Previous convictions in sentencing deliberations – A critical analysis into the justifications of recidivist sentencing premiums

(2022) Galway Law Review, 13 – 34

Previous Convictions in Sentencing Deliberations – A Critical Analysis into the Justifications of Recidivist Sentencing Premiums

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Introduction:

The paradigm case in criminal sentencing is not the first-time offender guilty of a lone offence.[1] Though the majority of theoretical literature focalizes around the "first-timer", [2] the most prevalent offender in sentencing deliberations is, in fact, the recidivist.[3] Despite the preponderance of previous convictions (PC) and predominance of multiple-offenders in criminal law,[4] there is a notable chasm of academic writing around the concept, and consequentially, a remarked paucity on the substantive impact of PCs on sentencing calculations.[5] However, as Ingram[6] & Roberts[7] separately denote, the consideration of previous criminal behaviour has existed since the 16th century, upon a move from a solely infraction-based sentencing model to one encircling assessments on the offender's character.[8] Throughout the developmental history of sentencing the recidivist, and as early as the era of Grotius[9], two foundational principles continue to compete for primacy in punishment, philosophically and in practice;[10] the doctrine of retributivism, and the consequentialist, crime-control based principle of prevention.[11]

[1] Michael Tonry, *Doing Justice: Preventing Crime* (Oxford University Press 2020) 98.
[2] ibid., 95.
[3] Though there has been a notable decrease in recidivism rates in Ireland from 2011 to 2017, the overall reoffence rate is still well above the European Average at 55.2per cent. See 'Probation Re-offending Statistics 2013, 2014 and 2015 Cohorts' (*Central Statistics Office*, 6 December 2019) <https://www.cso.ie/en/releasesandpublications/ep/p-prs/probationre-offendingstatistics20132014and2015cohorts/> accessed 30 May 2022; For other statistics from alternative jurisdictions to support this, see Julian Roberts, *Punishing Persistent Offenders: Exploring Community and Offender Perspectives* (Oxford University Press 2008) .
[4] Jose Pina-Sánchez and Julian Roberts, 'Previous convictions at sentencing: exploring empirical trends in the Crown Court' (2014) 8 Criminal Law Review 575, 575.
[5] Tonry (n 1) 98.
ibid., 95; Julian Roberts, *Punishing Persistent Offenders: Exploring Community and Offender Perspectives* (Oxford University Press 2008) .
[6] Martin Ingram, *Shame and Pain: Themes and Variations in Tudor Punishment* (Palgrave Macmillian 2005).
[7] Julian Roberts, *Punishing Persistent Offenders: Exploring Community and Offender Perspectives* (Oxford University Press 2008) 3. Note: Roberts cites an example, see *Alehouse Act* 1627 (Chapter 3) c.4.
[8] ibid., 4.
[9] Julian Roberts, *Punishing Persistent Offenders: Exploring Community and Offender Perspectives* (Oxford University Press 2008) 28.
[10] ibid., 29; Heinrich Oppenheimer, *The Rationale of Punishment* (University of London Press, 1913).
[11] Roberts, *Punishing Persistent Offenders* (n 9) 29; Note: Consequentialism and Utilitarianism will be used interchangeably throughout.

The penalisation of recidivists more stridently is a predominant feature in almost all common and civil law jurisdictions,[12] though through a multiplicity of divaricating approaches, and to diverging levels of severity.[13] Nevertheless, most such judiciaries, in sentencing a multiple-offender, conduct to some extent, a concurrent, two-directional observation, rearwards in consideration of the convicted crimes, and forwards in estimation of the probability of a re-offence.[14] Thus, the character and quantum of a sentence is ascertained through a combined consideration of the seriousness of the infraction, the degree to which an offender is culpable, and the likelihood of recidivism.[15] However, should this be the case? Moreover, how are the theoretical antinomies between "desert and dangerousness, punishment, and prevention"[16] integrated and justified within sentencing processes? Upon these contemplations, this essay will conduct a critical analysis into whether PCs should be a pertinent determinant in a recidivist's sentence, and if so, to what extent can the perceived objectives and rationales be justified in their contribution to the recidivist sentencing premium (RSP).

The Diverging Models of Previous Conviction Application in Sentencing: A Brief Comparative Analysis:

Calibrating a sentence that is reflective of the offence's seriousness, yet equitable to the defendant, just to the victim, and publicly approved is noted by Sir John Saunders and Sir David Calver-Smith as "the most difficult task" of a criminal judge.[17] After seriousness, the presence of criminal history (CH) is denoted as the second most paramount consideration in deciphering sentences, superseding the significance of alternative aggravating and mitigating factors.[18] However, differing underlying perspectives on sentencing stipulate substantially differing methods towards accounting for PCs during the sentencing process,[19] generating three predominant, diverging models forwarded by retributive and consequentialist theorists.

[12] A notable exception would seem to be Western Australia, whose Sentencing Act 1995, s7(2)b explicitly declares that an infraction cannot be aggravated by an offender's criminal record. See Jose Pina-Sánchez and Julian Roberts, 'Previous convictions at sentencing: exploring empirical trends in the Crown Court' (2014) 8 Criminal Law Review 575, 575.
[13] ibid., Andrew *Ashworth, Sentencing and Criminal Justice* (5th edn, Cambridge University Press 2010) 197.
[14] Roberts, *Punishing Persistent Offenders* (n 9) 29.
[15] ibid.
[16] ibid.
[17] Sir John Saunders and Sir David Calvert-Smith, 'The evolution of sentencing: some judicial reflections' (2020) 5 Criminal Law Review 388, 388; In Ireland, the power to sentence lies exclusively with the judiciary, See Tom O'Malley, *Sexual Offences: Law,Policy and Punishment* (Round Hall Sweet and Maxwell 1996); this principle was affirmed in *Deaton v Attorney General* [1963] IR 170.
[18] Peter Burke and Austin Turk, *Factors Affecting Postarrest Dispositions: A Model for Analysis* (Oxford University Press 1975); Celesta Albonetti, 'An Integration of Theories to Explain Judicial Discretion' (1991) 38(2) Social Problems 247; Roberts (n 9) 2.
[19] Roberts, *Punishing Persistent Offenders* (n 9) 8.

[A] The Exclusionary or "Flat-Rate" Model:

Numerous retributivists such as Fletcher,[20] Singer,[21] and Duff[22] submit that the insertion of PCs into sentence deliberations are wholly inapposite, constituting an infraction against principles of double jeopardy on foot of "double-counting" crimes for which an offender has, punitively, already paid for.[23] This approach is fixed upon an entirely retributive sentencing model,[24] primarily advancing that PCs cannot construe an offender as more culpable for their current crime, and thus accordingly, a sentences' asperity should take no account of an existent previous CH.[25] Under positive retributivist considerations, legal penalisation upon an offender imparts blame and articulates society's opprobrium, but only for a specific, proved offence.[26] If it were otherwise, such advocates surmise that a dysfunctional society would be generated whereby individuals could be held responsible, unduly, for every mistake throughout the lifetime.[27] Thus, the exclusionary model operates on the basis that sanctions should only embody the present offence's seriousness, and the culpability of the offender in this particular act, to the express exclusion of ruminations on PCs,[28] as offenders should be "punished only for what they do; not according to the type of people we think they are".[29]

Though neither Hegel, Bentham nor Kant expressly canvassed the concept of PCs, Tonry[30] purports that, through interpretation of Hegel and Kant's equality principle which pivots punishment on the seriousness of an infraction,[31] and Bentham's endorsement of parsimony,[32] all would align with theoretics underlying this positive retributivist approach, demonstrating the span of the model's conceptual foundations. However, despite this ideational longevity,

