more severely for a second offense if that person has already paid for the first offense, since that amounts to punishing the person twice for the first offense.”). One scholar put it this way:

If a judge is punishing the offender for other offenses upon which he has already been sentenced, such legislation would violate double jeopardy. An offender sentenced to a term of imprisonment, in the language of retributivists, must pay his debt to society. His debt is measured by the term of imprisonment. Completion of the term of imprisonment pays that debt. When the offender commits another offense and the
Therefore, while the belief that repeat offenders are deserving of greater punishment is widespread, there is no satisfactory retributivist defense of that prevailing view, prompting one leading scholar on the topic to note that "a plausible retributive justification for the recidivist sentencing premium has proved as elusive as the legendary resident of Loch Ness." And as another scholar noted, it appears that on this issue "[t]he difference between elite and popular conceptions of desert is stark."

earlier conviction becomes a prior strike to increase his term of imprisonment, that increase cannot be additional punishment for the earlier crime. To punish the offender again for the same conduct would violate double jeopardy.

Vitiello, supra note 12, at 426 (footnote omitted). The double-jeopardy argument and the proportionality argument can be thought of as the same argument about proportionality in two different forms if we take the view that the prohibition of double jeopardy is a way of enforcing the proportionality limitation. See Michael S. Moore, ACT AND CRIME: THE PHILOSOPHY OF ACTION AND ITS IMPLICATION FOR CRIMINAL LAW 309, 309–10 (1993) (arguing that prohibitions of multiple punishments for repeat offenders are "motivated by a proportionality worry"); see also Nancy J. King, Portioning Punishment: Constitutional Limits on Successive and Excessive Penalties, 144 U. PA. L. REV. 101, 104 (1995) ["[T]he contours of constitutional limits on the amount of punishment that can be inflicted for a particular wrong, traditionally a part of the Eighth Amendment and due process law, are inseparable from the constitutional limitations on the frequency with which an offender can be punished for that wrong, typically rooted in double jeopardy doctrine."].

15. Andrew von Hirsch is frequently mentioned as a desert theorist who supports sentencing enhancements based on offenders' criminal histories. See, e.g., Rappaport, supra note 11, at 596 (noting that von Hirsch advocates the use of a defendant's prior criminal record in assessing culpability); Alice Ristroph, Desert, Democracy, and Sentencing Reform, 96 J. CRIM. L. & CRIMINOLOGY 1293, 1315 n.74 (2006) (identifying von Hirsch as a proponent of the theory that "repetitive criminal behavior makes an offender deserve more punishment"). While it is true that he held such a view at one point, see Andrew von Hirsch, DOING JUSTICE: THE CHOICE OF PUNISHMENTS 84–88 (1976) (arguing that a first offender is deserving of less punishment than a person who has committed multiple offenses), his faith in the idea did not last very long, and he has since declared his argument about repeat offenders in Doing Justice to be "mistaken." Andrew von Hirsch, Criminal Record Rides Again, CRIM. JUST. ETHICS, Summer/Fall 1991, at 2, 2 [hereinafter von Hirsch, Criminal Record]. He has instead defended the idea of mitigation for first-time offenders—as opposed to aggravation for repeat offenders—for the past few decades. ANDREW VON HIRSCH, PAST OR FUTURE CRIMES 81–91 (1986); von Hirsch, Criminal Record, supra, at 2; Andrew von Hirsch, Desert and Previous Convictions in Sentencing, 65 MINN. L. REV. 591, 592 (1981) [hereinafter von Hirsch, Desert and Previous Convictions]. This view, which is also known as "progressive loss of mitigation," has been influential among some desert theorists. Martin Wasik & Andrew von Hirsch, Section 29 Revised: Previous Convictions in Sentencing, 1994 CRIM. L. REV. 409, 410; see also Andrew Ashworth, SENTENCING AND CRIMINAL JUSTICE 188 (4th ed. 2005) (describing "progressive loss of mitigation" as "characteristically adopted by desert theorists"); Martin Wasik, Guidance, Guidelines, and Criminal Record, in SENTENCING REFORM: GUIDANCE OR GUIDELINES? 105, 122 (Martin Wasik & Ken Pease eds., 1987) ("The theory of progressive mitigation, which is akin to just deserts, appears to be gaining prominence in English writings . . . ."). However, its focus on mitigation, not aggravation, puts it at odds with the common sentiment about repeat offenders' enhanced culpability. This view is examined in more detail below. See infra section II(B)(1).


17. Ristroph, supra note 15, at 1318. The purported difference between "elite" and "popular" conceptions of desert raises the following question: What should be the significance of ordinary
The lack of a retributivist account of the recidivist premium is problematic because an articulation of a retributivist basis could serve both as an affirmative basis for increasing a repeat offender’s punishment and as a negative constraint that limits permissible amounts of punishment. Without a good retributivist-based account of the recidivist premium, it would be difficult to raise justice or fairness arguments against habitual-offender statutes that impose dramatic increases in sentences on repeat offenders on the basis of incapacitation and deterrence rationales.

This Article supplies such an account, and it defends the views that repeat offenders are more culpable and that sentencing enhancements for prior convictions are justifiable on retributivist grounds. In order to avoid the common retributivist objections mentioned above, we may approach the question in two different ways. First, we may shift the focus away from the gravity of each criminal act and onto the person who connects the past and current transactions. That is, the idea is not to make the punishment fit the crime but to have the punishment fit the person. Second, we may give an account of how it is the case that an offender’s past criminal history makes a current offense somehow worse than an equivalent crime committed by a first-time offender.

Part II focuses on the former approach; Part III focuses on the latter. Parts II and III argue that the common objections against such arguments—that a liberal state should punish for acts and not for character and that a liberal state should not punish for defiance or disobedience—are wrongheaded. Parts II and III also argue, however, that neither the validity of the idea that character is relevant in culpability determinations nor the validity of the idea of punishing for disobedience can justify the recidivist premium. In other words, the problem with these arguments is not that they are committed to the notion of punishing for character or punishing for disobedience per se, but that they cannot explain the recidivist premium.

Part IV advances a new theory of the recidivist premium. Part IV argues that we should think of the recidivist premium as stemming not from our enhanced understandings of repeat offenders’ bad characters or allegedly defiant attitudes, but from what the repeat offenders have failed to do between the time of the previous conviction and the time of the new offense. I call this justification for the recidivist premium “recidivism as omission.”

intuitions about desert when one is theorizing about desert? If a popular belief about a question of desert does not match up with conclusions arrived at through theorizing and reflecting about desert, who should revise their views—the people or the theorists? Some may argue that when there is a gap, the people’s views control because the question of what offenders deserve should ultimately be decided by “the people,” as opposed to answered through some objective derivation from philosophical principles. Others may argue that the question of what people deserve is a matter of objective moral reality, and that the popular opinions should play no role in such determinations. In my view, neither argument is correct. I explore this question in more detail in Youngjae Lee, Desert and the Eighth Amendment, 10 U. PA. J. CONST. L. (forthcoming 2008), available at http://ssrn.com/abstract=1234263.
Part IV argues that punishments for such omissions are permitted because the relationship between an offender and the state is altered when the first conviction and punishment occur. The offender then has an obligation to organize his life in a way that reduces the risk of his reoffending, and it is the failure to fulfill that obligation that justifies the additional punishment. Part IV also explains why, under this account, habitual-offender statutes such as California's three-strikes law go too far. Part IV further points out that the relationship between the offender and the state is a two-way street, in the sense that offenders' obligations to organize their lives in a way that steers clear of criminality coexist with the state's corollary obligation not to interfere with their return to normal lives.

This Article concludes with two caveats. First, there is one other fairness argument that this Article does not discuss—namely, the idea that people who collect impressive criminal records over time "forfeit" their standings as citizens and the freedoms that come with such standings. I raise some preliminary doubts about the validity of this forfeiture argument. Second, because this Article focuses on the question of desert, it does not address the question of whether the state is ever justified in "punishing" those who are likely to reoffend beyond the level allowed by the just-deserts constraint for reasons having to do with incapacitation or deterrence. The point of this Article is to articulate a retributivist justification for the recidivist premium, and this Article does not attempt to answer the thorny question of whether punishment of repeat offenders beyond what they deserve should ever be permitted for preventive reasons.18

II. Punishing Bad Character

A. Character and Culpability

The practice of punishing repeat offenders more than first-time offenders is often criticized on the basis that it punishes people for their characters as opposed to for their conduct.19 Conversely, it is sometimes


19. See, e.g., Bagaric, supra note 13, at 15 ("[U]nder a system of punishment governed by law there is no basis for ascribing weight to character. People should be punished only for what they do; not according to the type of people we think they are."); Ekow N. Yankah, Good Guys and Bad Guys: Punishing Character, Equality and the Irrelevance of Moral Character to Criminal Punishment, 25 Cardozo L. Rev. 1019, 1033 (2004) (arguing that habitual-offender statutes like
argued that a theory of criminal culpability that makes references to offenders' bad character traits is unacceptable precisely because it leads to unjust laws like three-strikes laws.\textsuperscript{20} Such criticisms accurately capture the political rhetoric surrounding the three-strikes-laws debate—that these are "bad people" who are being singled out for special treatment—and thus are prima facie plausible as objections. For instance, one prosecutor commented that a three-strikes law punishes offenders for "being recidivists," and not only for their latest offense.\textsuperscript{21} However, the slogan that criminal law should punish for what people do and not for who they are is misleading. In a sense, it is accurate to state that we punish people for who they are and not just what they do, but not necessarily in a way that renders legitimate the common political rhetoric in favor of three-strikes laws.

In what sense do we punish offenders for who they are as well as for what they do? At the most basic level, we should first recognize the essential role of an actor as a recipient of blame and punishment.\textsuperscript{22} According to Joel Feinberg's formulation, desert statements have the form "A deserves X in virtue of Y," where A is the person deserving, X is what that person deserves, and Y is the desert basis, or whatever serves as the basis for X.\textsuperscript{23} Even though it is commonly stated that our criminal justice system judges acts, not people, we cannot make any sense of the practice of blaming if we try to think about it exclusively in terms of wrong acts, detached from actors. Blaming actors for what they have done implies that the acts that they have engaged in "reflect badly" on them, and to blame them for what they have done thus requires that we see a tight relationship between the actors and the acts.\textsuperscript{24}

California's three-strikes law imagine criminals to have bad characters and create a "class system based on permanent moral inferiority" making "the criminal a permanent lesser citizen").

\textsuperscript{20} Yankah, supra note 19, at 1029.

\textsuperscript{21} Wendy Thomas Russell, \textit{Those Who Struck Out: Most Third-Strikes Are Non-violent, Local Sentencings Show, but Most of Those Sentenced Had Violence in Their Past}, \textit{LONG BEACH PRESS}, Oct. 31, 2000, at A6 ("You're not sending them away for petty theft with a prior. You're sending them away for their felony history.") (quoting Long Beach Deputy District Attorney Christopher Frisco)); see also Andy Furillo, \textit{Most Offenders Have Long Criminal Histories}, \textit{SACRAMENTO BEE}, Mar. 31, 1996, at A1 ("Any discussion of 'three strikes' has to include discussion of the person's priors. These people are being punished for being recidivists, not just the current offense.") (quoting Santa Clara County District Attorney Kathy Storton)).

\textsuperscript{22} GEORGE SHER, \textit{IN PRAISE OF BLAME} 7 (2006); see also BERNARD WILLIAMS, \textit{Nietzsche's Minimalist Moral Psychology, in MAKING SENSE OF HUMANITY AND OTHER PHILOSOPHICAL PAPERS} 65, 72 (1995) ("Blame needs an occasion—an action—and a target—the person who did the action and who goes on from the action to meet the blame.").


\textsuperscript{24} SHER, supra note 22, at 7 (stating that blame has the structure of a reaction “to a person on the basis of the wrongness of what he has done,” as opposed to a reaction “to the wrongness of what a person has done”); VICTOR TADROS, \textit{CRIMINAL RESPONSIBILITY} 48 (2005) ("In holding an agent responsible for an action, we imply that the action reflects on the agent in some way."); John Gardner, \textit{On the General Part of the Criminal Law, in PHILOSOPHY AND THE CRIMINAL LAW: PRINCIPLE AND CRITIQUE} 205, 236, 236–37 (Antony Duff ed., 1998) ("The criminal law gets personal. To be convicted of a crime is to be criticized, or even sometimes condemned, as a person.").
This proposition—that blaming a person for an act entails a judgment that the act reflects badly on that person—implies that a criminal justice system may punish people only for "actions that are in a real sense their own." Only when actions are "their own" can we justify blaming persons for what they do. Theories of culpability that bridge the gap between an actor and an act through the notion of "character" derive some of their persuasive force from this idea of one's ownership of one's acts. According to this account, character plays both inculpatory and exculpatory roles in criminal culpability. It is appropriate to blame persons for their acts if the bad acts can be traced to their character defects. It is inappropriate to blame persons for their acts if the circumstances surrounding their actions are such that the acts cannot be explained as resulting from their character defects.

For instance, the duress defense requires, under the Model Penal Code formulation, that the kind of threat that has brought about the crime be

25. NICOLA LACEY, STATE PUNISHMENT: POLITICAL PRINCIPLES AND COMMUNITY VALUES 71 (1988). She puts things slightly differently at times when she says, for instance, that "actions for which we hold a person fully responsible are those in which her usual character is centrally expressed," id. at 66, or that "it is unfair to hold people responsible for actions which are out of character." Id. at 68. I am not as comfortable with these formulations as I am with the vaguer, and hence more noncommittal, notion of one's "own" actions, because the terms "usual" and "out of character" invite some theoretical troubles. See, e.g., JEREMY HORDER, EXCUSING CRIME 120 (2007) (noting the potential for character theory to generate a case for excusing defendants in some intuitively implausible cases, such as when a defendant of otherwise honest or good character succumbs to great temptation); R.A. Duff, Choice, Character, and Criminal Liability, 12 LAW & PHIL. 345, 374–78 (1993) (suggesting different ways one might interpret the idea of an act's being "out of character" for the relevant actor and demonstrating various problems that idea encounters); Jeremy Horder, Criminal Culpability: The Possibility of a General Theory, 12 LAW & PHIL. 193, 207 (1993) [hereinafter Horder, Criminal Culpability] ("[I]t might be taken to imply that even the most grave harm, intentionally inflicted, is not to be regarded as culpable if it was uncharacteristic of the agent to be moved to cause harm in this way. This would be a bad descriptive and normative error."); Michael S. Moore, Choice, Character, and Excuse, 7 SOC. PHIL. & POL'Y 29, 51–54 (1990) (arguing that those who freely choose to do wrong are culpable no matter how "out of character" the wrongful act may have been for the actor); Peter Westen, An Attitudinal Theory of Excuse, 25 LAW & PHIL. 289, 333, 332–33 (2006) ("[T]he fact that wrongful conduct is an exceptional lapse of otherwise good character provides no basis in law for excusing an actor altogether."). For an argument that a character theory need not be committed to the view that a person is not responsible for "out of character" actions, see TADROS, supra note 24, at 49–53.

