

Preface

This latest volume in the *Penal Theory and Ethics* series addresses one of the most contested questions in the field of criminal sentencing: should an offender's previous convictions be taken into account in deciding the quantum of sentence? In reality, this single question provokes a series of others: is it possible to justify a discount for first offenders within a retributive sentencing framework? How should previous convictions enter into the sentencing equation? At what point should prior misconduct cease to count for the purposes of sentencing for the current offence? Should similar previous convictions count more than convictions unrelated to the current offence?

Statutory sentencing regimes around the world incorporate provisions which mandate harsher treatment of repeat offenders. The practice of imposing progressively harsher penalties as the offender accumulates more convictions is called the *recidivist sentencing premium* and is the subject of this volume. Although there is a vast literature on the definition and use of criminal history information, the emphasis here, as befits a volume in the series, is on the theoretical and normative aspects of considering previous convictions at sentencing. The focus is upon retributive sentencing perspectives. Utilitarian sentencers justify a recidivist premium on the grounds that harsher penalties are necessary to deter or incapacitate repeat offenders.

The volume begins with three chapters which explore the 'discount theory'—which favours the imposition of mitigated punishments upon first offenders, or offenders with modest criminal records. This theory gives rise to the well-known principle of the *progressive loss of mitigation*. This principle argues that first offenders should receive a discounted sentence. If they reoffend, they should still receive a discount, albeit one of lesser magnitude. Ultimately, after a specified number of reconvictions, their first-offender status expires, and no further discount is offered. The principle has proven very influential in sentencing writings, less so in terms of sentencing practice. Andrew von Hirsch offers an account of the lapse theory and this is followed by two other contributions by Julian Roberts and Jesper Ryberg in which the theory and the principle are discussed at greater length.

Youngjae Lee and Chris Bennett propose retributive justifications for

imposing progressively harsher sentences on repeat offenders. Lee argues that repeat offenders may reasonably be considered more culpable for failing to take the necessary remedial steps to prevent reoffending. Chris Bennett also considers repeat offenders to be more blameworthy, but, in contrast to Lee, he locates the justification for a recidivist sentencing premium within a communicative theory of sentencing.

Michael Tonry provides a critique of a number of justifications for criminal-history enhancements, including those proposed in this volume by Lee and Bennett, and elsewhere by Roberts. Richard Frase seeks to identify normative principles and practical rules which may both justify and set limits on the widespread practice of enhancing sentence severity based on prior convictions. In his view the normative principles adopted for this purpose must be capable of generating clear, workable norms, providing guidance to judges and sentencing policymakers on when and why prior-record adjustments are permitted, and also when and why they are excessive.

Repeat offenders are usually defined as people who commit multiple offences over time, with their episodes of offending interrupted by sentencing for each offence. Recidivist statutes are constructed with this profile of offender in mind. However, a significant number of convicted defendants face sentence for multiple offences committed on a single occasion, or over a very short period of time. Sentencing in such cases throws up a raft of problems for the courts. One response to the offender who, for example, commits ten burglaries during the same evening is to impose concurrent sentences. Alternatively, a sentence may be assigned for each conviction; but the overall 'package' of sentences is discounted by the 'totality' principle. This ensures that someone convicted of, say, five burglaries does not receive a sentence that is more severe than an offender convicted of, say, rape. The practical consequence is a paradox, or inconsistency: repeated offences over time may result in a harsher penalty (if a recidivist sentencing premium is adopted), while multiple offences over a single occasion are 'discounted' by another practice (totality). Kevin Reitz explores the complexities surrounding the sentencing of offenders convicted of multiple offences.

In the second part of the volume, we turn from theory to practice. A number of contributors explore the use of previous convictions in three Western jurisdictions. First, Martin Wasik provides a salutary reminder that in practice determining the nature of an offender's record is a far from straightforward exercise. Wasik provides a typical criminal history and works the reader through the practical issues arising from considering previous criminal misconduct. Andrew Ashworth and Estella Baker describe and analyse the law in England and Wales, a jurisdiction in which the role of previous convictions at sentencing has changed significantly within a single decade. In 1991, courts were explicitly directed

to ignore an offender's previous convictions. This legislation was subsequently amended in 1993, and in 2003 matters turned full circle. The *Criminal Justice Act* of that year included a provision which requires courts to consider each prior conviction as enhancing the seriousness of the current offence, if this is reasonable.