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[20] George P Fletcher, *Rethinking Criminal Law* (Little, Brown & Co 1978).
[21] Richard G Singer, *Just Deserts* (Balling Publishing Company 1979).
[22] Antony Duff, *Punishment, Communication, and Community* (Oxford University Press 2001) 167.
[23] Tonry (n 1) 101.
[24] Graeme Newman, *Just and Painful: A Case for the Corporal Punishment of Criminals* (Macmillan Publishing Co 1983) 54, Note Newman remarks favourers of this sentencing model as "old retributivists"; Roberts, Punishing Persistent Offenders (n 9) 9; Mirko Bagaric and Michael Flatman, 'The Victim and The Prosecutor: The Relevance of Victims in Prosecution Decision Making' (2001) 6(1) Deakin Law Review 238.
[25] Richard Frase and Julian Roberts, *Paying for the Past: The Case against Prior Record Enhancements* (Oxford University Press 2019) 27; George P Fletcher, *Rethinking Criminal Law* (Little, Brown 1978); Richard G Singer, *Just Deserts* (Balling Publishing Company 1979); Mirko Bagaric, 'Consistency and Fairness in Sentencing – The Splendor of Fixed Penalties' (2000) 2 California Criminal Law Review 1.
[26] Richard Frase and Julian Roberts, *Paying for the Past: The Case against Prior Record Enhancements* (Oxford University Press 2019) 26.
[27] ibid.
[28] Roberts, *Punishing Persistent Offenders* (n 9); Frase and Roberts (n 26) 27.
[29] Mirko Bagaric and Kumar Amarasekara, 'Feeling sorry? - Tell someone who cares: the irrelevance of remorse in sentencing' (2001) 40 The Howard Journal 346; Frase and Roberts (n 26) 27.
[30] Tonry (n 1) 105.
[31] ibid., George WF Hegel, *Hegel's Science of Logic* (7th edn, Humanities Press 1969); Immanuel Kant and others, *Groundwork for The Metaphysics of Morals* (Oxford University Press 2019).
[32] Tonry (n 1) 105; Jeremy Bentham, *An Introduction to the Principles of Morals and Legislation* (Batoche Books 2000).

and its "theoretical purity",[33] it presents an array of shortcomings, and is a rather unpopularly implemented archetype.[34] Firstly, neglecting an offender's prior CH withholds from Court's a significant insight into the offender.[35] Furthermore, by declining to distinguish between the recidivist and first-time offender, the flat-rate approach infelicitously refuses the latter a forceful mitigation source,[36] rebuffing the virtually universal sentencing attribute of first-offender alleviation[37] and hence, popular public sentiment, which favours clemency for first-time offenders. Though public opinion cannot be considered a principled justification in sentencing, it alludes that a regime of disregarding PCs, would face notable enmity,[38] imperilling the judicial system's legitimacy. Additionally, this model fails to appreciate that the original sentence was indubitably ineffective upon the individual, as he continued criminality.[39]

Therefore, while the exclusionary model is conceptually chaste in comparison to the following alternative approaches which face starker ethical and philosophical denunciation, its pitfalls comprehensively demonstrate why the approach is so manifestly contradictory to present practice, societal sentiment, and professional opinion, and is thus decidedly unlikely to be functionally implemented in the near future.[40] Conclusively, the potential for an approach that takes no heed, whatsoever, to a recidivist's previous transgressions is both unconvincing, and improbable.

[B] The Progressive Loss of Mitigation Model:

In contrast to the abovementioned approach, numerous legal scholars revere towards a broad-shared intuition that PCs actively exacerbate the seriousness of subsequent offences and hence, the reoffender's culpability;[41] intuitiveness which permeates the sentencing practices of essentially every Western jurisdiction, though to varying extents.[42]

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[33] Frase and Roberts (n 26) 27.
[34] ibid.
[35] ibid.
[36] ibid., 28.
[37] ibid.
[38] ibid., 27.
[39] Brendan Glynn, 'Sentencing the Recidivist - Part I' (2020) 38(11) Irish Law Times 164.
[40] Frase and Roberts (n 26) 28.
[41] Andrew Ashworth and Martin Wasik, 'Sentencing the Multiple Offender: In Search of a "Just and Proportionate" Total Sentence' in Jan de Keijser and others, *Sentencing for Multiple Crimes* (Oxford University Press 2017); Benjamin Ewing, 'Prior Convictions as Moral Opportunities' (2019) 46(2) American Journal of Criminal Law 283, 312.
[42] Tonry (n 1) 101

One approach encapsulating these notions by endorsing a somewhat gentler RSP, is Von Hirsh's "progressive loss of mitigation" method.[43] This retributive punishment theory functions on two core assertions. Firstly, PCs are no justification for sharper, heavier punishments.[44] However, secondly, first-time offenders should be conferred reduced or discounted sanctions and sentences, on the presupposition that their misconduct was an out-of-character, singular transgression, or otherwise occurred under unprecedented circumstances,[45] drawing a definitive distinction between the recidivist and first-offender.[46] However, once first-time transgressors have obtained this reduction, and relapse into reoffence, such discount is gradually lost as the mitigating factor of possessing no, seldom, or minor PCs becomes steadily less appurtenant to the conclusive sentence,[47] as these preconceptions slowly lose plausibility.[48]

Progressive loss of mitigation encounters sturdy support within sentencing law, policy, practice from the public and professionals,[49] presumptively as it represents a middle-ground between the flat-rate model and cumulative approach. A main rationale cementing the strategy is that first-offenders are arguably, less culpable than recidivists,[50] as until they encounter the full force of the criminal justice system, they are more incognisant to the ensuing severity and consequences from a criminal infraction.[51] Frase & Roberts surmise that legal confrontation and subjection to state prosecution may conduce a "moral awakening"[52] within the transgressor, though the exculpatory influence of this submission will fluctuate upon a manifold of factors, such as the offence's innate unlawfulness and the potential harm emanating from the crime.[53] Additionally, several retributive academics found favour with progressive loss mitigation on its appreciation of human frailty and endorsement of understanding and

Note: Within Scandinavian states operating by way of statutory sentencing principles, the influence of previous criminal convictions is restricted and very specific but does exist. Conversely, Australian legislation refers to an "intuitive synthesis" which Courts are expected to rely upon during sentencing. In English law, enhancements on considerations of previous infractions can be used as aggravating factors, but only where previous transgressions are "recent" and "relevant."

[43] Andreas von Hirsch, 'Desert and Previous Convictions in Sentencing' (1981) 65 Minnesota Law Review 591, 631; Andreas von Hirsch, 'Proportionality and the Progressive Loss of Mitigation: Some Further Reflections' in Andreas Von Hirsch and Julian Roberts, *Previous Convictions at Sentencing: Theoretical and Applied Perspectives* (Hart Publishing 2010) .

[44] Tonry (n 1) 103.

[45] ibid., 112; Brendan Glynn, 'Sentencing the Recidivist - Part II' (2020) 38(12) Irish Law Times 174, 175; Julian Roberts, *Punishing Persistent Offenders* (n 9) 9.

[46] Julian Roberts, *Punishing Persistent Offenders* (n 9) 10.

[47] Brendan Glynn, 'Sentencing the Recidivist - Part II' (2020) 38(12) Irish Law Times 174, 175.

[48] Tonry (n 1) 103.

[49] Youngjae Lee, 'Repeat Offenders and the Question of Desert' in Andreas von Hurst and Julian Roberts, *Previous Convictions at Sentencing: Theoretical and Applied Perspectives* (Hart Publishing 2010).

[50] This is recognised in Irish Law by the reduction of sentence on foot of having no previous convictions; See *DPP v Malric* [2011] IECCA 99.

[51] Frase and Roberts (n 26) 29.

[52] ibid., 28.