26. Duff, supra note 25, at 378, 369–78 ("[T]he element of truth in the 'character' theory [is] that the action for which a person is convicted and punished must be 'hers,' in that they must be appropriately related to attitudes or motives that are necessarily aspects of her continuing identity as a person.").

27. ROBERT NOZICK, PHILOSOPHICAL EXPLANATIONS 382–84 (1981); Michael D. Bayles, Character, Purpose, and Criminal Responsibility, 1 LAW & PHIL. 5, 7 (1982); Richard B. Brandt, Blameworthiness and Obligation, in ESSAYS IN MORAL PHILOSOPHY 3, 9–13 (A.I. Melden ed., 1958); see also DAVID HUME, A TREATISE OF HUMAN NATURE 264 (2005) (1730–40) ("Actions are by their very nature temporary and perishing; and where they proceed not from some cause in the characters and disposition of the person, who perform'd them, they infall not themselves upon him, and can neither redound to his honour, if good, nor infamy, if evil.").

28. TADROS, supra note 24, at 53 (explaining that, according to the character theory of criminal responsibility, "[a] defendant is responsible for her action only insofar as that action is reflective of the character of the agent").
something "a person of reasonable firmness in his situation would have been unable to resist." According to this standard, even if a person genuinely felt that he has no choice other than to commit a crime to prevent a serious harm to himself by someone else, the duress defense would not be available to him if he did not live up to the standard of behavior set by the hypothetical "person of reasonable firmness." Persons of reasonable firmness are those who recognize the wrongness of the crime they are being pressured to commit and are courageous enough to resist the pressure. If someone who commits a crime meets the requirement of the duress defense, the message the legal system communicates is that the crime does not reflect badly on the offender because the source of the criminality is something external to the offender's self, and giving in to the threat of harm is not to be condemned because the offender has behaved in the same way a reasonable person would have.

Conversely, if the duress defense is not applicable in a particular offender's situation, the legal system judges the offender for being the sort of person who either does not live up to society's expected standard of fortitude and resistance to criminal temptations or threats, or does not care sufficiently about the seriousness of the values that the law protects, or both. Of course, this is not to say that the law is punishing the offender for being a coward; rather, the punishment is for the crime itself. Implicit in the punishment, however, is the proposition that whatever pressure the offender might have felt to commit the crime is something that should have been resisted, and the failure to resist it shows a blameworthy character defect.

There are many questions here, and an extensive literature on the relevance of character to criminal culpability has grown around the debate among the "choice," "character," and "capacity" theories of culpability. To

30. Duff, supra note 25, at 358 (suggesting that the "reasonable person" be understood as "someone with a reasonable or proper regard for the law and the values it protects, and having a reasonable or proper degree of courage").
31. Duff, supra note 25, at 359 ("To say . . . that a 'reasonable person' would have given in is to say that (even) someone with a proper regard for the law and its values, and with a proper degree of courage, would have given in: in which case this person's giving in did not display a lack or failing for which she can properly be condemned."). For a more detailed and nuanced discussion of different situations in which the duress defense is available, see R.A. Duff, Rule-Violations and Wrongdoing, in Criminal Law Theory: Doctrines of the General Part 47, 63–68 (Stephen Schute & A.P. Simester eds., 2002).
32. Duff, supra note 25, at 358–59. It is also possible that what the reasonable-person test does in a particular context is serve as an evidentiary device—for example, to determine whether the report of fear of one's life is credible or is a mere exculpating story developed after the commission of the crime in order to avoid conviction. R.A. Duff, Virtue, Vice, and Criminal Liability: Do We Want an Aristotelian Criminal Law?, 6 Buff. Crim. L. Rev. 147, 175 (2002) [hereinafter Duff, Virtue].
33. For examples of literature covering these issues, see generally Fletcher, supra note 11, at 799–802; H.L.A. Hart, Punishment and Responsibility: Essays in the Philosophy of Law 152 (1968); Horder, Excusing Crime, supra note 25, at 99–133; Lacey, supra note 25, at 58–78; Nozick, supra note 27, at 382–84; Tadros, supra note 24, at 21–130; Peter Arenella, Character,
give a full account of the current state of that debate in this Article would be out of place. Further, my purpose here is not to declare that the character theory of culpability is superior to competing accounts, nor is it to solve all the problems that the character theory of culpability raises. It does, however, seem to me that character theorists are correct when they argue that criminal law punishers persons for their actions only when those actions reflect badly on the actors in the sense that the actions display their character defects. Without an account along these lines, it is difficult to explain what makes up the relationship between actors and their acts, and why it is that we have no trouble connecting our condemnation of a bad act to the agent who performed it. In short, this is the sense in which it is correct to say that criminal law punishes people for what they do and for who they are.

But we must be careful. As Antony Duff has pointed out, there is a difference between treating character as a “condition of liability” and as an “object of liability.” The formulation that we punish people for actions only when they reflect their character defects can mean one of two things. First, it may be argued that it is unfair to hold persons responsible for actions not flowing from their character defects. Alternatively, it may be argued that the legal system is ultimately more interested in character defects as objects of condemnation, and that actions that express bad character are significant only to the extent that they provide a window into persons’ characters. The account of the role of character in criminal culpability I have given thus far does not appear to go beyond the former formulation, in which case it would be misleading to state that we punish people for being who they are as opposed to for what they do. It would be more accurate to say instead that we punish people for what they do, but only to the extent that what they do reflects who they are. Does this threaten my conclusion that we do punish people for who they are and not just for what they do?

Not exactly. And that is because it is doubtful that we can neatly separate out the two roles—condition of liability versus object of liability—played by character in culpability determination. Once character defects are thought to be behind the bad actions condemned by the criminal justice system, and it is this link that satisfies the condition of liability, then it is difficult to imagine how the character defects can escape the reach of


34. Duff, Virtue, supra note 32, at 155.
condemnation. The reasons we take character defects seriously as conditions of liability do not suddenly cease to operate when it comes to objects of liability as if there is some on–off switch. When a malicious act is condemned when it reflects a malicious character, a cruel act is condemned when it reflects a cruel character, or a reckless and indifferent omission is condemned when it reflects a callous character indifferent to suffering, there is no way for the criminal justice system to avoid commenting on the actor’s bad character trait as well as the bad act.

What does this account of the role of character in criminal culpability imply for the debate on recidivism? It depends. If character is a condition of liability, as opposed to an object of liability, then we can draw very little from this discussion. Character is relevant to the question of whether someone can be held criminally liable, but the question of whether repeat offenders are more serious criminals than first-time offenders is a different matter. That is, the argument that crime and character must be connected for there to be criminal liability leaves untouched the question of the legitimacy of the recidivist premium.

But as just discussed, if character is a condition of liability, it is difficult to avoid the implication that it can also be an object of liability. Perhaps we could say that a repeat offender’s criminal history warrants a more severe state response to his current offense than would be directed at a first-time offender, simply because the repeat offender’s current offense and criminal history together reveal something about him that is more blameworthy. In other words, a repeat offender displays a vice that is distinctive to repeat offenders. What is that vice?

It would be premature to answer this question in this Part. And that is because the distinction I have started this discussion with—the distinction between punishing the act and punishing the character—collapses under the conception of the role of character in criminal culpability outlined here. Character is relevant to the extent that it is manifested in action, and action is blameworthy to the extent it reflects a bad character. What this means is that the focus of blameworthiness analysis remains on acts, not character, and this in turn means that there is no difference between punishing the act and punishing the character, as far as our culpability evaluation is concerned. The question at hand must thus be deferred to Part IV, in which I will discuss the argument that offenses committed by repeat offenders are worse than those committed by first-time offenders.

35. It does not collapse completely. See Duff, *Virtue*, supra note 32, at 157–58 (explaining that punishing action to the extent that it shows bad character and punishing character to the extent that it is manifested in action may appear to be merely two different ways of stating the same idea, but that there is a difference between the two). But that makes little difference for the topic of this Article.
B. Recidivism and "Bad People"

1. First Time Offenses as Acts "Out of Character."—Even if my discussion in the previous section is correct, and the character theory of culpability can collapse into a theory that focuses on the badness of acts, that does not end the character theory of the recidivist premium, as it appears that those who argue that recidivists are being punished not for their latest offenses but for "being recidivists" have in mind something other than drawing a firm link between actions and character traits in order to judge actions as reflecting on actors.

There may be several alternative "character" theories of the recidivist premium. To see the alternatives, it is helpful to first recognize a puzzle in the idea that recidivists are being punished for being recidivists. If a person is convicted of robbery once, is punished for it, and then commits another robbery, what inferences can we draw about this person that warrant a harsher punishment? To isolate the effects of criminal history, let us assume that the first robbery and the second robbery are identical in every relevant way except for the existence of criminal record in the second instance. It seems odd to say that the person \( O_1 \) at the time of the repeat offense \( t_2 \) is a worse person than \( O_1 \) at the time of the first offense \( t_1 \). The problem with someone who repeats seems precisely to be that the person has not changed despite the first conviction and punishment, not that the person has changed for the worse. In other words, the person who has committed a crime at \( t_1 \) and the person who has committed a crime at \( t_2 \) is the same person, with the same set of character defects, and that is the problem. So the idea of imposing the recidivist premium on the person for being a recidivist should be formulated in a way that is not limited to the idea of \( O_1 \) being a worse person at \( t_2 \) than at \( t_1 \).

One possibility is the idea of lapse or acts that are "out of character." The reason \( O_1 \) at \( t_2 \) should be dealt with more harshly than \( O_1 \) at \( t_1 \) is that, at \( t_1 \), it is possible that \( O_1 \) acted in a way that was out of character, whereas any inference that \( O_1 \)'s act was out of character at \( t_2 \) would no longer be warranted. This account, which is a theory of "first-offense discount," as opposed to "recidivist premium," is a combination of two ideas: mercy and epistemic limitations of the criminal justice system.

In a series of articles, Andrew von Hirsch has defended a version of the first-offense discount.\(^{36}\) Von Hirsch points out that even well-intentioned, law-abiding citizens may at times come across opportunities to commit

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crimes and may give in to the temptation at moments of weakness. The first-time discount is given in acknowledgement of that fact and in the spirit of tolerance and recognition of human frailty. This is the "mercy" aspect of the first-offense discount. The discount is then gradually taken away as one's criminal record grows, since a record of repeat offending starts to become inconsistent with the idea that the given individual's criminal activity should be characterized as a "lapse." In other words, as a person accumulates a history of offenses, any claim that the person's acts are somehow "out of character" becomes no longer credible. This is the epistemic-limitation aspect of the first-time discount. The idea is that the criminal justice system is not able to tell whether first-time offenders have acted "out of character," in the sense of having a one-time slip, or whether they actually have permanent, bad character traits that are manifested in their offenses. Since the criminal justice system is not good at distinguishing those who lapsed and those who are fundamentally criminals, it should err on the side of giving a first-time discount and then take away the discount when someone with a criminal history commits a crime, because at that point we know that the offender is a criminal, not a law-abiding citizen who "slipped" in a moment of weakness.

The first-offense-discount idea, however, has some problems as a defense of the recidivist premium. First, the idea of "human frailty" is more suited to the ideas of forgiveness and mercy than to the idea of desert. To the extent that the first-offense discount is a theory of mercy as opposed to desert, it dissolves the problem of the argument for the recidivist premium on the basis of desert by denying the problem's existence. This account explains and justifies some differential treatment between first-time offenders and offenders with criminal records, but it cannot explain the intuition that the difference is due to the fact that repeat offenders are somehow deserving of more punishment—an intuition that is indicated by people's increased sense of resentment at recidivists.

Second, some people who are convicted for the first time did not have a lapse that led to their first crime; rather, they simply did not get caught the first time. The lapse theory does not apply to those whose first crimes did not end in conviction. A criminal history is not a history of how many crimes one has committed, but a history of how many times one has been convicted, and the lapse theory has trouble explaining why convictions, rather than multiple offenses, are significant. This is a specific manifestation of a broader problem. If one's criminal record serves only the evidentiary

37. See von Hirsch, Criminal Record, supra note 15, at 55 ("The idea is that even an ordinarily well-behaved person can have his or her moral inhibitions fail in a moment of weakness or willfulness. Such a momentary loss of self-control is the kind of human frailty for which some understanding ought to be shown.").

38. Id.

39. Id. ("The repeated offense can less and less plausibly be described as a lapse; it is no longer a case of momentary failure of moral inhibition.").
function of revealing one's true character, then the significance of conviction and punishment becomes merely incidental. In other words, if there were a better way of getting at the question of offenders' characters, then we would not need to pay attention to criminal records at all. And there is no reason to think that a conviction record is a better measure of character traits than, say, family background, education, work history, and relationship to community.

