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JUSTICE IN SENTENCING: THE ROLE OF PRIOR RECORD OF CRIMINAL INVOLVEMENT

ALEXIS M. DURHAM III*

I. INTRODUCTION

American sentencing practices have undergone substantial transformation during the last decade. The emergence of the justice model of punishment,¹ the appearance of evaluation research apparently revealing the ineffectiveness of correctional treatment,² and the subsequent retreat from the rehabilitative rationale have encouraged the abandonment of long-standing indeterminate sentencing systems. By the early 1980's, more than half of the states had adopted either determinate or mandatory sentences for various crime classifications.³ Furthermore, the Federal Sentencing Commission released its determinate sentencing guidelines for the federal system in 1987.

In the new determinate sentencing systems, the role of the current offense,⁴ victim injury, use of a weapon, and a host of other variables have been quantified in order to reduce inequity in sentencing determinations.⁵ One of the consequences of this objectification has been to increase the visibility of the variables that

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¹ See, e.g., N. MORRIS, *THE FUTURE OF IMPRISONMENT* (1974); A. VON HIRSCH, *DOING JUSTICE: THE CHOICE OF PUNISHMENTS* (1976); D. FOGEL, "WE ARE THE LIVING PROOF": *THE JUSTICE MODEL FOR CORRECTIONS* (1979).

² See, e.g., Martinson, *What Works? Questions and Answers About Prison Reform*, 35 PUB. INTEREST 22, 49 (1974); D. LIPTON, R. MARTINSON & J. WILKS, *THE EFFECTIVENESS OF CORRECTIVE TREATMENT*, (1975); S. MARTIN, L. SECHREST & R. REDNER, *NEW DIRECTIONS IN THE REHABILITATION OF CRIMINAL OFFENDERS* (1981).

³ See BUREAU OF JUSTICE STATISTICS, *REPORT TO THE NATION ON CRIME AND JUSTICE* 72 (1983).

⁴ Current offense refers to the criminal charge.

⁵ For example, Florida uses primary offense at conviction, additional offenses at conviction, prior record, legal status at the time of the offense, and the degree of victim injury as sentence-determining variables in its sentencing guidelines for violent felonies. FLA. STAT. ANN. Rule 3.988 (West 1986).

influence sentencing decisions. It is often possible to identify precisely the amount of weight accorded to each sentence-determining variable.

In traditional rehabilitatively driven indeterminate sentencing schemes the offender's general personal experience was considered relevant to the determination of sentence. Factors such as employment background, family situation, and residential stability have entered into the sentence determination process. As the justice system retreated from an interest in providing therapeutic services for offenders, the result was a decrease in the need to utilize information about the offender's experience to determine the proper sentence. The resulting sentences under the justice model formulation were based upon what was deserved for the offense perpetrated, not the characteristics of the offender.

One component of the offender's experience, however, has remained an important feature of the sentence determination process. States adopting determinate sentencing statutes, such as California, Florida, and Minnesota, have retained the offender's prior record as a factor in the determination of a sentence. As will be demonstrated in this Article, prior record of criminal involvement may play a larger role than the current offense in the determination of sentence. Given both the justice model focus upon the current offense and the fact that previous convictions will already have received appropriate punishment, it is unclear whether the justice model can tolerate the use of prior record as an important variable in the determination of just sentences. How is it possible that a desert-based system is able to utilize already punished behavior as the basis for increases in the severity of sentences for new convictions? The need to address this potential source of difficulty is all the more urgent in light of both the current powerful influence of the justice model in sentencing theory and practice, and the rapid national spread of desert-oriented determinate sentencing systems that make use of prior record of criminal involvement.

This Article contributes to the examination of this issue through a review and analysis of the arguments pertaining to the use of prior record in sentencing as they relate to the justice model. The discussion is only marginally concerned with the various utilitarian justifications for the use of prior record in sentencing. Ultimately, this analysis suggests that the most viable rationales for the use of prior record within the justice model framework may require a torturing of the fundamental retributive foundations of the model.

The arguments considered in this discussion are organized into four general classifications: arguments of implicit attribute, ele-

vated harm, leniency, and emotive reparation. Although this classification is not the only possible categorization of arguments, it is useful in highlighting similarities and differences between approaches. After examining the permutations of each argument, the Article concludes with a consideration of the implications of the discussion for sentencing policy. The Article begins with a brief historical summary of the use of prior record in determinations of punishment.

II. PRIOR RECORD AND SENTENCING: HISTORICAL BACKGROUND AND CURRENT TRENDS

According to the Book of Leviticus, the Lord established a series of rules regarding obedience.⁶ After listing these rules, the Lord warned:

But if you do not obey Me and do not carry out all of these commandments . . . I, in turn, will do this to you: I will appoint over you a sudden terror, consumption and fever that shall waste away the eyes and cause the soul to pine away; also, you shall sow your seed uselessly, for your enemies shall eat it up. And I will set My face against you so that you shall be struck down before your enemies; and those who hate you shall rule over you, and you shall flee when no one is pursuing you.⁷

If this gruesome list of sanctions was not sufficient to discourage non-compliance, a special provision was added for those who insisted upon continued deviation from the rules.

If also after all of these things, you do not obey Me, then I will punish you seven times more for your sins.⁸

This latter provision may be the earliest instance of the use of prior record in sentencing. The punishment for disobeying was seven times that for the initial offense. Actually, this particular provision is only the first of a series of seven-fold incremental punitive enhancements for continued violation of God's law.

Although it is estimated that Leviticus was written as early as the fifteenth century, B.C.,⁹ it has been succeeded by a variety of similar practices. Quakers exiled from Massachusetts in the seventeenth century were subjected to penalties that escalated with each repeat appearance in the colony.

If any Quaker or Quakers shall presume, after they have once suffered what the law requireth, to come into this jurisdiction, every such male

⁶ *Leviticus* 26.

⁷ *Id.* at 26:14-17.

⁸ *Id.* at 26:18.

⁹ THE RYRE STUDY BIBLE 158 (1978).

Quaker shall for the first offense have one of his ears cut off, and be kept in the house of correction till he can be sent away at his own charge, and for the second offense have his other ear cut off. . .for every Quaker, he or she, that shall a third time herein again offend, they shall have their tongues bored through with a hot iron. . . .¹⁰

In 1773, the Connecticut General Assembly created what some have argued was the first American prison.¹¹ Newgate of Connecticut incarcerated criminals in an old copper mine, thus providing a mitigation of punitive severity for perpetrators of a limited number of offenses. Furthermore, in the prison's enabling legislation, the Assembly provided punitive enhancements for recidivism.

That whoever shall commit burglary . . . or shall rob any person in the field or highway . . . shall for the first offense suffer imprisonment in said gaol and work-house, and there be kept to hard labour for a term not exceeding ten years . . . And if any such person shall commit the like offense a second time and be thereof convicted as foresaid, he or she shall suffer imprisonment in said gaol and work-house, and there be kept to hard labour as aforesaid for and during the term of his or her natural life.¹²

The American tradition of enhancing the punitive character of sanctions for offenders repeatedly convicted of crimes has survived into the present. Consider, for instance, the frequently cited case of *Rummel v. Estelle*.¹³ After receiving his third felony conviction in 1973, William Rummel was sentenced to life in prison under the Texas habitual offender provision.¹⁴ Although none of his convictions were for crimes of violence and the total property loss for the offenses totaled only \$229.11, he was a habitual recidivist according to Texas law. Rummel received a life sentence with eligibility for parole possible only after he had served a minimum of twelve years.

Rummel challenged the constitutionality of his sentence. He argued that the eighth amendment of the United States Constitution expressly prohibits cruel and unusual punishment, and that the excessive severity of his sentence exceeded what was permissible under this standard. The United States Supreme Court affirmed the decisions of the lower court¹⁵. In the majority opinion, Justice

¹⁰ *Massachusetts Public Records* IVa, 308-09, quoted in K. ERIKSON, *WAYWARD PURITANS* 117 (1966).