[53] ibid.,; Michael Edward O'Neill and others, 'Past as Prologue: Reconciling Recidivism and Culpability' (2004) 73(1) Fordham Law Review 245.

tolerance, summarised by Von Hirsch's asseveration that "the all-too-human fallibility…can lead to a first offence".[54] Thus, Von Hirsch proposes that such leniency is ground on the acknowledgment of the normality to lapse, disassociating the mitigation from any cogitation on culpability,[55] though the simplistic nature of this underlying societal sympathy logic may be vulnerable to dispute.[56]

However, while first-time offender reduction is ubiquitously recognised, this "lapse" theory has still faced staunch castigation and repudiation from several academics, such as Durham[57] and Ryberg,[58] inter alia.[59] Its first criticism is centred on the fact that, by incorporating quotidian moral reason to rationalise a first-offenders misconduct, the progressive loss of mitigation essentially summons capricious morality considerations to augment sentencing,[60] contributing to a further critique of the method lodged by Bagaric,[61] that the model represents an "unwelcome" discretionary interference upon sentencing procedures to desert theorists.[62] Such scholars denote that while the allure of retributivism is generally fixated upon intuitive responses to wrongfulness, which are inherently linked, the progressive loss of mitigation's human frailty justification is more convoluted owing to intricacies associated with measuring tolerance for human fallibility and divulging when exactly sympathy ceases for extensions of discount.[63] This fret is exacerbated by the submission that it fails to operate in consistency with its purported "second-chance" nature,[64] as there is no definitive conviction integer denoted to signify when mitigation should become inapplicable.[65] This generates angst that the theory is thus, so imprecise and nebulous as to risk nonuniform jurisprudence through excessive judicial discretion. Another pitfall is the scope of its inapplicability. Roberts[66] and Tonry[67] opine that more grave, premeditated transgressions cannot credibly promulgate a "temporary lapse" claim

[54] ibid.,; Andreas Von Hirsch, *Deserved Criminal Sentences* (Hart Publishing 2017) 75.
[55] Andreas Von Hirsch and Julian Roberts, *Previous Convictions at Sentencing: Theoretical and Applied Perspectives* (Hart Publishing 2010).
[56] Frase and Roberts (n 26).
[57] Alexis Durham, 'Justice in Sentencing: The Role of Prior Record of Criminal Involvement' (1987) 78 Journal of Criminal Law and Criminology 614.
[58] Jesper Ryberg and others, *Punishment and Ethics: New Perspectives (*Palgrave Macmillan 2010).
[59] Frase and Richard (n 26) also observe Bagaric's comparable stance here. See Mirko Bagaric, *Proportionality in sentencing: the need to factor in community experience, not public opinion* (Oxford University Press 2014).
[60] Frase and Roberts (n 26) 31.
[61] Mirko Bagaric, 'Consistency and Fairness in Sentencing – The Splendor of Fixed Penalties' (2000) 2 California Criminal Law Review 1.
[62] ibid.; Frase and Roberts (n 26) 32.
[63] Frase and Roberts (n 26) 30.
[64] Martin Wasik and Andreas Von Hirsch, 'Section 29 Revised: Previous Convictions in Sentencing' (1994) 8 Criminal Law Review 409, 410.
[65] Andreas von Hirsch, 'Desert and Previous Convictions in Sentencing' (1981) 65 Minnesota Law Review 591, 631.
[66] Frase and Roberts (n 26) 33.
[67] Tonry (n 1) 98.

to gain such mitigation. Thus, this approach should not be applicable to the full gamut of offences, but limited to specific transgressions and transgressors, ideally of a more minor character.[68]

Nevertheless, despite its complexities, the progressive loss mitigation approach continues to be implored within most Western states,[69] including Ireland, affirmed by *DPP v PS.*[70] Furthermore, it was recently reasserted in *Farrell,*[71] where Kennedy J adduced it was "correct" for the existence of the defendant's PCs to instigate a progressive loss of mitigation,[72] ostensibly jilting precedent within *DPP v GK*[73] which established an aggravating factor approach to CH. Though Ireland operates upon the principle of proportionality in sentencing, suggesting that only the offence in question and offender's personal circumstances should be given weight in ascertaining a sanction, O'Malley denotes that PCs may be contemplated under the latter, as previous CH is personal to the offender.[74] Thus, PLM endures as a receptive, progressive and equilibrated approach to a softer RSP, with a significant asset being its intrinsic acknowledgment of first-offenders' diminished culpability compared to the recidivist, and its incorporation of an upper-limit on sentence severity for multiple-offenders, a "cap" beyond which CH cannot influence. [75]

[C] The Cumulative Model:

The "Cumulative Sentencing" model (CSM) is a more utilitarian sentencing approach which avers that judiciaries should always utilise PCs as an aggravating factor in a recidivist's sentence,[76] except where priors are too former to be reasonably scrutinised,[77] or alternately, where such PCs are deemed to be too minor or immaterial to provide the Court with currently reliable predictive utility.[78] Such an approach produces a progressively more severe sentence in alignment with the number of PCs and their relative seriousness, assuming that each PC enlarges the recidivist's culpability or demonstrates an enhanced risk of reoffence, so as to

[68] Andrew Ashworth, *Sentencing and Criminal Justice* (Cambridge University Press 2005).
[69] The English Criminal Justice Act 2003 is noted, by virtue of its outward approval of enhancing sentences upon the existence of prior convictions, to essentially implement a cumulative model, to the relative dissolution of the progressive loss of mitigation model. See Jose Pina-Sánchez and Julian Roberts, 'Previous convictions at sentencing: exploring empirical trends in the Crown Court' (2014) 8 Criminal Law Review 575.
[70] *DPP v PS* [2009] IECCA 1.
[71] *DPP v Farrell* [2019] ICEA 134.
[72] ibid.
[73] *DPP v GK* [2008] IECCA 110.
[74] Thomas O'Malley, *Sentencing Law and Practice* (2nd edn, Thomson Round Hall 2006) 142.
[75] Frase and Roberts (n 26) 33.
[76] Roberts, *Punishing Persistent Offenders* (n 9) 9.
[77] Thomas O'Malley, *Sentencing; Law and Practice* (2nd edn, Thomson Round Hall, 2006).
[78] Roberts, *Punishing Persistent Offenders* (n 9) 8.

sufficiently justify an accordingly intensified sentence. This is distinguishable from PLM on the basis that once first-offender leniency is exhausted under PLM, the reoffender is not exposed to harsher punishment, but is prescribed an ordinary sentence with no differentiation made between alternate degrees of recidivism,[79] which contrastingly, the CSM approach hinges upon. Thus, CSM's underlying penal reason presumes that the prior sentence was inadequate to sufficiently deter recidivism, and so the model's primary objectives are regarded as prevention transgression through deterrence and incapacitation.[80]

However, the approach, though being firmly indicative of common public sentiment, meets vigorous theoretical, ethical, and legal opposition.[81] To counter proportionality concerns, any retributive CH-enhancement approach, whether ground on culpability or risk concerns, must prove that PCs enhance the recidivist's blameworthiness for the present offence.[82] Furthermore, additional sanctions cannot be conferred upon the offender for his CH existence alone as it would constitute a principle of "double jeopardy",[83] which would be activated by essentially penalising an individual twice for a singular infraction; prompting an unbridled "snowballing" of punishment.[84] Such double-counting of offences was censured in Ireland by Macken J in *Ulrich,*[85] speculatively owing to the contradiction it poses to several constitutional and common law principles, such as fairness, proportionality[86] and the foundational maxim *ne bis in idem.*[87] Furthermore, the utilitarian sentencer, under CLM, penalises transgressors on the presupposition that they're statistically likely to reoffend, to the detriment of those that will desist from crime.[88] Clear jurisdictional examples of CLM in practice are Australia, England & Wales pursuant to its Criminal Justice Act[89] and, infamously the most directly employed CLM, the United States. One only must look to the latter's "anomalous"[90] sentencing guidelines system to witness the inimical, inflexible imposition of criminal sentences deciphered majorly upon individuals' criminal records, and less upon the crimes seriousness.[91]

[79] ibid., 9.
[80] ibid., 30.
[81] In *R v Baumer* [1988] 166 CLR 51 (Australian High Court), the Australian High Court conferred that it was incorrect and wrong for previous convictions to enhance an offender's sentence beyond what a sentencer would contemplate as appropriate.
[82] Frase and Roberts (n 26) 25.
[83] See *Witte v United States* 515 US 389 (1995).
[84] Frase and Roberts (n 26) 19.
[85] *DPP v Ulrich* [2011] IECCA 30.
[86] *Heaney v Ireland* [1994] 3 IR 593, [1995] 1 IR 580; *Cox v Ireland* [1992] 2 IR 503.
[87] See Gerard Coffey, 'The principle of ne bis in idem in criminal proceedings' (2008) 18(1) Irish Criminal Law.
[88] Roberts, *Punishing Persistent Offenders* (n 9) 32.
[89] Criminal Justice Act 2003 (UK), s 143(2).
[90] Frase and Roberts (n 26) 9.
[91] ibid.