2. Second Time Offenses as Marks of "Bad Character."—The first problem of the first-offense-discount argument can be solved only at the exacerbation of the second problem. And this can be seen once we go back to the initial formulation of the problem. I mentioned above that there is something strange about the idea that $O_1$ at $t_2$ is a worse person than $O_1$ at $t_1$. This is because the problem appears to be that $O_1$ has not changed, not that he has become worse. One solution to the puzzle is the idea that the reason $O_1$ at $t_2$ is worse than $O_1$ at $t_1$ is not because $O_1$ has become worse, but instead is because the legal system now has a better understanding of $O_1$ as a person than it did at $t_1$. Another way of putting this is as follows. Say at $t_1$ there are two offenders, $O_1$ and $O_2$, who commit identical crimes. And after they are convicted and punished, $O_2$ never commits another crime, whereas $O_1$ does, at $t_2$. Why should $O_1$ be punished more harshly at $t_2$ than he was at $t_1$? The answer is that $O_1$ was in fact a worse person than $O_2$ at $t_1$—something that we did not know at $t_1$, but we do know now. The relevant comparison is, then, between $O_1$ and $O_2$. We know that $O_1$ has continued to offend, whereas $O_2$ has stopped, which can give rise to the inference that $O_1$ is worse than $O_2$, which in turn justifies the recidivist premium.

So, this theory would take into account the intuition that repeat offenders are deserving of more punishment, as opposed to merely the idea that first-time offenders are deserving of less punishment, by explaining the recidivist premium as reflecting the state's increased knowledge over time of an offender as a criminal. In other words, the epistemic-limitation aspect of the first-offense-discount argument can be used to generate an argument in favor of the recidivist premium, as opposed to an argument in favor of the first-offense discount. This revision, however, worsens the second problem because what we infer from offenders' criminal records is not merely the conclusion that their offenses are not acts out of character, but also that they in fact have character traits that are worthy of the extra punishment.

And what would those character traits be? It would depend on their offenses, but some possibilities may be as follows: cruelty, malice, abusiveness, arrogance (manifesting in the belief that rules of the society do not apply to them), callousness, dishonesty (if the crimes involve fraud), greed, hatred (if the crimes are motivated by hateful feelings), indifference (to human suffering), lack of discipline (if the crimes result from an inability to stick to a law-abiding path), weakness of will (if the crimes result from an inability to resist temptations), insensitivity, irresponsibility, or ruthlessness.
Now, these kinds of character traits may be relevant at the guilt stage, depending on how a crime is defined. For instance, a person who is found to be guilty of murder for driving drunk and killing may be found by the jury to have manifested some of these character traits. If so, what does one’s criminal record add in terms of character assessment once a person has been convicted of a crime? We might conclude that a repeat conviction demonstrates that such bad character traits are deeply ingrained. The conclusion is warranted by the fact that the first conviction and punishment apparently have not brought about a reform, when we may assume that those who have not re-offended were able to change their ways. And unlike other character approaches outlined thus far, it ties the enhanced culpability of repeat offenders to the process of conviction and punishment by positing, as a key step in the analysis, the assumption that those who do not respond to punishment have character traits that are deeply ingrained.

An account like this may be the best and most plausible theoretical approach to the recidivist premium that focuses on the character of the offender. But first, a cautionary note is in order. To the extent that the idea of evaluating those with deeply ingrained bad character traits as “worse people” deserving of greater blame appeals to us, we must be careful to separate its appeal from two related ideas—prediction of future offending and forfeiture of one’s citizenship—which have no place in determinations of what people deserve.

How deeply ingrained a vice is in a person may be relevant to the issue of incapacitation. If a character trait is thought of as a tendency for a person to act in a certain way with a certain mindset in certain situations over time, then how “deeply ingrained” a character trait is becomes a question that is relevant to whether a given offender will go out and manifest that character defect again. One’s judgment that a repeat offender deserves more punishment may in fact be driven by a fear of future offenses, and we must be vigilant not to slip into that potential confusion.

Also, there is a tendency in political rhetoric to conflate the idea that repeat offenders deserve more punishment because they are “bad people” with the very different idea that those who offend repeatedly have forfeited their positions in society. Whether criminals “forfeit” some basic rights as a result of their offending is a problematic idea, and the forfeiture concept works with a different logic from the logic that drives the idea of just deserts. Therefore, if the recidivist premium is to be defended on some sort of

40. See, e.g., Bob Egelko, Verdict on ‘3 Strikes’ Law Mixed After First 10 Years, S.F. CHRON., Mar. 8, 2004, at B1 (“Criminals with two strikes already have had a chance to go straight, [sponsors] argue, and forfeit their right to live outside prison if they can’t or won’t obey society’s rules.”).

41. See, e.g., Warren Quinn, The Right to Threaten and the Right to Punish, 14 PHIL. & PUB. AFF. 327, 332–34 (1985) (offering some criticisms of the idea that state punishment is justified by offenders’ forfeiture of their rights to liberty).
forfeiture-theory grounds, it should be examined separately from the just-deserts analysis.

Now, there are some problems with the character theory of the recidivist premium, which focuses on the ideas that a repeat conviction demonstrates that bad character traits are deeply ingrained and that people with such deeply ingrained bad character traits deserve more punishment. First, notice that the list of character traits mentioned above shows that these character traits, even if all are considered vices, cannot all be considered criminal by themselves. The character traits themselves do not come with clear labels like "criminal" and "noncriminal." Perhaps a criminal, in committing a crime, demonstrates some of these vices, and perhaps society's condemnatory response to the criminal is rightly limited only to situations where the criminal acts can be connected to the bad character traits. But these character traits cannot themselves be targets of criminal law. The traits can be expressed in both criminal and noncriminal ways, and focusing on the traits themselves as opposed to the criminal acts occludes the extent to which how these traits are expressed makes all the difference in the world for the legal system. This problem, it seems to me, is a symptom of a broader problem with theories of culpability that focus on character traits.42

Second, there remains the issue that the same conduct may reflect different defects in character, and it is not clear whether we can infer which character traits people have by looking at their behaviors. For instance, we may have several people who steal once, get caught and punished, and then after their punishments steal again. One thing that these thieves may have in common is that they desire goods and they are willing to steal from other people to satisfy such desires. But they may steal for different reasons. One person may steal because he has no respect for other people's claims to their property or the legal system that protects people's property rights. Another may, on the contrary, recognize that others have valid, legally protected claims to their things, but steal because she has trouble resisting the temptation of getting something for nothing. Yet another may steal because he is jobless, and stealing is the simplest and quickest way for him to feed himself. Yet another may steal in order not just to feed herself but to feed her children. And so on. It seems prima facie sensible to take some of these differences into account in sentencing; however, it is not then clear how informative the idea of "repeating" offenses can be in assessing people's character, compared to all other factors that may be relevant. There is no clear reason to privilege one's criminal history as particularly informative of an offender's character.

42. For related criticisms of the character theory of culpability, see, for example, Alan Brudner, A Theory of Necessity, 7 OXFORD J.L. STUD. 339, 346 (1987). Brudner writes: "Inasmuch a wicked character may be manifest in ways other than through the perpetration of criminal acts, [the character theory of culpability] renders problematic the act requirement of criminal law." Id.; see Horder, Criminal Culpability, supra note 25, at 206 ("In a liberal society there could be no reason to prohibit the formation or display of bad character as such . . .").
Third, the idea that certain character traits are deeply ingrained in recidivists and that is what justifies the additional punishment has the unattractive consequence of treating a large number of people as permanently irremediable. It seems to me that here some critics of character theories of culpability have a valid concern.\(^4\) This is not to assert that it makes no sense to treat character traits as permanent. Perhaps it is foolish to think that if we wait long enough, we will eventually see a good side in a person—given that in the long run we are all dead. At the same time, asserting that certain people have deeply ingrained bad character traits that they could never rid themselves of could lead society to give up on them and feel justified in forever excluding a certain set of people from the society. We should be wary of a way of thinking that seems eager to draw a line between insiders and outsiders and seeks to segregate “outsiders” from the rest of the society—potentially permanently.

While these concerns do not “refute” the character theory of the recidivist premium, they are serious weaknesses nevertheless. The next Part examines efforts that focus on the increased badness of a repeat offense as the justification for the recidivist premium.

III. Punishing Bad Acts

Another approach to the recidivist premium is to focus not on offender characteristics, but on whether offenses committed by those with criminal records are worse than offenses committed by those without. Here I consider two arguments, one having to do with notice, the other with defiance. The “notice” argument need not detain us long, whereas the defiance argument merits a more extensive discussion.

A. Notice

The “notice” argument for the recidivist premium is that a person is more aware of the wrongness of a criminal activity after being convicted and punished for it. The same way that we draw a distinction in culpability between “knowingly” and “unknowingly” in standard mens rea analysis, one might argue that a greater awareness that what one has done is wrong contributes to a greater level of culpability the second time around, which in turn justifies a greater amount of punishment.\(^4\) For instance, persons who are unaware that blowing one’s nose at the dinner table is considered rude by the host may be forgiven the first time they do the offensive deed, but it would not be as forgivable if they do it again after having been told that hosts consider such behavior rude and unacceptable.

\(^{43}\) See, e.g., Yankah, supra note 19, at 1033.

\(^{44}\) Von Hirsch has made this argument in Doing Justice and later retracted it in Past or Future Crimes. VON HIRSch, PAST OR FUTURE CRIMES, supra note 15, at 78–79.
There are several problems with the notice argument. First, it seems to imply that the recidivist premium must be limited to situations where a person is committing the same crime for which that person has previously been convicted and punished. The idea may be that a person committing a robbery is potentially unaware that robbery is prohibited, but that the person becomes aware of it after being convicted. But if that is the case, there would be no reason to presume that his conviction for robbery would put him on notice that rape is prohibited as well. In other words, under the notice theory, persons with prior convictions for robbery should not receive sentencing enhancements for their criminal records if they are later convicted for rape. Perhaps it is fruitful to determine the relationship between an offender’s current offense and past offense when judging how large of an increase on the basis of one’s criminal record is appropriate, but the concept of “notice” is much too crude to do that kind of work.

Second, the argument seems to depend on the patently implausible assumption that most people who are convicted of crimes for the first time are unaware, until the time of apprehension, of the illegality of whatever they were doing that led to their conviction. If a person is convicted of shoplifting and, after having been punished for it, does it again, it is unclear in what sense the person is more aware of the wrongness of stealing the second time unless one assumes that it is unreasonable to expect people to know that stealing is a crime without first having been convicted for it. The absurdity and unacceptability (both as a factual and a normative matter) of defenses like “I didn’t know rape was illegal,” or “I didn’t know stealing was illegal,” is, at its core, what is right about the maxim that ignorance of the law is no excuse.

One possible response to my objection is to apply the recidivist premium only in situations where the traditional maxim, “ignorance of the law is no excuse,” is most problematic. For instance, if an American moves to Paris, starts publishing writings doubting the existence of the Holocaust, and is prosecuted, he may first argue, quite plausibly, that he, being an American, did not realize that voicing his opinion about the existence of a historical event was a crime. Even if this response would be credible the

45. For a general discussion, see Roberts, supra note 2, at 331–33.
46. One way of avoiding this problem may be to reformulate the notice theory so that, under the theory, what one learns after the first conviction and punishment is not just that, say, stealing is wrong, but also that it is wrong to disobey the law. The heightened awareness, then, would be about the wrongness of disobeying the law, and one might say that repeat offenders are more culpable than first-time offenders because of such heightened awareness. This revised version would avoid the implication that those who rob the first time and rape the second time should not be subject to the premium. This version, however, is vulnerable to other objections to the notice argument, which I discuss below.
47. WAYNE R. LAFAVE, CRIMINAL LAW § 5.6 (4th ed. 2000).
first time around as a mitigating factor, it should not be available as a mitigator if he does the same thing again after having been convicted under French Holocaust-denial laws. Of course, he may still argue that his freedom of expression should not be curtailed, but that is a different argument from the argument that he did not realize what he was doing was illegal.

One possibility, then, is to design the law in such a way that the answer to the question of whether the recidivist premium applies tracks the strength of the maxim that ignorance of law is no excuse for different laws. Some of the factors that courts have used to determine whether ignorance of law could be a defense are: whether the offense is *malum in se* or *malum prohibitum*; whether the subject matter is likely or unlikely to be legally regulated; whether the ignorance is ignorance of criminal law or ignorance of noncriminal law; whether the defendant relied on an authoritative source of law; and whether the charge is based on an act or omission. So perhaps the recidivist premium should exist for crimes that are not obviously criminal but should not exist for crimes that are obviously criminal. But this would be odd; the recidivist premium would then be available for *malum prohibitum* (say, going over the speed limit because of a misunderstanding in what the correct speed limit is) but not be available for *malum in se* (say, sexual assault). There is no question that a criminal defendant’s awareness of wrongness of his conduct is relevant to his culpability—and exactly why this is true is a question that I explore in further detail below when considering the defiance argument for the recidivist premium. But it is strange to conclude that the more obviously wrong an offense is, the less culpable someone is for repeating it.

A different, stronger response to my objection to the notice argument for the recidivist premium would focus on the meaning of the term “notice.” It may be the case that everyone “knows” that stealing is wrong in the abstract, but once a person is apprehended for stealing, convicted, and then punished, then he really knows that stealing is wrong. That is, there may be a difference in quality between knowledge based on direct experience and

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49. See, e.g., Douglas Husak & Andrew von Hirsch, *Culpability and Mistake of Law, in Action and Value in Criminal Law* 157, 166–71 (Stephen Shute et al. eds., 1996) (distinguishing between reasonable and unreasonable ignorance of law, and arguing that mitigation and exculpation should be more available for the former); see also Meir Dan-Cohen, *Decision Rules and Conduct Rules: On Acoustic Separation in Criminal Law*, 97 Harv. L. Rev. 625, 647, 646–47 (1984) (listing different factors courts use to decide whether to allow a mistake-of-law defense and concluding that “the law is not reducible to any simple rule” and that it “consists of an entire array of decisional variables that give rise to almost endless permutations”).

50. Dan-Cohen, supra note 49, at 646.

51. This is not to say that it would be a bad idea to use the obvious–nonobvious distinction as a way of sorting through when ignorance of law might be an excuse or a mitigating factor. It may in fact be desirable to have the mistake-of-law defense reconfigured along such lines. See Husak & von Hirsch, supra note 49, at 166–71 (distinguishing between reasonable and unreasonable mistakes of law). My point here is merely that it would be odd to have the recidivist premium apply according to the logic of the obvious–nonobvious distinction.
knowledge based on indirect experience. A repeat offender’s knowledge—the knowledge that the offense was wrong, caused real harm to real people, and deserved society’s condemnation—should be held not just in some intellectual sense, but also in a deeper, experiential, affective sense. And, the argument might go, it is that deeper, more personal, individualized sort of knowledge—perhaps analogous to the phenomenon of “muscle memory”—that is missing in the case of the first-time offender.

