

1981

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von Hirsch, Andrew, "Desert and Previous Convictions in Sentencing" (1981). *Minnesota Law Review*. 841.
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Desert and Previous Convictions in Sentencing*

Andrew von Hirsch**

I. THE QUESTION

WHY IS PRIOR CRIMINAL RECORD IMPORTANT?

Most penal systems impose less punishment on a first offender than on offenders who have prior criminal records. Should this be so, and why?

On a future-oriented theory of sentencing, the practice is easy enough to explain. Most prediction studies suggest that an offender with a prior criminal record is statistically more likely to return to crime than a first offender.¹ The presence or absence of a prior record would thus be relevant to determina-

* This Article grew out of a presentation I made at a conference on penal desert held at Sterling Forest Conference Center, Tuxedo, New York, on November 17-19, 1978, under the auspices of the Graduate School of Criminal Justice at Rutgers University. Funding for the presentations and the conference was provided by the New Jersey Committee for the Humanities, the Ford Foundation, and the Rutgers University Research Council. Additional research was supported by the Project on Strategies for Determinate Sentencing, funded by grants from the National Institute of Justice of the U.S. Department of Justice (Grant Nos. 78-NI-AX-0081/2). Points of view stated in this Article are those of the author, and do not necessarily represent the official position or policies of any of these funding agencies.

I am indebted to all those who attended the Sterling Forest conference for the useful comments I received there. In addition, I received valuable advice on the Article in its various stages from Edward Bloustein, Nils Christie, Martin R. Gardner, Malcolm Greenway, Hyman Gross, Jonathan Hyman, John Kleinig, Deborah Koster, Janice LaMaack, Ruth Macklin, Sheldon Messinger, John Monahan, Philippe Nonet, David J. Rothman, Don E. Scheid, Richard G. Singer, Richard F. Sparks, Michael Tonry, Leslie T. Wilkins, and Marvin E. Wolfgang.

The perplexing issue of desert and prior criminality was one I discussed at length with my friend and former colleague, Susan Steward. This article is dedicated to her memory.

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1. See, e.g., D. GOTTFREDSON, L. WILKINS & P. HOFFMAN, *GUIDELINES FOR PAROLE AND SENTENCING* 41-67 (1978); Gottfredson, *Assessment of Prediction Methods*, in *THE SOCIOLOGY OF PUNISHMENT AND CORRECTION* 745-71 (2d ed. N. Johnston, L. Savitz & M. Wolfgang 1970).

tion of sentence on incapacitative grounds—as an indication of risk.

A desert-oriented theory, however, does not permit sentencing decisions to rest on predictions of future criminality. Penalties must, as a matter of justice, depend on the offender's deserts: that is, they must be commensurate with the degree of blameworthiness of the offender's past criminal conduct.²

If one subscribes (as I do) to such a desert-oriented view, is it legitimate to differentiate between first offenders and those with prior records? Arguments about the greater risk posed by repeat offenders would then be irrelevant. Unless the offender who has a record deserves to be punished differently in virtue of his having previously been convicted, he would have to be treated like the first offender—irrespective of risk.

In *Doing Justice*,³ I maintained that prior criminal record does bear on an offender's deserts. A first offender, I suggested, deserves reduced punishment: he does not merit the full measure of condemnation for his criminal act where there has been no previous conviction.⁴ This claim has drawn much fire. Any reliance on prior criminal record, critics variously have claimed, must rest on prediction rather than desert;⁵ or must assume an "authoritarian" theory of criminal punishment;⁶ or

2. See generally A. VON HIRSCH, *DOING JUSTICE* 66-76, 132-40 (1976) [hereinafter cited as *DOING JUSTICE*].

3. *Id.*

4. *Id.* at 84-85. One writer has claimed that, in a 1972 article, I asserted the opposite view—that a record of previous convictions does not bear on offender's deserts. A careful reading of that article makes it evident, however, that I made no such assertion. Compare von Hirsch, *Prediction of Criminal Conduct and Preventive Confinement of Convicted Persons*, 21 *BUFFALO L. REV.* 717, 744-50, 753 n.91 (1972) with Underwood, *Law and the Crystal Ball: Predicting Behavior with Statistical Inference and Individualized Judgment*, 88 *YALE L.J.* 1408, 1419 n.27 (1979).

5. G. FLETCHER, *RETHINKING CRIMINAL LAW* 466 (1978); Goldstein, *Supplemental Statement to DOING JUSTICE*, *supra* note 2, at 172-74; Schiller, *Book Review*, 67 *J. CRIM. L. & CRIMINOLOGY* 356, 357-58 (1976).

6. G. FLETCHER, *supra* note 5, at 463-66. Fletcher asserts:

If a child persists in violating [parental] rules . . . he implicitly undermines parental authority. This is the element of defiance or "rebellion" that constitutes the additional wrong in repeated violations of the rules. . . .

This rebellion against authority is what, to my mind, underlies von Hirsch's argument that a second offense deserves greater punishment than the first. If the family were an appropriate model for civil society, he might be right. But (thank God) the family is not the model for liberal society. . . . In a liberal society, based upon the rule of law, authority is not charismatic, but formal. Legislators, judges and law enforcement personnel occupy legally defined offices: they are not entitled to react to the "persistent" criminal as though their personal authority were challenged.

must bring with it unrestricted judicial inquiry into the defendant's whole past life.⁷

Yet it is difficult to escape the feeling that, for whatever reason, first offenders do deserve less punishment.⁸ The strength of this feeling alone justifies a closer look at the issue of desert and prior criminality: perhaps there are good reasons for responding differently to first offenders and repeaters, but those reasons need further exploration.

The issue of prior criminality is critical to a desert-oriented theory of sentencing because it so much influences the architecture of the penalty scale. If prior record is relevant to an offender's deserts, that permits a two-dimensional penalty scale, such as the one I proposed in *Doing Justice*:⁹ one dimension would be the seriousness of the current offense; the other, the prior convictions. But if prior record is irrelevant under a desert model, there would be only a one-dimensional scale: simply, the seriousness of the current offense.

The issue is important for another reason. Scaling down penalties for first offenders can be a way of limiting severity of punishment. In *Doing Justice* I proposed, for example, that individuals convicted of so-called "lower-range serious" offenses—that is, offenses of threatened but not actual violence—should get intermittent confinement on the first offense, and imprisonment only for repetitions.¹⁰ This reflected my view that first offenders deserve less. If I was mistaken and prior criminality is irrelevant to an offender's deserts, then individuals convicted of these crimes would deserve their "full dose" of punishment the first time—which could well mean a term of imprisonment for the first offense.¹¹

AGENDA FOR ARGUMENT

I am still convinced that prior criminal record should be considered in determining how much punishment an offender deserves. An offender facing sentence for the first time merits, other things being equal, less punishment than one who has had a previous record of convictions. (Notice that I am speaking of the previously-convicted offender. This Article will not

Id. at 465.

7. See, e.g., R. SINGER, *JUST DESERTS: SENTENCING BASED ON EQUALITY AND DESERT* 67-74 (1979).

8. *Id.* at 72.

9. *DOING JUSTICE*, *supra* note 2, at 132-40.

10. *Id.* at 138.

11. *Id.* at 86, 148-49.

address the rather different case of the offender who, without previous convictions, has now been found guilty of a series of past crimes and faces sentence on multiple counts. This latter question, of concurrent versus consecutive sentences, calls for separate discussion.)¹²

The argument that I made in *Doing Justice* for my view of prior criminality ran as follows:

The reason for treating the first offense as less serious is . . . that repetition alters the degree of culpability that may be ascribed to the offender. In assessing a first offender's culpability, it ought to be borne in mind that he was, at the time he committed the crime, only one of a large audience to whom the law impersonally addressed its prohibitions. His first conviction, however, should call dramatically and personally to his attention that the behavior is condemned. A repetition of the offense following that conviction may be regarded as more culpable, since he persisted in the behavior after having been forcefully censured for it through his prior punishment.¹³

I now think this argument is insufficient. It fails to explain why blameworthiness is reduced when the offender is "only one of a large audience to whom the law impersonally addressed its prohibitions" and why this blame-reducing factor is lost if the offender "persists" in the behavior after having been "forcefully censured for it through his prior punishments." Is it a question of notice of the wrongfulness of the conduct? Or is something else involved, and if so what?

In this Article, I shall develop a more explicit account of the relevance of prior convictions.¹⁴ First, I shall examine judgments about wrongdoers' deserts in everyday life, to show why and how prior misconduct is relevant in such judgments. When, in making such judgments, people cite an actor's past behavior, they are using the notion of desert correctly, I shall argue; they are not misconceiving the idea of desert—as they would, for example, were they to base judgments of deserved

12. When the state is responding to several crimes for which the defendant is only now facing sentence, the question arises whether and to what extent the punishment due for those acts may properly be cumulated. This question is manifestly distinct from the one I am addressing in this Article. My discussion focuses solely on the case in which the defendant has been punished already for the prior crime, and the issue becomes how those prior convictions should bear on the punishment due for the current offense.

13. *DOING JUSTICE*, *supra* note 2, at 85.

14. I shall be making the strong claim that first offenders do deserve less punishment, on the merits. In *DOING JUSTICE*, I also made a weaker, evidentiary claim: that evidence of culpability tends to be less persuasive for first offenders than for the previously convicted. *Id.* at 85-86. *But see* G. FLETCHER, *supra* note 5, at 463 n.17. As I believe the strong claim to be correct, I shall not be pursuing the evidentiary claim here.

blame on someone's anticipated future conduct.¹⁵

Second, I shall consider whether this feature of ordinary desert-judgments—the use of prior misconduct—may properly be carried over into criminal sentencing law. The chief problem here, I shall suggest, is not the logic of desert, but the reach of the state's power to scrutinize people's lives. Once the sentencer is permitted to look into the defendant's criminal record, how can the inquiry be limited there? What is to prevent a far wider examination of the defendant's past—the kind of scrutiny we may not, in a free society, wish to entrust to agents of the criminal law? I shall give some reasons why use of prior criminal record will not compel an unrestricted scrutiny into an offender's past personal life.

Third, I shall discuss how prior criminal record should be used in a desert-based sentencing scheme. How should penalties be adjusted to take prior record into account? What kind of prior record? In what manner can a proper, desert-oriented use of the criminal record be distinguished from a predictive-incapacitative use?

Finally, I shall address the dangers of abuse. Would reliance on prior criminal record lead to steadily escalating punishments for recidivists? What other possible dangers are there? Such practical concerns, I shall contend, should be debated explicitly, not masked as philosophical assertions about the supposed logic of desert-claims. We should examine how prior criminality has been used in jurisdictions that have recently moved toward more "determinacy" of sentence. We also should think about what the practical consequences might be of excluding prior record. Given the limited experience to date with systems having standards or guidelines, this issue cannot be fully resolved now; but it would be progress to start thinking about the potentials for abuse in these explicit terms.

II. PRIOR WRONGS IN EVERYDAY BLAMING-JUDGMENTS

The argument for desert-based sentencing rests, in large part, on the condemnatory overtones of the criminal sanction. Punishment connotes blame; the greater the penalty, the more blame is visited upon the actor. The severity of the punishment ought therefore to comport with the degree of blamewor-

15. For an explanation of the retrospective focus of the concept of desert, see J. KLEINIG, PUNISHMENT AND DESERT 55-56 (1973); *DOING JUSTICE*, *supra* note 2, at 46.

thiness of the offender's conduct. In *Doing Justice*, I stated the point as follows:

The severity of the penalty carries implications of degree of reprobation. The sterner the punishment, the greater the implicit blame In [setting] penalties, therefore, the crime should be sufficiently serious to merit the implicit reprobation. . . . Where an offender convicted of a minor offense is punished severely, the blame which so drastic a penalty ordinarily carries will attach to him—and unjustly so, in view of the not-so-very wrongful character of the offense. . . .