¹¹ See Durham, *Newgate of Connecticut: Origins and Early Days of an Early American Prison*, JUST Q. (1988)(forthcoming); A. D'Amato, *Newgate to Wethersfield: The Development of Prison Reform in Nineteenth Century Connecticut* (1972)(unpublished Master's thesis).

¹² *Connecticut Public Records* 207 (May 1773).

¹³ 445 U.S. 263 (1980).

¹⁴ See TEXAS PENAL CODE ANN. § 12.42(d)(formerly Art. 63). This section allows a life sentence for adult defendants convicted of a third felony offense.

¹⁵ 587 F.2d. 651 (5th Cir. 1978)(en banc).

Rehnquist noted that Rummel's punishment addressed not only the instant offense, but also his recidivism.¹⁶

Thus, the use of special punitive enhancements for repeat offenders, which Fletcher refers to as the "recidivist premium,"¹⁷ has a lengthy and familiar history. In a criminal justice system that seeks to reduce crime through forward-looking, utilitarian strategies, recidivist statutes seem well-justified. For certain crimes, a preventive effect may be achieved through the use of carefully designed techniques for the selective incapacitation of high-risk offenders.¹⁸ Peculiarly enough, at the very time when selective incapacitation seems to be gaining substantial support, due in part to the development of more sophisticated techniques for the identification of such offenders, it also finds itself directly confronting the recently emerging justice model of punishment. The justice model or "just deserts" model as it is alternatively called, posits that punishment is justified if it comports with the seriousness of offensive conduct.¹⁹ The model has its roots in the retributive tradition²⁰ and thus has limited interest in forward-looking justifications for the exercise of the state's punitive power. Rather, its primary interest is in confinement of the state response to punishments that are justified by a backward-looking evaluation of the acts perpetrated by the offender.²¹ The model seems as uncomfortable with the medical model of rehabilitation,²² which promises a transformation in the characteristics of its "clients," as it is with strategies that proclaim the ability to reduce the crime rate through forward-looking deterrent or incapacitative effects.

Recidivist statutes appear to fit comfortably within the forward-looking approach of policies most concerned with utilitarian strategies for crime control. Their justification is tied to preservation of public safety, rather than to enhancement of the justice of criminal justice system initiatives. For instance, the American Law Institute's Model Penal Code of 1962 advocates punitive enhancements if "the

¹⁶ 445 U.S. at 278-84. It should be noted that other factors, such as the availability of parole under Texas law, influenced the Court's decision. *Id.*

¹⁷ See Fletcher, *The Recidivist Premium*, 1 CRIM. JUST. ETHICS 54 (1982).

¹⁸ Crimes such as robbery and burglary have been examined for potential incapacitative effects. See P. GREENWOOD, *SELECTIVE INCAPACITATION* (1982); M. MOORE, S. ESTRICH, D. MCGILLIS & W. SPELMAN, *DANGEROUS OFFENDERS: THE ELUSIVE TARGET OF JUSTICE* (1985).

¹⁹ See von Hirsch, *Desert and Previous Convictions in Sentencing*, 65 MINN. L. REV. 591 (1981).

²⁰ I. KANT, 2 RECHTSLEHRE 49E (1796).

²¹ See, e.g., A. VON HIRSCH, *supra* note 1; N. MORRIS, *supra* note 1; D. FOGEL, *supra* note 1.

²² See, e.g., K. MENNINGER, *THE CRIME OF PUNISHMENT* (1968).

defendant is a persistent offender whose commitment for an extended term is necessary for protection of the public."²³ In their Report on Corrections, the National Advisory Commission on Criminal Justice Standards and Goals offered a similar justification for extended terms.

State penal code revisions should contain separate provision for sentencing offenders when, in the interest of public protection, it is considered necessary to incapacitate them for substantial periods of time. The following provisions should be included: . . . Authority for the judicial imposition of an extended term of confinement of not more than 25 years, except for murder, when the court finds the incarceration of the defendant for a term longer than 5 years is required for the protection of the public and that the defendant is a) a persistent felony offender, b) a professional criminal, or c) a dangerous offender.²⁴

This sentencing standard defines a persistent felony offender as: over twenty-one years of age; convicted of three felonies, with one of the prior felonies occurring within five years of the current offense; with the felonies including at least two crimes where serious bodily harm was either intended or accomplished.²⁵ This standard is far more exclusive than the one used in *Rummel*.

Several states have incorporated provisions from such models and recommendations into their codes. Florida law currently contains habitual offender provisions for both felons and misdemeanants.²⁶ Neither provision requires that crimes of violence be involved as criterion offenses. In addition, Florida allows the inclusion of behavior that has not resulted in a criminal conviction in the tabulation of prior record.

For purposes of this section, the placing of a person on probation without an adjudication of guilt shall be treated as a prior conviction if the subsequent offense for which he is to be sentenced was committed during the probationary period.²⁷

Alaska has treated the commission of a crime by a defendant who is out on bail for a pending charge as a sentence-enhancing variable.²⁸ Again, no determination of guilt need be made for the initial charged offense. Indeed, the charge leading to bail may ultimately never result in a conviction. California, on the other hand, adopted a sentence enhancement provision based not on conviction alone, but rather on the more restrictive test of previous felony

²³ See MODEL PENAL CODE Standard 5.3 (1962).

²⁴ NATIONAL ADVISORY COMMISSION ON CRIMINAL JUSTICE STANDARDS AND GOALS, REPORT ON CORRECTIONS 294 (1973).

²⁵ *Id.*

²⁶ FLA. STAT. ANN. § 775.084 (West 1986).

²⁷ *Id.* at § 775.084(2).

²⁸ R. SINGER, JUST DESERTS: SENTENCING BASED ON EQUALITY AND DESERT 78 (1979).

incarceration.²⁹

Thus, in practice as well as in proposal, a prior record of involvement in criminality has provided a basis for additional punitive severity. In some jurisdictions, such as Texas, these enhancements have appeared in special habitual offender acts. In other jurisdictions, such as Florida, sentencing guidelines use an offender's prior record as one of a variety of aggravating factors leading to extended sentences.³⁰

However, as suggested above, most sentence enhancement provisions have been conceived as crime control strategies. Enhancement predates the emergence of the backward-looking retributivist approach and poses a potential predicament for the justice model. Given the current importance of justice-oriented determinate sentencing systems, it is important to examine the arguments related to the use of prior record within the justice model framework.

III. ARGUMENTS OF IMPLICIT ATTRIBUTE

Arguments of implicit attribute assert that the very commission of repeat acts of criminality implies the existence of personal attributes or characteristics not apparent through more direct evidence. Furthermore, these attributes are relevant to the process of sentence-determination. There are several versions of this argument, all relying upon the general claim that recidivism is indicative of a greater personal evil and, hence, a higher level of moral culpability. According to this view, the offender who insists upon repeat acts of criminality reveals a more evil nature than does his non-recidivist counterpart, even if the instant act at hand is equivalent. In the conventional metric of the justice model, the severity of punishment is tied to the culpability of the offender.³¹ Thus, the more culpable the offender, the more severe the punishment merited.

This viewpoint seems to be little more than an argument about the general character of the offender. Singer, in his critique of von Hirsch, argues that prior record is actually a proxy for the general character of the offender.³² He notes that the use of criminal record to assess character invites the use of a multiplicity of other variables, such as employment history, childhood experience, and religious practices, to determine proper punishment.³³ Singer's point is that

²⁹ *Id.* at 92.

³⁰ FLA. STAT. ANN. § 775.084.

³¹ See A. VON HIRSCH, PAST OR FUTURE CRIMES: DESERVEDNESS AND DANGEROUSNESS IN THE SENTENCING OF CRIMINALS 71-74 (1985).

³² R. SINGER, *supra* note 28, at 69-71.

³³ *Id.* at 70.

if society is concerned with the character of the offender, then it is appropriate to have an interest in any variable available which may contribute to an accurate estimation of this character. Once this strategy is adopted, however, many of the same sentencing problems that the justice model presumably is designed to avoid will be reintroduced.³⁴

In response to this criticism, von Hirsch notes that Singer's point regarding prior record refers to its use as a means of establishing the good or bad character of the offender. Von Hirsch argues that what is at issue is not the general moral character of the offender, but rather the capacity of prior record to reveal whether criminal behavior is "characteristic" of the offender.³⁵ However, von Hirsch does not explain the importance of characteristic behavior. A conventional view would be that the extent to which a behavior is characteristic is important because it conveys something about the moral nature of the individual and ultimately the blameworthiness of the offender. Thus, to know that criminal activity is characteristic is to know something about the offender's moral character. Of course, if this is the case, then Singer's argument represents a serious concern.