This suggestion is plausible, but it cannot carry the weight of justifying the recidivist premium. First, there is no good reason to focus on criminal record to get at this—or any other—kind of notice. Say a person grows up in a household of criminals. He experiences firsthand what crimes look like and what law enforcement looks like when crimes take place. Even if he never commits the crimes himself, he may be close enough to the experience that he ends up with the kind of advanced knowledge about the effects of crimes that those who learn about crime only secondhand—from books, TV, movies, and various other media outlets—lack. The implication of the notice argument seems to be that persons with this kind of advanced knowledge when they commit crimes are more culpable than persons who lack such knowledge. And this seems odd.

Even if we set aside the oddness of this implication, it seems that a more direct way of getting at the question of how familiar offenders are with the wrongfulness and the harmfulness of their crimes would be to do a background check on all convicts to see how much they knew about how bad crimes can be when they committed the crimes for which they are now being sentenced. There would be little reason to give criminal records much weight—thus drawing a sharp distinction between first-time offenders and repeat offenders—because many first-time offenders know, in both the superficial sense (from reading books, watching TV, etc.) and the deep sense (from direct experience), what is wrong with what they are doing when they commit crimes.

B. Punishing Disobedience

The other argument that is frequently mentioned as a justification for punishing repeat offenders more is a bit more difficult to unpack conceptually. The argument is that repeat offenders should be punished extra for “defiance,”52 “disobedience,”53 “lack of respect for the law,”54

52. VON HIRSCH, PAST OR FUTURE CRIMES, supra note 15, at 79.
53. See STUART P. GREEN, LYING, CHEATING, AND STEALING: A MORAL THEORY OF WHITE-COLLAR CRIME 126 (2006) (finding “plausibly the view that what distinguishes the first-time and habitual offenders’ acts is the amount of disobedience involved”).
54. See R.A. DUFF, PUNISHMENT, COMMUNICATION, AND COMMUNITY 168 (2001). Duff provides:

Another possibility might be to argue that the repeat offender’s current offense is more serious and thus deserving of harsher punishment because, in addition to the wrong intrinsic to the particular offense, he now displays a culpable lack of respect for the
“insubordination,” 55 “contempt of state authority,” 56 or “‘thumbing [their noses]’ at the justice system.” 57 Commentators tend to reject this argument. Antony Duff, for instance, has argued that “a liberal polity... should not punish ‘disrespect’ as a wrong distinct from or additional to the particular substantive crimes.” 58 Andrew von Hirsch has objected that “[t]reating defiance as an evil in itself that warrants substantial extra punishment presupposes authoritarian assumptions about the state, the community and the criminal law.” 59 George Fletcher similarly writes that “in a liberal society, defiance should not constitute a wrong that justifiably enhances the punishment a recidivist deserves.” 60 Richard Singer, too, argues that “defiance alone cannot, in a moral system, be a predicate of liability or of increased liability.” 61

Why would anyone even think that the recidivist premium has anything to do with punishing disobedience? According to George Fletcher, the position may be that an “element of defiance” is “implicit in the behavior of recidivists” because their “return[] to a life of crime demonstrates defiance of the society and its institutions.” 62 That is, despite being singled out and told that they should not be doing something, they do it again, and that is the sense in which punishing repeat offenders seems to involve punishing disobedience. First-time offenders, not having been convicted and punished, have not disobeyed because they have not been told that they should not have broken the law, while those with criminal records have been told. Something like this at least appears to be the intuition, and critics of the recidivist law. Not only has he again infringed his victim’s rights: he has closed his ears to the authoritative voice of the law as it spoke to him through his previous punishments.

Id.

55. See von Hirsch, Past or Future Crimes, supra note 15, at 80, 79–80 (“A defiance theory... makes the treatment of recidivists depend on a particular (and rather authoritarian) political doctrine that treats insubordination to state power as a wrong aside from any... injury resulting from the criminal act itself.”).


57. See Robinson, supra note 12, at 1436, 1436–37 (“By committing an offense after a previous conviction, an offender might be seen as ‘thumbing his nose’ at the justice system.”).

58. Duff, supra note 54, at 168.

59. Von Hirsch, Record-Enhanced Sentencing, supra note 36, at 447; see also Von Hirsch, Past or Future Crimes, supra note 15, at 79, 79–80 (arguing that the “idea of defiance as something reprehensible in itself” is incongruent with liberal social values); Von Hirsch & Ashworth, supra note 18, at 149 (“Treating defiance in itself as an extra harm presupposes authoritarian assumptions about the state and the criminal law.”).

60. George P. Fletcher, The Recidivist Premium, 1 CRIM. JUST. ETHICS 54, 57 (1982).

61. Singer, supra note 11, at 68.

62. Fletcher, supra note 60, at 57.
premium in turn object on the basis that punishing disobedience is not appropriate in a liberal society like ours.\textsuperscript{63}

The question is whether the critics' worry is warranted, and if so, whether it is warranted for the right reasons. Even though there is an extensive philosophical literature on the subject of obedience and authority of law,\textsuperscript{64} there is surprisingly little written (beyond conclusory statements) on the question of whether the state may be morally justified in punishing disobedience. Assessing this line of argumentation requires that we answer the following three questions, each examined in order below: What is disobedience? Is it really unjust to punish disobedience? How should we think about the recidivist premium in relation to the idea of punishing disobedience?

1. \textit{What Is Disobedience? Some Preliminary Distinctions.---}

a. Lawbreaking and Disobeying.—In order to understand what is at stake here, we need first to be clear on what disobedience is. First, consider the term "obedience." If individuals go around in life never killing or raping, do they "obey" the laws that prohibit such conduct? In a sense, yes, they do because they do not break these laws. On the other hand, they do not "obey" or "follow" the law; they merely behave in a way that does not involve committing an act that is prohibited. They may be extremely lazy and never do anything that takes the kind of energy involved in most cases of rapes and murders. Also, especially for these kinds of offenses, some people would behave the same way with or without laws that prohibit them, simply because they are good people who behave morally at all times. If the thought of doing acts that the law prohibits is not even a live possibility for these individuals, they "obey" the law only in a very weak sense.

Obedience of the law, in other words, implies that a person does or refrains from doing something for reasons that have to do with the existence of a law. The purest instance of obedience would be the act of doing something or refraining from doing something \textit{just because} that is what the law requires. This is not the only kind of obedience, however. People may also be prudent and obey the law because they want to avoid bad consequences that follow from disobeying. These people are not following the law because that is what the law requires. These people are following the law because the consequences of not following would be unpleasant. Both instances of following the law should be considered instances of obedience because the actors behave in ways that the law requires, either because that is what the law requires or to avoid the sanctions attached to violations of what the law

\textsuperscript{63} FLETCHER, \textit{supra} note 11, at 465, 464-66 (contrasting the case of a defiant teenager who undermines parental authority with a liberal society where authorities are not entitled to react to a "persistent" criminal as though their personal authorities were challenged).

\textsuperscript{64} For examples, see \textit{infra} note 68.
Recidivism as Omission requires. The difference between the two is primarily attitudinal. The former respects the law, whereas the latter need not have any particular attitude towards the law. But both obey the law.

The flip side of this discussion is that disobedience can also show up in different ways. People who break the law without realizing it are disobeying the law in the sense that they do what they are told not to do, but the term “disobeying” implies knowingly going against a directive that one is aware of. A farmer who produces foie gras by force-feeding his ducks without realizing that foie gras production has been banned in his state may have broken the law, but he has not disobeyed the law. In other words, it is possible for one to break the law without disobeying the law. It is also possible to disobey the law without breaking the law. If a farmer who learns about the ban on foie gras production decides to defy the law by continuing to produce foie gras on his farm, he may have disobeyed the law but will not have broken the law if his violation takes place before the law goes into effect and he does not realize that the law is not yet in effect.\(^6\)

Also, disobeying the law can come in different flavors—disobeying, if it is defined as a knowing violation of a directive—can be accompanied by various attitudes, such as defiance, disrespect, disregard, denial, indifference, or regret. Even if all are instances of disobedience, disobeying with a defiant attitude is vastly different from disobeying with regret. Whether legal sanctions should reflect such differences is not the issue at the moment, but it is important to keep such nuances in mind when considering the question of what it means for the state to punish disobedience.

\(b. \text{ Disobedience as Conduct or Attitude.} - \) We must also distinguish among the different senses in which one may be punished for defiance, disobedience, insubordination, or disrespect. First, disobedience may be insubordination, which is conduct, or disobedience may be a lack of respect, which is an attitude or emotive state. Second, when punishing a recidivist, disobedience may be punished as a distinct crime, or disobedience may be thought of as a culpability enhancer that increases the seriousness of the underlying offense.

An important clarification is in order. When I say disobedience may be conduct, I include both physical acts and mental acts in my definition of conduct. Disobeying an ordinary “No Parking” sign by parking in the prohibited zone is a physical act of disobedience, whereas disobeying a

\(65. \text{ This example assumes that individuals can disobey a law that does not apply to them. Is this a coherent possibility? I think so, although I cannot give a full justification for this view here. If it were not a coherent possibility, an atheist would have a difficult time explaining what it is that religious people are doing when they say they are “obeying God.” Obedience or disobedience to a nonexistent entity, in other words, is a conceptual possibility. Some may think these are cases of attempted obedience or attempted disobedience and not cases of obedience or disobedience of inapplicable directives. Which formulation is correct is not important for the purposes of the distinction I am highlighting—the distinction between disobedience and lawbreaking.} \)
"Don't Even THINK of Parking Here" sign found in places in Manhattan by giving the idea of parking there some consideration would be a mental act of disobedience (if taking the sign literally). Because "thinking" of parking there is active in the same way doing calculations in one's head is active, mental acts can be distinguished from states of mind like one's attitude or emotion towards these no-parking signs.\textsuperscript{66} This definition of conduct, I concede, is somewhat idiosyncratic, especially given the backdrop of the act requirement in criminal law, which is commonly thought to prohibit punishing for thoughts, whether they are active (conscious deliberation) or passive (thoughts that simply "occur" to one).\textsuperscript{67} But it is merely a definitional device to aid analysis, and nothing of substance is meant to follow from it.

The attitude–conduct distinction and the crime–culpability distinction are orthogonal. One may punish insubordination—or an act of disobedience—as a distinct crime or as a culpability enhancer, and one may punish a lack of respect—or a disobedient view or attitude—as a distinct crime or as a culpability enhancer. There are, therefore, four possibilities: punishing disobedience as conduct as an independent wrong; punishing disobedience as conduct as a culpability enhancer; punishing disobedience as attitude as an independent wrong; and punishing disobedience as attitude as a culpability enhancer.

2. Is Punishing Disobedience Unjust?

a. Some General Considerations.—With the preliminary issues out of the way, we can now focus on whether punishment of disobedience is unjust. We might start with the question of whether there is a general duty to obey the law. There is a voluminous philosophical literature on this question, and much of this literature is critical of the idea that there is such a duty.\textsuperscript{68} If it were indeed the case that there is no such duty, would this mean that it is unjust to punish disobedience?

The answer is no. The obligation to obey that is generally said not to exist is "a general obligation applying to all the law's subjects and to all the laws on all the occasions to which they apply."\textsuperscript{69} This leaves open the


\textsuperscript{67} See Husak, supra note 66, at 86 (stating that punishment for thoughts is a category of criminality clearly precluded by the act requirement).


\textsuperscript{69} RAZ, THE AUTHORITY OF LAW, supra note 68, at 234; see also William A. Edmundson, State of the Art: The Duty to Obey the Law, 10 LEGAL THEORY 215, 215–16 (2004) (explaining that
following possibilities: there is an obligation to obey that applies to all the law’s subjects with regard to some laws on all the occasions to which they apply; there is an obligation to obey that applies to some of the law’s subjects with regard to all laws on all the occasions to which they apply; there is an obligation to obey that applies to all the law’s subjects with regard to some occasions to which they apply; or some other combination. And in some of these instances, not only may the duty to obey exist, but the violation of the duty (as distinct from the violation of the law) may be a punishable offense. In short, a proof against the existence of a general duty to obey the law cannot help us answer when a duty to obey exists and when a violation of such a duty is punishable.

Another debate that may seem relevant for our topic at first is the one regarding civil disobedience. In a liberal democratic society like ours, in which disobedience is sometimes thought to be a legitimate form of political participation, the vision of the government’s punishing its own citizens for disobeying seems distasteful and dangerous. The romantic images of courageous lawbreakers participating in lunch-counter sit-ins or refusing to move to the back of the bus resonate powerfully. There is a debate over how the law should respond to such situations of justifiable lawbreaking, but what seems clear is that there is a distinction between punishing civil disobedients for engaging in acts that the law prohibits—such as trespassing—and punishing them for being disobedient or defiant. The former may be deemed reasonable for rule-of-law reasons; the latter smacks of authoritarianism. Thinking along such lines, one may arrive at the view that it is unjust for the state to punish disobedience.

The problem with this argument, which takes the appeal of civil disobedience as a way of rendering illegitimate the idea of punishing defiance, is that civil disobedience is typically understood to be a special

the duty to obey the law as debated in the philosophical literature is a duty that is “comprehensively applicable” and “universally borne”).

70. See, e.g., RONALD DWORKIN, Civil Disobedience and Nuclear Protest, in A MATTER OF PRINCIPLE 104, 105 (1985) (“Americans accept that civil disobedience has a legitimate if informal place in the political culture of their community. . . . People in the center as well as on the left of politics give the most famous occasions of civil disobedience a good press, at least in retrospect.”); JOHN RAWLS, A THEORY OF JUSTICE 383 (1971) (“Along with such things as free and regular elections and an independent judiciary empowered to interpret the constitution . . . , civil disobedience used with due restraint and sound judgment helps to maintain and strengthen just institutions.”).

kind of lawbreaking that should be distinguished from ordinary offenses. And those who have defended the use of civil disobedience are eager to place strict conditions on permissible forms of lawbreaking under the banner of justifiable civil disobedience. As Joseph Raz has summarized, it has been argued by various theorists that civil disobedience, in order for it to be justified,

must be used as a measure of last resort...; it must be non-violent; it must be openly undertaken; and its perpetrators must submit to prosecution and punishment; such acts must be confined to those designed to publicize certain wrongs and to convince the public and the authorities of the justice of one’s claims; it should not be used to intimidate or coerce.  