[Conversely] [i]mposing only a slight penalty for a serious offense treats the offender as *less* blameworthy than he deserves.¹⁶

Given this rationale, it should be useful to look at the logic of blaming-judgments. Is prior misconduct considered in such judgments—and if so, why? Let us begin with blaming-judgments in everyday life, and see how their logic works.

THE LOGIC OF CENSURING OR REPROVING

Condemning someone for his behavior can take various forms: punishing him; or else, censuring or reprovving him. There are important differences between punishment on one hand and censure and reproof on the other—the most significant difference being that punishment typically involves what Joel Feinberg calls “hard treatment”¹⁷ (the deliberate infliction of pain, loss or deprivation), whereas censure and reproof do not. Nevertheless, punishment shares an important pair of characteristics with censure and reproof: A punishment, or a judgment of reproof or censure, when visited on someone for his action (1) connotes that the actor did wrong, and (2) expresses disapproval of the actor for his wrong. These two elements, it should be noted, both admit of degrees: one can consider wrongs to be more or less serious and can disapprove of persons more or less strongly. One can thus punish, reprove, or censure with greater or less severity.

The first point—that punishment, reproof, and censure are conceptually linked with wrongdoing on the part of the actor—should be obvious enough to require little elaboration here. For those interested, there exists considerable discussion of the point in the philosophical literature.¹⁸

The second point, however, is critical for our present purposes: punishing, reprovving, and censuring all involve convey-

16. *DOING JUSTICE*, *supra* note 2, at 71-73.

17. J. FEINBERG, *DOING AND DESERVING* 95, 98 (1970).

18. *See, e.g.*, R. WASSERSTROM, *PHILOSOPHY AND SOCIAL ISSUES; FIVE STUDIES* 112-51 (1980); Wasserstrom, *Retributivism and the Concept of Punishment*, 75 *J. PHILOSOPHY* 620, 621 (1978).

ing disapproval of the person. While the basis of the condemnation is wrongful conduct, the disapproval is focused on the actor. One reprovcs, censures, or punishes people, not acts. It is this feature—the focus of the disapproval on the person—that makes the prior misconduct relevant to the actor's deserts. We feel ourselves more entitled, for reasons I shall next describe, to disapprove of the person when his current misdeed follows previous misconduct.

RELEVANCE OF PRIOR MISCONDUCT

When a person commits some misdeed in everyday life and faces the opprobrium of friends, associates, or colleagues, he may plead that the misconduct was uncharacteristic of his previous behavior. He may use such language as "I'm sorry, I don't know what got into me: it's not been like me to do that kind of thing."

What this plea addresses is the inference from (1) the judgment about the wrongfulness of the act to (2) the disapproval directed at the person. The actor is pleading in self-ex-tenuation that though this act was wrong, *he* should not suffer full obloquy for it—because the act is out of keeping with the standards of behavior that he has observed in the past. He is suggesting that the moral quality of this act should not fully be used to judge him, because it was uncharacteristic for him.

This plea, by its manifest logic, carries its greatest force when the actor has not committed the misconduct before; and progressively loses persuasiveness with repetitions. To the colleague who commits an act of dishonesty after having repeatedly committed and been censured for other such acts in the past, the short answer to his plea that he "didn't know what got into me" would simply be "whatever got into you on such occasions before." When faced with disapproval of his person for his misdeed, the individual will have forfeited the right to plead that his act was uncharacteristic for him.

This willingness to blame the repeater fully for his act is not a matter of cumulating the censure for repeated misdeeds. The situation I am describing is one where the actor has committed a first misdeed, has been found out and censured for it (although the censure has been scaled down as befits a first offender), and repeats the act. He does not deserve cumulated blame for both misdeeds because he has been censured for the first act already. What the actor does deserve is the full meas-

ure of blame for the current act: he is no longer in a position to claim a scaled-down response.

To understand the plea, one must grasp the role of disapproval of the person in judgments of reproof or censure. One is not using the actor's misdeed merely as the occasion to express moral distaste for the conduct. (That might involve a wholly different kind of response, where one bemoaned the fact that the act occurred, expressed special sympathy for the person who was wronged, but paid no special attention to the wrongdoer.) Instead, one is singling out the wrongdoer for unfavorable attention. So long as censure or reproof is thought to address only the act,¹⁹ the plea will be incomprehensible: why should past acts have any bearing on the moral quality of a distinct act, occurring now? The plea makes sense only if the person-directed character of censure or reproof is understood. The actor is arguing that, since it is his person that is being visited with moral disapproval, adverse judgment of him should be qualified when the act that occasions it is out of keeping with what has otherwise been his practice.

The plea cannot, therefore, be explained in terms of culpability-factors associated with the present act, such as lack of knowledge of the consequences of the conduct, or possible (mistaken) beliefs that the conduct was justifiable or excusable.²⁰ Someone who commits misconduct of a certain kind can concede that the act was clearly wrong—that he was fully aware of the consequences, and that there were no other specific mitigating circumstances. Yet he still may claim, as grounds for reducing the blame due him, that the act was an uncharacteristic first misstep. The plea, let me reiterate, addresses not the moral qualities of the act, but the inference from the quality of that act—which is assertedly atypical of his past conduct—to the judgment of moral disapproval of the actor.

The plea does not, however, go to the other extreme of breaking the nexus between the act and the judgment of censure, and of calling for an evaluation of the actor's total moral

19. One philosopher has noted that "[r]ecent studies in normative ethics have concentrated on act evaluations, neglecting, almost ignoring, agent evaluations." Stocker, *Act and Agent Evaluations*, 27 *REV. METAPHYSICS* 42 (1973). See also Strawson, *Freedom and Resentment*, 48 *PROC. BRIT. ACAD.* 187 (1962).

20. Thus, my argument is not based on the claim that the first offender lacks notice of the wrongfulness of the conduct, although Singer ascribes that view to me. R. SINGER, *supra* note 7, at 68.

personality, with all his virtues and vices.²¹ It presupposes that the person is being judged for his present conduct; that he is not to be relieved from all disapprobation, but only is to get somewhat less, if the misstep is his first. As the act is repeated, the plea loses its force. Whole-life judgments are different: if the person's other virtues are sufficiently impressive he may deserve praise rather than censure, notwithstanding his having committed this particular species of wrongful act rather frequently—his other virtues and graces outweigh those misdeeds in the assessment of his total moral *persona*.

The plea is thus part of a complex set of judgments that can be described neither purely in terms of the act nor purely in terms of the actor. The primary focus is on the present act—because the actor is being censured for that conduct. Any such censure, however, entails disapproval of the actor himself. Because it entails such a judgment of disapprobation directed at the actor, he becomes entitled to claim that the disapproval of him should be dampened somewhat, because the act was out of keeping with his previous behavior. The judgment is chiefly an act-focused judgment, but qualified to a limited extent by judgments addressed to the actor's past.

The plea concerns the degree of the actor's blameworthiness, not his probable future conduct. Judgments of censure or reproof are desert-claims, rather than predictions: they are claims that someone merits disapproval in virtue of his chosen conduct. When the actor claims that he merits less disapproval because the misdeed was his first, his claim is likewise retrospectively oriented. The actor is asserting that he should be the object of less obloquy, because his behavior on this particular occasion is uncharacteristic of his past behavior.

The fact that the plea refers to the act's being "uncharacteristic" of the actor does not make it a prediction. Speaking of behavior as "characteristic" or "uncharacteristic" has two distinct uses: one use is predictive; the other serves the quite different, retrospective purpose of supporting judgments about an actor's deserts. (Consider the assertion that Professor *Z* is characteristically or habitually late for class. This assertion has a predictive use—as when a student tells others that they therefore needn't hurry to arrive at his classes

21. The latter evaluation is the kind that occurs when we decide that someone is praiseworthy or blameworthy as a person. We would be looking at his moral personality *in toto*, weighing his various good qualities against the bad.

on time. But the assertion may also be used in making judgments about *Z*'s deserts: If a university faculty committee is considering candidates for a teaching prize or award, *Z*'s habitual lateness can be cited as reason why he has not earned the prize. In this latter context, his future conduct may be irrelevant. The issue may arise even after *Z* has retired, and thus would not be expected to be late for class again.) Dispositional statements are not necessarily predictive, as Stuart Hampshire has pointed out some years ago.²²

The plea has nothing to do with disobedience. George Fletcher, in his criticism of my view of prior criminality, has argued that the only reason the repeater is deemed more blameworthy in ordinary desert-judgments is because he has committed an act of insubordination. The prior censure, he suggests, is akin to a command not to repeat the act; and the sharper response to the new act is condemnation for flouting the command.²³ (Fletcher then argues that this feature of ordinary blaming-judgments should not be carried over into the criminal law; disobedience of authority *per se* should not be the basis of sanctioning people in a liberal society.) This argument is mistaken, I believe, for a reason that should be obvious: censure or reproof is not a species of command, and is not restricted to relationships of authority. Someone—say, a friend or colleague—can reprove me for a thoughtless or selfish act. That reproof will be based on the claim that the act was morally wrong—for instance, that I had injured others without just cause. If this was the first occasion, I may plead that the act was uncharacteristic of my past behavior; and if he believes me, he may reduce the degree of his disapproval somewhat. If I then repeat the act and he responds more sharply, his complaint will not be that I am a refractory subordinate who has flouted his directives. Rather, he will contend that the act was wrong on its merits; that I should have altered my behavior when he previously confronted me because the conduct was wrong; and that, having failed to change my behavior, I can no longer claim to deserve less blame because such misconduct is “out of character” for me. His claim is one about wrong and blame, not about disobedience.²⁴

22. Hampshire, *Dispositions*, 14 ANALYSIS 5 (1953).

23. G. FLETCHER, *supra* note 5, at 464-66.

24. I agree with Fletcher when he argues that the criminal law ought not to impose any extra punishment for disobedience *per se*; and hence that disobedience cannot properly be the basis of treating recidivists differently from first offenders. In this connection, John Kleinig draws an important distinction be-

Thus far, I have described the plea—that is, described what we are and are not asserting when we introduce prior misconduct into ordinary desert-judgments. The more interesting (and difficult) question is “Why?” *Why* do we wish to disapprove of an actor less when his misconduct on a particular occasion is out of keeping with his past behavior?

1. Although it would be wonderful if people’s moral inhibitions were strong enough to keep them from wrongdoing at all times, we know that even those who ordinarily refrain from misconduct may have their self-control fail in a moment of weakness or willfulness. We wish to condemn the person for his act, but accord him 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. This we do by showing less disapproval for him for his first misdeed.

tween (1) who is entitled to condemn, and (2) why condemnation may be due. A special relationship of some kind, such as one of superior-subordinate, partnership in a joint enterprise, or personal friendship may in some circumstances be a prerequisite to being entitled to censure or condemn. (For example, a friend may censure me for my personal misconduct, but a stranger is being intrusive if he tries to do so.) Once one is so entitled, however, the grounds for censuring are not necessarily based upon threats to that particular relationship. (My friend, for example, may censure me for wrongs other than those which might affect our own friendship.) See J. KLEINIG, *supra* note 15, at 72-77. Kleinig’s point carries over to punishment: only a duly constituted authority is entitled to punish me; but the punishment is due for wrongs I commit, not for disrespect of that authority.

It is, I believe, undesirable for the law to assert any secondary obligation—whether of obedience, good citizenship, social cooperation, or whatever—as the basis for punishing people more severely than is deserved by their conduct *per se*. Once one admits the existence of such secondary obligations, the state’s permitted penal response could be made to vary with whatever importance one may wish to assign to that obligation. One could, for example, justify severe punishment for repeated lesser criminal acts by arguing that, although the acts are not serious in themselves, their repeated commission infringes a much more “important” duty of responsible citizenship.