A more specific articulation of the implicit attribute argument proposes that recidivism reveals an aggressive defiance that adds to the blameworthiness of the offender.³⁶ The offender has been alerted by his previous conviction to the unacceptability of his behavior. The initial conviction, and perhaps any ensuing punishment, acts as an informational conveyance. After being subjected to such an informational barrage, the offender cannot fail to understand the message. Continued criminal behavior therefore reflects a defiance of the law.

Of course, defiance may be too strong a term. Recidivism might be explained through a milder form of normative resistance, namely, indifference. In this view, the recidivist displays indifference to the messages represented by previous convictions. The offender does not actively pursue opportunities to show contempt or disregard for societal norms. Rather, his or her behavior simply reflects a lack of interest in conformity. The offender who is uninterested in the message conveyed by conviction, the message of condemnation or threat, is unsatisfactorily attentive to the responsibilities of citizenship. For example, children whose violations of

³⁴ *Id.* at 69-71.

³⁵ von Hirsch, *supra* note 19, at 609.

³⁶ Fletcher, *supra* note 17, at 57.

school or household rules reflect an absence of interest or attention are easily distinguishable from those who intentionally and energetically commit such violations. Similarly, the indifference of the criminal offender may increase blameworthiness, but his or her evil may be less troubling than that associated with the more vigorous assertiveness of the defiant recidivist.

Each of the above arguments has at its core two important ideas. First, repetitive criminal involvement indicates the existence of "hidden" attributes possessed by the offender. Second, personal blameworthiness increases as these hidden features are uncovered. Of course, hidden attributes might be revealed by continued criminal activity without necessarily increasing blameworthiness. For instance, the discovery of a defect in an individual's ability to learn new lessons, such as the lessons presumably taught by the experience of criminal conviction, might help explain recidivism without adding to the culpability of the offender. In the arguments at hand, however, the revealed attributes do increase blameworthiness, and ultimately influence the amount of punishment deserved by the offender.

There are several difficulties with this view. First, is there any reason, beyond unquestioned acceptance of prior record of criminal involvement as a proxy or indicator, to accept the assertion that such hidden attributes actually exist? Certainly it is logically consistent with a record of continued criminal activity that defiance, indifference, or general evil malevolence be found at the source of the behavior. Yet, mere logical consistency alone provides only the thinnest grounds for acceptance. A multiplicity of alternative hypothesized attributes possess an equal level of logical consistency. One must ask whether there are any independent grounds for viewing recidivism as the result of the asserted underlying features. For instance, if defiance were at the root of recidivistic behavior one might expect to find defiance expressed in other areas of enterprise. Does the offender espouse a general rhetoric of repudiation? Do general dealings with others reflect defiant disregard for normative expectations? A juvenile gang member displays his defiance through delinquency but also through patterns of dress, demeanor, and speech.³⁷ The same can be said for the behavior of certain political reformers and civil dissidents, such as Thoreau.³⁸ In both cases, one finds defiance expressed along a variety of behavioral

³⁷ See Piliavin & Briar, *Police Encounters with Juveniles*, 25 AM. SOC. REV. 206 (1964); Black & Reiss, *Police Control of Juveniles*, 35 AM. SOC. REV. 63 (1970); Lundman, Sykes, & Clark, *Police Control of Juveniles: A Replication*, 15 J. RES. CRIME & DELINQ. 74 (1978).

³⁸ See H. THOREAU, WALDEN (1854).

dimensions. Before the proposition that recidivists are inherently defiant is accepted, it seems reasonable to ask the empirical question of whether other expressions of defiance characterize the general actions of recidivists.

Aside from empirical matters, are hypothesized traits relevant to the issue of just punishment? Defiance may not be mannerly or behaviorally appealing, but it is generally not illegal. Is a retributive-based system of punishment willing to tolerate enhancements of punishment for behavior that itself does not violate any statute? It may be offensive that a criminal reacts to society's condemnation with indifference or defiance, but is it sufficiently offensive so as to warrant criminalization? If so, one might expect to find statutes criminalizing defiance or indifference apart from any conjunction with crime. Would punishment be acceptable for a previously convicted individual who was defiant, but who elected not to commit further crimes? Again, recourse to examination of behavioral dimensions not involving criminal activity might show such defiance. Unless it can be demonstrated that the combination of a current criminal act and a non-criminal act results in elevated legal culpability, it is difficult to justify punitive enhancements based upon such a combination.

Of course, it must be specified whether it is conduct or personal characteristics that merit enhanced punishment. Is it the *act* of defiance or the *state* of being defiant that warrants enhancement? If it is the latter, then the extra punishment is added for what the offender *is*, rather than for what he *does*. This appears to be a curious reversion to punitive rationales that focus on the character of the criminal instead of the attributes of the crime. The rehabilitative rationale, much criticized by enthusiasts of the justice model, makes vigorous use of such personal characteristics. It can be argued that because blameworthiness itself is a personal attribute rather than an act, the justice model does tolerate use of personal features.³⁹

The justice model, however, generally assumes that humans are free agents choosing their acts, and are thus responsible for the consequences of such acts. Blameworthiness is the default condition and is subject to question only in the presence of special mitigating factors.⁴⁰ Responsibility for actions is a feature of all persons, not an attribute found only in criminals. In contrast, evil, defiance, or indifference are not universally assumed of all persons, and their

³⁹ von Hirsch, *supra* note 19, at 609-12.

⁴⁰ See, e.g., H. GROSS, A THEORY OF CRIMINAL JUSTICE 453 (1979); A. VON HIRSCH, *supra* note 31, at 72.

attribution represents a process directed at specific individuals. The justice model's purported disinterest in most non-universal personal variables⁴¹ strains the credibility of the use of attributes such as personal defiance.

On the other hand, if defiant *acts* are the target of punitive enhancements, it is necessary to show the act to be not just an evil, but an evil worthy of punishment. Additionally, if the act of defiance justifies extra punishment, if punishment is to be apportioned according to the seriousness of the crime, and if the seriousness of the crime is to be determined in terms of harm and culpability,⁴² how are we to measure the amount of defiance associated with a particular criminal act? Presumably, the amount of defiance contributes to the total blameworthiness of the offender and must be specified before an appropriate punishment can be determined. It might be possible to sidestep this problem by arguing that defiance is a dichotomous variable and that, when it exists, it occurs in the same quantity or with the same quality in each instance. This notion, however, seems to contradict our common experience with defiance. People seem to display various levels of defiance just as they display various levels of joy, anger, malice, and benevolence.

One final variation on the theme of implicit attribute represents an effort to tie together the forward-looking policies of selective incapacitation with the backward-looking retributivist agenda. Moore and his colleagues suggest that, due to the inefficiencies in the criminal justice system, repeat offenders escape punishment for more crime than non-recidivists, thereby justifying the use of enhanced punishment for repeaters.⁴³

Given the magnitude of the punishment "deserved" by high-rate offenders, one can reasonably be skeptical that the high rate offenders get their "just deserts" relative to low rate offenders. To the extent that high-rate offenders get less than they deserve, an important inequity is introduced into the system. The guiltiest, most blameworthy offenders are being punished less than they deserve on the basis of their acts. . . . [I]f punishments for given offenses are increased for persistent high-rate offenders, justice might be enhanced because the distribution of punishment would more closely fit the distribution of rates of offending.⁴⁴

Moore thus suggests that there are hidden attributes of repeat offenders. Repeaters are more frequently involved in criminality than is suspected. If the criminal justice system were more efficient, this

⁴¹ *Id.* at 136-38.

⁴² *Id.* at 64-66.

⁴³ M. MOORE, S. ESTRICH, D. MCGILLIS & W. SPELMAN, *supra* note 18.