We can have a debate over whether all of these conditions must be met for an act of lawbreaking to be a genuine act of civil disobedience, but eliminating all or most of these conditions would erase the distinction between civil disobedience and ordinary lawbreaking. Given the importance of this distinction, whatever doubts one may have about punishing defiance as a general matter cannot be drawn from Rosa Parks’s charisma.

In short, neither skepticism about the existence of the duty to obey the law nor recognition of civil disobedience as a legitimate, justifiable form of political advocacy has the reach to show that the government is not permitted to punish disobedience. What the debates do show is that there are times when lawbreaking is either morally neutral or desirable, but it is too quick to go from that conclusion to the conclusion that punishment of disobedience is unjust as a general matter.

72. Raz, The Authority of Law, supra note 68, at 269; see also Greenawalt, supra note 71, at 226-43 (discussing various factors that justify disobedience); Rawls, supra note 70, at 364, 371-77 (defining civil disobedience as “a public, nonviolent, conscientious yet political act contrary to law usually done with the aim of bringing about a change in the law or policies of the government”); H.A. Bedau, Civil Disobedience and Personal Responsibility for Injustice, in Civil Disobedience in Focus 49, 51 (Hugo Adam Bedau ed., 1991) (describing “paradigm cases” of civil disobedience as acts that are illegal; are committed openly, nonviolently, conscientiously, and within the framework of the rule of law; and are committed “with the intention of frustrating or protesting some law, policy, or decision . . . of the government”). It has further been observed:

There is all the difference in the world between the criminal’s avoiding the public eye and the civil disobedient’s taking the law into his own hands in open defiance. This distinction between an open violation of the law, performed in public, and a clandestine one is so glaringly obvious that it can be neglected only by prejudice or ill will. It is now recognized by all serious writers on the subject and clearly is the primary condition for all attempts that argue for the compatibility of civil disobedience with law and the American institutions of government.

Hannah Arendt, Civil Disobedience, in Crises of the Republic 51, 75 (1972); see also Dworkin, supra note 70, at 105-13 (asserting that for civil disobedience to be acceptable, it must embrace a working theory that rests not on the mere wickedness of a law, but instead on the persuasiveness that disobedience is the appropriate response of those who view a certain law or political decision as immoral or wrong).
b. Justifiable Punishment of Disobedience: Obstruction of Justice.—At least one thing is clear: If there is a general principle that prohibits the government from punishing disobedience, it is a principle frequently violated. Instances of criminalization of disobedience abound throughout our legal system, and it is not at all the case that they are all problematic.

The most obvious example of criminalization of disobedience is the crime of contempt. It is a federal crime to “[d]isobe[y] or resist[] [a federal court’s] lawful writ, process, order, rule, decree, or command.” In California, “[w]illful disobedience of the terms as written of any process or court order or out-of-state court order, lawfully issued by any court” is a misdemeanor. It is a crime in Delaware to “knowingly violate[] or fail[] to obey any provision of a protective order issued by the Family Court or a court of any state, territory or Indian nation in the United States.”

Disobedience to law enforcement officers is punished as well. In New York, it is a crime to “congregate[] with other persons in a public place and refuse[] to comply with a lawful order of the police to disperse” with “intent to cause public inconvenience, annoyance or alarm, or recklessly creating a risk thereof.” In Alaska, a person commits the crime of “disorderly conduct” if “in a public place, when a crime has occurred, the person refuses to comply with a lawful order of a peace officer to disperse,” or if “in a private place, the person refuses to comply with an order of a peace officer to leave premises in which the person has neither a right of possession nor the express invitation to remain of a person having a right of possession.” In Massachusetts, it is a crime to “refuse[] or neglect[] to obey [a] command” to “assist in arresting . . . rioters or persons . . . unlawfully assembled, or in suppressing such riot or unlawful assembly.” In Ohio, it is a crime to “[f]ail to obey the lawful order of any law enforcement officer engaged in the law enforcement officer’s duties at the scene of or in connection with a fire, accident, disaster, riot, or emergency of any kind.”

73. There may be a genuine question as to whether it is fair to view contempt as a “crime” or whether it is in its own category. For a persuasive discussion that it should be thought of as a crime, see Stuart P. Green, Why It’s a Crime to Tear the Tag Off a Mattress: Overcriminalization and the Moral Content of Regulatory Offenses, 46 EMORY L.J. 1533, 1603–06 (1997). For discussions about the distinction between civil and criminal contempt, see Dan B. Dobbs, Contempt of Court: A Survey, 56 CORNELL L. REV. 183, 235–49 (1971); Margit Livingston, Disobedience and Contempt, 75 WASH. L. REV. 345 (2000) (reviewing the history of the distinction).
75. CAL. PENAL CODE ANN. § 166 (West 2000).
76. DEL. CODE ANN. tit. 11, § 1271A (2007).
77. N.Y. PENAL LAW § 240.20 (McKinney 2000).
78. ALASKA STAT. § 11.61.110 (2006).
79. MASS. GEN. LAWS ch. 269, § 2 (2000).
"Resisting arrest" is also a crime. In California, for example, it is a crime to "willfully resist[], delay[], or obstruct[] any public officer." It is a crime for a person to "intentionally refuse[] to give his name, residence address, or date of birth to a peace officer who has lawfully arrested the person and requested the information." It is also a crime for a person "lawfully released from custody . . . on condition that he subsequently appear" to "intentionally or knowingly fail[] to appear in accordance with the terms of his release." In Utah, it is a crime to "flee[] from or otherwise attempt[] to elude a law enforcement officer . . . after the officer has issued a verbal or visual command to stop . . . for the purpose of avoiding arrest.”

These provisions criminalize disobedience—as conduct—and punish people for their failures to obey commands by legal authorities in certain situations; the fact that one did not do what one was told to do is precisely at the heart of this type of criminality. If it were truly the case that punishing disobedience is illiberal, authoritarian, and thus impermissible, then these laws would all be problematic as well. Are they? Do they all violate the principle that a liberal state should not punish for disobedience?

It is not clear how such a position could be defended. Here is one possible reason why that might be: the legal system needs to employ coercive devices to ensure compliance with the law, because otherwise the rule of law, presumably a valuable thing, could not become reality. The problem with this rationale, however, is that the fact that the legal system needs the ability to punish people for disobedience in order to administer justice is insufficient to show that those who disobey the law in these contexts are blameworthy. An argument that appeals to the system’s need to punish is a consequentialist argument, and a consequentialist argument in favor of a punishment by itself is insufficient to demonstrate that the punishment is justified—no matter how valuable the rule of law might be.

At the same time, the observation that the legal system crucially depends on the cooperation of those who are subject to it in order to function as a legal system can serve as the basis for a moral obligation on the part of the citizens. That is, a failure to obey government officials in certain situations interferes with the government’s ability to carry out the functions of a

82. TEX. PENAL CODE ANN. § 38.02 (Vernon 2003).
83. Id. § 38.10.
84. UTAH CODE ANN. § 76-8-305.5 (2008).
85. See Dubber, supra note 56, at 959, 959–60 (describing laws that “explicitly criminalize acts of disobedience”); Green, supra note 73, at 1608 (“Criminal contempt sanctions punish defendants not for the underlying conduct in which they are engaged but rather for their defiance of a court order.”); cf. JOEL FEINBERG, HARM TO OTHERS 19–21 (1987) (distinguishing between “primary” and “derivative” crimes).
legitimate state. Punishment of disobedience is justified in these instances because persons have a moral duty not to interfere with workings of a legitimate and reasonably just legal system, and those who violate such duties by disobeying authoritative directives in these specified conditions are morally culpable for that reason.

It should of course be kept in mind that the duty to obey legal officials is not an absolute duty but a prima facie duty. There will be cases in which the prima facie duty to obey is overridden by a competing consideration, if the reasons to disobey are of correct kinds and of sufficient strength. But for our purposes, the fact that there exists a prima facie duty to obey the orders of government officials who are administering justice is enough to show that punishment of disobedience in a liberal society can be permissible.

c. Justifiable Punishment of Disobedience: Disregard of Law.— Another group of cases that raise the issue of whether the legal system does or should punish for disobedience involves mistake-of-law defenses, a topic we considered briefly above to the extent it was relevant to the "notice" argument for the recidivist premium. Here, we consider mistake-of-law cases to answer a different question—whether the criminal law punishes people for disobedience.

The controversy surrounding mistake-of-law defenses implicates two types of concerns: legality and culpability. Legality concerns have to do with whether there has been fair notice of the penal consequences of certain acts that may appear innocent. Culpability concerns have to do with whether people who do not realize that they are committing criminal acts can be said to be criminally culpable. The issue in this debate is usually framed as whether persons who have committed crimes without realizing that what they did was prohibited by law (due to their mistaken beliefs about what the law prohibits as opposed to about what they did, factually speaking) should be allowed to raise the mistake-of-law defense. But the question that concerns us here is the flip side of that inquiry—not whether persons who violate a law without realizing it are morally innocent, but whether persons who knowingly violate a law are culpable for reasons having to do not only with the underlying badness of the conduct, but also with the fact that they are disregarding a prohibition they know about.

In other words, it is important to see here that the mere fact that sometimes knowledge of law is a required element of a crime does not show that the crime punishes disobedience; there may be legality-based, as

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88. E.g., Lambert v. California, 355 U.S. 225, 228 (1957) ("The rule that 'ignorance of the law will not excuse' is deep in our law.... On the other hand,.... [e]ngrained in our concept of due process is the requirement of notice.").
opposed to culpability-based, reasons for requiring such knowledge.\textsuperscript{89} We must do more work to see what difference knowledge of law makes in terms of an offender's culpability, as opposed to the overall fairness of holding that offender criminally liable (since fairness of criminal liability turns on not just the blameworthiness of an offender, but also on fair-notice principles).

Working out a full theoretical answer to this question will take another article. So, for the purposes of this Article, I will consider just a few examples that offer the strongest challenge to the idea that it is authoritarian, illiberal, and impermissible for the state to punish disobedience. First consider these examples.\textsuperscript{90}

1) A homeowner shoots and kills a trespasser. Is there a difference in culpability between the homeowner who shoots thinking she is legally entitled to kill and the homeowner who shoots knowing that it is illegal to kill?

2) A man rapes his wife. If he rapes her under the mistaken legal belief that the criminal legal prohibition of rape does not apply to spousal rape, is he as culpable as a man who rapes his wife knowing that spousal rape is included within the definition of rape under the law that governs?

In scenarios (1) and (2), the knowledge that the conduct is a violation of the law should not make a difference in whether the offender should be convicted, as both offenders are inflicting direct harms on persons (physical and otherwise).\textsuperscript{91} The knowledge of law makes little difference in their culpabilities, except in one respect. Let us assume that the homeowner and the spousal rapist understand that murder is wrong and rape is wrong, but they mistakenly consider what they are doing to be morally permitted because they believe their acts do not count as murder or rape. We could then say that the homeowner and the rapist who disregard the knowing prohibition, believing that they are morally justified in doing what they are doing, are guilty not only of committing immoral acts (even if they did not realize it was immoral), but also of ignoring society's judgments that shooting a trespasser is murder and nonconsensual sex with a spouse is rape. The question is whether those who knowingly ignore prohibitions are, then, more culpable than those who are not aware of the legal prohibitions simply because of this disregard. At least for these examples, it seems to me that the

\textsuperscript{89} See JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW § 13.01 (2d ed. 1995) (explaining that the rationale behind the rule that mistake of law is no defense is to avoid subjectivity and fraud).

\textsuperscript{90} Many of these examples come from Husak and von Hirsch's article on mistake of law. See generally Husak & von Hirsch, supra note 49.

\textsuperscript{91} Id. at 161–65.
correct answer is yes. The difference in culpability between the unknowing criminal and the knowing criminal may not be dramatic, but it is not insignificant, either.

A few things must be emphasized about these two examples. First, not all instances of disregarding the law are morally equivalent. Rape and murder are two of the most serious crimes. Those who know and ignore the fact that the acts they believe are morally and legally innocent are actually considered by society to be serious crimes worthy of stern condemnatory labels like "murder" and "rape" are culpable not only for performing bad acts, but also for disregarding societal judgments of morality. Second, the more serious the crime is, the less significant this "additional culpability" is in judging the overall conduct. Because murder and rape are heinous offenses, the fact that the actor engaged in them despite knowing that they are prohibited by law is a relatively trivial component of the actor's overall level of culpability.

Now consider the following example:

3) An adult has consensual sex with a fifteen-year-old believing that the legal age of consent is fourteen, when it in fact is sixteen. Is he as culpable as an adult who has sex with a fifteen-year-old while knowing that the legal age of consent is sixteen?

In other words, would the adult be more culpable if he ignored the law that says that his sex partner is under the legal age of consent than if he were not aware of the law (or believed that the legal age of consent is fifteen)? When contemplating sexual activity with a fifteen-year-old, with or without statutory-rape laws, a responsible adult would think carefully about whether the teenager is mature enough to give consent and whether the possibility of sexual exploitation is present. In that sense, there is probably little difference in culpability between a knowing violator and an unknowing violator. However, knowledge of the legal prohibition makes a difference in that it at least expresses the state's judgment as to the appropriate age of consent. Ultimately, the adult might disagree with the state's judgment, in which case he may be justified in going against the law. But disregard of the state's judgment of the age of consent without a genuine and reasonable disagreement adds a layer of culpability.\(^2\) It is this requirement of a genuine and reasonable disagreement, as opposed to a thoughtless disregard of the age of

\(^{92}\) This may not always be the case. It is possible that the age of consent could be facially absurd (say, thirty). Or, for some reason, the state could have lost its credibility over time as to the rationality of its laws generally or of laws having to do with sexual relations. In such cases, it may be the case that the state is not entitled to deference.
consent, that constitutes the moral significance of one’s knowledge of the age of consent.\textsuperscript{93}

Examples (1) and (2) involve \textit{malum in se} offenses, whereas example (3), statutory rape, is a hybrid of \textit{malum in se} and \textit{malum prohibitum} offenses.\textsuperscript{94} The following two examples involve \textit{malum prohibitum} offenses.

