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Gateway Crimes

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ABSTRACT

Many who argue against the legalization of marijuana suggest that while its consumption may not be very harmful, marijuana indirectly causes significant social harm by acting as a "gateway drug," a drug whose consumption facilitates the use of other, more harmful drugs. This Article presents a theory of "gateway crimes," which, perhaps counterintuitively, implies that there are social gains to decriminalizing offenses that cause minor harms, including marijuana-related offenses. A typical gateway crime is an act which is punished lightly, but because it is designated as a crime, being convicted for committing it leads one to be severely stigmatized. People who are stigmatized have less to lose by committing more serious crimes, and therefore the criminalization of these acts increases recidivism. Thus, punishing gateway crimes may generate greater costs than benefits, and this possibility must be kept in mind when discussing potential criminal justice reforms. This "gateway effect" does not require that, but is strongest when, people underestimate or ignore either the likelihood or magnitude of the consequences associated with being convicted for a minor crime. Therefore—if potential offenders in fact underestimate expected conviction costs—this theory not only implies previously unidentified benefits associated with decriminalizing acts that cause questionable or minor harms but also benefits associated with making the costs associated with convictions more transparent.

INTRODUCTION

Can the criminalization of minor offenses, such as marijuana possession, increase aggregate criminal harm? This Article presents an economic theory of "gateway crimes" that answers this question affirmatively.

The primary dynamics of the theory are easy to explain. Broadening the reach of criminal law means stigmatizing more people by branding them as criminals. An increase in the number of stigmatized individuals means more people who are tempted to resort to criminal options and criminal careers to make a living because they have a harder time finding well-paying jobs.[1] This, in turn, translates into an increase in aggregate criminal harms inflicted. Although it remains to be empirically proven, these harms may dwarf any potential harms that may be eliminated by

1. Available empirical observations are consistent with this claim and suggest that most people who are convicted for felonies have prior records. In 2006, for instance, among the 58,100 subjects included in the Bureau of Justice Statistics' study, 61% of felony defendants had at least one prior conviction. BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, NCJ 228944, FELONY DEFENDANTS IN LARGE URBAN COUNTIES, 2006 5 (2010) (TABLE 4).

criminalizing and deterring minor acts, such as harms associated with more frequent marijuana consumption. Clearly, the theory and its implications are more complicated than what I have just described above; however, as I demonstrate in the remainder of this Article, the primary implications outlined above are quite robust and emerge from very basic assumptions.

Anyone who has the slightest interest in the issue knows that the United States is the world leader in incarceration.[2] When decriminalization of minor offenses is proposed as a solution to this "Mass Incarceration"[3] problem, opponents of decriminalization may quickly point out that people who are serving time for minor offenses make up a small proportion of the prison population.[4] Although accurate, this response illustrates how people may fail to identify—or refuse to acknowledge—perhaps the most important, yet indirect, effect of criminalizing minor offenses: the stigmatization of a large number of people who would otherwise have clean records. In fact, the criminalization of minor, day-to-day acts is so prevalent today that there seems to be a consensus among many academics that "[p]erhaps over 70% of living adult Americans have committed an imprisonable offense at some point in their life."[5]

This is quite troubling because offenders who receive criminal records, even if for misdemeanors, face many difficulties after they pay their fines or serve their time.[6] This includes the inability to secure a job,[7] which

2. According to the Bureau of Justice Statistics, there were a total of 2,220,300 incarcerated people in the United States in 2013. BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, NCJ 248479, CORRECTIONAL POPULATIONS IN THE UNITED STATES, 2013 2 (2014) (Table 1). This is about 560,000 people more than the number of incarcerated people in China, which is the second country in the world in terms of the number of people it has incarcerated. See ROY WALMSLEY, WORLD PRISON POPULATION LIST 3–4 (10th ed. 2013), http://www.apcca.org/uploads/10th_Edition_2013.pdf.

3. This term is used frequently and without definition to refer to the high incarceration rate in the United States. *See, e.g.*, MICHELLE ALEXANDER, THE NEW JIM CROW MASS INCARCERATION IN THE AGE OF COLORBLINDNESS (rev. ed. 2012); Paul D. Butler, *Poor People Lose:* Gideon *and the Critique of Rights*, 122 YALE L.J. 2176, 2182–83 (2013).

4. According to the estimates of the Bureau of Justice Statistics, more than 72% of sentenced prisoners were convicted for a violent or property crime (DUIs and drug offenses do not fall in these categories). BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, NCJ 248955, PRISONERS IN 2014 16 (2015) (Table 11). It should be noted that these figures measure percentages of prisoners who were sentenced to more than one year in prison. However, because "97% of prisoners under the jurisdiction of state and federal authorities were sentenced to more than 1 year in prison," *id.* at 5, a lower bound for the percentage of prisoners sentenced for a property or violent crime is 70%.

5. DOUGLAS HUSAK, OVERCRIMINALIZATION: THE LIMITS OF THE CRIMINAL LAW 24 (2008). An online news article about this issue suggests that many legal experts and law professors find the estimate reasonable. Jon Greenberg, *Watch Out, 70% of Us Have Done Something that Could Put Us in Jail*, POLITIFACT (Dec. 8, 2014, 11:34 AM), http://www.politifact.com/punditfact/statements/2014/dec/08/stephen-carter/watch-out-70-us-have-done-something-could-put-us-j/.

6. *See generally* Jenny Roberts, *Why Misdemeanors Matter: Defining Effective Advocacy in the Lower Criminal Courts*, 45 U.C. DAVIS L. REV. 277 (2011) (discussing the collateral effects of having a criminal record for a misdemeanor offense). A news article in Time illustrates the same point. *See* Maya Rhodan, *A Misdemeanor Conviction is not a Big Deal, Right? Think Again*, TIME, Apr. 24, 2014.