⁴⁴ *Id.* at 67.

hidden criminality would be visible for all to observe, and there would be little objection to imposing punishment for these now known offenses.

Several considerations plague this analysis. First, it has yet to be demonstrated that all individuals with records of recidivism have committed offenses in addition to those leading to convictions. Until this can be shown, the false positive issue must be confronted. In meeting the false positive problem, it will be necessary to develop some sense of how many errors society is willing to tolerate to accomplish its goals regarding recidivists. In the language of selective incapacitation, how many innocent-of-hidden-crime citizens should be afflicted with more punishment than is deserved in order to provide just punishment for guilty-of-hidden-crime citizens? The language and boundaries of the discussion smack of conventional utilitarianism⁴⁵ and, on that basis, will probably be rejected by many retributivists.

In addition, there are due process objections to the scenario Moore presents. Punitive enhancements based upon the assumption of additional criminality effectively convict and sentence citizens for crimes they were never accused of committing. The typical due process protections allowing defendants to bring forth evidence contradicting the state's assertion of criminality are bypassed because charges are never filed. The resulting extra punishment, however, is nonetheless just as painful as though it were the product of a careful and scrupulously fair judicial proceeding. The objections raised by retributivists to enhancing punishment in order to achieve general deterrent effects seem applicable to Moore's proposal. Furthermore, if, as Davis argues, fair sentences must be the outcome of a fair process,⁴⁶ sentences produced in the manner described by Moore must be unfair. The formal process of determining blameworthiness ceases to be fair because it systematically condemns both the undeserving and the deserving to enhanced punishment. Indeed, after introducing this approach, Moore backs away from it and adopts policy recommendations limited to improvements in investigative and prosecutorial efficiency in order to improve the chances of detecting, apprehending, and convicting higher proportions of repeaters.⁴⁷

In general, arguments of implicit attribute entail both a process and a result that have been found to be objectionable to retribu-

⁴⁵ See J. BENTHAM, AN INTRODUCTION TO THE PRINCIPLES OF MORALS AND LEGISLATION (1870).

⁴⁶ Davis, *Just Deserts for Recidivists*, 4 CRIM. JUST. ETHICS 29 (1985).

⁴⁷ M. MOORE, S. ESTRICH, D. MCGILLIS & W. SPELMAN, *supra* note 18, at 67-68.

tivists. The commission of multiple acts of criminality is utilized as a device to establish the existence of features that are unapparent through more direct forms of scrutiny. Advocates of the medical model approach to punishment have traditionally maintained the existence of otherwise undetected forms of personal pathology, often solely on the basis of involvement in crime.⁴⁸ Enthusiasts of selective incapacitation have argued that involvement in crime can be used to discern the existence of the attribute of dangerousness.⁴⁹ Furthermore, supporters of the rehabilitative and incapacitative rationales have argued for, and often practiced, the prediction of future behavior on the basis of the asserted attributes, as, for example, in parole prediction. These forward-looking views have generally been unacceptable to retributivists.⁵⁰ It should be noted, however, that although retributivists may not be interested in devising punishments based upon assessments of future behavior, those retributivists who argue from an implicit attribute approach seem to share with their medical model and incapacitative antagonists the practice of asserting the existence of attributes without empirical substantiation.⁵¹ Thus, the difference between retributivists and utilitarians who defend the use of prior record in sentencing may turn on what use is made of assumed implicit attributes, not on the assertion of their existence.

IV. ARGUMENTS OF ELEVATED HARM

Proponents of the justice model argue that punishment should be related to the harm associated with crime. Serious offenses merit severe penalties, while minor crimes deserve minor punishments. Thus, punitive enhancements make sense if recidivistic activity itself adds to the harm associated with instant offenses. A number of arguments can be adduced in support of the proposition that the harm produced by a repeat act of criminality exceeds the harm resulting from an initial criminal act.

One line of thought argues that crime is unacceptable because it entails taking unfair advantage of those who conform their behavior to the requirements of law. The argument typically posits agree-

⁴⁸ See, e.g., K. MENNINGER, *THE CRIME OF PUNISHMENT* (1968).

⁴⁹ See, e.g., P. GREENWOOD, *supra* note 18.

⁵⁰ A notable recent exception is A. VON HIRSCH, *supra* note 31, at 149-59. Von Hirsch attempted to provide for a crime control component.

⁵¹ In fact, it could be asserted that, for the rehabilitative rationale, involvement in crime is often viewed as nothing more than a trigger for the initiation of an empirical process wherein convicts are subjected to empirical assessment to determine whether pathology is present, not what form it assumes. Thus, rehabilitation asserts that prior record merely suggests, rather than confirms, the existence of hidden implicit attributes.

ment as the primary predicate of social arrangements, with individuals foregoing certain advantages in order to access other, ultimately more important rights, protections, and opportunities. Davis offers a succinct description of the advantage viewpoint. In referring to the criminal, Davis writes:

Even if his act would be morally indifferent were there no law, the obedience of others makes his disobedience a taking of unfair advantage (all else equal). Others, though they too would like to take such liberties as he has did not. He has something they do not. The unfair advantage is the "illicit pleasure" in every crime, whether jaywalking or murder, prostitution or stealing. What the criminal deserves (for this act) is a punishment proportioned to that advantage (and to that advantage alone).⁵²

Conceiving of crime as the taking of unfair advantage still provides no guidance regarding how the advantages associated with the sum of individual offenses in a series of offenses manages to total to an advantage, and equivalently to a harm, greater than the sum of the individual parts.

In a more recent work, Davis offers a solution. He suggests that recidivists are especially blameworthy because their acts go beyond simple unfair advantage.

So, to say that a recidivist deserves more punishment for what he did than would a first offender for the same act must be to say simply that the recidivist (by an act seemingly identical to that of a first offender) takes an unfair advantage that the first offender does not take. But what might that advantage be? That advantage must, I think, be a "second order" advantage—that is to say, the unfair advantage of taking more than one's fair share of unfair advantage.⁵³

Davis uses the analogy of an auction to demonstrate his point.⁵⁴ He finds merit in the notion that, because recidivists would be willing to pay a price at an auction above and beyond the price that first-time offenders would pay to purchase a license to commit the same offense, recidivists must therefore derive an advantage beyond the advantage accruing to first-time offenders. If no such advantage existed, how could the willingness to pay more than a first-time offender co-bidder be explained? For Davis, a recidivist is not merely one who is willing to buy a license to commit an offense with impunity, but one who is willing to buy both that license and an additional license allowing him to purchase the first license.⁵⁵ More importantly, Davis argues, "we can gauge the unfair advantage of a

⁵² Davis, *How to Make the Punishment Fit the Crime*, 27 *NOMOS* 119, 138 (1985).

⁵³ Davis, *supra* note 46, at 41.

⁵⁴ *Id.* at 39-41.

⁵⁵ *Id.* at 40.

particular crime by determining the value of the corresponding 'license.' . . . The price of 'pardons-in-advance' should correspond to the advantage taken unfairly by doing the forbidden act without a license."⁵⁶ This correspondence is crucial because punishment is determined, at least in part, by the amount of unfair advantage obtained by the offender.

Thus, it is fair to impose additional sanctions upon the recidivist because he or she gains additional unfair advantage beyond that acquired by the first-time offender. This additional advantage is indicated by the recidivist's willingness to purchase the right to commit a crime with impunity for a price that exceeds that charged to first-time offenders.

Two observations merit mention regarding this view of the recidivist premium, both involving the notion of "unfair advantage." Davis suggests that criminals take an unfair advantage when they commit crimes. Although this conclusion may seem self-evident for certain kinds of crimes, such as instrumental offenses (larceny, burglary, auto theft), it is difficult to see the unfair advantage for many other violations. How does the user of a deadly, illegal drug gain an unfair advantage over his or her law-abiding counterparts, especially when use of the drug is likely to result in an addiction that will only bring on further physical and psychological woes? How does the violent offender who kills a spouse in a moment of passion gain an unfair upper hand? In both of these examples, the offender may put himself at a severe disadvantage, in the former case by setting off a progression of self-destructive behavior, and in the latter case by eliminating a spouse that is perhaps the offender's main source of support, pleasure, and comfort. These all-too-common scenarios also call into question Davis's notion of "illicit pleasure" and suggest that illegal acts, like legal acts, have the capacity to result in either pleasure or pain, advantage or disadvantage.