4) A driver does not update her car inspection because she believes that she is required to inspect her car every year, when the law actually requires an inspection every six months. Is she more culpable than a driver who ignores the biannual inspection law and gets his car inspected only once a year?

   In example (4), there is a moral difference between the driver who does not update her car inspection because of a mistaken understanding of the law and the driver who knows the law but does not comply with it. The latter is someone who has decided that he should not be governed by the state inspection law, the purpose of which is to ensure that cars that are on the road meet minimum safety standards. It may be the case that he has a superior knowledge of his car and he is confident that the car does not pose a danger to others on the road. But as in the case of statutory rape, the driver would have to have a good safety-related reason to justify his disregard of the state requirement.

   And finally:

5) A person does not pay Social Security and Medicare taxes for his housekeeper because he does not realize that he is required to do so under the law. Is he more or less culpable than someone who knows the legal requirement and ignores it?

   Example (5) involves a different moral principle than example (4). Someone who does not pay taxes—not realizing that he owes them—is different from someone who knows that he owes taxes and does not pay. Example (5) is an instance in which ignorance of law is an excuse under \textit{Cheek v. United States},\textsuperscript{95} in the sense that not knowing that one owes taxes can serve as a defense to criminal prosecution. However, the point is not whether knowing and unknowing tax evaders should both be prosecuted, but


whether knowing evaders’ disregard of what the law says they must do adds a layer of culpability. Taxation is a way of raising public revenue in order to put that revenue to public use, and the government has devised formulas to determine how much each taxpayer must contribute to the general fund. A knowing nonpayment is, in other words, an opt-out of the system of payments that makes it possible for the government to function.  

The point of all these examples is to show some situations in which it would make sense to attribute some blame to disobedience. The situations in which this holds true are difficult to generalize, but, as these examples show, sometimes the existence of a rule, and a person’s knowledge of it, change the normative position that the person faces. Philosophers who are skeptical of the duty to obey the law argue that if noncompliance does not result in an injury, either to the interest protected by the law in question or to the system of rule of law generally (through inducing others to disregard the law), then it is permissible to disobey the law.  

Murder is an easy issue because noncompliance would result in harm, and whether the law exists or does not exist makes little difference, if any. But the point of these examples is that the existence of law does make a difference, in a way that is separate from the consequences of not obeying the law, that could be reduced to either a concrete injury to the interest protected by the law or to an undermining of the rule of law through one’s noncompliance with the law.  

In short, the blameworthiness attributable to disobedience arises from one’s insufficient attention to why the law may be the way it is. Thus, we might say that it would be proper for the state to punish people for their disregard of the law. Two features of this idea should be noted. First, disregard is neither physical conduct nor attitude; rather, it is a mental act, meaning that punishing disregard would be an instance of punishing disobedience as conduct. Second, to say that disregard is culpable is not to deny that the duty to obey the law is not an absolute duty; there may be situations where one is justified in disobeying the law. But the point is that one needs to have a good reason to disobey the law, and it is this requirement that constitutes the normative force of the existence of a law and one’s awareness of it.  

3. Does the Recidivist Premium Punish Disobedience?—What does all this have to do with the topic of this Article? Although it may seem that this has been a long detour from the main subject matter, it was necessary in order to evaluate many desert theorists’ objection to the recidivist premium

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96. Cf. David Luban, Lawyers and Justice 37, 34-41 (1988) (basing the duty to obey the law on the idea that “the wrong of lawbreaking lies in its unfairness to those who obey”); John Rawls, Legal Obligation and the Duty of Fair Play, in Law and Philosophy 3, 9-10 (Sidney Hook ed., 1964) (deriving one’s obligation to obey laws from the duty of fair play); H.L.A. Hart, Are There Any Natural Rights?, 64 Phil. Rev. 175, 185 (1955) (describing the duty of fair play).

97. Simmons, supra note 68, at 192-94.
based on the following syllogism: (1) the recidivist premium punishes
defiance; (2) punishing defiance is unjust; (3) therefore, the recidivist
premium is unjust.98 A full evaluation of this argument necessitates an
evaluation of step (2).

The discussion thus far has demonstrated that it would be too quick to
dismiss punishing disobedience as something that is not to be permitted.
And that is because there are at least two contexts in which punishment of
disobedience is acceptable. First, obstruction-of-justice crimes, such as con-
tempt and resisting arrest, are acceptable instances of the government’s
punishment of disobedience. Under the scheme I introduced above, this
category of cases may be described as punishment of disobedience as
conduct and as an independent wrong. Second, at least in some situations,
individuals’ awareness of the existence of a law prohibiting the conduct that
they are engaged in is significant in evaluating their blameworthiness. These
situations are also examples where the government may punish for
disobedience, or, more precisely, for disregard of law. This category of cases
I would describe as punishment of disobedience as conduct and as a
culpability-enhancer.

This conclusion—that punishment of disobedience is sometimes
justified—of course does not show that the recidivist premium is justified.
The question of whether the recidivist premium is one of the justifiable in-
stances of punishing disobedience remains. In order to answer this question,
we first have to describe the sense in which recidivists can be said to be
disobeying. And, as described above, the argument may be that recidivists,
having been singled out and told that they should not be doing something, do
it again, and that is the sense in which punishing repeat offenders may be a
type of punishing disobedience. So, assuming that disobedience (or
defiance) is culpable, or that it enhances culpability sometimes, does it make
sense to punish recidivists more for their disobedience?

It seems to me that neither of the two types of justifiable punishment of
disobedience identified above is analogous to the recidivist premium. First,
the obstruction-of-justice provisions criminalize failures to obey particular
directives that were individually created for particular persons. When a court
issues an order to a particular individual to testify at a trial proceeding, the
normative relationship between that individual and the court changes at the
moment the court issues the order. Before a court issues an order, no duty to
testify exists. But when a court issues the order, the recipient of the order has
a new obligation to the court. It is unclear how this idea applies in the con-
text of recidivism. When a person is convicted and punished, is it the case
that the person is now facing a special order not to commit a crime that did

98. See FLETCHER, supra note 11, at 466 (rejecting the recidivist premium on the ground that
defiance of legal authority does not make an offender more culpable in a liberal society based on the
rule of law); SINGER, supra note 11, at 68 (“[D]efiance alone cannot, in a moral system, be the
predicate of liability or of increased liability.”).
not exist before? A person who has been convicted of stealing was a recipient of the message that stealing is prohibited before he committed the crime, after he committed the crime, during the legal process, and after the punishment. A special order for the convict that he should not commit a crime does not change the content of the prohibition itself. His duty not to break the law against stealing remains the same before, during, and after his contact with the legal process.

Second, examples of culpability arising from disregard of the law are not particularly analogous, either. The examples I have discussed to show that punishment of disobedience may be permitted in certain situations draw a contrast between those who know and those who do not know about the existence of legal prohibitions. With knowledge of legal prohibitions comes the possibility of disregarding legal prohibitions and disobeying the law. The problem is that it is unclear what new knowledge is gained when persons are punished. Their crimes were wrong before they committed them, and if they did not know it, they should have known it, which is the idea behind the maxim that ignorance of law is no excuse. There is no new notice that is created due to a legal proceeding. The crime was illegal before, during, and after the conviction. For certain crimes, it is possible that defendants actually may not have known about the illegality of their conduct, and for such cases, it may make sense to punish those defendants more if they are convicted for the same crime the second time. But, barring such situations, what additional knowledge does one gain about the undesirability of criminal conduct once one is apprehended, convicted, and punished?

The recidivist-premium context is different from the obstruction-of-justice context and the disregard-of-law context, but that does not show that the recidivist premium is illegitimate, of course. Rather, the argument is this: In the obstruction-of-justice context, those subject to official orders have duties created by those orders, and those not subject to those official orders do not have the same duties. In the disregard-of-law context, those who are aware of the law have the duty to pay it due regard, but those who are not aware of the law do not have a duty to pay it due regard. However, the difference between recidivists and first-time offenders is unclear. They are both presumed to know the law, so we cannot infer that one disregarded the law and the other one did not. And both are under a duty to comply with the law, not just those who have been punished. Thus, there is no difference between first-time offenders and repeat offenders in terms of specific duties to obey that have been violated.

The only new command or knowledge gained by an offender, it appears, has to do with the fact that particular legal actors bothered to deliver an individually tailored condemnation on the offender. But because the “additional” command or awareness is essentially redundant, it is hard to see what new normative significance it generates. Without a new normative significance, the additional command or awareness cannot carry the weight of justifying the recidivist premium. Further, attempts to justify the recidivist premium on
such a thin rationale simply confirm the suspicion that the recidivist premium is merely a loud cry by an authoritarian figure demanding obedience or else, which is hardly an attractive picture.

In short, even if it is the case that disobedience can be culpable, it is unclear whether we can justify punishing repeat offenders more than first-time offenders on the basis that repeat offenders are disobedient and first-time offenders are not.

IV. Recidivism as Omission

A. The Basic Idea

The recidivist premium is a mystery. The intuition that repeat offenders deserve more punishment is strong and widespread. But once we strip away the prevention ("keep them off streets") justification, we seem to be left with a character argument ("recidivists are bad people who deserve more"), a notice argument ("recidivists know what they are doing is wrong"), and a defiance argument ("recidivists show defiance by reoffending")—none of which hold up to scrutiny. At this point, we have several options. First, we may throw up our hands and think that this is just one of those features of our desert judgments that seem difficult to rationalize but are here to stay. Second, we may conclude that the recidivist premium is not justifiable as a matter of desert and seek ways to eliminate or limit it so that our sentencing is consistent with principles of desert. Third, we can attempt a different argument, and that is the task of this Part.

I have considered various arguments for the recidivist premium above, and although they all differ theoretically, they essentially fail for one reason. It is difficult to make a good argument as to why repeat offenders are, in principle, different from first-time offenders when we focus on the badness of their characters or badness of their acts. The fault of these arguments, I would argue, is twofold. First, the arguments take a snapshot of the offenders’ character traits or bad acts at the moment of their reoffending. This is a mistake. The key to understanding the recidivist premium lies in seeing that a self continues over time, and that the self at $t_1$ can influence what the self does at $t_2$. Second, the theories approach the question of individual culpability by focusing on the individuals in question in isolation, and by focusing on their acts or character traits. This, too, is a mistake. The key to the recidivist premium lies not just in evaluating an individual’s act of reoffending or bad character traits. Rather, the focus should be on the ongoing relationship between the offender and the state.

99. See supra notes 7–10.
100. See supra Part II.
101. See supra subpart III(A).
102. See supra subpart III(B).
One of the conceptual difficulties of the recidivist premium is that if we focus on the moment of offending, the offense does not look, at least at first, any different, no matter who commits it—whether it was a repeat offender or a first-time offender. The first step out of this conundrum is to see that criminal offenses—like many acts that we undertake in life—do not happen in isolation. A series of events and circumstances can combine to produce a moment ripe for a crime to take place. This in turn means that well before individuals end up committing crimes, they can steer their lives in different directions in order to minimize the risk of finding themselves in a position in which committing a criminal offense becomes a compelling—or at least appealing—option.

One way to think about this is to divide up an individual’s life into different selves, as in the self at $t_0$, the self at $t_1$, at $t_2$, $t_3$, $t_4$, and so on. What a past self does at $t_0$ can powerfully shape the choices that the future self faces at, say, $t_4$. To use a mundane example, a person on a diet might decide at $t_0$ to travel out of the way to avoid passing next to a fast-food joint at $t_1$. A person who has a tendency to overspend at grocery stores might eat at $t_0$ to avoid grocery shopping at $t_1$ on an empty stomach. Obviously, how one finds oneself in situations that tempt or induce one to commit a crime is a far more complicated matter. But a person who thinks that she has a tendency to give in to peer pressure to commit criminal acts may stay away from those who are likely to encourage her to engage in criminal activities. If a person understands that having no source of income may lead him down the path of a life of a criminal, he could try to find a job to support himself and his family. If a person’s drug addiction leads her to look for quick bucks through burglary, then perhaps combating the drug addiction could lead to a life away from crime. If a person is tempted to molest children whenever he is around children, he can organize his life in a way that minimizes his contact with children. The point is that for every crime that a self commits at $t_x$,
we can find other "guilty" selves at $t_{x-n}$ preceding the self at $t_x$ who committed the crime. Loosely speaking, we might even say that one's past self, through a series of missteps, can aid and abet a self in committing a crime by increasing the risk that the future self would commit that crime.

So what does this have to do with the recidivist premium? I am suggesting that the recidivist premium is not about what an offender does or reveals at the moment a crime is committed; rather, the recidivist premium is additional punishment directed at the previous selves who enabled the later self to commit a crime. The recidivist premium does not punish disobedience or bad character; rather, it punishes an ex-offender's omission—the omission being his failure to take steps to prevent himself from committing another crime.105

I am here making analogies to both omission liability and complicity liability. It is no accident that these two types of liability are paired together for my purposes. Omission liability and complicity liability can be thought of as what George Fletcher has called "derivative liability." Fletcher explains that failing to intervene to prevent a harm and helping someone else commit a crime are "derivative" in the sense that neither conduct is sufficient for liability.107 In the omission context, the ultimate harm must occur in order for the omitter to be held liable. In the complicity context, the principal must commit a crime in order for the helper to be held liable.108 These two forms of liability are derivative also in the sense that there is a causal gap between the omitter and the harm that ultimately results, as well as between the helper and the crime that ultimately occurs.109 If a parent is liable for

105. Stephen Morse has made a similar argument in the context of preventive detention, which he defines as the state practice of "interven[ing] in the life of a citizen, who, at the time of the intervention, has neither done nor attempted to prevent harm, but who poses a substantial risk of doing so." Morse, supra note 13, at 114. He suggests that we expand the crime of reckless endangerment by criminalizing the "failure to commit oneself voluntarily or to take other reasonably effective steps to avoid causing future harm" by persons who have had "prior conviction[s] of at least one serious crime of violence, or at least one prior occurrence of involuntary civil commitment for actual serious violent conduct" and have "conscious awareness of an extremely high risk that [they] will in the immediate future cause substantial unjustified harm." Id. at 152. Under this proposal, "[i]f the crime is complete when the agent recklessly fails to take the steps reasonably necessary to avoid harmdoing." Id. I should also note that Morse has offered the proposal as a "purely heuristic" device and does not favor adopting it for reasons of privacy and administrative difficulties. Id. at 152 n.126. Our proposals have a number of differences—in the aims and contents of the proposals themselves and in the theoretical justifications for them. See, e.g., infra note 117. However, one commonality here is the idea that individuals' failures to prevent themselves from committing crimes can be culpable.