7. *See*, Joseph Graffam et al., *The Perceived Employability of Ex-Prisoners and Offenders*, 52 INT'L J. OFFENDER THERAPY & COMP. CRIMINOLOGY 673, 673 (2008) (finding that "[a]part from

pushes ex-convicts towards committing more crimes.[8] Thus, our prisons may not be populated by people who are serving time for minor offenses, but many of them may be in there *because* they committed minor offenses (which subsequently incentivized them to commit the crime for which they are currently serving time).[9]

Although a rigorous empirical study on this issue is yet to be conducted, existing raw data is consistent with this theory. For instance, a study by the Bureau of Justice Statistics (BJS) found that among people who were released from prison whose most serious crimes were drug possession, 78.3% were re-arrested within five years.[10] The same study found that among ex-convicts whose most serious offenses were drug offenses, 24.8% were re-arrested for violent offenses and 33.1% were re-arrested for property crimes within five years.[11] One must interpret these statistics with care since they only provide raw numbers.[12] However, they

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people with an intellectual or psychiatric disability, those with a criminal background were rated as being less likely than other disadvantaged groups to obtain and maintain employment"); Charles E. Loeffler, *Does Imprisonment Alter the Life Course? Evidence on Crime and Employment from a Natural Experiment*, 51 CRIMINOLOGY 137, 137 (2013) ("Ex-prisoners consistently manifest high rates of criminal recidivism and unemployment."); John R. Lott, Jr., *An Attempt at Measuring the Total Monetary Penalty from Drug Convictions: The Importance of an Individual's Reputation*, 21 J. LEG. STUD. 159, 160 (1992) (showing "that the most significant portion of the monetary penalty imposed upon criminals takes the form of reduced legitimate earnings once they return to the labor force and that the overall penalty increases dramatically with the level of preconviction income"); John R. Lott, Jr., *The Effect of Conviction on the Legitimate Income of Criminals*, 34 ECON. LETTERS 381, 381 (1990) (showing "that for many crimes the effect of reduced income from conviction constitutes a major penalty").

8. For the effects on unemployment on crime, see, for example, Steven Raphael & Rudolf Winter-Ebmer, *Identifying the Effect of Unemployment on Crime,* 44 J.L. & ECON. 259 (2001).

9. Although there exists abundant empirical evidence showing that ex-convicts have a high propensity to commit crime upon release from prison, it is very difficult to disentangle the various effects that cause ex-convicts to have high criminal tendencies. Potential effects that may be responsible for high recidivism rates include: (i) for selection effects, i.e., many people who commit crimes as first-time offenders have criminal tendencies to begin with and thus, upon release they are likely to commit crime again, see, for example, Scott D. Camp & Gerald G. Gaes, *Criminogenic Effects of the Prison Environment on Inmate Behavior: Some Experimental Evidence,* 51 CRIME & DELINQ. 425 (2005); (ii) for peer effects, e.g., the effect that people serving time in the same facility have on each other's likelihood to commit crime, see, for example, Patrick Bayer et al., *Building Criminal Capital Behind Bars: Peer Effects in Juvenile Corrections,* 124 Q.J. ECON. 105 (2009); (iii) for gang membership effects, see, for example, Brendan D. Dooley et al., *The Effect of Prison Gang Membership on Recidivism*, 42 J. CRIM. JUST. 267, 268 (2014) (finding that "prison gang membership results in a six percentage point increase in recidivism"); and (iv) for stigmatization effects, which, as explained in this Article, and other previous articles, see, for example, Patricia Funk, *On the Effective Use of Stigma as a Crime-Deterrent*, 48 EUR. ECON. REV. 715 (2004), increase an ex-convict's incentive to commit crime.

10. BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, NCJ 244205, RECIDIVISM OF PRISONERS RELEASED IN 30 STATES IN 2005: PATTERNS FROM 2005 TO 2010 8 (2014) (Table 8).

11. *Id*. at 9 (Table 10).

12. These raw statistics can be misleading in both directions. First, these statistics are underinclusive because they cannot capture every crime committed by ex-offenders but only those that were detected. Second, they can be biased upwards because the second proportion is reported for all drug crimes and not just possession crimes (this is because BJS does not offer a more detailed

do demonstrate that people, once convicted for drug possession, are significantly likely to commit more serious crimes in the future.

Obviously, the link between general recidivism[13] and the criminalization of minor acts, described above, does not explain the criminal tendencies of all individuals. Some people may have the inclination to commit serious crimes whether or not they possess criminal records, and other individuals' behavior may be completely unresponsive to whether they have criminal records. However, the raw data and intuition suggest that a large number of people are inclined to commit serious crimes only when their legal options are limited, and perceive only in those circumstances criminal acts as a way out. For these individuals, being convicted for a minor crime acts as a *gateway*[14] from making a living through legal means towards a criminal career. Thus, I refer to crimes that a large subpopulation of society may have the tendency to commit as "gateway crimes" and refer to the general recidivism effects generated by the criminalization of these acts as "gateway effects."[15]

I formalize gateway crimes and gateway effects through an economic theory that builds on existing economic models of law enforcement.[16] To my knowledge, there exists no comparable theory in the economics literature that identifies and studies this effect. One may wonder why law and economics scholars may have overlooked this phenomenon, given the extensive economics literature on crime and deterrence[17] starting in 1968 with Gary Becker's seminal article.[18] A plausible answer is that the economics literature has generally focused, and continues to focus, on a single-crime model, which is incapable of incorporating cross-crime effects.[19] Moreover, with the exception of the literature on the optimal

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breakdown in its report). Third, these statistics report results for all offenders whose most serious crimes were drug related and not only first-time offenders.

13. General recidivism refers to the commission of any crimes by ex-offenders, whereas specific recidivism refers to the recommission of similar crimes by ex-offenders. *See, e.g.*, Pieter E. Baay et al., *"Ex-Imprisoned Homicide Offenders: Once Bitten, Twice Shy?" The Effect of the Length of Imprisonment on Recidivism for Homicide Offenders,* 16 HOMICIDE STUD. 259, 265, 268 (2012).

14. See *infra* Part IV.A for a discussion of the alternative ways in which the word gateway can be used as a metaphor. I define this term in further detail in Parts I.A. and IV.D., *infra*.

15. Part I, *infra,* defines and discusses the concept of gateway crimes and gateway effects in more detail.

16. Part I.A, *infra,* discusses the relationship between gateway crimes and the previous economics literature in further detail.

17. See, for example, A. Mitchell Polinsky & Steven Shavell, *The Theory of Public Enforcement of Law*, *in* 1 HANDBOOK OF LAW AND ECONOMICS 405, 405 (A. Mitchell Polinsky & Steven Shavell eds., 2007) and Nuno Garoupa, *The Theory of Optimal Law Enforcement*, 11 J. ECON. SURVS. 267 (1997), for extensive reviews of this literature.