The chapter by Petter Asp explains the use of previous convictions in jurisdiction which utilises a variant of the principle of progressive loss of mitigation. The volume concludes with a contribution by Lila Kazemian who examines, in the light of recent empirical studies, the assumption that harsher penalties will actually deter or incapacitate recidivists. She notes that the *recidivist sentencing premium's* promise of lower crime or recidivism rates is remains unfulfilled—at least on the evidence that has accumulated to date.

<http://www.pbookshop.com>

Contents

	<i>Acknowledgements</i>	v
	<i>Preface</i>	vi
	<i>Contributing Authors</i>	xi
I	Proportionality and the Progressive Loss of Mitigation: Some Further Reflections <i>Andrew von Hirsch</i>	I
2	First-Offender Sentencing Discounts: Exploring the Justifications <i>Julian V Roberts</i>	17
3	Recidivism, Retributivism, and the Lapse Theory of Previous Convictions <i>Jesper Ryberg</i>	37
4	Repeat Offenders and the Question of Desert <i>Youngjae Lee</i>	49
5	'More to Apologise For': Can We Find a Basis for the Recidivist Premium in a Communicative Theory of Punishment? <i>Chris Bennett</i>	73
6	The Questionable Relevance of Previous Convictions to Punishments for Later Crimes <i>Michael Tonry</i>	91
7	Prior-conviction Sentencing Enhancements: Rationales and Limits Based on Retributive and Utilitarian Proportionality Principles and Social Equality Goals <i>Richard S Frase</i>	117
8	The Illusion of Proportionality: Desert and Repeat Offenders <i>Kevin R Reitz</i>	137
9	Dimensions of Criminal History: Reflections on Theory and Practice <i>Martin Wasik</i>	161
10	The Role of Previous Convictions in England and Wales <i>Estella Baker and Andrew Ashworth</i>	185

11	Previous Convictions and Proportionate Punishment under Swedish Law <i>Petter Asp</i>	207
12	Assessing the Impact of a Recidivist Sentencing Premium on Crime and Recidivism Rates <i>Lila Kazemian</i>	227
	<i>Index</i>	251

<http://www.pbookshop.com>

Contributing Authors

Andrew Ashworth is the Vinerian Professor of English Law at the University of Oxford, Fellow of All Souls College, Oxford and former Chairman of the Sentencing Advisory Panel in England and Wales.

Petter Asp is Professor of Criminal Law at the University of Stockholm.

Estella Baker is Senior Lecturer in the Faculty of Law, University of Sheffield.

Chris Bennett is Senior Lecturer in the Department of Philosophy, University of Sheffield.

Richard S. Frase is the Benjamin N Berger Professor of Criminal Law at the Faculty of Law, University of Minnesota.

Lila Kazemian is an Assistant Professor at John Jay College of Criminal Justice, New York.

Youngjae Lee is currently Visiting Professor of Law, University of Chicago Law School and Professor of Law, Fordham University School of Law.

Kevin R Reitz is the James Ammenberg Levee Professor of Law, University of Minnesota.

Julian V Roberts is Professor of Criminology in the Faculty of Law, University of Oxford and Fellow of Worcester College, Oxford.

Jesper Ryberg is Professor of Ethics and Philosophy of Law, Department of Philosophy and Science Studies, University of Roskilde, Denmark.

Michael Tonry is the Marvin J Sonosky Professor of Law and Public Policy at the Faculty of Law, University of Minnesota and Senior Fellow of the Netherlands Institute for the Study of Crime and Law Enforcement.

Andrew von Hirsch is Honorary Professor of Penal Theory and Penal Law, University of Cambridge; Honorary Fellow, Wolfson College, Cambridge; and Honorary Professor, Law Faculty, Johann Goethe-University, Frankfurt

Martin Wasik is Professor of Law at Keele University, and a former Chairman of the Sentencing Advisory Panel in England and Wales.