In ordinary life, people are at various times associated in one or another joint venture. When they are so associated, repeated violations of the terms of that joint enterprise may be seen, within the confines of that enterprise, as involving some special evil akin to a violation of a collective trust. But that is not the appropriate model for the criminal law in a free society. Citizens should be judged for the wrongs they do other citizens, not for supposed breaches of imputed secondary obligations. Fletcher is right, I think, in distrusting “organic” theories of citizen obligation to the state.

In this Article, however, I am arguing that one need not invent any such secondary obligations in order to justify the scaled-down treatment of first offenders. The offender, whether a first offender or recidivist, commits the same wrong of causing or threatening a given degree of harm with a given degree of culpability. The differentiation between the first offender and the recidivist concerns, as I have suggested, how much disapproval we may wish to visit on the person for that wrong.

In so doing, we distinguish—in the degree of our willingness to disapprove—between (1) the actor who has on one occasion committed a wrong but has previously maintained his inhibitions against such misconduct, and (2) the actor who consistently has failed to show self-restraint. With the latter, more than a momentary lapse is involved. As the act becomes more typical of the way he has behaved, we become more ready not only to judge the act to be wrong, but to visit our disapproval on him for that act.

2. The somewhat muted disapproval that the actor gets on the first occasion still is blame: it confronts the person with the wrongfulness of the conduct and others' disapprobation of him for that conduct. The purpose of the remonstrance is, in part, to give the person the opportunity to reconsider, to reflect on the propriety of his conduct, and to decide whether he ought to pursue a different course. It is expected of a moral agent that when he has done something wrong he should attend and take seriously such adverse judgments.

When the first misdeed occurs and the actor is blamed for it, it is not yet known how he will respond. But part of the notion of treating him as a moral agent is to give him the opportunity to respond: to presume that he takes the blame seriously, unless he demonstrates otherwise by repeating his behavior. He thus gets his "second chance"—and we express the idea that he is entitled to it by saying that he "deserves a second chance." We visit him with less than the full weight of disapprobation and give him the opportunity to attend, reconsider, and try to control himself better.

This "second chance" is not a matter of giving the actor notice that the act was wrong. He ought to have been aware of that already; and he may well have been aware. His misdeed may have been the result, not of ignorance, but of simply having for the moment placed his own needs or inclinations above the requirements of doing right. The point is, rather, that this is something that fallible humans are capable of doing in an unguarded or unwise 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 contrary.

Nor is this judgment predictive in nature. It is not a matter of muting one's response because one thinks it unlikely that the actor will do it again. (Were that the logic, some first of-

fenders would get the benefit of the scaled-down condemnation and other first offenders would not—depending on the perceived likelihood of repetition; and that likelihood would, in turn, depend on a variety of facts about the actor, such as his apparent strength of character and the incentives he has to repeat the conduct.) Forecasts of this kind are precisely what is ruled out by the notion of the actor's deserving another chance. Rather than trying to foretell which actors will and will not do it again, the idea is that every actor is entitled to some scaling-down of the disapproval directed toward him for the first act, and is so entitled as a moral agent presumed capable of responding responsibly to others' adverse judgment of his conduct. (This should also help illuminate a point I made earlier: that such blaming-judgments are linked closely to the particular act; they are not judgments about the actor's total moral self. When the misdeed first occurs, blame is due; in fact, it must be imposed if the actor is to be exposed as he ought to be to others' censure; it is only a matter of muting our disapproval of the actor somewhat.)

3. Underlying the foregoing notions—of "human frailty" and the "second chance"—are certain assumptions about how stringently or tolerantly others ought to be judged. When allowing the actor a partial respite from blame on the first occasion, we are showing a degree of tolerance: that is, we are operating with a standard in our condemnatory judgments of people that allows a limited leeway for their making wrong decisions.²⁵ That 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. The temporary character of the tolerance is critical—because it assures that, ultimately, people are held fully accountable for their misdeeds, as any conception of desert requires.

Were our moral expectations different, we might not grant this temporary tolerance. Among a race of angels, it would not be a matter of common frailty that momentary losses of self-

25. Tolerance refers to the willingness to overlook wrongdoing to some extent in deciding how much disapproval the person deserves for his acts. Tolerance, in other words, is something that is exercised in determining the level of response that is deemed deserved. Mercy, by contrast, involves the notion of punishing or disapproving less than the person is thought to deserve, for a variety of possible reasons. See Card, *On Mercy*, 81 *PHILOSOPHICAL REV.* 182 (1972); Smart, *Mercy*, 43 *PHILOSOPHY* 345 (1968).

control occur. Such a race might well feel no obligation to mute their censure of the actor who has made the uncharacteristic first misstep; even a first wrong would be shocking enough to allow the inference from the wrongfulness of the act to the full disapproval of the actor. With a sufficiently puritanical outlook, one conceivably might espouse a similar view for humans: no allowance for the uncharacteristic first misdeed; no "second chance" before the full measure of disapproval is inflicted. But such a stringent moral outlook is not one that many of us (or at least, I) would be tempted to share; and it surely is not necessitated by the logic of desert.

APPLICABILITY TO EVERYDAY PUNISHMENT CONTEXTS

There are a variety of everyday contexts outside the formal criminal law where people are punished: parents punish children; school and university officials punish students for cheating and other rule infractions; employers discipline employees; sporting organizations penalize competitors for unsportsmanlike conduct. These less formal contexts involve punishments, rather than censure or reproof, because it is not merely disapproval that is being visited on the offender, but disapproval expressed through the deliberate visitation of pain or deprivation. The child may lose some of his privileges; the student may be put on probation, suspended, or expelled; the employee docked in pay, demoted or discharged; the competitor fined, suspended, or excluded from competition.

Does the foregoing logic apply here? I think it does. A school, employer, or sporting organization, in deciding on the amount of punishment that is deserved, will (and should) distinguish between the first offender and the offender who previously has been disciplined. The reason for making that distinction is much the same as for censure and reproof. If censure involves disapproval of the person, punishment does so *a fortiori*. It is the *person* who suffers the pains of punishment. Those pains, when inflicted in consequence of a finding of wrongdoing, necessarily constitute a dramatic expression of disapproval of the person. That being the case, the offender may, as with censure, concede the wrongfulness of the conduct and yet plead that he—his person—does not deserve the full measure of condemnation because the particular act was uncharacteristic of the way he has conducted himself in the past. The plea has applicability if the offender is being penalized for the first time; it loses force with subsequent repetitions.

III. CARRY-OVER TO LEGAL PUNISHMENT

So much for the reasons why prior misconduct is relevant to desert-judgments in everyday contexts of reproving, censuring, and punishing. There remains the question of whether it is desirable to carry this reasoning over into criminal sentencing.

RESTRICTIVE TAXONOMIES

Before trying to answer the question, we must first clear away the impediments to asking it. The chief impediment has been penologists' taxonomies—their descriptions of the components of deserved punishment in the criminal law. These taxonomies have tended to exclude prior criminality by definition. Such restrictive definitions do not dispose of the issue, but merely prevent it from being considered on its merits.²⁶

An example of such a restrictive taxonomy is George Fletcher's. Citing the German legal literature, he asserts that a criminal offender's desert is determined by (1) the degree of wrongfulness of the defendant's criminal act; and (2) the extent to which the act's wrongfulness can properly be attributed to the choice of the actor (*i.e.*, issues of culpability).²⁷ By directing attention exclusively to the current crime, Fletcher rules out consideration of prior convictions by fiat—and thus settles nothing. The questions remain whether prior misconduct is relevant to desert-judgments in everyday life, and whether this feature of ordinary desert-judgments should be carried over into the criminal law. Those issues must be dealt with on their merits; and if their answers are affirmative, then one has to develop a more complex description of criminal desert-judgments.

There are less sophisticated versions of this theory: it sometimes is said that the idea of desert "looks at the crime, not the criminal."²⁸ If this phrase is meant to say that desert theory is not concerned with the offender's propensities for future conduct or need for treatment, then it is correct. But if "the crime" is used to mean only the current crime, and if the facts about past convictions are seen as bearing only on "the criminal," then the formulation begs the question. It would be more accurate to say that desert theory in sentencing is con-

26. H.L.A. Hart refers to such attempts to rule out issues by definition as the "definitional stop." H. HART, *Prolegomenon to the Principles of Punishment*, in PUNISHMENT AND RESPONSIBILITY 5 (1968).

27. G. FLETCHER, *supra* note 5, at 510; *see id.* at 393-514.

28. *See, e.g.*, Goldstein, *supra* note 5, at 172.

cerned with the degree of blameworthiness of the offender's criminal choices. Debate would then focus on whether, and to what extent, this should include prior criminality.

I regret to say that in *Doing Justice* I unwittingly adopted my own restrictive taxonomy, and it obscured my analysis of prior criminality. When I introduced the principle of commensurate-deserts, I described it as the requirement that penalties be commensurate in severity with the seriousness of the crime.²⁹ If the principle is formulated in terms of the gravity of the current offense, a problem is created: how can past convictions possibly bear on the seriousness of the present crime? Clearly, the past convictions can have no bearing on the harm done or risked by the present act. So, I was compelled to argue, the presence or absence of prior convictions must alter the culpability of the offender in committing his current crime.³⁰ This is a strained way of describing the role of prior convictions. As I suggested above,³¹ the presence or absence of prior misconduct is not a culpability-factor specifically associated with the act, in the same manner that, say, provocation is. Prior misconduct bears, instead, on the appropriateness of visiting the full measure of disapproval upon the actor for his act, where that act is uncharacteristic of his previous behavior.

The difficulty lay in my formulation of the commensurate-deserts principle: by focusing on the current act, I virtually ruled out consideration of priors. The remedy is a formulation of the principle that does not decide the question of priors by definition. In *The Question of Parole*, therefore, Kathleen Hanrahan and I reformulated the commensurate-deserts principle as requiring that penalties be commensurate in severity with the seriousness of the defendant's criminal conduct.³² This formulation preserves the basic idea of punishment which is proportionate with the blameworthiness of the defendant's criminal choices. It is neutral, however, on whether the relevant conduct is only the current crime, or whether prior criminality may be considered to some extent. Thus, the issue of prior criminality is left open for debate.

Confusions over taxonomies can best be avoided if one remembers that punishing someone is, as I have suggested,³³

29. *DOING JUSTICE*, *supra* note 2, at 66-76.

30. *Id.* at 84-88.

31. *See* text accompanying notes 19-20 *supra*.

32. A. VON HIRSCH & K. HANRAHAN, *THE QUESTION OF PAROLE* 13-24 (1979) [hereinafter cited as *THE QUESTION OF PAROLE*].

33. *See* text accompanying notes 19-21 *supra*.

neither exclusively act-directed nor exclusively person-directed: it involves condemning the person for having committed wrongful behavior. Trying to focus exclusively on the instant act—or going to the other extreme of paying little heed to the particular act and looking instead at the actor's total moral personality—is likely to produce a cramped or misleading account.

REACH OF THE SENTENCING PROCESS

In critical respects, the criminal sanction is a species of blaming. Like censure, reproof, and punishment in everyday life, the criminal sanction connotes that the actor did wrong, and it visits disapproval upon him for that wrong. Although the criminal law tends to deal with more serious kinds of wrongdoing, it is still conduct that fallible humans may have understandable temptations to commit. A humane penal system thus has reason to mitigate the treatment of first offenders on much the same grounds as I have described for ordinary blaming-judgments.³⁴ What, then, is the problem? There is one, but it relates not to the logic of desert but to the proper reach of criminal sentencers' inquiry.