18. Gary S. Becker, *Crime and Punishment: An Economic Approach,* 76 J. POL. ECON. 169 (1968).

19. *See, e.g.*, the literature reviewed in Polinsky & Shavell, *supra* note 17, and Garoupa, *supra* note 17.

punishment of repeat offenders,[20] most of the economics literature also focuses on static models, where offenders have opportunities to commit crime only once.[21]

After I formalize gateway effects, I ask: how one may mitigate the magnitude of these effects? Alternatively, how may one break the link between the criminalization of an act that causes relatively small harms and general recidivism? Two obvious solutions are decriminalization and legalization. Both options greatly mitigate the stigma attached to committing the act and thereby reduce recidivism. A third, less obvious option is allowing offenders to seal their criminal records.[22] This option makes the ex-convict's record less visible to the public and thereby mitigates stigma, which in turn reduces recidivism incentives.[23] In addition to reducing stigma, variants of the third option, if used appropriately, can have the desirable effect of giving ex-convicts who truly regret their actions a second chance,[24] which may be socially desirable from instrumentalist as well as deontological perspectives.

These observations give rise to important normative questions. First, under what circumstances should one of the three methods above be used to reduce recidivism? Relatedly, what factors affect which of the three methods ought to be used to reduce recidivism, when it is normatively desirable to do so? As I discuss in Part II, although these are very hard questions, meaningful factors that affect their answers can be identified. In particular, the discussion reveals that legalization and decriminalization are socially more desirable, *ceteris paribus*, when the harm from the act is low, and a large number of people continue to commit the act even when it is criminalized.[25] The most obvious example for this type of act is marijuana possession, since many people commit the act even if it is illegal. In particular, "[a]ccording to a 2012 national survey, more than 111 million Americans over the age of 12 had tried marijuana at least once."[26]

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20. For recent articles in this field that review the existing literature, see, for example, Stan Miles & Derek Pyne, *Deterring Repeat Offenders with Escalating Penalty Schedules: a Bayesian Approach,* 16 ECON. GOVERNANCE 229 (2015); Murat C. Mungan, *A Behavioral Justification for Escalating Punishment Schemes,* 37 INT'L REV. L. & ECON. 189 (2014); and Murat C. Mungan, *The Law and Economics of Fluctuating Criminal Tendencies and Incapacitation,* 72 MD. L. REV. 156 (2010).

21. *See, e.g.*, the literature reviewed in Polinsky & Shavell, *supra* note 17, and Garoupa, *supra* note 17.

22. *See infra* Part II.C for a more detailed discussion of practices that allow offenders to seal their criminal records; s*ee also* Murat C. Mungan, Reducing Crime through Expungements (Jan. 4, 2016) (unpublished manuscript), http://ssrn.com/abstract=2711024 (proposing an economic theory of expungements and illustrating how expungements may be used to reduce crime).

23. *See* Mungan, *supra* note 22.

24. *Id.*

25. *See infra* Part III.

26. NAT'L INST. ON DRUG ABUSE, U.S. DEP'T HEALTH & HUMAN RES., MARIJUANA: FACTS PARENTS NEED TO KNOW 9 (Mar. 2014).

Moreover, even when the act causes non-negligible harms, and therefore decriminalization is undesirable, it may still be socially desirable to allow ex-convicts to expunge their records at a (monetary or non-monetary) cost, since this would give a second chance to people who in a rare lapse of judgment committed a crime and reduce the likelihood that they become recidivists.[27] A plausible example for this type of act is petty theft.

One may form quick objections to the above statements, like various politicians have in the past,[28] such as, "Even if the direct harm from marijuana consumptions is small, it is well documented that it is a gateway drug!" or, "So, we just let people steal things, and then apologize, and not get a criminal record, or anything else to document their past transgressions?" Although, I respond to these,[29] and other,[30] arguments in the remainder of this Article, I provide a brief preview of my responses here to alleviate obvious concerns that the reader may have.

Briefly stated, reactions similar to the first response quoted above fail to note the incentive distortions caused by prohibiting marijuana: criminalization reduces the marginal expected punishment cost of using other, more harmful drugs to the person who consumes marijuana. Hence, criminalization increases the very gateway drug effect that the commenter wishes to prevent. Moreover, some recent research contradicts the gateway drug hypothesis and suggests instead that increased marijuana usage may actually even reduce the consumption of more harmful drugs, such as heroin.[31]

Reactions similar to the second response quoted above fail to note that the expungement system proposed in this Article imposes significant costs (e.g., in the form of monetary payments and/or civil service) on the person who desires to seal his criminal record and thereby generates significant general deterrence effects.[32] Moreover, the value of this type of expungement is enjoyed by "the ex-convict only if he does not become a repeat offender, because otherwise he re-obtains a criminal record."[33] Thus,

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27. *See* Mungan, *supra* note 22, at 2–3.

28. For instance, Mitt Romney is quoted as saying: "I believe marijuana should be illegal in our country. It is the pathway to drug usage by our society, which is a great scourge—which is one of the great causes of crime in our cities." Yu-Wei Luke Chu, *Do Medical Marijuana Laws Increase Hard-Drug Use?*, 58 J.L. & ECON. 481, 481 (2015). Similarly, John McCain is quoted as saying "I believe that marijuana is a gateway drug." *Id.*

29. *See infra* Part IV.B, responding to the first claim; *see infra* Part II.C, and Mungan, *supra* note 22, at 4, responding to the second claim.

30. *See infra* Part IV.

31. *See generally* Chu, *supra* note 28.

32. For a definition of general deterrence, see, for example, Daniel S. Nagin & G. Matthew Snodgrass, *The Effect of Incarceration on Re-Offending: Evidence from a Natural Experiment in Pennsylvania*, 29 J. QUANTITATIVE CRIMINOLOGY 601, 602 (2013) ("[G]eneral deterrence refers to the response to the *threat* of punishment in the public writ large.").

33. *See* Mungan, *supra* note 22, at 1.

the full value of sealing one's criminal record in this manner is enjoyed only by those who truly hope to refrain from committing crime in the future.

It is worth highlighting that the economic discussion presented in the remaining parts of this Article start off by focusing only on fully rational people who have accurate expectations. The purpose of this is to highlight the robustness of the theory: unsurprisingly, the presence of common behavioral biases[34] increase the magnitude of gateway effects[35] because they reduce the general deterrence benefits associated with criminalizing acts.

Finally, the dynamics identified in this Article have important policy implications and academic corollaries in related fields. For instance, the Broken Windows Theory[36] has gained popularity among many legal scholars, and policy makers have initiated aggressive law enforcement methods based on this theory.[37] The presence of gateway effects implies that this type of aggressive policing may have unintended consequences in the form of increased crime in the long-term.[38] These effects may be partially responsible for the mixed empirical results regarding the relationship between broken windows policing and crime rates.[39] Another question, which attracts considerable attention among legal scholars yet is generally not rigorously considered by economists, is whether a particular policy has distributional effects. I argue that gateway effects are likely to have disproportionate effects on socio-economically disadvantaged people because, among other reasons, they are less likely to have the means to take the necessary steps to mitigate the stigmatizing effects of their first convictions.[40] Other topics and questions that gateway effects are closely related to include the gateway drug effect of marijuana and whether criminalization may cause stigma dilution.[41] I discuss these issues in Part IV.