106. See FLETCHER, supra note 11, at 581–85; see also Sanford H. Kadish, Complicity, Cause and Blame: A Study in the Interpretation of Doctrine, 73 CAL. L. REV. 323, 337 (1985) (explaining that complicity liability is derivative in that it is dependent upon a principal violation of the law).

107. FLETCHER, supra note 11, at 583.

108. Id. at 583–84.

109. The ideas of "causation" by omission and "causation" by complicity are controversial, and there is much written about the two subjects. It is beyond the scope of this Article to resolve these issues, but some idea of causal connections between omission and result, and complicity and result, is stable and robust enough for our purposes. On causation by omission, see, for example,
manslaughter for not seeking medical attention for his child when the child is ill, it is the illness that harms the child, and the parent’s role in the occurrence is merely that he failed to prevent the illness from harming the child. If a helper is liable for helping the principal commit a crime, it is the principal who commits the crime, not the helper. Recidivism as omission, as I envision it, has a similar structure. The culpability of the self at $t_0$ who has enabled the self at $t_{10}$ to commit a crime derives from the badness of the crime committed by the self at $t_{10}$. Of course, since there is only one actor in the context of recidivism, the punishment for the repeat offense takes into account both the culpability of the selves at $t_{0-9}$ and the self at $t_{10}$.

Above, we saw that all the competing accounts of the recidivist premium have a flaw: It is not clear that first-time offenders lack whatever feature supposedly distinguishes repeat offenders under any particular theory. So, one may object, is it not the case that my proposal suffers from the same problem? Do we not demand that all persons organize their lives so that they steer clear of criminality? Why is it not the case that when first-time offenders are being punished, they are being punished not only for committing the crimes with which they are charged, but also for their failures to live life in a way that would have allowed them to steer clear of criminality?

The answer is that there is a difference between a first-time offender and a repeat offender because a repeat offender has gone through the process of conviction and punishment and a first-time offender has not. When a person is convicted and punished for a crime, one thing we can say with confidence is that the relationship between that person and the state has changed in a way that makes that person different from others who have not had that kind


110. I do not mean to imply here that “attempted omission” or “attempted complicity” is absurd or non-existent. The aim here is merely to explain how “recidivism as omission” is to be conceptualized. Cf. Kadish, supra note 106, at 356 (explaining that his explication of complicity as containing a “result” requirement is not meant to preclude the possibility of the concept of attempt to complicity).
of encounter with the state. It is this change in relationship that changes the normative positions of persons with regard to the state.

The idea that obligations arise from relationships is a familiar concept in law. The most straightforward relationship that can give rise to obligations in law is one created by a promise, but bases for obligations need not always be voluntary. For instance, family is often given as a paradigmatic example of an association that gives rise to obligations despite the fact that it is not—or at least not fully—voluntary.

Even though phrases like “paying one’s debt to society” imply that once individuals have been punished, they start with a clean slate, the idea that punishment puts people back to where they were before flies in the face of our everyday experiences. One’s life cannot be thought of as simply one event after another, one encounter after another, each of which is discrete and disconnected from the others. “After all we have been through,” a phrase that typically precedes a normative statement, is not an idle phrase; it is a way of emphasizing the different normative expectations that arise as a result of what “we have been through.” What we expect of one another is shaped by what we have been through, and different relationships people enter into (voluntarily or involuntarily) can inject new, morally significant elements into their lives.

What kinds of morally significant duties or obligations exist as a result of the existence of a relationship depend on the nature of the relationship itself. Obviously, merely spending time with someone does not give rise to obligations. If a person beats me up every day for several days and later I notice that the person who assaulted me is drowning, there may or may not be a duty for me to rescue my assailant, depending on a number of factors.

However, it would be absurd for anyone to argue that I have a duty to rescue him because we have had a relationship. Everything about the argument

111. See, e.g., RESTATEMENT (SECOND) OF CONTRACTS § 1 (1981) (defining a contract as a promise that creates an enforceable legal duty); RESTATEMENT (SECOND) OF TORTS § 314A (1965) (listing several types of special relationships that create a duty to act in tort law).

112. There are obvious parallels here to the idea of “associative obligations,” which has been extensively discussed in the literature on the duty to obey the law. See, e.g., RONALD M. DWORKIN, LAW’S EMPIRE 190–216 (1986); Stephen Perry, Associative Obligations and the Obligation to Obey the Law, in EXPLORING LAW’S EMPIRE: THE JURISPRUDENCE OF RONALD DWORKIN 183, 183–206 (Scott Hershovitz ed., 2006). Accounts of associative obligations forming a basis for political obligations are controversial. For criticisms, see Denise Réaume, Is Integrity a Virtue?: Dworkin’s Theory of Legal Obligation, 39 U. TORONTO L.J. 380, 380–409 (1989); A. John Simmons, Associative Political Obligations, 106 ETHICS 247, 259–61 (1996). Whether their criticisms apply to the argument I am advancing here turns on the moral justifiability of the institution of punishment and of the relationships that the institution creates.

113. See, e.g., RESTATEMENT (SECOND) OF TORTS § 314 (1965) (“The fact that the actor realizes or should realize that action on his part is necessary for another’s aid or protection does not of itself impose upon him a duty to take such action.”). But see, e.g., id. § 314A (stating that a common carrier and innkeeper have a duty to render aid when they know a passenger or customer is ill or injured); id. § 322 (stating that actors who know that their conduct has placed others in a position where they will suffer further harm are under a duty to render aid); id. § 324 (stating that one who undertakes to aid a person who is ill or injured is liable for any harm resulting from discontinuing that aid).
being advanced here thus turns on the nature of the relationship between an offender and the state.

The nature of the offender–state relationship is as follows. The institution of punishment has a communicative, expressive dimension. When the state punishes, it condemns what the offender has done as blameworthy and it communicates to the offender that what he has done is wrong. Implicit in that message, of course, is that the offender is being punished for what he has done, and after his punishment is complete, he shall not offend again. This is one way in which punishments that carry stigma are different from, say, receiving a parking ticket. The message that people experience when they receive a parking ticket is not, “Do not park illegally again,” but, “If you park illegally and you are caught, you have to pay.” By contrast, when a person is convicted of rape, the message given is, “What you did was wrong, and you cannot do it again,” not, “If you rape again and you are caught, you have to serve time.” The possibility of committing the crime again should not even be contemplated, as the whole point of criminal prohibition is that some things just should not be done.

Now, if the process of conviction and punishment communicates the message that what the offenders have done is wrong and they should not do it again, the process also should prompt a period of reflection on the part of offenders to determine how they ended up committing the prohibited act. This kind of self-diagnosis, aided by the institution of punishment, should identify what has gone wrong in an offender’s life. People may end up committing crimes for different kinds of reasons, and those reasons differ for different types of offenses. Such diagnoses should lead to appropriate prescriptions for each offender, and each offender should follow those prescriptions while and after serving a sentence. A repeat offense by someone who has gone through this process of reflection, diagnosis, and prescription justifies the inference that, for whatever reason, the prescription was not followed, and the offender failed to prevent herself from reoffending by failing to organize her life in a way that steers clear of criminality.

Some may object that none of this is unique to repeat offenders. Those without criminal histories have the ability to know themselves and to understand the kinds of factors that lead people into situations in which they end up committing a crime. First-time offenders may have taken each step leading to their crimes knowing exactly what they were doing and understanding that each step was leading them closer to the commission of a crime. Also, as mentioned above, those who are convicted of a crime for the first time are not necessarily those who have committed only one crime in their lives. Some may already have an impressive criminal background without ever having been caught. If my argument holds, and that those who are convicted of crimes know themselves well enough to know what kinds of things lead them down the path of the criminal, then that argument should apply to those first-time offenders who have good understandings of such factors as well. And if that is the case, then my argument ceases to become an argument in
favor of singling out an offender's criminal history as a significant aggravating factor.

However, this objection misses the point that the crucial difference between first-time offenders and repeat offenders is that the repeat offender has gone through a *process* with the state that has created a *relationship* with the state, and the point of that relationship was to ensure that whatever led the offender to the status of being a convict should be avoided in the future. It is *that history* of having had *that relationship* that first-time offenders lack. And once a person enters into a thick relationship with the state through the process of conviction and punishment, it is appropriate for the state to attribute blame to how a person has increased the risks of criminal wrongdoing over time.

Why should the state not apply the same kind of scrutiny to first-time offenders? The answer is that we have a society that respects individual autonomy. We provide space for people to feel free to move about as long as they do not cross certain boundaries. And if a person crosses a boundary, it is likely that the person’s wrongdoing was not only in doing the prohibited act, but also in taking the steps leading up to the prohibited act. But such steps leading up to the prohibited act should not be what the state concerns itself with; they are none of the state’s business. However, it all becomes the state’s business once the offender and the state enter into a relationship the sole point of which is to recognize that what the offender did was wrong and should not be done again.

At the same time, this proposal does not require the institution of punishment to seek a transformation of an offender’s character or soul. The message is, “We are making you go through the process of conviction and punishment because you crossed certain lines, and we don’t want you to cross those lines again.” This is very different from the message, “We are making you go through the process of conviction and punishment because you are a bad person, and we want you to come out of the process a good person.” Perhaps some of these people have desires to hurt others that they never rid themselves of. But if that is the case, they must find ways to weaken or suppress those desires, or to organize their lives in ways that help them avoid situations in which those desires are triggered and avoid opportunities to act on such desires. But what is not required of them is to transform themselves into people with different traits, preferences, and attitudes.  

It is important to be clear here that I am not suggesting a new command during the process of conviction and punishment that states that offenders must now “get their acts together” and that the recidivist premium is for offenders’ violations of that command. There would be several problems with positing that kind of command in explaining the recidivist premium.

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114. This is one way in which my account differs from rehabilitation theories of punishment. For a quick discussion of the rehabilitation approach to sentencing, see Andrew Ashworth, *Sentencing*, in THE OXFORD HANDBOOK OF CRIMINOLOGY, *supra* note 104, at 1076, 1079–80.
First, it is not likely that such a command is actually part of the meaning of the process of conviction and punishment, whereas it seems incontrovertible that the process of conviction and punishment carries the message that the offender should not reoffend. Second, a regime of such commands already exists in the form of probation, parole, and supervised release. A command-centered account would then have two sets of parallel commands—explicit commands and implicit commands—and it is unclear why the explicit commands would not simply “occupy the field” and become an exclusive set of commands. The account advanced here avoids this problem by focusing instead on the nature of the offender-state relationship, and the kinds of normative expectations that are raised once the offender enters into that relationship.

I should also make clear that by arguing that we should think of the recidivist premium as punishment for “omission,” I am only making an argument for interpreting the idea of imposing additional punishment for repeat offenders. I am not advocating a creation of the new crimes of “failure to fix your own life” or of “aiding and abetting your future self to commit another crime.” In other words, the idea is not to create a situation where individuals are punished for failing to reform even though they never reoffend. Say a person commits a crime and is convicted, and once he completes his sentence, he goes back to his old way of living. Despite the fact that he—call him an “unrepentant law-abider”—never shows any sign that he has rearranged his life in order to steer clear of criminality, he miraculously never commits a crime. My argument thus far does not imply that the unrepentant law-abider should be punished because, after all, he is a law abider. A prior offender’s act of offending again should give rise to an inference that the offender helped himself commit another crime, and it is on the basis of that inference that we can justify imposing additional punishment. However, that does not mean that the failure to prevent oneself from committing another crime need be criminalized by itself; it can simply be a culpability enhancer, the same way in which hatred is not a crime but is a culpability enhancer for racially motivated crimes.

On the flip side, some may wonder whether an inference that there was a failure to reform is always justified when assessing re-offenders. It is easy to imagine a “repentant law-breaker,” a mirror image to the unrepentant law-abider. It is possible for a person to be convicted and punished, and then once she completes her sentence, she acts like a model citizen. She cleans up her act, finds a job, avoids her criminal friends, and so on, but, for whatever reason, she finds herself back in court for committing some crime. Or, even worse, she attempts to clean up her act, find a job, and avoid her criminal friends, but she finds that her options post-incarceration are few and far

115. For a contrasting perspective on this point, in the context of preventive detention, see Morse, supra note 13, at 152.
between, and all her attempts to rearrange her life fail. It seems unfair to punish such a person for failure to reform when they re-offend.

How to deal with situations like these is not easy to determine, and would depend on individual situations. For the purposes of this paper, I would only say the following. First, it seems that the repentant-law-breaker scenario is the kind of situation where repeat offenders might say things like, "I couldn’t help it," and, "I could not do otherwise," because they might have tried to do everything possible to set their lives straight but failed anyway. But such excuses are codified in the criminal law as formal defenses such as duress or insanity, and if a repeat offender’s repeat offense can somehow fall into one of those categories, then there can be a genuine defense against the recidivist premium—or even against the conviction for the re-offense itself. Second, the inference of the offender’s failure to reform need not be absolute, meaning that it may be rebutted by the offender. Similarly, one could also imagine allowing partial or full excuses for one’s failure to reform. Although details as to how to design a system of full and partial rebuttals and excuses cannot be worked out here, it seems to me that repeat offenders ought to be able to present the ways in which they have tried to steer clear of criminality and, depending on the reasonableness and sincerity of their attempts, receive a reduction in the recidivist premium.

116. One difficult issue lurking in the background here is whether the legal system should recognize something like a partial or full “social-adversity defense.” For discussions of social-adversity defense, see MICHAEL TONRY, MALIGNS NEGLECT—RACE, CRIME, AND PUNISHMENT IN AMERICA 134–48, 163–64 (paperback ed. 1996); and VON HIRSCH & ASHWORTH, supra note 18, at 62–74. I cannot resolve the social-adversity-defense debate here; I only note that how that debate is resolved would have obvious implications for when the recidivist premium would be unavailable.