Operatively in England & Wales, the Court has attempted to rectify the disparity between CLM and the proportionality principle, notably in *Evans,*[92] by propounding that the influence of PC's in aggravating sentences should be strictly modulated by proportionality restraints[93] and typifying seriousness.[94]

Thus, while CLM undoubtedly has its conceptual convolutions, it arguably constitutes the most simplistic, salient epitome of RSP of the three diverging models.[95]

Justifying the Recidivist Sentencing Premium:

Retributive Justifications:

While retributivism possess internal conflict regarding sentencing's inclusion of PCs,[96] retributivist justifications for RSPs are founded upon the inherent intuition that recidivists simply deserve heavier punishment,[97] thus delineating suitable sentences upon an offender's blameworthiness.[98] Reflectively, Roberts observes the "spine" of retributivism as proportionality,[99] which establishes a correlation between the strength of a sentence and the seriousness of the act, alongside the offender's culpability.[100]

Punishing Defiance:

The defiance rationale's main perception is that the amassing of multiple convictions demonstrates a wilful dismissal and defiance of the law, illustrating an increasingly defiant stance with each offence transgressed.[101] While the determinants behind such defiant attitudes are multifaceted,[102] the mass attraction of sterner penalties on this ground emanates largely from the widespread societal expectation that legal sanctions should desist criminality, and when cessation fails, the offender has neglected to "learn his lesson" from a pedagogical

[92] *R v Evans* [2016] EWCA Crim 31, [2016] 1 WLUK 265 (CA Crim Div).
[93] ibid.; Gary Betts, 'Limiting the role of previous convictions at sentencing' (2016) 80(4) Journal of Criminal Law 224, 226.
[94] *R v Bown* [2015] EWCA Crim 2057 [11]; *R v Langley* [2011] EWCA Crim 2471 [17].
[95] Frase and Roberts (n 26) 31; Matt Matravers, *Justice and Punishment* (Oxford University Press 2000) 95.
[96] Note: not all retributivists agree, as this essay will demonstrate there are various schools of thought under the umbrella of retributivism. See Frase and Roberts (n 26) 2. However, Hessick and Hessick denote that despite such conflicting views on how to impose recidivist premiums, the existence of the premium itself is one of the most widely agreed upon theories. See Carissa Byrne Hessick and Andrew Hessick, 'Double Jeopardy as a Limitation on Punishment' (2012) 97(3) Cornell Law Review 43, 45.
[97] Frase and Roberts (n 26) 40.
[98] Tonry (n 1) 110.
[99] Roberts, *Punishing Persistent Offenders* (n 9) 12.
[100] Frase and Roberts (n 26) 1.
[101] Roberts, *Punishing Persistent Offenders* (n 9) 37.
[102] Richard L Lippke, 'The ethics of recidivist premiums' in *The Routledge Handbook of Criminal Justice Ethics* (Routledge 2017) 19.

perspective,[103] evoking an austere judicial retort. Thus, the reoffender's recidivism reflects a heightened culpability through flagrant rejection of the law's attempts to desist him, which, as stated in the *Halliday Report*[104], necessitates "increasing denunciation and retribution".[105] An ancillary limb of intuitivism mirrors an expressive punishment theory which purports that multiple-offenders, through previous prosecutions, are regarded as having posited a spurious moral claim to behave respectfully to society[106] and avoid reoffending,[107] an obligation Lee professes as being implied between the state and offender upon the initial conviction.[108] Ewing concurs, furthering that convictions re-alert offenders to their legal duties, moral responsibilities, and liability to err, thus providing them with superior opportunity to obviate such fallibilities in future.[109] Consequentially, neglecting to utilise that opportunity debases protestation to any heightened penalisation that duly follows.[110]

However, such submissions are innately flawed. In retort to Lee & Ewing, no logical offender would freely agree to shoulder otherwise unwarranted sanctions or obligations not imposed upon other individuals.[111] Even if such pledges are implied, and irrespective of whether the offender consented, such undertakings must be somewhat legally grounded.[112] Though, even then, such "voluntary" agreements could be undermined through assertions of duress or psychological pressure of the Court.[113] Furthermore, considering all persons are equal before the law, every citizen is presumed to have knowledge on what criminal law proscribes, and are equally required to obey it; neither Ewing nor Lee proffer any elucidation for why prosecuted individuals bare contrasting, enlarged legal obligations.[114]

Additionally, the rationale falls by way of its assumption that defiance is wilful on the offender's behalf. Presuming such wilfulness is solely fixed upon on the fact of reoffence,[115]

[103] Nigel Walker, *Sentencing-Theory, Law and Practice* (Butterworths 1985) 44; Frase and Roberts (n 26) 10.
[104] Home Office, 'Making Punishments Work: A Review of the Sentencing Framework for England and Wales' (2001) <https://webarchive.nationalarchives.gov.uk/+/http://www.homeoffice.gov.uk/documents/halliday-report-sppu/> accessed 30 May 2022.
[105] ibid., 13.
[106] Frase and Roberts (n 26) 34.
[107] Benjamin Ewing, 'Prior Convictions as Moral Opportunities' (2019) 46(2) American Journal of Criminal Law 283, 290; Youngjae Lee, 'Repeat Offenders and the Question of Desert' in Andreas von Hurst and Julian Roberts, *Previous Convictions at Sentencing: Theoretical and Applied Perspectives* (Hart Publishing 2010).
[108] ibid.
[109] Benjamin Ewing, 'Prior Convictions as Moral Opportunities' (2019) 46(2) American Journal of Criminal Law 283, 312
[110] Tonry (n 1) 111; Benjamin Ewing, 'Prior Convictions as Moral Opportunities' (2019) 46(2) American Journal of Criminal Law 283, 318.
[111] Tonry (n 1) 108.
[112] ibid.
[113] ibid., 107.
[114] ibid.
[115] Roberts, *Punishing Persistent Offenders* (n 9) 40; George P Fletcher, *Rethinking Criminal Law* (Little, Brown 1978).

and not the actual demonstration that such degression was done intentionally.[116] As offenders may regress for a multitude of reasons, it is both credulous and inequitable to assign the same motive to all transgressors, and thence sentence them upon this postulation. Furthermore, the defiance rationale fails to illustrate why RSP should progressively increase with each infraction, portraying what Lippke denounces as an "all-or-nothing" regime.[117] Suggestions stating intensified sentences on defiance grounds may be ultimately counterproductive insofar as they provoke stronger disobedience from begrudging recidivists are also submitted.[118] Therefore, despite compliance being an essential constituent of an efficacious judicial regime,[119] such a retributive rationale cannot justify RSP alone, especially in the absence of proved wilfulness.[120]

The "Culpable Omission" Theory:

Numerous academics have engaged with culpable omission theories to concur that PCs ultimately amplify an offender's blameworthiness by virtue of their culpable choice not to react to punitive reprimand. MacPherson[121] presents a potential model whereby sentence aggravation on culpability grounds is limited. Firstly, he proffers that sentence be only modestly enhanced to uphold proportionality principles,[122] and secondly, promotes a restricted application of RSP to cases where PCs and the current offence are of similar, or identical nature. Lee[123] employs a comparable line of reasoning in his conclusion that RSPs are justifiable as a reoffender's neglect to restrain his criminal inclinations, of which he has awareness, intensifies his culpability. Interestingly, Bennet[124] reconceptualises Lee's argument into communicative theory whereby the sentence is emblematic of how remorseful the offender should feel for

[116] Roberts, *Punishing Persistent Offenders* (n 9) 37.
[117] Richard L Lippke, 'The ethics of recidivist premiums' in *The Routledge Handbook of Criminal Justice Ethics* Routledge 2017) 19.
[118] Roberts, *Punishing Persistent Offenders* (n 9) 42.
[119] Darcy L MacPherson, 'The Relevance of Prior Record in the Criminal Law: A Response to the Theory of Professor von Hirsch' (2002) 28 Queens Law Journal 177, 208.
[120] Roberts, *Punishing Persistent Offenders* (n 9) 40.
[121] Darcy L MacPherson, 'The Relevance of Prior Record in the Criminal Law: A Response to the Theory of Professor von Hirsch' (2002) 28 Queens Law Journal 177, 211.
[122] ibid., 213; Note: this is so because refusing or neglecting to react adequately to such sanctions is only a minor aspect that contributes to the offender's overall culpability.
[123] Youngjae Lee, 'Repeat Offenders and the Question of Desert' in Andreas von Hurst and Julian Roberts, *Previous Convictions at Sentencing: Theoretical and Applied Perspectives* (Hart Publishing 2010).
[124] Chris Bennet, '"More to Apologise For": Can We Find a Basis for the Recidivist Premium in a Communicative Theory of Punishment?' in Andreas Von Hirsch and Julian Roberts, *Previous Convictions at Sentencing: Theoretical and Applied Perspectives* (Hart Publishing 2010).

transgressing which thus, indicates the degree of responsibility to not reoffend, though reliable verification of actual remorse-based desistance is speculative.[125]

However, while such a rationale provides a functional equation for deciphering the extent of a RSP, this approach in practice would default, as it only relates to past and present offences which are analogous, or controlled by similar criminal compulsions, and further, obliges the Court to participate in complex evaluations to discern the degree to which the recidivist undertook genuine efforts to restrain his impulses, before ceding.[126] Moreover, criminal law permits omissions liability only under extraordinary circumstances where a recognised duty of care is owed, meaning that Lee's submission fails to be justified in absence of a comparable, identifiable legal obligation.[127] Therefore, founding RSP upon a general responsibility not to re-transgress pushes omissions liability beyond any cogent capacity and places such justification upon unsteady grounds.

The Demonstration of a Recidivist's "Bad Character":

An alternative retributivist justification for RSP is the intuitive, character-based assessment of the recidivist, whose persistent commissions of criminal infractions purportedly signifies their demonstrably antisocial, "bad" character, and consequently justifies the imposition of additional punishment.[128] However, while such conceptualisations are supported by social psychology explications,[129] they should not be utilised to justify RSP in sentencing.

Liberal societies criminalise stipulated behaviours, not "bad character, bad attitude or bad judgement".[130] As Bagaric affirms, individuals can be of a deplorable character, though if they do not infringe the law, they cannot be legitimately penalised.[131] Even if an individual committed an offence, they are attached penalties relative to the infraction and its respective seriousness, not upon personal traits, beliefs, or habitual tendencies. Enabling characterological evaluations to be contemplated in RSP invites problematic idiosyncratic, stereotypical assessments[132] that risk detrimentally typecasting those that are disadvantaged, discreditable

[125] Richard L Lippke, 'The ethics of recidivist premiums' in *The Routledge Handbook of Criminal Justice Ethics* Routledge 2017) 22; Mirko Bagaric and Kumar Amarasekara, 'Feeling sorry? - Tell someone who cares: the irrelevance of remorse in sentencing' (2001) 40 The Howard Journal 346.
[126] For example, the offender could desist through old age, also referred to as "aging out". Alternatively, perhaps he has no accomplices to commit infractions owing to their imprisonment, inter alia. See Frase and Roberts (n 26) 36.
[127] Tonry (n 1) 108.
[128] Jan de Keijser and others, *Sentencing for Multiple Crimes* (Oxford University Press 2017).
[129] Frase and Roberts (n 26) 10.
[130] Tonry (n 1) 106.
[131] Mirko Bagaric, 'Double punishment and punishing character: the unfairness of prior convictions' (2010) 19 Criminal Justice Ethics 10, 15; Lippke (n 102) 19.
[132] Tonry (n 1) 118.

and living perhaps uncustomary lives.[133] Furthermore, its exact impact upon RSP is dubious. Upon what, or whose, moral compass is "bad character" assessed? Is each PC indicative of worsening character that compels individualised sentence enhancements? This answer is likely positive, which means eventually, the character-accorded increments may outweigh the current offence's sanction,[134] as character-focused theories typically contend an offender's right to capped penalisation on human rights or retributive grounds has been sequestered.[135] Such deduction threatens to induce a lamentably harsh recidivist-sentencing regime, alike the "three-strikes" system.[136] Therefore, the overt infringement of this justification upon the foundational principle that people are penalised for "what they have done, and not for who they are",[137] and its stimulus of deleterious character assessments negates the utility and plausibility of this retributivist RSP rationale.

Public Preference:

Alternately, RSPs are justified partially upon a public preference argument, which switches focus from the transgressor to the audience, indulging the moral collective by recentring a sentence upon what society wants implemented, rather than what offenders punitively deserve in principle.[138] Advances state that citizens' preferences should be given sufficient democratic weightage, particularly on contemplations that moral institutions, such as the Court, are illustrative of public proclivities and a by-product of natural selection,[139] and thus, to uphold institutional integrity and respect society's moral inclinations upon which the justice system is founded, must accurately reflect such public attitudes.[140]

However, despite the existence of powerful communal cynicism around magnanimous recidivist sentences,[141] public potency in sentencing should be constricted insofar as it may impel judiciaries to dispel the rule of law and case facts in favour of exterior preferences based purely upon moral intuition as opposed to lawful doctrine. Such legal rudiments cannot be dispersed; the offender's liberty may be at stake, and regardless of whether sentencing is

[133] ibid.
[134] Lippke (n 102) 19.
[135] Frase and Roberts (n 26) 34.
[136] ibid.; Tonry (n 1) 100.
[137] Frase and Roberts (n 26) 34.
[138] Tonry (n 1) 109.
[139] ibid.
[140] ibid.
[141] Julian Roberts and Mike Hough, *Understanding Public Attitudes to Criminal Justice* (Open University Press 2005) table 2.2; Julian Roberts and Mike Hough, 'The State of Prisons: Exploring Public Knowledge and Opinion' (2005) 44(3) Howard Journal of Criminal Justice 289; Roberts, *Punishing Persistent Offenders* (n 9) 12.

viewed from a retributivist, consequentialist or economist perspective, no theory tethers the severity of criminal sentence to spectators' contentment. Furthermore, populist RSP rationales flourish upon the sentiment that some people plainly pursue harder punishment for "mere punitiveness".[142] Alternately, such inclination reposes amongst vexation born from unfeasible, utopian suppositions founded on public "denial and delusion" about recidivists.[143] Dworkin[144] highlights the triviality of community opinion in reality, referencing *Sweatt v Painter,*[145] where Texans' refuted the admission of African-Americans into the University of Texas. Clearly, this is inherently wrong. This illuminates the severity of potential ethical ramifications of according to the public too much legal persuasion, and the endangerment it may expose typically disadvantaged, stigmatised classes to, whether it be 1950's African-Americans, or the modern-day criminal. *Sweatt*[146] also instantiates that widely-held intuitions are rarely permanent.[147]

Therefore, any public opinion given serious appraisal must be properly informed,[148] free from political demagogism, and untouched by cultural, race or class bias.[149] While institutional legitimacy through public approval is pertinent, why recidivists should be more sharply sanctioned simply to fulfil such pursuit and how exactly it should be codified, is unobvious and, on public preference alone, unviable, particularly when most offenders are oft at a social, economic, or racial disadvantage.[150] Thus, to achieve workable public sentencing expectations which can be actualised in policy, Lippke[151] proposes that such public demands be "tutored" to generate RSPs that are practical, non-partisan and thus, implementable.