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34. These include present bias (or hyperbolic discounting) and optimism bias, which are discussed in legal scholarship in Richard H. McAdams, *Present Bias and Criminal Law,* 2011 U. ILL. L. REV. 1607, and Christine Jolls, *Behavioral Economics Analysis of Redistributive Legal Rules,* 51 VAND. L. REV. 1653, 1658–63 (1998), respectively.

35. *See infra* Parts I.C.1.–3.

36. This theory is proposed in George L. Kelling & James Q. Wilson, *Broken Windows The Police and Neighborhood Safety*, ATLANTIC (Mar. 1982), http://www.theatlantic.com/magazine/archive/1982/03/broken-windows/304465/.

37. *See infra* Part IV.C and references cited therein.

38. This deduction is further explained in Part IV.C, *infra*.

39. *See infra* Part IV.C and references cited therein.

40. *See infra* Part I.D.

41. Stigma dilution refers to the reduction of the stigma associated with being convicted for serious crimes caused by the criminalization of minor offenses. *See* Murat C. Mungan, *Stigma Dilution and Over-Criminalization*, 18 AM. L. & ECON. REV. 88, 89 (2015); Murat C. Mungan, *How Criminalizing Minor Offenses Can Mean There is Less of a Deterrent for People to Commit More*

In Part I, I outline my theory of gateway crimes. Then, in Part II, I discuss methods that can be utilized to mitigate gateway effects. In Part III, I consider normative implications. Part IV describes how the dynamics identified in this Article relate to policy and academic arguments made in other pertinent fields.

I. A THEORY OF GATEWAY CRIMES

The theory I propose here is closely related to existing economic theories of law enforcement[42] and stigmatization.[43] In particular, the pioneering work of Gary Becker provides a framework to study the incentives and behavior of potential offenders,[44] and later works extend this framework to formalize the stigmatizing effect of punishment[45] and the specific and general deterrence effects of stigmatization.[46] The theory presented here builds on these previous works to explain how criminalizing acts, which a large number of people may be inclined to commit, can have the unintended consequence of increasing people's propensities to commit serious crimes.[47] This part defines gateway crimes and gateway effects within an economic setting where individuals rationally decide whether to commit crimes. Subsequently, it highlights how behavioral biases may increase the prevalence of gateway effects.

A. The Economics of Stigma

Modern economic theories of criminal behavior build on Gary Becker's 1968 article where rational actors decide whether or not to commit illegal acts by weighing the costs and benefits associated with their options.[48] Although Beckerian analyses have been criticized by many,[49] the

Serious Crimes, LSE USAPP BLOG (Jan. 11, 2016), http://blogs.lse.ac.uk/usappblog/2016/01/11/how-criminalizing-minor-offenses-can-mean-there-is-less-of-a-deterrent-for-people-to-commit-more-serious-crimes/.

42. For surveys of the economics literature on law enforcement, see, for example, Polinsky & Shavell, *supra* note 17, and Garoupa, *supra* note 17.

43. There is a considerable and growing literature on the economics of stigma. *See, e.g.*, Funk, *supra* note 9; Alon Harel & Alon Klement, *The Economics of Stigma: Why More Detection of Crime May Result in Less Stigmatization*, 36 J. LEGAL STUD. 355 (2007); Mungan, *Stigma Dilution and Over-Criminalization*, *supra* note 41; Eric Rasmusen, *Stigma and Self-Fulfilling Expectations of Criminality,* 39 J.L. & ECON. 519 (1996).

44. *See* Becker, *supra* note 18.

45. *See* sources cited *supra* note 43.

46. *See* Funk, *supra* note 9.

47. A similar effect is caused by stigma dilution, as explained in Part IV.E, *infra*.

48. Becker, *supra* note 18, at 207.

49. See, for example, Mungan, *The Law and Economics of Fluctuating Criminal Tendencies and Incapacitation*, *supra* note 20, at 169–75, for a review of existing critiques of economic analyses of criminal law.

primary implications of his model are robust and intuitive: people are more likely to commit crime when they perceive high-expected returns or substantial satisfaction from the commission of a crime.[50] Similarly, people are more likely to commit crime if they are not content with the legal options available to them.[51]

These primary takeaways from Becker's work are very simple, yet they have very powerful implications. Most relevant to the current analysis are the implications of Beckerian models vis-à-vis the stigmatizing effects of criminal records. Explaining these implications requires a brief digression to describe what is meant by stigma in the economics literature.

It is no secret that criminal records have negative consequences on ex-convicts' lives, nor is there any serious debate about the importance of this phenomenon. In fact, according to the American Bar Association's database, there are over 45,000 (state and federal) potential negative consequences associated with a conviction.[52] Among these negative consequences, the ones that can be most easily demonstrated through empirical work are presumably effects in the labor market.[53] Employers are reluctant to offer jobs to people who have criminal records due to a variety of reasons, and this causes ex-convicts[54] to have lower expected earnings.[55] Moreover, it is not hard to imagine other, more social, negative consequences associated with having a criminal record.[56] For instance, an ex-convict may be viewed as a social outcast[57] and may therefore have a hard time finding a spouse,[58] or he may not be welcome in (or banned from) various clubs or even religious organizations.[59] In addition to these

50. More specifically, most law enforcement models contain two key variables which determine the level of deterrence, namely the probability and severity of punishment. *See, e.g.*, Polinsky & Shavell, *supra* note 17, at 420.

51. Correlations between unemployment and likelihood of committing crime provide empirical support for this idea. *See, e.g.*, Raphael and Winter-Ebmer, *supra* note 8, at 280–81 (finding a strong correlation between unemployment and property crimes). See also Rasmusen, *supra* note 43, and Mungan, *supra* note 22, for mathematical formalizations of this idea.

52. *See National Inventory of Collateral Consequences of Conviction*, JUST. CTR., http://www.abacollateralconsequences.org/search/ (last visited Feb. 9, 2016).

53. *See* sources cited *supra* note 7.

54. This lower earning effect can potentially be reduced through expungements. This is discussed in Mungan, *supra* note 22, at 3.

55. *See* sources cited *supra* note 7.