More particularly with regard to recidivist premiums, the fact that an individual might be willing to pay at auction more than a first-timer for the license to commit a crime with impunity demonstrates only that individuals are willing to pay different prices for the same commodity. This discovery is relatively unsurprising when viewed in light of consumer purchase patterns. Consumer purchase patterns for conventional goods display a similarly varied willingness. It does not follow that, of the customers who are willing to pay different prices for the same coffeemaker, the customers paying

⁵⁶ *Id.* at 38.

the most will necessarily derive a greater advantage from possession of the merchandise.

Furthermore, in analyzing purchasing decisions, should the perceptions of advantage or the advantage actually obtained be the primary concern? Are the real outcomes of a purchase decision the basis for a purchase, or is the basis merely expectation of advantage? The same question applies to the purchase of licenses to commit crimes. An offender might be willing to pay the recidivist surcharge because of expectations that have little to do with reality, and, in fact, the offender might well place himself at a disadvantage in making the purchase. Unless there is a willingness to define *a priori* the commission of crime as representing an unfair advantage, without regard for the consequences of the offense, it is hard to understand how the "unfair advantage" notion can lead to an acceptance of punitive enhancements for recidivists.

A somewhat different conceptualization of the unfair advantage notion focuses not only upon the willingness of the offender to take what belongs to others, but also upon the offender's exercise of special skills acquired at public expense. This line of argument suggests that recidivists possess special advantages enabling them to be more effective perpetrators of crime. The experience of apprehension, prosecution, and conviction provides instruction on how to avoid most effectively the full impact of the criminal justice system in future encounters. According to this view, recidivists are more threatening than non-recidivists because this experience increases the probability that they will be able to elude detection, capture, and conviction and thus will be able to continue to victimize society with relative impunity. To offset this additional capability, the justice system must provide an elevated punitive response. Note that this argument is not the utilitarian argument that crime prevention demands extended punitive incapacitation. Rather, it is that the possession of special abilities to do harm puts the individual in a position of heightened responsibility not to exercise those abilities. The failure to meet this responsibility justifies additional increments of punishment.

This notion of heightened responsibility is not uniquely applicable to criminals. For instance, politicians have the power to use their special position in the community for their personal advantage and to the detriment of the community. When a politician accepts a one hundred dollar bribe, what is shocking is not the magnitude of the material gain, but rather the abuse of power and position. If respected citizens are especially blameworthy because they take unfair advantage of their special positions, why is it unjust to attribute

to the experienced, skillful former convict an elevated component of blameworthiness when he takes advantage of his privileged information to commit additional crimes? Society is more vulnerable when its politicians, role models, and pillars of the community acquire citizen trust. When they violate that trust, they take unfair advantage. The same can be said of the recidivist. The repeat offender has learned some of the secrets of the system, and society is therefore more vulnerable. Yet, there is no punitive or even incapacitative premium applied to the first offense to offset the acquisition of this knowledge. The convict is trusted not to make ill-use of the information. The behavioral expectations applied to the convict, which are also applied to persons vested with conventional power and influence, are not identical to those applied to the average citizen. As a consequence of rightly expecting more, society is justified in blaming more when its expectations are not met.

This line of reasoning seems to hold the convict responsible for the potential benefits of an education never sought. The expectations that society maintains for public officials accompany what are presumably the benefits of the position. These elevated expectations can be understood as a tariff that must be paid for success. Sometimes such expectations are even formally codified, as in the United States Senate's Code of Ethics.⁵⁷ In addition, both the advantages and the heightened responsibilities comprise a package that can be declined. After all, despite occasional rhetoric about drafting candidates, no one is forced to accept public office. Regardless of what one thinks of assigning special responsibilities to public figures simply because they happen to be in the public eye, that situation is not comparable to that of the convict who experiences the intrusion of the criminal justice system against his or her will. The convict experiences the special lessons that exposure to the system provides not out of willingness to improve upon educational attainments, but out of the forced subjection represented by captivity. Acquisition of secrets to "beat the system," and the elevated responsibility entailed by the possession of those secrets, are not the trade-off for other compensating advantages. Thus, the assertion that criminals bear the extra responsibility that all in positions of advantage bear, and are therefore culpable in an extra measure of blameworthiness when they fail to behave responsibly, appears unpersuasive. Criminals are not sufficiently analogous to those holding legitimate positions of trust and influence.

Another approach to the contention that recidivists actually

⁵⁷ See S. Doc. No. 1, 98th Cong., 1st Sess. 65-77 (1984).

perpetrate more harm than their first-time offender counterparts is the argument that recurrent crime demoralizes society, undermines confidence in public institutions, and generates a fear that diminishes the quality of life.⁵⁸ Public knowledge of recidivistic criminal activity reveals the ineffectiveness of efforts to control crime. Of course, this form of asserted harm is presumably subject to various attempts at empirical measurement. Citizen attitudes regarding prospects for the future, fear of visiting the downtown theatre district at night, the moral character of young people, the fear of criminal victimization in one's own neighborhood, confidence in the capacity of the penal system to effect desired modifications in the behavior of convicts, and faith in the police as agents of crime prevention, are some of the topics that have already been examined.⁵⁹ More direct methods, such as observations of the level of avoidance behavior of citizens in high risk neighborhoods, could also be utilized. Time series analyses of these kinds of data might help reveal trends in the impact of recidivism on social life.

The assertion of a heightened level of demoralization, fear, and degraded life quality resulting from recidivism itself, apart from the substantive harm caused by the instant act, is therefore a claim requiring empirical substantiation. Recidivism may well result in such additional harms, yet it would seem that when deprivations of liberty or property are at stake, as they are when punishment is at issue, the burden of proof falls upon those who assert the injury. Pending demonstration of the existence and magnitude of such harms, it is difficult to see how punitive enhancements can be imposed in a system of desert-based just punishment.

V. ARGUMENTS OF LENIENCY

Punitive traditions have long included provisions for leniency. In the Gospel according to Matthew, the plight of a debt-ridden slave is described.⁶⁰ The slave is condemned to be sold, along with his family and possessions, in order to satisfy a debt. Upon the entreaties of the slave, the master relents. "And the lord of that slave

⁵⁸ A recent example is the case of the California man convicted of the rape and mutilation of a teenage girl. After completion of a prison term, the State attempted to release him on parole. Both the State of Florida and numerous California municipalities refused to accept him into their jurisdictions. Public apprehension has run so high that California has been forced to house him temporarily in a trailer situated on the grounds of a state correctional facility. See Gainesville Sun, June 17, 1987, at 4A.

⁵⁹ T. FLANAGAN & M. MCLEOD, SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS § 2 (1983).

⁶⁰ *Matthew* 18:24-27.

felt compassion and released him and forgave the debt.”⁶¹ In eighteenth century England, juries displayed leniency in their implementation of the Bloody Code.⁶² The so-called “pious perjury” of bringing convictions of petit larceny in cases warranting conviction for grand larceny became a regular strategy for showing leniency toward thieves at risk of execution. In early nineteenth century New York, the state issued pardons to approximately one-half of its inmates, in part due to the recognition that sentences were often unduly severe.⁶³

Leniency is pertinent to discussion of enhancements of punishment because analysts such as von Hirsch have argued that recidivist statutes can be viewed as the withholding of the leniency that typically defaults to non-recidivist offenders.

The role of prior record I am proposing is one that reduces severities of punishment. The first offender is to get less punishment than he would were the presence or absence of a criminal record disregarded in assessing deserts; and the previously-convicted offender is not to get any more punishment than he would in a hypothetical desert-based system that ignored prior criminality.⁶⁴

Thus, the so-called “enhancements” of punishment directed at recidivists are in actuality little more than a return to the pure use of offense-based desert as the determinant of sentence. Fletcher’s term “recidivist premium” is really the flip side of “non-recidivist discount.”⁶⁵ In this view, the defense of the recidivist premium is actually the defense of mitigations in sentence for non-recidivists.