The Social Deprivation Narrative: What Recidivists & Society Overlook:

Laminating all these challenges with RSP rationales is "social deprivation narrative" (SDN).[152] This theory fixates upon the inequity of offenders who come from socially-underprivileged environments, to which they will return after concluding their punishment; depraved

[142] Roberts, *Punishing Persistent Offenders* (n 9) 7.
[143] Lippke (n 102) 26.
[144] Ronald Dworkin, *Law's Empire* (Harvard University Press 1986).
[145] *Sweatt v Painter* 339 US 629 (1950).
[146] ibid.
[147] Consider how same-sex marriage was only legalised in Ireland in 2015, before which at a time, homosexuality was perceived as a mental disorder and its acts punishable by law. Furthermore, consider historic societal perceptions about unmarried mothers, the ability of a husband to discipline his wife, the inability of a wife to work once she became a mother, inter alia.
[148] Sir John Saunders and Sir David Calvert-Smith, 'The evolution of sentencing: some judicial reflections' (2020) 5 Criminal Law Review 388, 394.
[149] Tonry (n 1) 111.
[150] ibid.
[151] Lippke (n 102) 17.
[152] ibid., 18.

circumstances which are only exacerbated by the acquisition of a criminal record.[153] It's argued that retributivist rationales fail to sufficiently consider these factors.

Incarceration can contort personalities in a perturbant manner, particularly in harsher sentencing systems like the United States, where rehabilitation objectives are perfunctory or outwardly absent.[154] Therefore, recidivism amongst such disadvantaged individuals appears inescapable for these offenders as CH records and social deprivation leave them with scant practicable alternatives to acquire higher social-status or improve earning capacity.[155] Pairing this with indications that lower-class crimes are less complicated to probe than middle-class transgressions,[156] the justice system's profile of offences can be ostensibly distorted insofar as it generates the perception that the lower-class are worse offenders than they may actually be, at least in comparison to other segments of the community.[157]

The SDN pokes stark holes in retributivist's conceptual dialogue through argument that these factors conduce a less culpable offender, as their destitute circumstances have generated a desperation that the ordinary citizen cannot comprehend, destabilising advances that recidivists are of deficient character, more defiant, and thus more deserving of harsher penalisation.[158] Such retributivist rationales risk imprisoning someone on a judgement of class, and their diminished respect for that individual alone.[159] Furthermore, the common perception that reoffenders had abundantly opportune lives, but volitionally chose unlawfulness, is oversimplified. This elucidation also provides comprehension on why, perhaps, RSPs have scarce perceptible deterrent effects, as even where such offenders have awareness of the heightened recidivism ramifications, may be easily enticed to risk such enhancements where there are few, plausible alternatives to earn income.[160]

This socio-economic criminal disparity is also prevalent in Ireland, confirmed by statistics observing a "startling"[161] imbalance whereby 145.9 prisoners per 10,000 population resided within the most impoverished addresses of the state, compared to 6.3 prisoners in less destitute

[153] ibid.; Craig Haney, *Reforming Punishment: Psychological Limits to the Pains of Imprisonment* (American Psychological Association Books 2006).
[154] ibid.
[155] Lippke (n 102) 21.
[156] William Stuntz, 'Race, class, and drugs' (1998) 98 Columbia Law Review 1795.
[157] Lippke (n 102) 21.
[158] ibid.
[159] Tom O'Malley, 'Bail and Predictions of Dangerousness' (1989) 7 Irish Law Times 41; See also Ronald Dworkin, *Taking Rights Seriously* (Harvard University Press 1979) 13.
[160] Lippke (n 102) 21.
[161] Ian O'Donnell and others, 'When prisoners go home: Punishment, social deprivation and the geography of reintegration' (2007) 17(4) Irish Criminal Law Journal 1, 4.

areas, displaying a "potentially destabilising" discrepancy.[162] Furthermore, Irish recidivisms rates are materially higher where offenders are male, younger, unemployed, illiterate and lesser formally educated.[163] Thus, such retort largely undermines harsh RSP retributivism rationales. Alternatively, for individuals so susceptible to criminality and thus, recidivism, the public should undertake concerted endeavours to allow socially-disadvantaged offenders to gain a societal footing through discarding solely-desert based justifications, only eliciting a strong RSP when reoffenders, having been given the chance to change, refuse.[164] The SDN cannot be allowed to grow, as without counteracting the narrative, RSPs will work discriminately towards underprivileged offenders, and against the public insofar as it increase the justice system's price while failing to accord society sufficient protection by refusing to proactively address, treat and ameliorate the socio-economic contributions that conduce recidivism.[165] Therefore, understanding of detrimental sociodemographic factors which produce the recidivist should temper RSP against genuinely disadvantaged offenders, so as to reduce the abrasive effects of legal penalisation and combat the roots of recidivism directly.[166]

Consequentialist & Utilitarian Justifications of "Risk":

Much literature has emanated in recent decades from what Beck denotes as the "risk-society",[167] where communities aspire to regulate every aspect of threats to national or individual security.[168] This social evolution accordingly conduces an anticipated influence upon the sentencing process whereby the multiple-offender, as a recognisable hazard within society, is now increasingly susceptible to stringent risk-restrictions. Such transformation has incited a move away from retributivist sentencing, in favour of more preventive, crime-control orientated utilitarian approaches which strive to prevent crime through employing theories of deterrence, incapacitation, and rehabilitation.[169] Contrasting to retributivism, utilitarian theories are founded upon empirical observations that consider PCs to be directly reflective of an offender's proclivity to regress into crime and apply such sentence

[162] ibid.; Ian O'Donnell, 'Ireland's Shrinking Prison Population' (2017) 27(3) Irish Criminal Law Journal 70; Ian O'Donnell, 'Measuring Recidivism: A Research Not' (2020) 64 Irish Jurist 47.
[163] Ian O'Donnell and others, 'Recidivism in the Republic of Ireland' (2008) 8 Criminology and Criminal Justice 123, 134.
[164] Lippke (n 102) 26.
[165] As O'Malley suggests, the "acid test" of a liberal society's "commitment to individual rights is the way in which it response to an identifiable individual who finds himself in contact with that system", See Tom O'Malley, 'Bail and Predictions of Dangerousness' (1989) 7 Irish Law Times 41.
[166] See Jean Hampton, 'Correcting Harms Versus Righting Wrongs: The Goal of Retribution' (1992) 39 University of California Los Angeles Law Review 1659, 1698. Hampton notes from a retributivist perspective, that the progressive loss of mitigation approach would be a fitting model to utilise where offenders are from disadvantaged backgrounds.
[167] Ulrich Beck, *Risk Society: Towards a New Modernity* (Sage 1992).
[168] Roberts, *Punishing Persistent Offenders* (n 9) 21.
[169] ibid., 8; Frase and Roberts (n 26) 11.

enhancements in direct correlation with the ascertained risk of reoffence, to the exclusion of crime seriousness considerations; essentially the larger a risk the offender presents, the more justified a sharper RSP is.[170]