The criminal sanction applies to a much more limited range of behavior than do ordinary moral prohibitions. Not all wrongs, but only certain wrongs specified in advance of the conduct, should be punishable as crimes. There are a number of practical reasons for the limitations on the reach of the criminal law. For example, consensus on penalizing conduct will be more readily obtainable if the law concentrates on behavior that interferes with people's rights in substantial and obvious ways; the criminal justice system also shows a sounder sense of priorities if it focuses its limited resources on such behavior. Behind these practical reasons, however, lies a more fundamental concern with privacy and autonomy. Any attempt to criminalize all wrongful conduct would involve intolerable intrusions into citizens' lives and choices. Much wrongdoing in people's private and working lives should not be legally punishable because it involves areas of behavior which a free society should keep clear of the drastic intervention of the criminal law.³⁵ For example, acts of meanness or vindictiveness towards

34. See text accompanying note 25 *supra*.

35. Herbert Morris argues that the limits on the reach of the criminal law are based ultimately on considerations of autonomy and privacy. H. MORRIS, *Punishment for Thoughts*, in *ON GUILT AND INNOCENCE* 1-29 (1976). For other

family, friends or colleagues should not be legally punished although they are wrong—in order to keep the state from interfering with peoples' family life, friendships, and normal working existence.

Once someone has been convicted for conduct that the law defines as criminal, there are similar questions that arise concerning the appropriate scope of inquiry of the sentencing process. Sentencing judges and parole officials, acting under the traditional rehabilitative-predictive rationale, sought information virtually unlimited in scope about the defendant's past criminal acts, his past noncriminal acts, his school, employment, social and family history, his personal habits, attitudes and preferences. This kind of limitless inquiry has drawn increasing criticism for being intrusive and socially discriminatory.³⁶ One of the attractions of the desert model, to many of its proponents, has been that it promises to restrict the reach of inquiry in sentencing: only the defendant's criminal conduct would determine the choice of the penalty; the defendant's non-criminal conduct, work habits, and personal preferences and predilections would remain his own business.

Critics of my view of prior criminality have expressed the fear that, if previous convictions are considered in sentencing, the desert model's limits on scope of inquiry may become eroded.³⁷ Once prior convictions are permitted entry, it is asked, what is to prevent the sentencer from inquiring also into the defendant's noncriminal misdeeds—or into anything else in his past that might bear on the degree of his supposed moral blameworthiness?

On its face, the objection is puzzling. Any inquiry into prior criminal record, by definition, concerns only the defendant's *criminal* behavior—conduct that has been proscribed by law, and for which the defendant's guilt has been established by a recorded conviction. The criminal record is distinct from the defendant's noncriminal past: his history of legally permissible choices and his past attitudes and preferences. When dealing with the current crime, many desert theorists have urged that the sentencer's inquiry be carefully restricted to the criminal act and those of its surrounding circumstances that directly bear on the act's harmfulness and the actor's culpability.

arguments, *see, e.g.*, H. PACKER, *THE LIMITS OF THE CRIMINAL SANCTION* 249-363 (1968).

36. *See, e.g.*, AMERICAN FRIENDS SERVICE COMMITTEE, *STRUGGLE FOR JUSTICE* 147 (1972).

37. *See, e.g.*, R. SINGER, *supra* note 7, at 67-74.

They have urged that the sentencer not be permitted to make broader inquiry into such matters as the actor's general attitudes toward the rights of others, his apparent degree of contrition for the crime or lack of it, and the social and economic circumstances that may have made it more or less difficult for him to resist criminal temptations on this occasion.³⁸ Why should not similar restrictions be imposed upon the use of the prior criminal record? If judging the offender's deserts for the current crime does not require one to investigate every aspect of his current life that might bear directly or indirectly on his blameworthiness, then judging the extent of his past criminal record need not call for an investigation of his entire past.

The critics, in reply, take their objection one step back—to the rationale for taking prior offenses into account. That rationale, they assert, must rest on notions of the actor's general personal merit or "character;" those notions, in turn, will support broader scrutiny of the person's past life. By conceding the inch of prior criminality, they assert, we will be left with no principled way of objecting to those who wish to go the mile of wholesale inquiry into the defendant's past personal life. In the words of Richard Singer:

[T]he argument of character clearly raises the specter of bringing into the sentencing process all of that soft data upon which sentencing judges have relied for the last hundred years—the defendant's religion, his past employment, his relations with his spouse, his childhood history, whether he loves animals, and so forth.³⁹

This argument still will not do, because it assumes, mistakenly, that the use of prior misconduct in judging someone's actions must rest on a whole-life notion of good or bad character. That is simply not an accurate description of how everyday judgments of punishing, censuring, or reproof work. When someone faces censure or reproof for a wrong he has committed and he pleads that this is the "first time," that is not an invitation to consider his generalized merit or demerit. The judgment, I have tried to suggest,⁴⁰ remains focused primarily

38. *Id.* But see Gardner, *The Renaissance of Retribution—An Examination of Doing Justice*, 1976 Wis. L. Rev. 781, 805.

39. R. SINGER, *supra* note 7, at 70.

40. See text accompanying note 21 *supra*. Singer, in the last-quoted passage, is confusing "characteristic"/"uncharacteristic" with the quite different notions of "good character" and "bad character." The plea of which I have been speaking involves the judgment of whether a present act is or is not characteristic of the person's past behavior. To determine that, one needs merely to find out whether and how often he has done such things before. The notions of good and bad character, by contrast, are much more sweeping judgments about the actor's whole moral personality. I may know that it is characteristic of so-

on his current act—with limited modification in the degree of disapprobation he faces to reflect the fact that he has previously maintained his inhibitions against such misconduct.

Is there a problem, then? There is, but it is a narrower one. Most kinds of criminal conduct have analogues in ordinary life that violate similar moral norms but are not criminalized. Criminal fraud, for example, resembles various lesser acts of dishonesty that the criminal law does not deal with. The problem concerns these analogous acts.

Consider the following example. *X*, a consulting engineer, is convicted of fraud for having knowingly obtained large sums from a client by billing him for nonexistent services. The conviction is his first, and he pleads for less severe treatment as a first offender. He has, however, repeatedly been called to task for various acts of misrepresentation. Several employers have discharged him after having discovered that he grossly misstated his professional credentials; his professional organization has censured him for similar reasons; and his family and acquaintances have come to regard him (with good reason) as an inveterate liar.⁴¹ Were he being reproved informally for the current misrepresentation, his history of past misrepresentations would be extensive enough so that he could not ask for less blame on grounds that he had not done such things before. But he is, instead, being sentenced for the current fraud. In this sentencing proceeding, is it appropriate to treat him as a first offender, notwithstanding his noncriminal misrepresentations?

X's past conduct, in this example, certainly involves wrongful acts of misrepresentation. But a person's working relations with his employers, business partners, or professional association are not normally dealt with through the criminal law and how he conducts himself in his circle of acquaintances is still further from the criminal law's ambit. Why should the sentencing process avoid inquiring into this noncriminal behavior? It is, in my view, for essentially the same reasons that the substantive criminal law should not criminalize such conduct. The sentencer ought not review our friend *X*'s entire past for all acts of lying because much of this history concerns matters that should be none of the state's business. Even if *X* has mis-

and-so to do as he promises, and yet not know enough about him to be able to tell whether he has a good or bad character.

41. I am assuming that none of these misdeeds qualify as criminal fraud under the applicable criminal statutes of the jurisdiction.

conducted himself in his professional association or his social club, for example, state scrutiny into such conduct can too easily violate his—or those bodies'—rights of free speech and association. Were the search broadened to *X*'s misrepresentations in his personal life—numerous and shocking as these may be—the problems of privacy become all the more obvious. If the criminal laws ought not regulate such behavior directly—for reasons of privacy, autonomy, or for other reasons—then it should not involve itself with such conduct indirectly through the sentencing process.⁴² The defendant should not get more or less punishment now, because he did or did not do such non-criminal acts then.

Suppose that one therefore restricts the sentencer's inquiry to past criminal convictions. What will this do? It will make the plea of being a first offender somewhat more inclusive. Criminals who have been convicted for the first time can avail themselves of the plea, even if they could not (because of their noncriminal history) qualify as first offenders in ordinary judgments of reproof or censure. Mr. *X* in the above example is no first offender in the ordinary sense, given the numerous past misrepresentations for which he has been censured. But he would be considered a first offender for sentencing purposes, because only past convictions would count and he has none.

Upon subsequent convictions, the offender will lose his favored status. A history of criminal convictions for misrepresentation will surely be enough to preclude the plea that the present wrongful act is uncharacteristic of the actor, even without considering additional noncriminal misdeeds of the person.

Using only the criminal record, then, will cause the law to act more slowly before withdrawing the benefits of first-offender status. The first time the defendant is convicted, he is given the benefit of the doubt: he is presumed to be a first offender, without inquiry into past noncriminal misdeeds. As he goes on to commit further crimes for which he is convicted, however, the law will catch up: his plea for favored treatment will be lost and he will receive his full measure of punishment for his crime. The availability of first-offender status will be de-

42. It is conceivable, for example, that *X* could have taken express care not to violate the law on the previous occasions, and now chose to commit a crime for the first time. In that event, he could argue that the prior acts (even if morally unedifying) were acts he was legally permitted to do—and hence the law has no business considering them in deciding how much he now should be punished.

terminated by the defendant's decisions to commit criminal wrongs or not. And, by moving more slowly in this fashion, the sentencing process will have no need to probe into the person's past life and associations. The inquiry will be limited to past conduct that has been prohibited by law and documented by a criminal conviction—conduct that the criminal law treats as outside the ambit of personal privacy and autonomy in any case.

A first conviction is not the same as a first offense. A defendant may have committed and gotten away with several crimes before perpetrating the one for which he is first convicted. How, then, should the sentencing law treat such prior crimes? I think it should ignore them if the state has been and is unwilling (or unable) to convict the offender for such alleged past criminal conduct. Unproven prior conduct should not be considered in the current sentencing decision.

Empirical research does suggest that, for each previous crime for which they were officially apprehended and punished, many offenders admit having committed several unpunished offenses.⁴³ The vicissitudes of being discovered, arrested, prosecuted, and convicted are such that the absence of a prior criminal record is hardly a reliable indicator of whether one has committed prior crimes. But it would be unjust—and it would in some cases simply be inaccurate—to impute prior criminality to a defendant facing his first conviction on the basis of such statistical information about the behavior of most offenders. To deny the defendant the benefits of first-offender status, the sentencer must have proof that the defendant in fact was guilty of past crimes and that he had been censured for them through the formal criminal process. The one safe proof that he was guilty—safe in the sense of meeting the requirements of proof beyond reasonable doubt—is a conviction for those prior crimes. The one formal mode of censure in the criminal law is the imposition of a sentence for those crimes following conviction.⁴⁴ Any lesser standard will risk denying first-offender sta-

43. See, e.g., J. PETERSILIA, P. GREENWOOD & M. LAVIN, *CRIMINAL CAREERS OF HABITUAL FELONS* 15-18 (1977).

44. That is why a prior conviction should be essential to the loss of first-offender status; and why (notwithstanding R. SINGER, *supra* note 7, at 68) a prior arrest, trial, or other proceeding short of conviction should not suffice.

The issue of unpunished prior crimes is not unique to desert theory, but arises on utilitarian rationales as well. If a jurisdiction explicitly bases its sentencing scheme on predicted future criminality, it will have to decide whether it should consider suspected but unpunished prior crimes. The U.S. Parole Commission, for example, uses a prediction score that counts prior convictions.

tus to defendants, some of whom may in fact be innocent of previous criminality.

IV. THE ROLE OF PRIOR CRIMINAL CONDUCT IN THE SENTENCING STRUCTURE

Assuming that prior criminal conduct is germane to offenders' deserts, the next issue is how that record should be used. Should the criminal record's role be that of reducing penalties for first offenders—or of increasing penalties for recidivists? Should the seriousness of prior convictions, as well as their frequency, be considered? I shall try to suggest some answers—although, in the absence of a more complete theory of scaling punishments⁴⁵ these answers must remain sketchy.