56. *See* Nora V. Demleitner, *Preventing Internal Exile: The Need for Restrictions on Collateral Sentencing Consequences*, 11 STAN. L. & POL'Y REV. 153, 155–58 (1999) (describing a variety of negative social consequences associated with convictions).

57. *Id.* at 158.

58. This possibility is mentioned in both Rasmusen, *supra* note 43, at 520, and Harel & Klement, *supra* note 43, at 355.

59. Michael Hugh Mirsky pleaded guilty for resisting arrest in 2012; subsequently, "his church has told him that he cannot serve as an usher." Binyamin Applebaum, *Out of Trouble, but Criminal Records Keep Men out of Work*, N.Y. TIMES, Feb. 28, 2015, https://www.nytimes.com/2015/03/01/business/out-of-trouble-but-criminal-records-keep-men-out-of-work.html.

effects one may also lose certain legal rights when he is convicted for a crime[60] and even be deported if he is a non-citizen.[61] It is the combination of all of these effects that I refer to as stigma or informal sanctions.[62] Formal sanctions, on the other hand, refer to the more direct consequences associated with conviction, e.g., a prison sentence or a criminal fine.

Both stigma and formal sanctions have the desirable effect of increasing the expected cost to committing crime and thereby reducing people's incentives to commit crimes.[63] However, unlike formal sanctions, a large part of informal sanctions are attached to one's status, and therefore affect an ex-convict's future decisions as well.[64] In particular, because a stigmatized ex-convict faces great difficulties in finding legal employment and otherwise fitting in society, his tendency to commit further crimes is increased. Thus, stigma produces a *negative specific deterrence effect*.[65] This is, in the current context, equivalent to a *recidivism effect*,[66] which simply refers to the fact that informal sanctions reduce the deterrence of ex-convicts by making their legal options less desirable.

Recidivism effects are positively related to the magnitude of stigma, which typically consist to a large extent of the fixed costs associated with

60. These include the loss of the right to possess firearms, *see, e.g.*, 18 U.S.C. § 922(g) (2012); loss of voting rights, *see, e.g.*, ESTELLE H. ROGERS, RESTORING VOTING RIGHTS FOR FORMER FELONS 1 (2014), http://www.projectvote.org/wp-content/uploads/2014/03/POLICY-PAPER-FELON-RESTORATION-MARCH-2014.pdf ("In all but two states, citizens with felony convictions are prohibited from voting either permanently or temporarily."); and exclusion from jury duty, *see, e.g.*, Brian C. Kalt, *The Exclusion of Felons from Jury Service,* 53 AM. U. L. REV. 65 (2003). Other legal consequences are discussed in Demleitner, *supra* note 56, 155–58.

61. Demleitner, *supra* note 56, at 165.

62. For a list of economics articles that analyze informal sanctions and conceive of these sanctions as negative consequences associated with a conviction besides the formal sanction, see Murat C. Mungan, *A Generalized Model for Reputational Sanctions and the (Ir)relevance of the Interactions Between Legal and Reputational Sanctions*, 46 INT'L REV. L. & ECON. 86 (2016).

63. This statement assumes that the deterrence of the illegalized act, on the margin, is socially desirable. In a consequentialist analysis, this is true if, as argued by George Stigler, one excludes the benefits from crime from the social welfare calculus. George J. Stigler, *The Optimum Enforcement of Laws,* 78 J. POLITICAL ECON. 526, 527 (1970) ("What evidence is there that society sets a positive value upon the utility derived from a murder, rape, or arson?"). However, if one includes criminal benefits in a utilitarian analysis, then technically people may be overdeterred from committing the illegalized act, i.e., the available sanction scheme may cause people with benefits that more than offset the harm from their criminal acts to refrain from committing crime. However, as Gary Becker demonstrates, this condition is unlikely to hold because optimal sanction schemes generally result in underdeterrence. *See generally* Becker, *supra* note 18. Thus, if possible, increasing deterrence is desirable when the sanction scheme is chosen optimally. *Id.*

64. *See, e.g.*, Funk, *supra* note 9, and Mungan, *supra* note 22, mathematically formalizing this effect.

65. Nagin & Snodgrass, s*upra* note 32, at 601 ("Specific deterrence refers to the possible chastening effect of the actual *experience* of punishment.").

66. A recidivism effect refers to increases in an ex-convict's likelihood of committing crime. *See, e.g.*, Funk, *supra* note 9, at 717.

having a criminal record.[67] In other words, the stigma associated with being a criminal is affected less than proportionally by the severity (and the number) of crimes one has committed. This is because a large portion of the informal sanction is incurred as soon as one obtains a visible criminal record.[68] This is one of the rationales, for instance, for why repeat offenders are punished more severely: because a repeat offender does not face as severe informal sanctions as a first-time offender does, the formal sanction for repeat offenders must be increased to bring the total sanction for repeat offenders closer to the total sanction for first-time offenders.[69] Similarly, fixed costs associated with informal sanctions is one of the explanations for the widely held presumption that people are more responsive to the certainty than the severity of punishment.[70]

To summarize, existing theories on punishment provide us with a couple of very important insights. A convict is stigmatized in addition to suffering formal sanctions. This causes a recidivism effect, and a large portion of informal sanctions is incurred as soon as one obtains a visible criminal record. These insights play a key role in defining and explaining the importance of gateway crimes and gateway effects.

B. Gateway Crimes and Examples

A gateway crime is an offense that a large group of people may have the inclination to commit.[71] Moreover, people who commit these minor offenses do not necessarily have criminal tendencies to commit more serious crimes. However, since these minor offenses are designated as

67. This point has been noted in the economics literature. For instance, William Neilson and Harold Winter use state-dependent utilities to capture this idea. William S. Neilson & Harold Winter, *On Criminals' Risk Attitudes,* 55 ECON. LETTERS 97, 98 (1997).

68. Michael K. Block & Robert C. Lind, *An Economic Analysis of Crimes Punishable by Imprisonment,* 4 J. LEGAL STUD. 479, 481 n.7 (1975) states and formalizes this idea.