Such submissions are bolstered by findings over numerous decades, which have concurred that recidivism rates tend to rise expeditiously in parallel with PCs and sentences delivered.[171] For example, statistics in England & Wales report that imprisoned offenders with 10 or more PCs are five times more susceptible to reoffend than first-time offenders.[172] Furthermore, in Ireland, the recidivism rate within two years of sentence completion is astoundingly 58.3per cent.[173] However, despite such substantial corroboration to this effect, the utilitarian justification contains a flaw insofar as the approach operates irrespective of unguaranteed reoffence of the first-timer or the recidivist.[174] In applying the rationale to all offenders, of every degree, equally, it discounts the transgressor that will actually desist. Such an offender is nevertheless consequentially penalised by utilitarian sentences for what other prospective transgressors *may* do, as opposed to what the offender himself, has, *in fact*, done. This is more troublesome alongside the existence of conflicting evidence which indicates recidivism probability rates are more marginal than commonly reported, conducing angst upon the reliability of this theory's assumptions knowing the existence of false positives.[175] Thus, to be conceptually sound and rebuff retributivists' moral dissents, the utilitarian justification must encompass an individual strand[176] within risk-based assessments to obviate any condemnation of a "blanket approach" within utilitarian PC-based sentencing. Additionally, each PC should be singly inspected to determine its

[170] ibid.
[171] Jack Cunliffe and Adrian Shepard, 'Re-offending of adults: results from the 2004 cohort' (*UK Home Office*, June 2007) <https://lemosandcrane.co.uk/resources/Homeper cent20Officeper cent20-per cent20Reoffendingper cent20ofper cent20adultsper cent2007.pdf> accessed 2 June 2021; Thomas Gabour, *The Prediction of criminal behaviour: Statistical Approaches* (University of Toronto Press 1986).
[172] Roberts, *Punishing Persistent Offenders* (n 9) 31, table 2.1.
[173] 'Recidivism Study' (*Irish Prison Service*, 2013) 3 <https://www.irishprisons.ie/images/pdf/recidivismstudyss2.pdf> accessed 2 June 2021; Ian O'Donnell, 'An Evidence Review of Recidivism and Policy Responses' (2020) <http://www.justice.ie/en/jelr/an_evidence_review_of_recidivism_and_policy_responses.pdf/files/an_evidence_review_of_recidivism_and_policy_responses.pdf> accessed 2 June 2021; 'Probation Re-offending Statistics 2013, 2014 and 2015 Cohorts' (*Central Statistics Office*, 6 December 2019) <https://www.cso.ie/en/releasesandpublications/ep/p-prs/probationreoffendingstatistics20132014and2015cohorts/> accessed 2 June 2021.
[174] Roberts, *Punishing Persistent Offenders* (n 9) 32.
[175] ibid.; Jean Floud, 'Dangerousness and Criminal Justice' (1982) 22(3) The British Journal of Criminology 213 Note the "Floud Report" ceded that false positives existed in such context, potentially reaching 66per cent.
[176] ibid., 59.

applicability towards an RSP, to the disregard of "minor or trivial" offences,[177] as adduced in the Irish cases of *DPP v Galligan,*[178] and *DPP v Ormonde.*[179]

Deterrence:

The objectives attached to deterrence, and additionally incapacitation, are posited upon the presupposition that PCs can predict future crimes and thus, the multiple-offender merits a harder punishment as the risk of reoffence they pose is largely superior than the first-timers'.[180] To be empirically-justified, Roberts'[181] declares that such an argument must fulfil two conditions. Firstly, a considerable affiliation between the nature and degree of PCs and the probability of future reoffence must be evidenced. Secondly, it must be proved that the infliction of RSP will reduce recidivism.[182]

However, while RSP upon a utilitarianist deterrence rationale is argued as more theoretically concrete and noble, the theory makes some irresolute presumptions. In assuming this rationale, theorists presume that transgressors are logical, rational actors, who calculate the potential risk and reward of their recidivism. Indeed, this can be argued for deterrence procedures *en masse,* however here, RSPs further conjecture presupposes those reoffenders contemplate the additional penalties that loom, and regress regardless.[183] This suggests that imposing added sanctions upon a recidivist's every reoffence, has meagre impact upon individual recidivism rates; a submission confirmed by Werminks'[184] recent uncovering that longer sentences directly correlated with higher rates of reoffending. This indicates that while the individual deterrence approach is attractive, and less conceptually-challenged than retributivist rationales, the impact of RSP upon deterrence is circumspect, signifying that the justification must be empirically affirmed, individualised and not solely risk-based, to find legitimacy.

Dangerousness and Prevention-based Recidivist Sentence Premiums in Practice:

[177] Thomas O'Malley, *Sentencing Law and Practice* (2nd end, Thomson Round Hall 2006) 143; *DPP v Griffin* [2011] IECCA 62; *DPP v Ormonde* [2011] IECCA 46.
[178] *DPP v Galligan* (Court of Criminal Appeal, 23 July 2003).
[179] *DPP v Ormonde* [2011] IECCA 46; See also *DPP v Griffin* [2011] IECCA 62.
[180] Roberts, *Punishing Persistent Offenders* (n 9) 31.
[181] ibid., 33.
[182] Bargaric denotes this as the "verifiable good". See Mirko Bagaric and Michael Flatman, 'The Victim and The Prosecutor: The Relevance of Victims in Prosecution Decision Making' (2001) 6(1) Deakin Law Review 238.
[183] Roberts, *Punishing Persistent Offenders* (n 9) 2.
[184] Hilde Wermink and others, 'Effects of Imprisonment Length on Recidivism in the Netherlands' (2018) 64(8) Crime and Delinquency 1056, 1077.

RSPs concluded upon an offender's "dangerousness", deciphered by assessing their relative CH, have been inconsistent. The English CJA 2003 established sentences of Imprisonment for Public Protection (IPP).[185] These sentences compelled Courts to presume the dangerousness of reoffenders, pursuant to s.229(2), unless such assumptions were "unreasonable". In practice, IPPs had pernicious application, whereby they were often sanctioned for rather minor offences on account of prior, outdated, trifling transgressions, as the act necessitated a CH evaluation to ascertain an offender's "dangerousness".[186] This generated a mass of enhanced sentences justified outside the current offence, and largely upon what they may do in future.[187] This led to the section's ultimate abolition, as the risk-based rationale of PCs were perceived as having incited, rather than restrained, recidivism upon release.[188] This demonstrates the danger of over-punishment by implementing a purely risk-based, utilitarian justification for RSPs, where the theory attributes too much weight to danger-based scales, to the neglect of considerations around material seriousness of PCs.

In Ireland, the inclusion of a future dangerousness evaluation was first rebutted in *DPP v Ryan*[189], upholding *DPP v Callaghan,*[190] though decided in the context of bail. Although Murnaghan J in *Callaghan* was prepared to approve the incorporation of future dangerousness on bail deliberations, O'Dalaigh CJ retaliated with the statement that such a contemplation would be "a denial of the whole basis" of the legal system.[191] This jurisprudence was affirmed in *Ryan*[192], with McCarthy J finding no "persuasive authority" to signify the approach was grounded in common law.[193] Most emphatically however, *DPP v McMahon*[194] refuted the DPPs proposition of a life sentence upon McMahon by reason of the appellant's inherent dangerousness to society.[195] On appeal, O'Donnell J concurred that, while admiring the Irish justice system's innate flexibility,[196] the Court's sentencing capacity does not decree any