Why would the default condition be one of discount? Von Hirsch offers three arguments in support of this discount. First, it is reasonable to accord to the non-recidivist offender “some respect for the fact that his inhibitions against wrongdoing have functioned on previous occasions, and show some sympathy for the all-too-human frailty that can lead someone to such a lapse.”⁶⁶ Second, the initial offense is

something that fallible humans are capable of doing in an unguarded moment; that the adverse judgment of others is designed to give the person the opportunity to reflect and set his priorities straight; and that he is entitled to have it assumed that he takes such adverse judgment to heart, in the absence of subsequent conduct by him to the

⁶¹ *Id.*

⁶² M. IGNATIEFF, *A JUST MEASURE OF PAIN* 19 (1978).

⁶³ B. MCKELVEY, *AMERICAN PRISONS: A HISTORY OF GOOD INTENTIONS* 27 (1978). McKelvey also points out that the pursuit of practical goals, such as the reduction of overcrowding, provided other incentives to issue pardons. *Id.* at 61.

⁶⁴ von Hirsch, *supra* note 19, at 613.

⁶⁵ See Fletcher, *supra* note 17.

⁶⁶ von Hirsch, *supra* note 19, at 601.

contrary.⁶⁷

At the time of sentencing, the manner in which the offender will respond to the punishment he or she will receive is unknown. As a moral agent, the offender gets a "second chance"⁶⁸ to modify his behavior and to respond properly to the punishment. Thus, initial punishment entails "muting our disapproval of the actor somewhat."⁶⁹

Von Hirsch's third point is that the notions of "human frailty" and "second chance" are important because they reflect the operation of tolerance. Von Hirsch states that "[t]olerance refers to the willingness to overlook wrongdoing to some extent in deciding how much disapproval a person deserves for his acts. Tolerance, in other words, is something that is exercised in determining the level of response that is deemed deserved."⁷⁰ Furthermore, von Hirsch argues, "tolerance is granted on the grounds that some sympathy is due human beings for their fallibility and their exposure to pressures and temptations; and some respect is owed for their capacity, as moral agents, to respond to others' censure and to reconsider their future course."⁷¹

Thus, human frailty, moral agency, and tolerance form a triadic justification for punitive leniency. It is important to note that, for von Hirsch, tolerance is not simply an exercise in mercy. As he notes above, deference is owed out of respect for human frailty and moral agency. Von Hirsch points out that tolerance, properly understood, is tolerance considered as a factor determining the deserved response. Tolerance is not applied apart from determinations of desert, as in the application of mercy, but rather is an integral part of the desert-determination process.

Von Hirsch's arguments are both appealing and puzzling. It is easy to feel comfortable with the notions of "human frailty," "second chance," and "tolerance." It is easy to recall circumstances in which personal experience seems well-captured by these ideas. Who has not fallen prey to what can be perceived as personal human frailty? Who has not made erroneous decisions that seemed "out of character?" Who has not benefited from the tolerance of others and from being given a second chance? Yet, the fact that people are able to apply their experience to these concepts means neither that this application is accurate nor that it has any applica-

⁶⁷ *Id.* at 602.

⁶⁸ *Id.*

⁶⁹ *Id.* at 603.

⁷⁰ *Id.* at 603 n.25.

⁷¹ *Id.* at 603.

tion to the sentencing problem at issue. Society may want to believe in human frailty as an explanation for "errors," but such a belief may be little more than a rationalization for conduct.

What is it that society wants to assume about human conduct? Do actors freely make decisions for which they properly can be lauded or censured? It is important to understand precisely what the notion of "human frailty" means. To von Hirsch, this concept apparently means that actors are not as culpable when they commit acts that are first-occurrence acts, that are acts out of character with their typical behavior. This interpretation seems to harken back to the primary deviants of Lemert, whose early acts of deviance were out of keeping with their normal behavior.⁷² In rejecting the thesis that first-timer offenders must be shown leniency as part of a strategy to give the offender proper notice that what was done was wrong, von Hirsch writes that these initial acts may result from the offender "for the moment [placing] his own needs or inclinations above the requirements of doing right."⁷³

It is difficult, however, to see how this process of placing personal needs above doing right distinguishes first offense motives from those associated with recidivism. Fallible humans may submit to their "own needs" once as a result of fallibility, or they may submit multiple times, again because of fallibility. How can it be determined that human fallibility appears as a blame-reducing factor and, by implication, as an explanation for the offense, only on initial forays into crime? Furthermore, is fallibility, the tendency to err, beyond the actor's power to control? If it is, how can any blame be assigned to the offender? If it is not, how can the diminution of responsibility be justified? Given the general willingness of retributive theory to assume personal responsibility, if the actor is truly responsible and knew in advance that what was done was wrong, why does the actor deserve "the opportunity to reflect and set his priorities straight?"⁷⁴

The assertion that human acts are sometimes the consequence of frailty, and merit tolerance that expresses itself in the issuance of second chances, raises questions about the underlying causes of human behavior. In addition, this assertion poses questions about the existence of frailty in particular cases. Are we to assume that frailty works its will only on a teenager's initial illegal drink, the speeder's first driving ticket, or the student's first excursion into

⁷² E. LEMERT, *SOCIAL PATHOLOGY* (1951).

⁷³ von Hirsch, *supra* note 19, at 602.

⁷⁴ *Id.*

cheating? Von Hirsch regards the continued participation in undesired acts as evidence of fully responsible and thus, fully blameworthy, behavior. It seems equally reasonable, however, to view the failure to properly "reflect and set his priorities straight"⁷⁵ as evidence of an even more profound than expected measure of human frailty. Furthermore, if it is reasonable to assume that the influence of frailty will not necessarily be limited to motivating first offenses, then how can it be determined when a repeat offender has fallen from grace again simply as a result of frailty? In addition, how can those cases in which frailty played no part in even the first offense be identified? Before frailty can be operationalized as a defense for sentence mitigation, far more detailed specification than has currently been achieved will be required. If what an individual deserves is to depend, in part, upon how much the offense can be attributed to human frailty, it is imperative that frailty be something that can both be demonstrated in the general case and recognized in the particular case. Of course, from the retributivist point of view, this would seem to require a relatively uncomfortable shift toward additional consideration of individualistic variables.

Mercy operates somewhat differently than tolerance as a mitigator of punitive severity. Generally, mercy is applied to reduce punishment even when desert dictates otherwise. It is possible to justify mercy on a number of grounds. Beccaria argued that mercy had long been justified as a remedy for punishments that were excessively severe.⁷⁶ A papal encyclical issued in 1980 asserted that mercy, though not identical to justice, was quite compatible with justice.⁷⁷ Modern advocates of desert-based justice have proposed their own operationalizations of mercy. For instance, Gross's principle of sentence mitigation permits administration of sentences less severe than deserved out of deference to concerns apart from desert.⁷⁸ In referring to factors such as the unusual hardships on a convict's family, convict cooperation with the state in securing the convictions of others, and the amends already made for harm committed, Gross notes that "[t]he punishment deserved is no less when these things are taken into consideration, but since what is deserved is not all that matters in deciding what sentence is right, there is

⁷⁵ von Hirsch, *supra* note 19, at 602.

⁷⁶ C. BECCARIA-BONESANA, *AN ESSAY ON CRIMES AND PUNISHMENTS* (rev. ed. 1963). Contrarily, he held that if the laws were properly crafted, there would be no need for mercy because the law would already contain the proper remedy for the offending act. (Chapter 20).

⁷⁷ N. MORRIS, *MADNESS AND THE CRIMINAL LAW* 156 (1982).