At the outset, let me emphasize that I am not trying to defend the way current sentencing law and practice deals with prior criminality.⁴⁶ Rather, I am trying to develop norms for judging how a fair, desert-oriented scheme should utilize prior criminal record.

MORE OR LESS SEVERITY?

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.

Why should prior record have this severity-reducing role instead of a severity-enhancing one? It is because, as I suggested in Part II,⁴⁷ a plea in extenuation is involved: the actor should be disapproved of less for a particular wrongful act, if that act was uncharacteristic of his previous behavior. The role

Prior arrests not resulting in convictions, although predictive of recidivism, were eliminated on ethical grounds as a factor in the Commission's prediction score. P. GOTTFREDSON, L. WILKINS & P. HOFFMAN, *supra* note 1, at 49. Where there has been no conviction, the arrestee may have had valid defenses.

45. See THE QUESTION OF PAROLE, *supra* note 32, at 16-17.

46. Under multiple-offense statutes in force in many states today, long terms of as much as life imprisonment may be imposed upon the third conviction of any felony irrespective of its seriousness. The Supreme Court has upheld the constitutionality of such statutes in *Rummel v. Estelle*, 445 U.S. 263, 285 (1980). This is not the kind of legislation I am seeking to defend—for reasons which will become evident in this and the next part.

47. See text accompanying notes 16-25 *supra*.

of priors, in other words, is to alleviate blame when the conduct is unprecedented for the actor.

But how does one distinguish less from more? In the absence of easily agreed-upon quanta for what would constitute the "full measure" of punishment for various crimes,⁴⁸ how can one tell whether it is first offenders who are (properly) getting less than this amount, or recidivists who are getting more? This will be a matter of judgment—but such judgments are possible. It should be fairly evident, for example, that the scale proposed in *Doing Justice*⁴⁹ gives the question of prior criminality a severity-reducing role—since the penalties proposed there for first offenders are well below what could plausibly have been proposed for such crimes had prior criminality been disregarded. Judgments of this kind might be aided by conducting simulations. Suppose one constructs a proposed two-dimensional penalty scale that uses prior criminal history as well as the current offense. One could then try to imagine what a one-dimensional scale might look like, were one required to disregard the presence or absence of priors. If, for first offenders, the proposed two-dimensional scale has lower penalties than the simulated one-dimensional one; and if, for recidivists, the two-dimensional scale is no more severe than the one-dimensional one, then one would indeed have given prior criminality a mitigating role. Such methods are admittedly crude, but they may be of some help in making the qualitative judgment.

This point, that reductions in severity rather than increases are involved, has been lost on some critics. In arguing against my proposed treatment of prior record, Fletcher and others have assumed that what is being proposed is more punishment for recidivists than could be justified in a system that ignored prior criminality.⁵⁰ Singer argues that less and more are the same: if first offenders are punished less, then that means recidivists must be being punished more.⁵¹ The latter claim is true only in the trivial sense that if *A* is made less than *B*, then *B* becomes greater than *A*.⁵² Debates about what is greater

48. THE QUESTION OF PAROLE, *supra* note 32, at 14-15.

49. DOING JUSTICE, *supra* note 2, at 132-39. See also text accompanying note 10 *supra*.

50. See G. FLETCHER, *supra* note 5, at 463-66; Goldstein, *supra* note 5, at 172-73. But see THE QUESTION OF PAROLE, *supra* note 32, at 157 n.39.

51. R. SINGER, *supra* note 7, at 67.

52. James Thurber made a joke of this in his *The 13 Clocks*. The wicked Duke would ask any suitor for the hand of his beautiful niece to describe his legs. If the unwary suitor said one leg was shorter than the other, the Duke

and what is less can be settled only by using an outside reference point.⁵³ My claim is that when the reference point of a hypothetical scheme that disregards prior criminality is used, first offenders should get less than they would under such a scheme, and recidivists would not get more. Thus considered, less is not the same as more.

The foregoing reasoning also gives us an answer to the off-heard objection that the offender has been "punished already" for his prior crime, and should not suffer for it again. The offender is not being made to suffer twice for the same crime. He is punished less on the first occasion than he otherwise would be because of our reluctance to impute the full measure of blame to a first offender. On the subsequent occasions, he simply loses this preferred status and is punished as he deserves for his current crime.

SERIOUSNESS AND NUMBER OF PRIOR CONVICTIONS

Should the seriousness of the priors count? In everyday judgments of censure, the gravity of the prior misconduct would make a difference. Suppose someone has committed a fairly serious intentional wrong, and wants to claim the act is uncharacteristic of his past behavior. Suppose he has previously been censured for other intentional wrongs—but wrongs that are much less serious in terms of, say, the extent of the intended harm. He still could plausibly argue that it was uncharacteristic of him to commit wrongs of this magnitude; he might claim, for example: "Yes, I've committed petty acts of malice before, but this is the first time I've done anything like this."

Similar logic should hold for sentencing. If someone is being sentenced for a serious crime, he should be entitled to some reduction in severity if this is his first serious offense—even if he has prior conviction for lesser crimes. The sentencing standards governing prior criminality should thus take

would kill him and feed him to the geese—because the correct answer, according to the Duke, was that one leg was longer than the other. J. THURBER, *THE 13 CLOCKS* 20-21 (1950).

53. Thurber introduces a reference point: the reader is told that the Duke's legs had once been the same length, but that the right one had outgrown the left because as a boy he had used it so much "place-kicking pups and punting kittens." *Id.* at 20. So the Duke had it right if one knew his history: the left leg was normal and the kicking leg has grown to abnormal size. However, the hapless visitor could not know the Duke's history when asked the fatal question.

gravity as well as frequency into account.⁵⁴

How many repetitions may occur before the plea loses its force entirely? I have no ready answer—as this seems to be a matter of judgment even in everyday judgments of censure. But it should be apparent from what has been said already⁵⁵ that after a certain limited number of repetitions, the plea will have been spent entirely, and the offender will get his “full measure.” If, after that, the actor commits further repetitions, he should not get any severer a response: there simply would be no mitigation due, and the person should be censured or punished as before. Were it permissible to keep increasing the response with each subsequent repetition, even relatively minor offenses could eventually receive a severe response with a sufficient number of occurrences.⁵⁶

54. See text accompanying notes 66-70 *infra*.

55. See text accompanying notes 16-25 *supra*.

56. There are two other issues that need to be considered.

(1) Type of Priors. When looking at the defendant's record, should one count only convictions for offenses similar to the current offense? Or should prior convictions for any crimes, similar or dissimilar, count? In *DOING JUSTICE*, *supra* note 2, at 86, I said that prior convictions might lose some of their significance if they were for crimes “sufficiently dissimilar” to the present one. Should this be so?

Let us look again at ordinary judgments of censure. If someone commits a wrongful act and pleads for reduced condemnation on grounds that the act was uncharacteristic of his or her behavior, what kind of prior conduct would one consider relevant? What one would look for, I think, are past acts that are similar in the moral principles they violate, not merely acts that are similar in their details of execution. Suppose Y cheats. He claims favorable consideration on the grounds that such behavior is uncharacteristic of him. His plea would not be persuasive if, for example, he had recently been reprimanded for stealing. It would make little sense for him to argue, “Oh, that was different. Then I stole, but I haven't *cheated* before.” The two acts involve the same kind of turpitude; both involve intentional infringement of others' rights. (Here, it is worth recalling a point I made in the text accompanying note 20 *supra*. The rationale for considering prior wrongs is not one of notice. Even if this person had not cheated—but had stolen—before, he presumably knew that cheating was wrong, or certainly ought to have known.) On the other hand, had this been the first time he cheated, and had the prior reproof concerned acts of failing to help a friend in need, his case would be stronger. He could say that, while he may have been ungenerous in the past, he had always abided by the principle of respecting others' rights.

If this reasoning is carried over to sentencing decisions, the criterion would become whether the current act and the prior criminal conduct are similar in the basic principles they violate. Although the question of “similar principles” is debatable, the acts of force, theft, and fraud that make up the bulk of the criminal law are all intentional violations of the manifest rights of others. When punishing a person for one such intentional, victimizing crime, it thus seems appropriate to consider previous intentional victimizing crimes, even if the technique of victimization was different. When someone is convicted of white-collar swindle, for example, it would be appropriate to consider prior con-

V. DISTINGUISHING DESERT FROM PREDICTION IN THE USE OF THE CRIMINAL RECORD

Some critics have asserted that any concern about prior criminality must be predictive—so that a purported desert rationale for considering priors, such as that suggested in *Doing Justice*, is merely prediction in disguise. George Fletcher, for example, asserts:

The contemporary pressure to consider prior convictions in setting the level of the offense and of punishment reflects a theory of social protection rather than a theory of deserved punishment. The rule of thumb is that recidivists are more dangerous and that society will be better served if the recidivists are isolated for longer terms. This view raises empirical and methodological issues in gauging the dangerousness of recidivists and it poses serious ethical issues in punishing a person more severely on the basis of past crimes already once punished. These are issues that must be confronted directly, with no illusions about the camouflage offered by the concepts of retribution and desert.⁵⁷

Were Fletcher correct, it would never make any practical difference whether one adopted a purported desert rationale for using priors or an explicitly predictive one. So let us ask: what practical difference does it make? In what manner would desert theory utilize prior criminal history differently than an incapacitative rationale would? To answer these questions, let me sketch some hypothetical sentencing scales and illustrate what the main differences are.

A desert-oriented penalty scale that uses prior criminal

victions involving not only other frauds but also outright thefts and acts of force, as all these acts involve willful injury.

(2) Decay of Priors. Should the time that has passed since the previous conviction be taken into account? In *DOING JUSTICE*, *supra* note 2, at 87, I argued that provision should be made for decay of offenders' criminal records, with convictions long past being disregarded.

The justification of scaling down penalties for first offenders, I have here suggested, is that the person ought not suffer the full measure of condemnation for the act where it is uncharacteristic of his past mode of conduct. The more one must reach into the distant past to find similar acts, and the longer the stretch of time prior to the current act during which the defendant has led a law-abiding life, the less plausible it becomes to claim that the current misdeed is, indeed, typical or characteristic of the way he has been behaving.

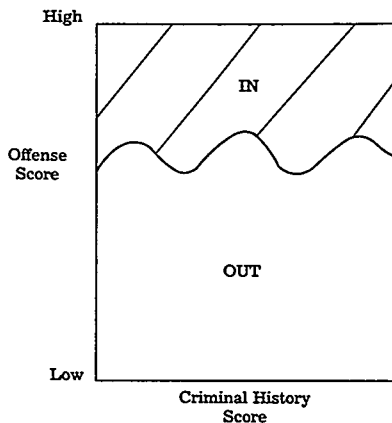
Notice the difference, here, between a desert and a predictive rationale. On a desert rationale, the claim is that there is something inappropriate or unfair about holding distant misdeeds against the person: that people ought to be judged by the way they have come to conduct themselves. On a predictive rationale, the issue would be purely an evidentiary one: how good are long past crimes as predictors? To the extent they are poor predictors, they could be disregarded. But to the extent that the evidence shows (for certain crime categories, at least) that past convictions keep their predictive utility despite lapse of time, that rationale would call for using them.

57. G. FLETCHER, *supra* note 5, at 466.

record would take the shape of a two-dimensional matrix. The vertical axis would be the offense score, representing the seriousness of the offender's current offense. The horizontal axis would be the criminal history score, representing previous convictions.⁵⁸

Assuming that incarceration is used as the severe sanction in the system,⁵⁹ and that various nonincarcerative penalties are used as less severe sanctions,⁶⁰ the matrix would have an IN-OUT line. Above the line would be prescribed presumptive penalties⁶¹ of confinement, of varying durations; below the line would be the penalties not involving incarceration. The matrix would thus take the form shown in Figure I.