69. This argument is formalized in Funk, *supra* note 9, at 717–18.

70. Murat Mungan and Jonathan Klick provide a more detailed description and discussion of this presumption. Murat C. Mungan & Jonathan Klick, *Identifying Criminals' Risk Preference,* 91 IND. L.J. 791, 809 (2016). The presumption is at least 250 years old because it dates back to Beccaria's work. CAESAR BONESANA & MARQUIS BECCARIA, AN ESSAY ON CRIMES AND PUNISHMENTS 93 (Edward D. Ingraham trans., Philip H. Nicklin 2d ed., 1819) (1764) ("Crimes are more effectually prevented by the certainty than the severity of punishment."). Becker, *supra* note 18, showed that this presumption implies that criminals must be risk-seeking in the expected utility framework, which is disturbing to some academics because this finding may be interpreted as criminals having fundamentally different preferences than non-criminals. As shown by Mungan and Klick, *supra*, at 808–09, stigmatization costs explain how potential offenders may simultaneously be more responsive to the *certainty* of punishment than the *severity* of punishment and be risk averse.

71. There is no universal definition of this term. Thus, the term has been used to refer to different things in some prior articles, which do not define the phrase precisely. See *infra* Part IV.D for a discussion of how this phrase has been used in the literature, and how alternative uses of this phrase differ from the way it is used in this Article.

crimes, being convicted for one of these crimes implies a criminal record and thus generates significant stigma.[72]

People who have been convicted of gateway crimes, unless effective remedies allowing the removal of criminal records are available and known to them,[73] suffer the negative consequences of being stigmatized. Therefore, they are more inclined, compared to when they had no criminal records, to commit (further) crimes, including serious offenses.[74] This is because the marginal informal sanction from committing an additional crime is lower for ex-convicts compared to first-time offenders. Thus, by designating offenses that many people are inclined to commit as crimes, the criminal justice system converts a large number of relatively ordinary people into potential offenders who may cause substantial social harms. This type of conversion is what I call the gateway effect of designating minor offenses as crimes.

The theoretical dynamics behind gateway crimes and gateway effects can be illustrated through simple numerical examples, which are based on true criminal records.[75] For instance, why may A.M.,[76] who maintained a clean criminal record until the age of twenty-six, have decided to commit serious crimes (including grand theft, trespass on property, and possession of a firearm by a felon) after turning twenty-six? A look at his criminal record reveals that A.M. was convicted for driving while his driving license was revoked (DWLR) when he was twenty-six.[77] The following numerical example provides a plausible explanation for how this conviction may have led him to subsequently commit more serious crimes.

Suppose that when A.M. was twenty-six, he was confronted with a situation where his expected benefit from DWLR was about $120: He was notified (with short notice) of an attractive job opportunity, which required him to be at an interview at a specific time. However, getting there on time

72. The stigmatizing effect of criminal records is discussed *supra* in Part I.A and the Introduction.

73. Part II.C, *infra*, discusses the effects of expungements and similar practices that enable the sealing of criminal records.

74. These deductions follow from the observations made in Part I.A, *supra*. It should be noted that these dynamics are similar to, but different than, those that are the subject of the Alchian and Allen theorem, which holds that "adding a per unit charge to the price of two substitute goods increases the relative consumption of the higher price good." Tyler Cowen & Alexander Tabarrok, *Good Grapes and Bad Lobsters: Applying the Alchian and Allen Theorem*, 33 ECON. INQUIRY 253, 253 (1995). However, unlike the per unit charges considered by Alchian and Allen, criminalization of minor offenses is the analog of adding a per unit charge to the cheaper good when the consumption of the expensive good already requires a per unit payment. Thus, the dynamics considered here are different than those which are the subject of the Alchian and Allen theorem.

75. The records on which the examples below are based came from the Clerk of the Circuit Court and Comptroller for Leon County, Florida. The name of the individual is not disclosed out of respect to his privacy. The *Alabama Law Review* reviewed redacted records to ensure accuracy.

76. *See supra* note 75.

77. *See supra* note 75.

would require him to take a cab—which would necessitate getting another cab on the way back home—or driving his own car. Unfortunately for him, his driving license was previously revoked. Moreover, suppose that he believed that the probability of being pulled over during his drives was 0.1%, that the monetary fine for a DWLR was $1000, and that he attached a value of $100,000 to not being stigmatized by a conviction. Thus, he rationally chose to drive with a revoked license because he expected benefits that more than offset all future expected costs associated with this option.

In particular, let b represent his benefit from DWLR, p the probability of being convicted, s the monetary sanction associated with a DWLR, and z the stigma cost of having a DWLR conviction. Given this notation, A.M. would rationally decide to drive if[78]:

$$b > p(s + z)$$

Plugging in b= $120; p=0.1%; s=$1000; and z=$100,000, reveals that this inequality holds, since:

$$\$120 > 0.1\%(\$1{,}000 + \$100{,}000) = \$101$$

Thus, A.M. decided to drive with a revoked license.[79] He was out of luck, and despite the very low probability, he was pulled over on his way to his job interview. Subsequently, he was convicted for a DWLR.

Subsequent to his conviction, A.M. applied for jobs but had no luck finding any. Thus, when he observed a car with an unlocked door that had a lot of cash in it, A.M. again stopped to consider his options. He believed that there was about $1,500 in the car, and knowing his neighborhood, he had a feeling that his odds of being caught were around one out of ten. He also estimated that the monetary equivalent of the formal punishment for

78. This expression intentionally ignores the potential marginal increase in future benefits net of the stigma effect from the first conviction because this effect is negligible. In particular, if A.M. were fully forward looking, he would note that if he were caught for DWLR, he may commit further crimes in the future as a rational response to his stigmatization. Thus, he would commit DWLR if

$$b > p(s + z + \max\{0, b_f - p_f(s_f + \sigma_f)\})$$

where b_f is the benefits from future (and more serious) crime, s_f is the formal sanction associated with future crimes, and σ_f is the marginal stigmatization effect associated with being convicted for a second crime. $p(b_f - p_f(s_f + \sigma_f))$ represents the increased net-future benefits net of the initial stigma effect of an individual who decides to commit serious crimes in the future only if he has a criminal record. As can be inferred from the next paragraph, this term equals 30 cents in the current example and thus can safely be ignored.

79. In a more realistic analysis, one would have to consider the fact that A.M. would actually forgo the benefits from DWLR when he is caught. Hence, his expected benefit would be about (99.99%) × $120 = $119.99, i.e., a penny less than $120. Abstracting from this consideration has no effect on A.M.'s decision-making process.

getting caught for this crime was $2,000. However, unlike the previous DWLR example, he believed that the cost of being further stigmatized by adding an additional crime on his record was relatively minimal, about $10,000. His benefits[80] again outweighed his costs:

$$\$1,500 > 0.1(\$10,000 + \$2,000) = \$1,200$$

It is very easy to note that, but for a prior criminal conviction, A.M. would not have committed this offense. Since then, the expected stigma cost associated with committing the act alone would be no smaller than $\$100,000 \times 0.1 = \$10,000$.