⁷⁸ H. GROSS, *supra* note 40, at 449.

good reason for a lighter sentence in spite of that.”⁷⁹ Gross thus diverges from von Hirsch’s application of tolerance in arguing that mercy is to be applied apart from considerations of desert and does not affect the determinations of desert. More particularly, Gross writes:

Apart from justice, there is mercy. If justice is without rigor, justice is undone; and yet the harshness often accompanying rigorous justice may be tempered without causing justice to be undone. But merciful dispensation is not available on the easiest terms. Mercy is always given without there being a claim of right to it, and so it is exceedingly difficult to distinguish the compassion of common decency that ought to influence a sentence from the tender regard that is a precious human sentiment but has no place in the deliberations of a sentencing judge.⁸⁰

Gross does not develop an argument in favor of these propositions. Rather, he points out that certain factors have been used as mitigators, that it seems right to use them as such, and that mercy itself may rightfully be included in the sentence-determination process. As he notes above, mercy is an important factor apart from justice and can be invoked without jeopardizing the justice of a sentence. Receiving a punishment of less than is deserved as a result of the application of mercy is perfectly consistent with justice.

Gross expresses concern about the practical problem of being able to specify when mitigating factors such as mercy can be used safely and when their use places the justice of a sentence at risk.⁸¹ The problem of where to draw the line, however, is not the only difficulty associated with this view. It is unclear why mercy, which is an act of favor offered from unobligated compassion and not out of respect for what is due, has any place in the sentencing of criminals. Proponents of the justice model typically insist that punishment be strictly determined by what is deserved. Though arguing for mitigation of sentence for non-recidivists, von Hirsch maintains that human frailty should be included as a factor in the computation of desert, thereby sidestepping the difficulty that is inherent in Gross’s view of the role of mercy. That a sentence of less than what one deserves is nonetheless just suggests either that the notion of justice has unexplored conceptual creases or crevasses or that punishment is somewhat less strictly tied only to desert than is generally argued.

A common answer to these questions is that desert is a limiting, not a defining, principle.⁸² Desert sets the boundaries within which

⁷⁹ *Id.*

⁸⁰ *Id.* at 451.

⁸¹ *Id.*

⁸² A. VON HIRSCH, *supra* note 31, at 38-46.

sentences may be modified without violating the integrity or the justice of the sentence. Within these boundaries, it is possible for any number of factors to be applied to accomplish various goals. Even utilitarian goals may be pursued so long as justice is not jeopardized by their pursuit. This formulation, however, still holds desert as the determining factor in sentencing. Mercy cannot be applied so as to produce sentences beyond what is stipulated by desert. Gross argues that a sentence of less than what is deserved might, nonetheless, be just.⁸³

Finally, it is possible to conceive of leniency as a device to accommodate for the possibility that actors conduct themselves on the basis of partially formed judgmental processes. For example, juveniles arguably are only partially mature agents of their own behavior. Their lack of experience and understanding limits the extent to which they can be held fully responsible. Thus, lenient sentences are distributed to juveniles out of deference to their partially formed character. Such leniency also provides the "second chance" discussed above, not because of a general desire to allow for self-scrutiny, but, rather, because of the expectation that young people are not fully prepared to exercise responsible citizenship.

This view of the role of leniency focuses on the extent to which juveniles are only partially formed agents of responsible behavior. The notion of "partial responsibility," discussed long ago by Aristotle,⁸⁴ is still troublesome today. The merits of hard or soft determinism versus free will are beyond the scope of this discussion. However, even if partial responsibility is possible, the ways in which particular degrees of responsibility are to be associated with particular amounts of culpability must be specified. The decision to commit a delinquent act may be the result of a 99% formed character or the result of a 25% formed character. How is the magnitude of responsibility associated with any particular juvenile actor to be determined? Without a validated method of determination, specification of the amount of leniency warranted in the distribution of punishment is problematic. Beyond the particular case of juveniles, the determination of desert would seem to require a level of discriminatory precision that exceeds current capabilities.

VI. ARGUMENTS OF EMOTIONAL RECOMPENSE

Retributivism can be defended, at least in part, by appealing to the right of victims to experience pleasure at the offender's suffer-

⁸³ H. GROSS, *supra* note 40, at 449.

⁸⁴ ARISTOTLE, *THE NICOMACHEAN ETHICS*, Book 3.

ing. According to this view, sometimes described as "satisfaction theory," victimization establishes a right to such recompense. It is part of the "payment of the debt" owed by the offender.⁸⁵ The pleasure felt at the suffering of another is not barbaric. Indeed, the desire for such gratification resides deep within the constitution of man and is as much a part of humanity as the inclination to mercy. It is, therefore, both reasonable to desire such repayment for victimization and proper that the payment be accepted.

J.L. Mackie, in his discussion of retributive emotion, finds a paradox in the coexistence of the impossibility of a reasonable defense of retributivism and the indisputable omnipresence of retributivism in moral thought.⁸⁶ Whether one agrees with his analysis of the possibility of a reasonable justification of the retributive principle, it is difficult not to be receptive to his point about retributive emotion; there does seem to be a widespread and longstanding affinity for retributivism.

Furthermore, it is possible to apply Mackie's observation to the matter of recidivism. As Fletcher has suggested, individuals seem to possess a powerful intuition that recidivistic involvement in crime merits an extra measure of punitive sanction.⁸⁷ There is something special about repeat acts of unacceptable behavior. Just as a child is perceived to be ever more incorrigible if he or she continues to neglect instructions, a special evil is associated with the criminal recidivist. The child becomes not merely one who commits unacceptable act after unacceptable act, but rather one who acquires a new feature altogether, namely, incorrigibility. The child now has a characteristic that is undesirable and worthy of attention apart from the particular attitudes that provided the motivation for the individual unacceptable acts. To know that the child is incorrigible, even if nothing else of the child is known, is to know that he or she requires attention.

A similar result occurs with the recidivist. Recidivism itself, stripped naked of its particular content, becomes the object of concern. Society perceives a need to respond not only to the evil acts perpetrated, but also to the recidivistic condition itself. The emotional desire to experience an increased measure of satisfaction at the suffering of the recidivist seems to accord with conventional retributivism.

It is possible, however, to acknowledge the existence of a

⁸⁵ Cottingham, *Varieties of Retribution*, 29 PHIL. Q. 238, 241-42 (1979).

⁸⁶ Mackie, *Morality and the Retributive Emotions* 1 CRIM. JUST. ETHICS 3 (1982).

⁸⁷ Fletcher, *supra* note 17, at 57.

human characteristic without insisting that the feature be preserved through our social institutions. That humans seem to have a relatively enduring capacity for various forms of evil has not motivated society to incorporate such evil into the normative system. Simply because men have murdered each other from time immemorial, there is no apparent inclination to embrace homicide as acceptable behavior. Feelings of racial hatred become no less evil merely because history reveals that such feelings have been remarkably persistent. Rather, society recognizes the need to do battle with humanity's darkest inclinations. Religious institutions, for example, commit a fair amount of their resources to combatting and attempting to eliminate practices that violate the will of God. As Cottingham notes, that a particular social response is desired by various parties, such as punishment inflicted to provide satisfaction to a victim, is no evidence that the course is desirable from either a social policy or an ethical perspective.⁸⁸

Should society be content to accept retributivist emotions as worthy of normative preservation and codification in law simply because such feelings have been a regular part of human reactions? Would it not be reasonable to insist on a demonstration of the merits of the retributive emotion itself, apart from the fact that citizens often possess such emotions? In the absence of such a demonstration, it is difficult to be receptive to the "retribution-as-emotional satisfaction" thesis for either retributivism in general or for its particular application to recidivism.

VII. CONCLUDING OBSERVATIONS

This Article has examined four general kinds of justifications for the use of prior record as a variable in the sentencing of criminals within the confines of the justice model of punishment. These arguments make various and, at times, conflicting claims about justice, desert, human nature, personal responsibility, and the harmfulness of criminal acts. Some of the arguments appeal to emotional experience, some to sentencing traditions, others to an understanding of what it means to be a free agent, and yet others to society's conception of the damage wrought by repetitive criminal activity. There have been many defenses of the use of prior record, and they have been articulated by a large, diverse, and competent body of analysts. This diverse advocacy suggests either the existence of either a heartfelt, but mistaken, appreciation of prior behav-

⁸⁸ Cottingham, *supra* note 85, at 242.

ior as a determinant of how individuals are evaluated, or the real merits of prior record as a justly utilized variable in sentencing.