FIGURE I. Two-dimensional sentencing matrix.



Let us see, then, how the criminal history would be scored, and where the IN-OUT line would be located, on a desert rationale and on a predictive rationale, respectively.

CRIMINAL HISTORY SCORE: OPEN-ENDED OR CLOSED?

An open-ended criminal history score is one in which each additional prior conviction would count: two priors would be

58. See *DOING JUSTICE*, *supra* note 2, at 132-40, 133 note.

59. For the justification for using incarceration as the system's severe penalty, reserved for serious offenses, see *id.* at 107-17.

60. For possible penalties of this nature, see *id.* at 118-23.

61. For a discussion of presumptive penalties, see *id.* at 98-106.

scored more than one, three would be scored more than two, and so on *ad infinitum*. An example is California's rule that, for offenders committed to prison, each prior conviction resulting in imprisonment would result in a specified increase in the prison sentence.⁶² A closed criminal history score is one in which additional prior convictions would cease to count after a certain point. The highest (*i.e.*, worst) score would be reached after a modest number of priors—and the accumulation of a larger number of previous convictions would not change it. An example of a closed score is that which the Pennsylvania sentencing commission has adopted in its new proposed sentencing guidelines.⁶³ Under Pennsylvania's criminal history score, the first felony conviction would count one point; the second or third, two points; and the fourth or higher, three points; but larger numbers of prior felonies would produce no higher scores.

Under the principles I sketched in Part IV, a desert-based sentencing scheme should have a closed criminal history score. A first offender would be entitled to less blame (and therefore reduced punishment), because the act was out of keeping with his past choices. With repetitions of the criminal conduct, this plea soon loses its force—and the offender comes to deserve the full measure of condemnation due a crime having the seriousness of his most recent conviction. If, after that, he goes on to commit and be convicted for further crimes, he would get no harsher response; there would simply be no penalty-reduction due.⁶⁴

An incapacitative rationale, on the other hand could call for an open-ended score. Each time the sanction fails to prevent the offender from returning to crime, progressively greater re-

62. CAL. PENAL CODE § 667.5 (West Supp. 1980). Where the current crime and the prior crimes are not classified as "violent" offenses, however, some limit is imposed: the sentence cannot exceed twice the normally-recommended term for persons without prior prison commitments. CAL. PENAL CODE § 1170.1(f) (West Supp. 1980). For discussion, see Cassou & Taugher, *Determinate Sentencing in California: The New Numbers Game*, 9 PAC. L.J. 5, 48 (1978).

63. Commonwealth of Pennsylvania Comm'n on Sentencing, Proposed Sentencing Guidelines, 10 PA. BULL. 4181-96 (Oct. 25, 1980) [hereinafter cited as Pennsylvania Sentencing Guidelines].

64. See text accompanying notes 55-56 *supra*. If the offender accumulates a very large number of convictions, there may be an understandable desire to begin to respond more severely. But that would have to rest, in my view, on utilitarian notions (*e.g.*, the notion that harsher measures need to be tried when lesser ones have failed so often before—see note 65 *infra*), rather than on the idea of the offender's deserving more punishment (see also note 24 *supra*). On a "modified desert model," discussed in text accompanying note 80 *infra*, there may be a limited degree of room for this kind of response.

striction on his freedom might have to be tried to forestall further occurrences.⁶⁵

SCORING THE QUALITY OF THE RECORD

A criminal history score reflecting quality would be one that took the seriousness as well as the number of prior convictions into account. The scoring system in the proposed Pennsylvania guidelines attempts this: besides the 0-4 points based on the number of prior felony and misdemeanor convictions, up to two further points would be added if any of the prior convictions were for felonies having a specified (high) seriousness score.⁶⁶ The intent is to distinguish offenders having records of the most serious offenses from those having records of lesser crimes. Minnesota's criminal history score, in its sentencing guideline matrix, by and large does not attempt such distinctions.⁶⁷

According to the principles outlined in Part IV, the quality of the record should count. Someone convicted of his first serious crime would be entitled to plead that such gravely reprehensible conduct has been uncharacteristic of him, and hence that he deserves to have his penalty scaled down—even where he has had a record of lesser infractions. Where the current crime is serious, in other words, the criminal history should take into account the gravity of the prior convictions as well as their number.⁶⁸ Thus the upper right hand corner of the ma-

65. Norval Morris proposes such progressively increasing restrictions for recidivists (subject to certain upper limits determined on desert grounds). N. MORRIS, *THE FUTURE OF IMPRISONMENT* 58-84 (1974).

66. Pennsylvania Sentencing Guidelines, *supra* note 63, at 4182-83.

67. In Minnesota's matrix, each prior felony conviction is assigned a point, regardless of its seriousness. The sentencing guidelines are set forth in MINNESOTA SENTENCING GUIDELINES COMMISSION, REPORT TO THE LEGISLATURE (Jan. 1, 1980) [hereinafter cited as MINNESOTA SENTENCING GUIDELINES]. The guidelines took effect on May 1, 1980. For a discussion of their rationale, see MINNESOTA SENTENCING GUIDELINES, *supra*, at 1-3, 26; K. Knapp & D. Parent, Impact of Sentencing Guidelines on the Minnesota Criminal Justice System: Establishment of Coordinated Sentencing and State Correctional Policy (n.d.) (unpublished draft report for the Minnesota Sentencing Guidelines Commission; on file with the *Minnesota Law Review*).

68. See text accompanying note 54 *supra*. Suppose, however, that the current crime is not serious. Should the quality of the record count in that event? There, the matter is more debatable. When someone has been convicted of a lesser property crime, for example, one might argue that it does not matter whether his or her prior crimes were other such lesser offenses, or were more serious infractions such as burglary or robbery. In any event, the offender's record shows that crimes of at least the present degree of seriousness are not uncharacteristic of him. (On this view, the criminal history score would be adjusted for the seriousness of the prior crimes only where the current offense is

trix, with the stiffest penalties, would be reserved for those having a record of serious crimes as well as a serious current conviction.

On an incapacitative rationale, on the other hand, the quality of the criminal record may be irrelevant: a record of lesser offenses may be as good a predictor of recidivism as a record of more serious crimes. It may, in fact, be a better predictor—since lesser crimes typically are repetitive and serious crimes have low recidivism rates.⁶⁹ To the extent the lesser crimes are indeed the superior predictors, offenders with records of such crimes could draw longer incapacitative sentences.⁷⁰ No desert view could possibly permit harsher treatment of those with less reprehensible records.

DRAWING THE IN-OUT LINE

The question of desert versus prediction comes still more clearly into focus when one draws the IN-OUT line on the sentencing matrix. Let me suggest what kind of IN-OUT line would be consistent with the principles I have sketched, and describe how that line would differ from one drawn on an incapacitative-predictive rationale.⁷¹

Consider, first, a hypothetical desert model that disregarded prior criminality entirely. Here, the IN-OUT line would be flat, as shown in Figure II. The decision whether or not to incarcerate would depend solely on the seriousness of the cur-

above a certain degree of seriousness.) On the other hand, one might argue that the mitigated treatment due first offenders should be lost more swiftly, where the prior crimes are worse. (In that event, the criminal history score would consider the quality as well as quantity of priors throughout the matrix.)

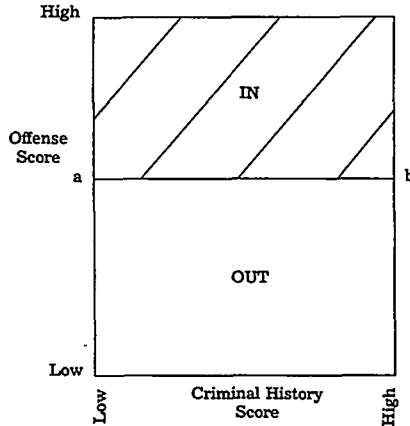
69. There has been little empirical research to date on the predictive utility of more versus less serious prior convictions.

70. Under a predictive rationale, confinement for longer periods could be justified only if (1) the person is expected to remain a potential recidivist for that length of time, and (2) the predicted crimes would be frequent enough, or serious enough, to make the benefits to society of restraining the offender "worth" the human and financial costs of confinement. If the offender represents a risk merely of occasional minor crimes, long-term confinement may be deemed not worth its costs. If, however, the offender is predicted to offend frequently (or if his past crimes are of the kind that are statistically associated with more serious future criminality) a predictive rationale would call for long-term confinement—even if the offender's current and previous offenses were not in themselves serious. For discussion of these issues, see Dershowitz, *Indeterminate Confinement: Letting the Therapy Fit the Harm*, 123 U. PA. L. REV. 297 (1974).

71. For further discussion of how to stimulate IN-OUT lines under alternative rationales, see MINNESOTA SENTENCING GUIDELINES, *supra* note 67, at 8-13; K. Knapp & D. Parent, *supra* note 67.

rent crime, and would not be affected by the offender's criminal history score at all.

FIGURE II. IN-OUT line in hypothetical desert model disregarding prior criminality.

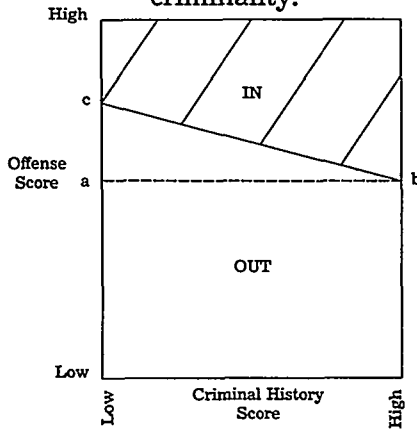


Were one to adopt a desert model that utilized the criminal record, how should this IN-OUT line change? The first step in answering this question would be to recall that the record would be relevant only as a severity *reducing* factor: someone with an extensive prior record merely loses a plea in extenuation to which he would be entitled as a first offender.⁷² Thus, the offender with a poor criminal history score should receive no severer punishment than he would in a hypothetical desert model in which prior record is disregarded. The IN-OUT line will have to intersect the right-hand edge of the matrix at the same point (marked "b") as it would in Figure II representing the "blind to priors" model.

The next step is evident. If prior record is relevant in this severity-reducing capacity, a person with a favorable (*i.e.*, low) criminal history score should get less punishment than one who has an unfavorable (high) score. Thus the IN-OUT line should begin at the left-hand edge of the matrix at a higher point (marked point "c") than the flat line; and then it should slope down so as to meet the flat line at the right-hand edge of the matrix (at point "b"). The result is shown schematically in Figure III.

72. See text accompanying notes 47-53 *supra*.

FIGURE III. IN-OUT line in desert model utilizing prior criminality.

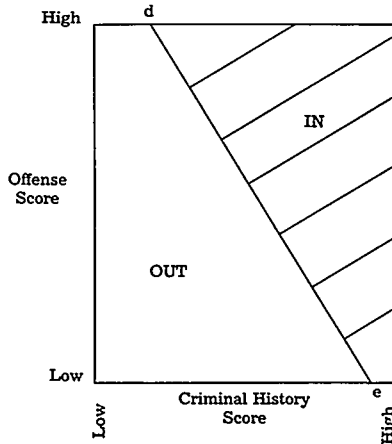


Putting this figure into words: When one is a first offender, it should take a more serious offense to send one to prison than it would in a desert system that ignored prior criminality. When one has accumulated a substantial record, however, one should lose this favored treatment and get the full measure of punishment deserved for the current offense. In other words, the offender with a record would get the same quantum of punishment as he would in a priors-blind scheme.