[185] Criminal Justice Act 2003, s 225.
[186] Criminal Justice Act 2003, s 225(I)(b); See also for additional definitions Council of Europe, 'Recommendation CM/Rec (2014) 3 of the Committee of Ministers to member States concerning dangerous offenders" (19 February 2014) Part I, s 1(a) <https://pjp-eu.coe.int/documents/41781569/42171329/CMRec+per cent282014per cent29+3+concerning+dangerous+offenders.pdf/cec8c7c4-9d72-41a7-acf2-ee64d0c960cb> accessed 2 June 2021.
[187] Sir John Saunders and Sir David Calvert-Smith, 'The evolution of sentencing: some judicial reflections' (2020) 5 Criminal Law Review 388, 393.
[188] ibid.; Legal Aid, Sentencing and Punishment of Offenders Act ("LASPOA") 2012 (UK).
[189] *DPP v Ryan* [1989] IR 299.
[190] *DPP v O'Callaghan* [1966] IR 501.
[191] ibid.
[192] *DPP v Ryan* [1989] IR 299.
[193] *DPP v Ryan* [1989] IR 299, in upholding *O'Callaghan* (n 190), Finlay CJ asserted that it must be understood that *AG v McCann* [1955] IR 163 and *AG v McEvoy* [1959] IJR 44 had been overruled by *O'Callaghan* (n 190). See Tom O'Malley, 'Bail and Predictions of Dangerousness' (1989) 7 Irish Law Times 41.
[194] *DPP v McMahon* [2011] IECCA 94.
[195] Brendan Glynn, 'Sentencing the Recidivist - Part II' (2020) 38(12) Irish Law Times 174.
[196] *DPP v McMahon* [2011] IECCA 94 [18].

judiciary to bestow tentative sentences on grounds that an offender may present a potential risk to society in future.[197] Therefore in Irish law, a sanction on grounds of speculative future recidivism, even if somewhat defensible, is impermissible by risk of constituting a preventative detention[198] which Irish Courts' deem "a recalibration of the scales of justice".[199]

Therefore, despite utilitarian justifications appearing more conceptually persuasive in practice,[200] an absolute risk-based approach can be contentious. Although proportionality of sentence severity is a core element of utilitarian penalisation, sentences that refuse to reflect the transgression's seriousness even vaguely can produce counteractive deterrent standards that fail to equate crime-control benefits with price of punishment.[201] Furthermore, if PCs can only be feebly linked to future offending,[202] or if harder sentences can only demonstrate a minimal preventive impact, a purely risk-oriented RSP approach may produce unjustified over-punishment, whereby the substantial portion of the offenders sentence is unrelated to his unlawful conduct and blameworthiness, but is rather contingent upon deterring or incapacitating him to subdue his *potential* regression toward criminal proclivities.[203] To justify this utilitarian risk-centred rationale, the approach must confidently display that its crime-control advantages exceed its alternative disagreeable ramifications, which may necessitate a collaboration between intuitive retributivist rationales and recidivism-reducing utilitarian theories. Nevertheless, despite its frailties, the difficulty such an approach encounters in assessing future crime cannot be dismissed; as Floud & Young deduce, "not even the offender himself can be certain that he or she will or will not reoffend".[204]

Conclusion: Towards a Flexible Model:

Despite the theoretical and practical intricacies littered throughout both retributivists and utilitarianists rationales, the preventive, crime-control based justification for RSPs upon repeat offenders is conclusively more cogent and convincing than the retributive, culpability-orientated rationale. This is primarily upon contemplations of the weak lawful basis in which

[197] ibid.
[198] Brendan Glynn, 'Sentencing the Recidivist - Part II' (2020) 38(12) Irish Law Times 174.
[199] *DPP v Ryan* [1989] IR 299.
[200] Roberts, *Punishing Persistent Offenders* (n 9) 30.
[201] Frase and Roberts (n 26) 25.
[202] ibid., 13.
[203] ibid.
[204] Jean Floud and Warren Young, *Dangerousness and Criminal Justice* (Heinemann 1981) 39.

many intuitive retributivist rationales reside, alongside the moral, conceptual and deontological hazards attached to fixating RSPs upon instinctive culpability.

However, in operation, the two justifications are not mutually exclusive; recidivists may pose a higher risk of reoffence while being, concurrently, more culpable. However, this necessitates a merger between retributivist theories and utilitarian crime-control objectives, which to be equally respected, would compel reformation of both the severities and structure of sentencing.[205] To resolve any incongruities that arise between this coalition, the principle of parsimony should be incorporated to act as a buffer to any convolutions which arise between the, equally competitive, approaches. Thus, any blended model that prevails should be balanced and united through the shared objective of fulfilling a parsimonious mandate of imposing a sentence which is only as trenchant and strident as necessary to execute sentencings' ultimate goals.

In practice, such a proposition would be realised through a flexible model, such as currently employed in Ireland,[206] whereby a hybridised PLM and cumulative sentencing approach is employed, that enables Courts to undertake adaptable, discretionary evaluations of how, and if, a sentence upon a recidivist should be augmented. Considering the individuality of offenders and the worrisome social deprivation narrative, such a malleable, fused-system would enable Judges to proactively respond to variables such as minor, immaterial PCs, archaic PCs and patterns of comparable reoffences to uphold proportionality by distributing receptive and equitable sentences, dispelling critical observers.[207] While the pliability of this approach threatens to conduce inconsistent precedents, this doesn't negate its value, especially noting the restrictiveness of alternative approaches, such as the American[208] and English sentencing guidelines,[209] which, though providing sentence certainty, works to encroach upon Courts' independence and disregards the specificity of every transgression and every transgressor. However, one modification that should be made upon the Irish model, is the inclusion of legitimate contemplation of future recidivism, though this would demand robust justification

[205] Frase and Roberts (n 26) 13; Commentary from Macken J in *DPP v Ulrich* [2011] IECCA 30 strongly suggests the confirmation of a flexible approach whereby judges are not constrained to one single approach on enhancing sentences on considerations of previous convictions.
[206] Brendan Glynn, 'Sentencing the Recidivist - Part II' (2020) 38(12) Irish Law Times 174.
[207] Frase and Roberts (n 26) 21.
[208] United States Sentencing Commission, Guidelines Manual §3E1.1 (November 2018).
[209] 'Magistrates' Courts Sentencing Guidelines' (*Sentencing Council for England and Wales*, 2011) <https://www.sentencingcouncil.org.uk/offences/> accessed 10 June 2021; 'Sentencing Guidelines for use in the Crown Court' (*Sentencing Council for England and Wales*, 2011) <https://www.sentencingcouncil.org.uk/crown-court/> accessed 10 June 2021.

and would likely encompass a high threshold to counter current common law contradictions. Furthermore, a rebuttable culpability presumption and the incorporation of a retributive upper-limit[210] beyond which CH and PCs cannot influence the increment of a sentence, are absolute fundamentals for the efficacious implementation of this model.[211]

In conclusion, when adducing RSPs, Courts should adopt a balanced blend of both retributivist and consequentialist rationales to employ effective crime-prevention, avert the "dangerousness of dangerousness"[212] and acknowledge public preference to avert demoralisation. Additionally, the impact of judicial fairness upon recidivism cannot be understated.[213] Regardless of diverging theories and conflicting practices in RSP reality, to ensure an equitable, honourable, and just criminal sentence upon contemplations of PCs, recidivism, and punishment, one fundamental must be ubiquitous; the balance between rule and discretion.[214]

[210] The rule of thumb on this cap is often concurred by academics and legal theorists as: no matter the previous conviction or offence or its respective seriousness, and recidivist sentencing premium cannot account for more than half of an offender's total sentence. See Youngjae Lee, 'Repeat Offenders and the Question of Desert' in Andreas von Hurst and Julian Roberts, *Previous Convictions at Sentencing: Theoretical and Applied Perspectives* (Hart Publishing 2010) 67; Frase and Roberts (n 26) 36.
[211] Frase and Roberts (n 26) 211.
[212] Tom O'Malley, 'Bail and Predictions of Dangerousness' (1989) 7 Irish Law Times 41.
[213] Research conducted by Bijersbergen and others demonstrated that prisoners who considered their treatment and sentence fair and just, were statistically less likely to reoffend. See Karin Beijersbergen and others, 'Reoffending after Release: Does Procedural Justice During Imprisonment Matter?' (2016) 43(1) Criminal Justice and Behaviour 63.
[214] Frase and Roberts (n 26) 211.