117. Some might wonder here why the burden of proving that there was a failure to reform is not on the government and why the burden of proving that there was an attempt to reform is on the defendant. The reason for this is that the state is, ultimately, too far removed from individuals to know how they ought to reform their lives. The state can listen to individuals’ stories as to how they have tried to reform and understand them, but how a particular individual is to avoid a life of crime is not information that the state has access to, given the individual variations and opacity of the internal lives of individuals. There are many ways of living a law-abiding life, and they cannot and should not be specified by the state. A broader point here is that it is inappropriate to have an absolute rule barring presumptions that go against criminal defendants just because we are in the criminal context; a more general articulation of the proper relationship between citizens and the state must come first. For a discussion of some of the general issues involved in determining when legal presumptions are appropriate, see R.A. Duff, Strict Liability, Legal Presumptions, and the Presumption of Innocence, in APPRAISING STRICT LIABILITY 125, 137–43 (A.P. Simester ed., 2005). It is true that through probation and parole conditions and such, the state does keep an eye on how ex-offenders return to a life of normalcy. But that, it seems to me, does not show that the state has any special insight as to how to live a law-abiding life; such post-release conditions are more about the state’s maintaining a tight control over each individual—in a way privileging one state-chosen way of staying out of trouble—and less about the state knowing what is good for each individual.

118. For a similar suggestion, see ROBERTS, supra note 5, at 220–22.
B. Advantages over Competing Accounts

My account has several advantages over competing accounts of the recidivist premium. First, it explains and justifies the extra resentment felt against repeat offenders. Given that the point of the punishment system is to express and communicate blameworthiness of criminal conduct, another offense by someone who has been punished can be an indication that the person has failed to rearrange his life in a way that ensures that he does not offend again. The special kind of resentment that people may feel about a repeat offender stems from the feeling that we have all been through this before. The purpose of the institution of punishment is to forcefully drive home the point that what the offender did was wrong and should not be done again, not just the point that what the offender did carries a price. Once offenders have gone through that kind of process, the expectation is for them to change their ways of life, and the extra resentment arises from that expectation. Arguments against the recidivist premium or arguments for a sentencing differential that is solely based on first-time-offender mitigations have trouble explaining and justifying this intuition.

Second, recidivism as omission does not suffer from the problems that plague obedience- or character-based accounts of the recidivist premium. Both obedience and character arguments have the same weakness; it is not clear why one’s criminal record—reflecting not necessarily the number of times one has committed a crime, but the number of times one has been caught and punished—should be privileged as a way of getting at a person’s bad character or disobedience. First-time offenders can have bad character traits or can act in rebellion against the state, just as repeat offenders can repeat without having permanent “criminal” traits or rebelling against authority. By tying the recidivist premium to additional obligations that arise from the relationship that an offender and the state enter into with each other, my account avoids such problems.

Third, by specifying exactly what the wrongdoing consists of, my proposal gives more guidance as to what amount of extra punishment is appropriate. When one encounters habitual-offender statutes, two reactions are common. One, some kind of additional punishment is appropriate. Two, the additional punishment should not be “too much.” Accounts that focus on disobedience or bad character traits have trouble placing a principled limitation on the size of the recidivist premium. If an offender has bad character traits that are deeply ingrained and irremediable, how much additional punishment is appropriate? If an offender has rejected the idea of playing by the rules, how much additional punishment is appropriate? It is unclear whether any principled limitation can be placed on the size of the recidivist premium. In fact, arguments based on character or defiance have a tendency to recommend large increases in punishment without encountering any meaningful resistance, simply because what justifies the additional punishment is an abstract “harm” of being a “bad person” or “defying authority.”
By contrast, my account of the recidivist premium takes into account the belief that some additional punishment is appropriate, but places a ceiling on it because the wrongdoing does not consist of the abstract harm of being defiant of authority, rejecting society’s norms, or being a heinous human being. Rather, the wrongdoing we are concerned with has to do with living one’s life in a way that is insufficiently far away from criminal activity. And given that the recidivist premium punishes for increasing the risk of a criminal activity, as opposed to punishing for engaging in the criminal activity itself, the appropriate punishment for recidivism should be less than the punishment for the crime itself. This is why I believe habitual-offender statutes prescribe punishments that are too harsh and excessive in just-deserts terms. The recidivist premium is for the wrong of failing to set one’s life straight, which increases the risk of a subsequent offense; but such a failure should not lead to a punishment that is harsher than the punishment for the second (or third, or whatever) offense itself.

C. Government as a Responsible Party?

Finally, the account advanced here opens up a new line of inquiry that, in my view, should always be part of the recidivist-premium calculus—the idea of assigning to the state at least partial blame for an offender’s recidivism. As I have been stressing, the engine that drives the recidivist premium is the relationship between the state and the offender, the point of which is to acknowledge that what the offender has done is wrong. And implicit in that relationship is a commitment on the part of the offender to organize his life in a way that steers clear of criminality so that he does not re-offend. Like most relationships, this is a relationship that places obligations on all parties involved. In the same way that the relationship between an offender and the state allows the state to take a closer look at how an offender carries out his life, the state also has a heightened responsibility towards the offender—namely, to help him get back to a life of normalcy or at least to not interfere with an offender’s effort to become a law-abiding citizen. In other words, if the recidivist premium is imposed for one’s failure to set his life straight postconviction, if what justifies the recidivist premium is the relationship between the individual and the state, and if the moral logic of the relationship necessitates the parties’ commitment that the offender should organize his life in order to prevent another offense, then it seems to follow that the state has a role to play in helping the offender live a life away from crime as well.

This last implication is especially significant for the recidivism issue because there are serious and legitimate concerns that the increasing punitiveness of the American criminal justice system in the past few decades has had the perverse effect of driving up the rate of recidivism. Many offenders who are released from prison frequently face daunting prospects as they try
to get their lives back in order. First, they will find that, because of their felony convictions, they are excluded from public housing. Second, they will find that they not only are excluded from housing, but also are excluded from a source of income because their felony convictions make them ineligible for welfare. Third, if they seek to get education to improve their lots, they will find another stumbling block if they were convicted of a drug-related offense, as Congress has made such people ineligible for student loans. Fourth, they will find that they may not be able to find jobs as teachers or child-care workers due to various laws regarding the eligibility of individuals with criminal records. Fifth, even if they somehow find jobs, they will find that they cannot drive there because of laws that revoke or suspend their driver’s licenses because of their felony backgrounds.

In short, as the recidivist premium has increased in the past few decades, various government policies have simultaneously made it difficult for ex-offenders to pursue normal lives by denying them housing, welfare, education, certain jobs, and the ability to drive to work. On top of all of this, ex-offenders are hit with the ultimate symbol of exclusion: denial of the right to vote. The connection between the lack of the right to vote and recidivism may be a bit more tenuous than the connection between recidivism and the lack of basic needs such as food, housing, and education. However, those who commit crimes tend to be those who feel alienated from the mainstream

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120. E.g., IND. CODE § 12-14-1-1(c) (2007) (barring felons from receiving assistance under Indiana’s Temporary Assistance for Needy Families program for ten years); KAN. STAT. ANN. § 39-709(d)(4) (2007) (prohibiting those found guilty of certain crimes from receiving some forms of state assistance); see also Travis, supra note 119, at 23 (discussing legislation that has cut offenders off from welfare).


122. Travis, supra note 119, at 22; see also, e.g., ARK. CODE ANN. § 6-17-414(b) (2007) (preventing those convicted of certain crimes from gaining employment as nonlicensed staff in public schools); CAL. EDUC. CODE § 45125.01(d) (West 2006) (establishing a system to make criminal records of school-district employees available to superintendents); CONN. GEN. STAT. § 20-195p (1999) (permitting disciplinary action to be taken against social workers convicted of felonies); BRUCE WESTERN, PUNISHMENT AND INEQUALITY IN AMERICA 112–13 (2006) (noting that a criminal record can result in legal restrictions on employment options).

123. Travis, supra note 119, at 24; see also, e.g., ALA. CODE § 32-5A-195(j) (1999) (requiring the revocation of the driver’s license of anyone convicted of certain crimes); ARIZ. REV. STAT. ANN. § 28-3304(A) (2004) (requiring the driver’s license of a person convicted of certain offenses to be revoked).
society and who do not have a faith in the democratic process to reflect their interests; such a lack of faith in turn can lead them to lose respect for the law. Taking away offenders’ right to vote would naturally exacerbate such attitudes, and it is difficult to deny that the state’s reinforcement of their feelings of alienation from the rest of the society and other citizens would have a detrimental impact on rehabilitative efforts.\textsuperscript{124}

These types of social exclusionist policies are inconsistent with the system’s demand that offenders set their lives straight after going through the process of conviction and punishment.\textsuperscript{125} Our consideration of the recidivist premium should take into account the government’s role in making recidivism a comparatively appealing option for ex-offenders. But in what way? If the government is a complicit party in the recidivist’s reoffending, the theoretically consistent thing to do seems to be to impose some kind of a penalty on the government as a complicit actor contributing to the reoffending. However, the most effective way of communicating the government’s responsibility in contributing to the reoffending may instead be to reduce the offender’s recidivist premium—even though there is something theoretically odd about one’s criminal culpability being reduced just because there is another blameworthy subject. The difficult question, of course, is how all this would be done, and the proposal raises many questions. For the purposes of this Article, the only propositions that I would like to advance are that the recidivist premium can be justified on the basis of the relationship offenders enter into with the state; that this relationship places an obligation not only on the offenders, but also on the state; and that the size of the recidivist premium should reflect the ways in which each party to that relationship has failed.


\textsuperscript{125} There is a difficult question here that I cannot resolve in this Article, and it is this: How should we think about the government’s responsibility in repeat offenders’ reoffending, given that the institution of punishment itself—and not just government policies that deal with ex-offenders—has the effect of disrupting people’s lives in ways that increase the difficulty of living law-abiding lives? See, e.g., DAVID COLE, NO EQUAL JUSTICE: RACE AND CLASS IN THE AMERICAN CRIMINAL JUSTICE SYSTEM 175, 169–80 (1999) (asserting that “[t]he criminal justice system’s exploitation of inequality” not only causes people to doubt the legitimacy of our society’s legal systems, but also undermines the social cohesion within our communities that encourages law-abiding behavior); DEV AH PAGER, MARKED: RACE, CRIME, AND FINDING WORK IN AN ERA OF MASS INCARCERATION (2007) (studying the barriers to employment for offenders); WESTERN, supra note 122, at 108–67 (discussing the effects of incarceration on offenders’ chances of finding employment and on their family lives). Here we run up against a problem of individual responsibility in adverse conditions, which is analogous to the social-adversity-defense debate mentioned above. See DUFF, supra note 54, at 182–84 (suggesting that the lost sense of obligation to obey the law that results when people feel excluded from or disadvantaged by society helps explain why those people commit crimes). It seems to me that it is an advantage, not a disadvantage, of my theory that these kinds of questions must be constantly asked under my framework.
V. Conclusion

This Article has argued that the recidivist premium should be thought of not as punishment for a defiant attitude or a bad character trait, but as punishment for an omission. The culpable omission that justifies the recidivist premium is the repeat offender’s failure, after conviction, to arrange his life in a way that ensures a life free of further criminality. Although how individuals conduct their lives as a general matter is not properly the business of the state, once offenders are convicted of a crime, they enter into a thick relationship with the state, and that relationship gives rise to an obligation for the offenders to rearrange their lives in order to steer clear of criminal wrongdoing. This Article has also argued that obligations between the state and offenders run in both directions, and that we should recognize the ways in which the state may be a responsible actor that should share the blame for recidivists’ reoffending. Needless to say, many questions remain on how to implement a theory like this and which aspects of our current practices would remain and which would change.126

In addition, there are two broader normative questions that this Article has not addressed. First, given appropriate retributivist limitations, is it ever nevertheless justifiable for the state to “punish” those who are likely to reoffend beyond the level allowed by the just-deserts constraints? This is a question that this Article must leave untouched.127

Second, can the recidivist premium be based on some idea of forfeiture or loss of citizenship? There are times when the rhetoric surrounding habitual-offender statutes sounds like an argument in favor of excluding certain people from the rest of the society, as opposed to punishing them. It is beyond the scope of this Article to fully evaluate this argument. I would only say that in debating the recidivist premium, we must identify the moment at which the discourse of just deserts turns into an argument based on the idea of forfeiture. Versions of the just-deserts theory retain the notion of treating offenders as part of the community. The idea would be that a political community imposes rules to live by on the members of the community, and when a member of the community fails to live up to community

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126. Some implementation questions (a few of which were discussed above briefly) are: Should inferences of offenders’ failures to set their lives straight from additional offenses be rebuttable? Should the size of the recidivist premium decrease if repeat offenders can demonstrate the ways in which they have attempted to set their lives straight? How should we think about the government’s interference with an ex-offender’s rehabilitative efforts as a potential mitigating factor? Should one’s criminal record expire after a certain period of time? Should the amount of time elapsed between the current offense and previous offenses make a difference? Should the degree of similarity between one’s current offense and past offense make a difference for sentencing purposes? How should we take into account any pattern in reoffending—such as increasing or decreasing seriousness of crimes—on every subsequent conviction? Should juvenile records be included? For a discussion of these and various other issues, see Roberts, supra note 2, at 321–41. 127. For some discussions of this question, see sources cited supra note 18.
standards, the community condemns the failure. Habitual-offender statutes, however, sometimes seem as if they are ways of taking away people's citizenship and banishing them outside the community's territory. There is a difference between giving people what they deserve and stripping them of their citizenship, and we must always be on the lookout for the moment at which a person who is a full member of the community, but whose acts nonetheless call for condemnation, starts being treated as a person who should not be part of the community at all.

128. See, e.g., Duff, supra note 54, at 75 (describing the criminal trial in a liberal political community as a process through which members of the community confront their violations of the laws, and are held accountable for those violations, while still remaining full members of the community).

129. See Duff, supra note 18, at 156–63 (exploring the possible grounds for permanently excluding an offender from the community).