It is worth noting that some of the arguments appear to follow the conventional lines of the justice model view of punishment more closely than others. The model's important focus upon the crime, rather than upon variables long associated with the individual, seems better retained by arguments of elevated harm than by those of implicit attribute. Proponents of the implicit attribute argument insist on the validity of assertions about the character of the individual, such as the possession of defiant attitudes, and argue that these attributes compound the blameworthiness of the offender. Proponents of elevated harm arguments assert that deserved punishment is bound by the harmful consequences of the offending behavior and that recidivistic behavior creates harms that exceed the simple sum of the individual damages associated with each component crime. Leniency-based arguments vary in their conformity to desert as a determinative principle. Gross suggests that desert is not the only factor to consider in handing down a just sentence, while von Hirsch argues that tolerance is due to non-recidivists and should be factored into the computation of desert. Finally, proponents of arguments of emotional recompense take the discussion to the heart of retributivism. The persistent, enduring existence of an emotional need to inflict pain upon those who violate the criminal law may provide a basis for both retributively-based punishment in general and, by extension, its application to those who insist on recidivistic activity.

A number of concerns about these various arguments have been discussed in this Article. Such concerns include questions about the empirical status of important assertions, such as the existence of defiance in repeat offenders and the increases in real harm produced by recidivist enterprises. They also include questions about the nature of justice and its tolerance for factors other than desert, such as mercy, as sentence determinants. It has been suggested that the apparent historical endurance of retributive emotions may offer little justification for either retributivism as a general predicate of punishment or as a rationale for the use of prior record in sentencing. In sum, this Article has attempted to show that a significant number of questions crucial to the justification of the use of prior record in sentencing remain unanswered. The unanswered status of these questions suggests caution in embracing the use of prior record as an important sentence determinant in justice model sentencing systems.

This caution seems especially appropriate given the reform in-

clinations of various states. It has become conventional for new determinate sentencing systems to include prior record as a factor affecting sentence severity. For instance, Florida's rules of criminal procedure include the following provisions:

The primary purpose of sentencing is to punish the offender. Rehabilitation and other traditional considerations continue to be desired goals of the criminal justice system but must assume a subordinate role. The penalty imposed should be commensurate with the severity of the convicted offense and the circumstances surrounding the offense. The severity of the sanction should increase with the length and nature of the offender's criminal history.⁸⁹

It is apparent from these provisions, and from the factors included in the sentence score sheets used to compute sentences for felony offenders,⁹⁰ that Florida's criminal justice system has moved away from utilitarian goals toward retributive aims, has identified crime seriousness as the key variable in sentence determination, and has included prior record as an important factor in the sentence determination process. For example, the sentence guideline score sheets for robbery include weights for the current offense, probation or parole status at the time of the offense, and level of injury to the victim.⁹¹ Prior record for robbery is composed of two sub-scores, the first for prior convictions of any offense and the second for prior convictions in the current crime's offense category. An individual convicted in Florida of first-degree robbery without any additional instant offenses, who had a prior record consisting of one first-degree robbery and one first-degree non-robbery felony, who perpetrated no physical harm and was under no parole or probation restrictions would receive a sum score of 221: 70 (instant offense) + 126 (prior record) + 25 (in-category prior record).⁹² Almost 70% ($126 + 25 = 151$; $151/221 = 69\%$) of the guidelines score is the result of the contribution of prior record. Were prior record not a factor in this case, the offender would receive a sentence of three years incarceration instead of the ten-year sentence provided by the guidelines. In Florida, at least for some offenses, prior record is not only an important factor, it is the most important factor in determining the appropriate sentence.

Florida is not alone in its adoption of determinate sentencing systems which use prior record.⁹³ Unfortunately, penal reforms have moved ahead without adequate concern for many of the issues

⁸⁹ FLA. STAT. ANN. § 648 (West 1986).

⁹⁰ FLA. STAT. ANN. Rule 3.988 (West 1986).

⁹¹ *Id.*

⁹² *Id.*

⁹³ For example, California's Uniform Determinate Sentencing Act took effect in July,

raised in this Article. Of course, much of this enthusiasm and reform activity can be attributed to the crime control goals of reformers and legislators, rather than solely to a stubborn, hard-nosed retributivism that pushes ahead without concern for important questions that remain unanswered. Yet, there is reason to be concerned about the future. If prior record can occupy such an important role in our new sentencing systems, despite some of the potential weaknesses of the rationales justifying its use, what is to prevent other equally controversial personal factors from finding a home in public policy? Von Hirsch seems relatively unconcerned about this issue. He points to the experience of states such as Minnesota and notes that their experience has failed to affirm concerns with abuses such as escalating sentence severity or inclusion of offender personal attributes as factors in determining sentences.⁹⁴ However, it is difficult to share von Hirsch's optimism. After all, systems such as that used in Minnesota have been in place for a relatively short period of time, historically speaking. It would be lacking in proper methodological caution to track a felon for one week after he has served his prison sentence in the hope of learning whether he has gone straight. A week is simply not long enough. Similarly, too few years have passed since the development of the new sentencing systems to justify high levels of optimism.

Of course, one can wait forever. Advocates of the rehabilitative model have been accused of endlessly arguing that the model has not been given enough time for a proper assessment.⁹⁵ But, even apart from the problem of determining an adequate test period, there is reason for concern simply because responsible voices in justice-oriented penal theory argue that personal factors ought to have a role in determining proper punishment. In discussing personal history, Gross writes:

Such a record may include not only past crime but active criminal association that marks a man's life as a life of crime. Reference to a record of crime or active criminal association might be for the proper purpose of preventing a mitigation of sentence that might otherwise be right;

1977. CAL. PENAL CODE §§ 1170, 3040 (West 1984). Minnesota's determinate guidelines became operative in August, 1979.

⁹⁴ von Hirsch, *supra* note 19, at 632.

⁹⁵ See Martinson, *What Works? Questions and Answers about Prison Reform* 35 PUB. INT. 22 (1974). In a neglected passage in his storm-provoking article, Martinson asserts:

From this probability, one may draw any of several conclusions. It may be simply that our programs aren't yet good enough—that the education we provide inmates is still poor education, that the therapy we administer is not administered skillfully enough, that our intensive supervision and counseling do not yet provide enough personal support for the offenders who are subjected to them.

Id. at 49.

or it might be for the improper purpose of imposing a heavier sentence than the crime deserves.⁹⁶

Gross indicates that factors beyond conviction, such as an offender's personal lifestyle, may be justly utilized to determine desert.

American correctional history, however, is littered with examples of the abuse of such criteria. The record of abuses perpetrated on those living "disfavored" lifestyles, such as immigrants, blacks, the poor, and other minorities suggests skepticism regarding the potential for the just use of the lifestyle variable, irrespective of how it might be formally operationalized. Nonetheless, the existence of credible voices arguing for the justice of using such factors and the aggressive public clamor for tougher sentencing represent powerful influences potentially capable of bringing such variables into roles of prominence. The point here is political, and has less to do with the ultimate integrity of the justice model than with the uses to which penal ideas are put by those capable of exercising power. One of the tools available to stave off abuses of the original intent of penal reform is a well-conceived punitive rationale that presents a solid and coherent front to the possessors of power who would selectively adopt bits and pieces of reform strategies to suit their own political agenda. A punitive rationale that cannot solve problems found at its own doorstep is unlikely to provide such a front. How will the rationale explain that certain kinds of offender variables, such as attitudes of defiance, are acceptable for use in sentencing, while other similar variables, such as attitudes toward giving to charitable organizations, are irrelevant?⁹⁷ If the rationale cannot make these kinds of distinctions clearly, it may confront severe difficulties when faced with proposals to include heretofore unacceptable variables that it is unable to exclude on analytic grounds.

⁹⁶ H. GROSS, *supra* note 38, at 456.

⁹⁷ A. VON HIRSCH, *supra* note 29, at 172. Von Hirsch argues that policies which involve "drastic sacrifices of equity" are to be rejected. But, what principles can be used to determine when such sacrifices are drastic? Von Hirsch recognizes the legitimacy of some sacrifices of equity, such as those associated with quarantine, but it remains unclear how principled judgments might be made which result in justified deprivations of liberty.