The above example does not include many important factors that may affect a person's decision-making process, including, for instance, some moral considerations. These are, of course, important considerations in reality, but the objective of the example is to illustrate a very simple point: a reduction in stigma costs caused by a prior conviction can increase the incentives of people to commit more serious crimes in the future. This may result in people with records committing crimes they would otherwise not. Moreover, the above example demonstrates that people may be the subject of gateway effects, even when they have completely accurate expectations, are rational, and do not possess any type of behavioral bias. The example also demonstrates that, under these assumptions, gateway effects are most likely when the prohibited crime conveys large benefits to the individual, and the probability of being sanctioned is low.

Another important feature of gateway crimes that leads to prevalent gateway effects is that the opportunities to commit them spontaneously and frequently present themselves to ordinary people with low criminal tendencies. This trait is quite obvious, for instance, in the context of public intoxication, which is an act that can be committed by anyone who has access to alcohol. The same can also be said for marijuana offenses. For instance, a report by the BJS states that among high school seniors surveyed in 2008, 83.9% "report[ed] they could obtain"[81] marijuana "easily or very easily."[82] Thus, although the probability of being convicted for committing these offenses once may be very low, as in the above example, the probability of being convicted over one's entire life may be

80. As in the previous case, realistically A.M.'s expected benefits would be $\$1,500 \times 0.9 = \$1,350$ because he would forgo his criminal benefits when he gets caught. Abstracting from this consideration, again, has no effect on A.M.'s decision-making.

81. Tina L. Dorsey & Priscilla Middleton, *Drugs and Crime Facts*, BUREAU OF JUST. STATISTICS 50 (n.d.), http://www.bjs.gov/content/pub/pdf/dcf.pdf.

82. *Id*.

substantial.[83] Therefore, designating these offenses as crimes may generate substantial gateway effects, despite the low probability of conviction per offense.

C. Behavioral Biases and Other Considerations

The theory and examples presented in the previous part focus on individuals who are completely rational, have accurate expectations, and do not have any behavioral biases. Next, I argue that incorporating some behavioral considerations exacerbates the expected magnitude of gateway effects.

1. Present Bias

One of the most studied behavioral biases in the law and economics literature is what is called "present bias" or "hyperbolic discounting."[84] This concept is often used to formalize a person's inability to delay (or his difficulty in delaying) instant gratification.[85] A person who is present-biased in this manner undervalues future costs relative to instant gains.[86] This implies that present-biased people are willing to commit gateway crimes more often because they undervalue future costs, including the cost of stigma (and formal sanctions), and thus, their propensity to commit these crimes is increased.[87]

One may argue that a person who suffers from present bias is also likely to commit serious crimes more often, even as a first-time offender. If this were true, this argument would introduce complications in identifying

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83. To see this, note that the probability of never being convicted after committing gateway crimes n times is $(1-p)^n$ where p is the per-offense conviction probability. Hence, $1-(1-p)^n$ denotes the probability that a person is convicted at least once. Thus, if the per-offense conviction probability is 0.01 and the person commits the act 100 times over his lifetime, the probability that he will be convicted at least once is $1-(1-0.01)^{100}\approx 63\%$.

84. *See, e.g.*, Shane Frederick, et al., *Time Discounting and Time Preference: A Critical Review*, 40 J. ECON. LITERATURE 351 (2002); David Laibson, *Golden Eggs and Hyperbolic Discounting,* 112 Q.J. ECON. 443, 445–46 (1997); McAdams, *supra* note 34, at 1607–09.

85. As McAdams, *supra* note 34, at 1608, notes, "The time inconsistency typically pushes one to abandon long-term preferences in favor of immediate gratification. For example, 'Prudence might prefer $105 after 366 days to $100 after 365 days but change her mind when the choice becomes one between $100 today and $105 tomorrow.'"

86. More specifically, a person's inter-temporal utility can be expressed as $U(\beta,\delta) = u_0 + \beta\sum\delta^i u_i$ where β captures the degree to which a person is present-biased, δ captures his standard (i.e., exponential) discounting of future utilities, u_0 is the present utility associated with an action, and u_i is the utility a person obtains in period i. Thus, when a person heavily overvalues the present, β is very close to zero, and future utilities receive very small weights.

87. In particular, the benefits from crime are obtained immediately, i.e., at period zero in the notation introduced in *supra* note 86, but stigma and other costs are incurred in later periods, whose values are discounted by β. Thus, as β gets smaller, the person's criminal propensity to commit gateway crimes increases.

gateway effects because it can no longer be said that the present-biased offender who commits a serious crime would not have committed it but for his criminal record. However, the argument fails for the most relevant group of people who suffer from gateway effects, namely those individuals who have significantly lower benefits from committing serious crimes compared to the expected costs associated with committing those crimes (as first-time offenders).[88] Thus, the gap between these expected benefits and costs cannot vanish unless the person discounts future costs at unreasonably high rates.[89] Therefore, present bias is likely to increase people's propensity to commit gateway crimes, but unlikely to induce ordinary people to commit serious crimes. This implies that present bias increases the prevalence of gateway effects.

2. Expressive and Defiance-Related Utility

Two different fields of research suggest that people may derive additional pleasure, or in the jargon of economics, utility, from engaging in activity which they believe is being punished unjustly. Defiance theory suggests that people may respond to punishment by breaking the law more frequently if they perceive the punishment of the act as illegitimate.[90] Previous work on expressive behavior, which has been rigorously studied in the context of expressive voting,[91] also suggests that people may derive utility, in addition to the relevant material utility, simply by acting in accordance with their views.[92] Thus, people may attach additional benefits to committing an illegal act when a belief emerges (or exists) among a sizeable group of people that the criminalization of a particular act is unjust.

There are historical and current examples of laws that criminalize acts that many believe ought to be legal. Initiatives passed by voters in several states to legalize the sale of marijuana provide one of the most recent and

88. More formally, let b^h denote the highest benefit from committing a serious crime for "ordinary people," i.e., the people who I have previously defined as those who are unlikely to commit crime unless they have a criminal record. For present bias to induce these people to commit crimes, it must be the case that $\sum \delta^i u_i$>bh> $\beta \sum \delta^i u_i$ where u_i denotes the expected future marginal utilities associated with committing crime.