Turning our attention to an explicitly incapacitative scheme, what would this look like? Given limited prison resources, such a scheme would confine those with statistically the highest likelihood of returning to crime, and would use nonincarcerative sanctions for those who are lower risks. An offender's criminal record is the best known statistical predictor of future criminality⁷³—so such a scheme would base the IN-OUT decision primarily on the criminal record, and would give much less emphasis to the gravity of the current offense. The resulting IN-OUT line is shown in Figure IV.

73. See note 1 *supra* and accompanying text.

FIGURE IV. IN-OUT line in a predictive-incapacitative model.



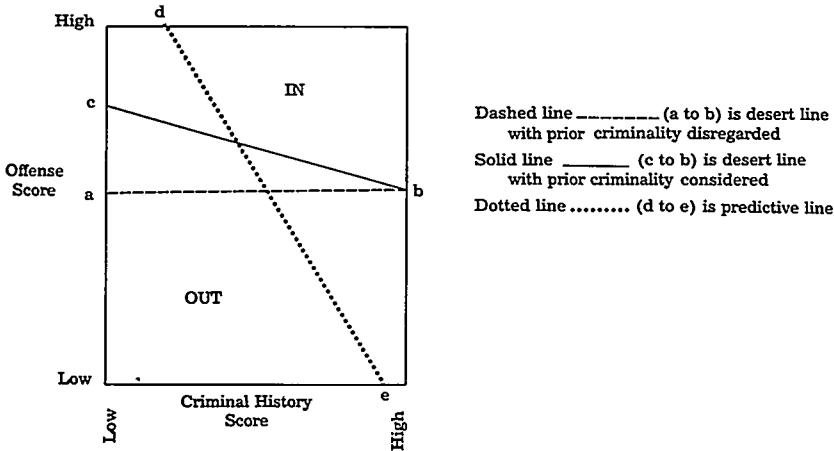
Under this predictive model, those with more extensive records would go to prison, even if their current crimes were not serious. Those who are first offenders would not be incarcerated, even if their current crime were grave. The criminal record, as the best predictor of risk, carries the preeminent weight.

In such a predictive model, should the seriousness of the current crime carry any weight? That would depend solely on its usefulness as a predictor of future criminality. It may even be that seriousness is inversely correlated with risk. For example, the U.S. Parole Commission's researchers found that two of the least serious Federal crimes, check passing and auto theft, are statistically associated with higher recidivism rates.⁷⁴

Now we are in a position to see what basic differences there are between a desert model using prior convictions, and a predictive-incapacitative model. By superimposing the three IN-OUT lines I have drawn onto a single matrix, we can clearly see these differences. This is done in Figure V.

74. D. GOTTFREDSON, L. WILKINS & P. HOFFMAN, *supra* note 1, at 54-56.

FIGURE V. The three IN-OUT lines compared.



Obviously, the dotted predictive line (d to e) has a quite different slope and intersection points than the solid desert line: although both reflect prior criminality, they do so in divergent manners. The differences in principle involved are these:

- A desert model, with or without the use of prior convictions, restricts the severe penalty of imprisonment to crimes that are serious.⁷⁵ Thus both the solid and dashed desert lines indicate IN dispositions only for current offenses having high offense scores. (The only difference between the two desert lines is that the use of prior criminality permits one to be somewhat less severe for those having low, *i.e.*, good, criminal history scores.) A purely predictive model, by contrast, has no such limits. Offenders who constitute high recidivism risks could be imprisoned, whatever the gravity of their current offense. The dotted predictive line thus calls for IN dispositions for all offenders having poor criminal history scores—even where their current offense is not at all serious. Judged from a desert perspective, the predictive model is unjust because it treats non-serious crimes in the lower right-hand corner of the matrix with disproportionate severity.

- A desert model also has the converse constraint: where the crime is grave, the offender deserves a severe punishment.⁷⁶ Thus both the solid and the dashed desert lines pre-

75. See *DOING JUSTICE*, *supra* note 2, at 109-11.

76. *Id.* at 66, 92-93.

scribe IN dispositions for offenders convicted of crimes with the highest offense scores. The introduction of prior criminality into the desert model, as we saw, does permit somewhat more leniency toward those with good criminal history scores: the solid desert line tilts up at the left, compared with the flat dashed line that ignores priors. This upward tilt, however, should not be too steep, because on the rationale proposed here the seriousness of the offense would continue to be the primary determinant of the penalty.⁷⁷ Under a predictive-incapacitative model, by contrast, serious offenders who were favorable risks would not have to be confined. The dotted predictive line thus prescribes an OUT disposition for all offenders with good criminal history scores, even where their current crimes had very high offense scores. This also would be unjust when judged from a desert perspective because it is disproportionately lenient toward those convicted of gravely reprehensible criminal conduct.

It thus should be apparent that there are fundamental differences between a desert model that utilizes prior criminality such as I have proposed, and a predictive model. When Fletcher claims that any reliance on prior criminality is merely prediction in disguise, he is mistaken.

Only a very determined utilitarian will be willing to espouse a pure predictive model, and ignore considerations of proportionality entirely. What is more commonly proposed are hybrid models, which utilize prediction—but subject to certain desert constraints. These models will have greater or less resemblance to the desert scheme I have proposed here, depending upon how central or peripheral a role is given to the principle of commensurate-deserts.

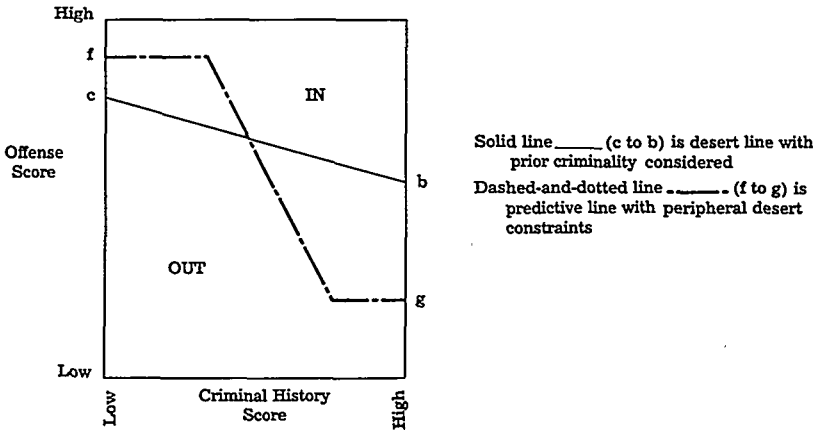
Some hybrid schemes give desert a marginal role only, and rely chiefly on prediction or other crime-control considerations. An example is the Model Penal Code's scheme—which has been re-endorsed in a large part by the American Bar Association's recent report on sentencing.⁷⁸ In the Model Penal Code, utilitarian concerns—prediction, rehabilitation, deterrence—normally determine the disposition. There would, however, be outer limits on grossly disproportionate sentences: incarceration could not be used for trivial infractions, and nonincarcera-

77. See text accompanying notes 16-25, 45-56 *supra*.

78. ALI MODEL PENAL CODE §§ 6.06, 6.08, 7.01 (Proposed Official Draft, 1962); ABA STANDARDS FOR CRIMINAL JUSTICE, SENTENCING ALTERNATIVES AND PROCEDURES, 18-2.1, 18-2.2, 18-2.5, 18-3.2 (2nd ed. 1980).

tive sanctions would be ruled out for the very worst offenses of all. The resultant IN-OUT line will be something like the dashed-and-dotted line⁷⁹ shown in Figure VI.

FIGURE VI. IN-OUT line for predictive model with peripheral desert constraints.



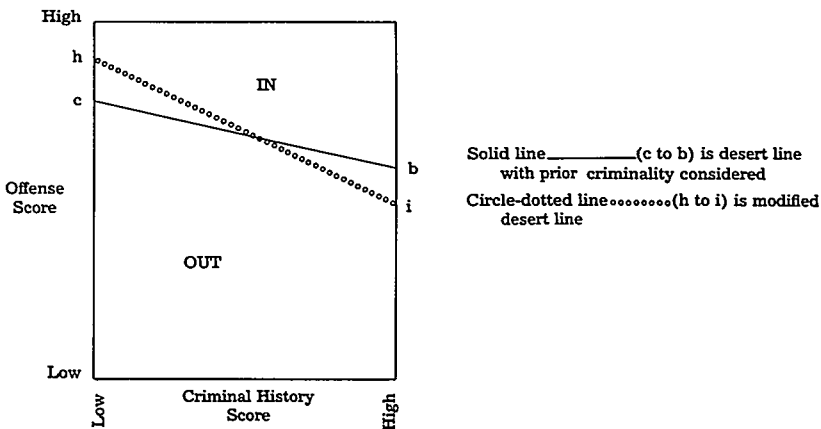
A comparison of this line to the solid line representing my proposed desert model, reveals two things. First, this predictive line calls for imprisonment for much less serious crimes: those with extensive criminal records generally go IN, irrespective of the gravity of their current offense. It is only when the current crime becomes quite minor that the desert constraint is finally invoked and the offender is spared going to prison. Second, the predictive line is considerably more lenient with first offenders committing serious crimes: generally, they go OUT because their history suggests that they are good risks. It is only when the crime becomes very serious indeed that the desert constraint is finally resorted to and the person is confined. In my view, this scheme still is substantially unjust, both in the severity with which it treats lesser offenders and the leniency with which it treats serious offenders. In an equitable sentenc-

79. The line becomes flat at the top and bottom because the most serious crimes would be deemed clearly to deserve imprisonment and the least serious crimes would be deemed clearly undeserving of it. The broad range of the intermediate-level crimes would be considered ones where either an IN or an OUT sentence would be consistent with the watered-down requirements of commensurability this model uses. For this broad range of offenses, the disposition would be determined wholly by utilitarian (for present purposes, predictive) grounds. Hence Figure VI has the steep predictive slope in the middle.

ing system, desert should not be relegated to being a marginal constraint.

Other hybrid schemes have their priorities reversed. Desert continues to have the preeminent role in determining the relative severities of punishment, but with modest deviations permitted for future-oriented considerations. This is what Kathleen Hanrahan and I have called the "modified desert" model.⁸⁰ It represents a compromise, but one emphasizing commensurability: the basic structure of the system would be shaped by the commensurate-deserts principle, but incapacitative considerations would be allowed limited scope in the choice of penalties. How would this model's IN-OUT line look? There would be modest additional leeway to confine high-risk offenders and not to confine low-risk offenders, for those cells in the matrix that are close to the desert line. The model would thus take the form of the circle-dotted line shown in Figure VII.

FIGURE VII. IN-OUT line for modified desert model.



The effect is a modest clockwise twist of the line: a few more persons with low criminal history scores go OUT, a few more persons with high criminal history scores go IN. But the constraints of commensurability are still taken seriously. Imprisonment remains reserved for persons committing serious crimes—crimes of sufficient blameworthiness to merit so harsh a sanction. Minnesota has explicitly adopted such a modified

80. THE QUESTION OF PAROLE, *supra* note 32, at 18-19.

desert model in drawing its IN-OUT line.⁸¹ One can debate the merits of such a hybrid as compared to a "pure" desert model⁸²—but it is a far cry from the predictive lines shown in Figures IV and VI.

VI. DANGERS OF ABUSE: THE POLITICS OF PRIOR CRIMINAL RECORD

Even if a theoretical case can be made in favor of considering the prior criminal record, the question remains of the potential for abuse. Will a concept of desert that uses prior criminality, when put into practice, tend to erode toward a system that uses priors in a fashion that violates desert (or other) constraints? There are two kinds of risks we need to consider.

One possible risk is that of escalating penalties for recidivists. Given public fear of criminals and the steady interest of officials in incapacitating those considered dangerous, will there be difficult-to-resist pressures to impose longer and longer punishments on convicted recidivists? My proposed severity-reducing role for priors could be poorly understood or else dismissed as politically impractical. The result could be the use of prior record in a way that increases severities: first offenders would get at least the full "deserved" amount of punishment, and repeat offenders would get much more.

The other possible risk is that of eroding the limits on the scope of inquiry in sentencing. Once one concedes that past conduct is relevant to an offender's deserts, how can one effectively limit inquiry to the defendant's *criminal* past? How can one resist officials' natural propensity to seek progressively more information about defendants, to widen the inquiry into the defendant's noncriminal history? I have suggested a theory here—that past criminal conduct suffices for judging criminal desert, and that any broader inquiry will infringe personal privacy or autonomy. But how persuasive will such a theory be in the debates that shape practical sentencing policy? How many rulemakers would be interested in drawing fine distinctions between criminal and noncriminal histories? How many would care whether convicted offenders' privacy is violated? Is there not a danger that those shaping the sentencing system will hear only that it is permissible under a desert model to con-

81. MINNESOTA SENTENCING GUIDELINES, *supra* note 67, at 9-10. However, Minnesota's guidelines give somewhat more weight to the criminal record in determining *duration* of confinement. See note 92 *infra*.

82. THE QUESTION OF PAROLE, *supra* note 32, at 19.

sider the criminal's past, and pay little heed to strictures and qualifications about what aspects of the past may properly be used?

These concerns, it is important to note, are about sentencing politics, not desert theory. They do not support the assertion that offenders deserve the same punishment whether the crime was their first or was preceded by other convictions. Rather the claim is that—even if first offenders deserve less in principle—prior criminality might have to be disregarded because of certain practical dangers.

How great are these dangers of misuse? To answer, we should look at the experience of jurisdictions that have adopted more determinate⁸³ systems of punishment, and see what the effects have been of considering prior criminality. Has use of priors led to escalated punishments? Has it led to inquiry about offenders' whole past lives? Here is a brief sketch of that experience, insofar as I am familiar with it.

Traditional, discretionary sentencing systems often have "habitual offender laws" that authorize long terms of imprisonment—sometimes as much as life—upon the third conviction of any felony.⁸⁴ Systems recently making extensive use of mandatory minimum sentences, such as New York's, sometimes have mandated substantial terms of imprisonment upon the second or third conviction of any felony.⁸⁵ Such requirements manifestly infringe commensurate-deserts, as the crimes may be rather trivial (theft of as little as \$100 may be defined as a felony). Such systems, however, do not purport to implement a desert rationale: they stress rehabilitation or incapacitation instead, and their habitual-offender provisions are unabashedly incapacitative in aim.⁸⁶

A number of jurisdictions have recently adopted legislative determinate-penalty systems: the legislature prescribes a code

83. By "determinate" penalty systems, I mean those that (1) adopt explicit standards that purport to narrow the discretion of those charged with deciding how much to punish, and (2) adopt procedures that purport to inform imprisoned offenders early of the probable duration of their stay in prison. This definition is, intentionally, neutral on which agency sets the standards—on whether the standard-setter is to be the legislature (as in California), a sentencing commission (as in Minnesota), or the parole board (as in Oregon). See *THE QUESTION OF PAROLE*, *supra* note 32, at 86-87, 91-96.

84. See note 46 *supra*.

85. New York's mandatory minima for second felony offenses are described in *ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK, THE NATION'S TOUGHEST DRUG LAW: EVALUATING THE NEW YORK EXPERIENCE* 149-56 (1977).

86. Katkin, *Habitual Offender Laws: A Reconsideration*, 21 *BUFFALO L. REV.* 99, 102-04 (1971).

of presumptive sentences for various crime categories. Although some of these systems treat repeaters harshly, they tend to be harsh in other respects also: the treatment of repeaters seems symptomatic of the legislature's general desire to take a tough stance.⁸⁷ Several authors, including Hanrahan and myself in *The Question of Parole*, have suggested that giving the legislature the mission of prescribing specific penalties tends to politicize the system and make it vulnerable to the pressures of law-and-order politics.⁸⁸ To the extent this is true, the defects of these systems may stem more from the choice of the legislature as the standard-setter than from the decision to take prior criminality into account.

Some other jurisdictions have been developing standards or guidelines on how much to punish, using a rule-making agency that should not be so vulnerable as the legislature to political pressures. Two of these, Minnesota and Pennsylvania, have established sentencing commissions to write the guidelines;⁸⁹ several others—including Oregon, and the Federal system—have been using the parole board to write the guidelines on duration of confinement.⁹⁰ These guidelines do give considerable weight to the criminal record—but not necessarily in a manner that increases overall severities. Minnesota is an inter-

87. See, e.g., R. SINGER, *supra* note 7, at 72; Gerber, *Arizona's New Criminal Code: An Overview and a Critique*, 1977 ARIZ. ST. L.J. 483, 502-06; von Hirsch, *The New Indiana Sentencing Code: Is it Indeterminate Sentencing?*, in AN ANATOMY OF CRIMINAL JUSTICE 143, 149-52 (C. Foust & D. Webster eds. 1980); Note, *Definite Sentencing in New Mexico: The 1977 Criminal Sentencing Act*, 9 N.M. L. REV. 131 (1979).

88. THE QUESTION OF PAROLE, *supra* note 32, at 83-86; Zimring, *Making the Punishment Fit the Crime*, 6 HASTINGS CENTER REP. 13-17 (Dec. 1976).

89. MINN. STAT. § 244.09 (1980); PA. CONS. STAT. ANN. tit. 18, §§ 1381-1386 (Purdon Supp. 1980).

90. The Oregon guidelines are written under a 1977 law that calls upon the parole board (after receiving the recommendations of a joint advisory commission, consisting of judges and parole officials) to write explicit guidelines for the duration of imprisonment before release on parole. The law directs the parole board, in writing those standards, to give primary (although not exclusive) emphasis to commensurate deserts. The law is Chapter 372 of the 1977 Oregon session laws; it is described and analyzed in THE QUESTION OF PAROLE, *supra* note 32, at 92-96. For the text of the Oregon statute, see *id.* at 123 app.

The Oregon parole board's guidelines under this statute are set forth in Chapter 254 of the Oregon Administrative rules, and are summarized in Taylor, *In Search of Equity: The Oregon Parole Matrix*, 43 FED. PROBATION 52 (1979). A full analysis of the content and impact of the Oregon guidelines will be set forth in a soon-to-be completed study by Sheldon Messinger, Richard Sparks, and Andrew von Hirsch, funded by the National Institute of Justice. (Grant No. 78-NI-AX-0081/82).

The Federal Parole Commission's guidelines are described in D. GOTTFREDSON, L. WILKINS & P. HOFFMAN, *supra* note 1, at 13-39.

esting example: under its system, a defendant convicted of armed robbery would get 16 months imprisonment if he is a first offender and four times as much if he has a very lengthy record. A defendant convicted of burglary of a residence would not be imprisoned for the first offense, yet would receive 2.2 years with a long record.⁹¹ How do those penalties compare with those one might choose were one constructing a system that disregarded prior criminality? They clearly seem lower for first offenders. The Minnesota sentencing commission would hardly have been likely to prescribe as little as 16 months for robbery and to prescribe a nonprison sentence for burglary if these penalties had to apply to multiple recidivists as well as first offenders. On the other hand, Minnesota's penalties for those with long records seem higher than one might advocate under a desert rationale. (That is not so surprising, when one bears in mind that Minnesota was not purporting to implement a pure desert rationale in its rules on duration of confinement.)⁹²

What of the other supposed danger, that using prior criminal record in a desert-oriented system will lead to unlimited scrutiny of the offender's personal past—to scrutiny of whether, in Singer's words, he has been a good husband and been kind to animals?⁹³ This kind of risk has not materialized significantly, so far as I can discern. California's determinate-sentencing statute, while providing "enhancements" in confinement for those with criminal records, gives much less weight, if any, to the defendant's past noncriminal conduct.⁹⁴

91. MINNESOTA SENTENCING GUIDELINES, *supra* note 67, at 35-36, 48, 64. The cited figures reflect actual durations of confinement, after deduction of good time.

92. The Minnesota guidelines treat duration of confinement differently from the IN-OUT decision. The guidelines expressly state that the IN-OUT line is intended to reflect a modified desert rationale; in drawing that line, the guidelines give considerably more weight to the seriousness of the current offense than to the criminal record. *See* note 81 *supra* and accompanying text. The guidelines do not explain what is the intended rationale of its rules on duration of confinement; and those rules give about equal weight to the seriousness of the current offense and the criminal record. MINNESOTA SENTENCING GUIDELINES, *supra* note 67, at 27-34, 48.

93. *See* text accompanying note 39 *supra*.

94. The middle base term in the California sentencing law depends on the conviction offense; enhancements to the base term depend either on special features of the current offense (*e.g.*, arming, injury, large property loss) or on prior imprisonments for felony convictions. The judge is free to invoke the upper or lower base term, based on aggravating or mitigating circumstances. The rules of the California Judicial Council provide a nonexclusive list of aggravating/mitigating circumstances that for the most part relates to facts about the current offense or prior convictions. The judge, however, may cite aggravating

The Minnesota guidelines use a matrix based on the seriousness of the offense and a "criminal history score." The latter score counts only past felony convictions, misdemeanor convictions, and—to a limited extent—juvenile delinquency adjudications.⁹⁵ The aggravating and mitigating factors described in the guidelines are focused mainly on the circumstances of the current offense.⁹⁶ Moreover, certain facts about the offender's noncriminal past, such as his educational and employment history, may not be considered at all.⁹⁷ The overall impression is that, by adopting the guidelines, Minnesota has moved away from considering the defendant's noncriminal past.⁹⁸

This thumbnail sketch of how prior criminality is being used should suggest that the story is more complex than the critics assert. Among jurisdictions which have adopted penalty standards purporting to be influenced by notions of desert, prior criminal history is considered in varying ways with varying weights. It is hazardous to make generalizations about the good or ill consequences of using priors.

As I said at the beginning of this Article, the subject of potential abuse is an important one. We need to know more about how prior criminality is being used in practice; about what adverse consequences, if any, there have been in terms of

or mitigating factors not listed in the Council's rules, and these could relate to the defendant's noncriminal past. CAL. PENAL CODE § 1170 (West Supp. 1980); CAL. R. CT., tit. 2, div. I-A, rules 421, 423; see Cassou & Taugher, *supra* note 62, at 23-24.

95. MINNESOTA SENTENCING GUIDELINES, *supra* note 67, at 28-34. The criminal history score also counts whether the current offense was committed while the offender was under probation or parole supervision.

96. *Id.* at 37-40. The guidelines give a nonexclusive list of aggravating and mitigating factors. All of these relate to the circumstances of the current offense that affect the harm or culpability involved, with two exceptions. One listed factor concerns prior convictions: whether there was victim injury both in the current offense and the prior conviction offense. One factor concerns whether the crime is a major economic offense; and if it is, the judge may consider whether the defendant has been involved in similar past conduct "as evidenced by the findings of civil or administrative law proceedings or the imposition of professional sanctions." Thus of the various listed factors, only this last-described one concerns prior noncriminal conduct. In addition, a judge may invoke unlisted aggravating or mitigating factors. Any such factor, listed or unlisted, may be used, however, to deviate from the guidelines only if the case involves "substantial and compelling circumstances." The Commission's aim was to authorize such deviations only in exceptional circumstances.

97. *Id.* at 37-38.

98. The Minnesota sentencing commission found that facts about the offender's past other than his criminal history were not, statistically, a major influence in sentencing decisions even before adoption of the guidelines. *Id.* at 5-6. The guidelines' restrictions, however, may well limit the influence of these factors still further.

the fairness and commensurability of sentencing systems; and about what the potential is for future abuses. But these practical concerns should be examined and debated explicitly in their own terms—not clothed as theoretical assertions about the logic of desert.