89. Using the above notation, it must be true that $\beta < \frac{b^h}{\sum \delta^i u_i}$

90. *See* Lawrence W. Sherman, *Defiance, Deterrence, and Irrelevance: A Theory of the Criminal Sanction,* 30 J. RES. CRIME & DELINQ. 445, 445 (1993) ("A theory of 'defiance' helps explain the conditions under which punishment increases crime. . . . Both 'specific' defiance by individuals and 'general' defiance by collectivities results from punishment perceived as unfair or excessive, unless deterrent effects counterbalance defiance and render the net effect of sanctions irrelevant.").

91. *See* Arye L. Hillman, *Expressive Behavior in Economics and Politics*, 26 EUR. J. POL. ECON. 403, 404 nn.1–7 (2010) (collecting sources).

92. *See id.* at 403 ("Expressive behavior is the self-interested quest for utility through acts and declarations that confirm a person's identity.").

popular examples.[93] These movements demonstrate that sizeable proportions of populations in various states view the criminalization of marijuana as a mistake. Similarly, one of the greatest examples from American history comes from the Prohibition era, where criminal law interfered with the production and sales of "intoxicating liquors."[94]

When the law criminalizes acts against the will of a substantial population, a subgroup of that population is likely to enjoy greater benefits from committing it than their material gains from those acts. The implications of this observation vis-à-vis the present analysis is straightforward: an increase in the benefits from these minor offenses leads people to commit them more often, which increases the likelihood with which they are convicted and stigmatized. These people are more likely to subsequently commit more serious crimes due to gateway effects.

3. Optimism Bias and Underestimating the Consequences of Conviction

In a previous study Professor Christine Jolls states: "An amazingly robust finding about human actors—and an important contributor to the phenomenon of risk underestimation—is that people are often unrealistically optimistic about the probability that bad things will happen to them. A vast number of studies support this conclusion."[95] If true, the effect of this type of optimism bias is very similar to the effect of present bias: because people underestimate probabilistic costs but accurately estimate certain benefits, their criminal tendencies to commit gateway crimes are increased. Thus, they are more likely to obtain criminal records and therefore more likely to commit more serious crimes in the future. Therefore, the presence of optimism bias increases the prevalence of gateway effects.

The type of optimism bias that is generally studied is the type Professor Jolls is referring to, where people underestimate the probability of bad events. However, people may also underestimate the importance of a

93. *See State Medical Marijuana Laws*, NAT'L CONF. OF ST. LEGISLATURES (Feb. 8, 2017), http://www.ncsl.org/research/health/state-medical-marijuana-laws.aspx (summarizing state laws on medicinal marijuana use); *see also Marijuana Resource Center: State Laws Related to Marijuana*, OFF. OF NAT'L DRUG CONTROL POL'Y, https://obamawhitehouse.archives.gov/ondcp/state-laws-related-to-marijuana (last visited Feb. 9, 2017) ("Voters in Alaska, Colorado, Oregon, and Washington state also passed initiatives legalizing the sale and distribution of marijuana for adults 21 and older under state law. District of Columbia voters approved Initiative 71, which permits adults 21 years of age or older to grow and possess (but not sell) limited amounts of marijuana.").

94. It is worth noting that the 18th Amendment did not prohibit the consumption of "intoxicating liquors" but prohibited its manufacture, sale, and transportation. *See* U.S. CONST. amend. XVIII.

95. Jolls, *supra* note 34, at 1659 (citing to a bibliography containing 200 articles on unrealistic optimism).

negative event, or in the current context, the severity of stigmatization. This is particularly relevant when people do not know much about the functioning of the legal system. The executive director of the National Association of Criminal Defense Lawyers, Norman Reimer, states: "The single most dangerous thing people think is that if they get a conviction and don't go to jail they won't face issues. . . . Misdemeanor convictions can have serious impacts."[96] Interviews with ex-convicts provide anecdotal evidence for Mr. Reimer's statement. For instance, Mr. Ronald Lewis, a person struggling with unemployment because of a criminal record dating back to 2004, explains how he pled guilty to three misdemeanors.[97] When asked if he was worried at the time about whether his plea would affect his future, he states: "No. Because the lawyer had told me, 'It's only a misdemeanor. It's never [going to] hurt you. Don't even worry about it.'"[98]

Underestimating either the probability of conviction or the magnitude of the consequences associated with a conviction produces results that are very similar to those produced by present bias: people under-weigh expected costs relative to certain benefits, and thus are more likely to commit small crimes.

D. Distributional Impacts of Gateway Effects and Responses to Potential Counterarguments

The skeptical reader may demand a list of gateway crimes. Although one can give specific examples that illustrate how gateway effects may be produced, it is difficult to provide a comprehensive list. Fortunately, a list of this nature is not necessary. The objective here is pointing out the dangers associated with expanding the scope of criminal law such that ordinary people who are, by chance, caught within its reach may be converted into habitual criminals. An equally important objective is explaining the features of gateway crimes, such that a policy maker or legislator provided with the relevant empirical facts can determine whether a particular act is in fact a gateway crime.

Marijuana possession,[99] "driving with a license suspension for failure to pay tickets,"[100] and public intoxication offenses are probably the most easily definable categories of acts that are likely to generate gateway effects. In addition to these, there are also crimes that are harder to categorize, either because they are not crimes in all states or because their

96. *See* Rhodan, *supra* note 6.

97. *See Living with a Record: How Past Crimes May Drive Job Seekers into Poverty*, PBS (Jan. 24, 2015), http://www.pbs.org/newshour/bb/living-record-past-crimes-driving-job-seekers-poverty/.

98. *Id.*

99. *See supra* notes 26, 81 and accompanying text.

100. *See* Roberts, *supra* note 6, at 277.

classifications depend on the particular jurisdiction. Public urination, for instance, can constitute a sex offense in some jurisdictions,[101] such that people who are convicted for it can be required to register as sex offenders.[102] In addition to these there are less commonly known crimes, which are less often prosecuted and have been the subject of commentary pointing out the surprisingly wide reach of criminal law.[103] Examples include practicing interior design without a license,[104] lying in a fishing tournament,[105] and dredging for oysters at night.[106]

Clearly, some of the individual crimes listed above may not generate significant gateway effects on their own. However, the joint criminalization of all of these and other acts cause criminal law to reach ordinary people who, without a criminal record, would not be inclined to commit serious crimes. This is what generates substantial gateway effects.

The skeptical reader may also argue that the designation of these acts as crimes is unlikely to generate significant gateway effects because (i) one can generally contest cases involving these crimes, such that the probability of conviction is low; (ii) even if one is convicted for these offenses, there are remedies allowing the sealing of criminal records generated by these offenses; and (iii) even if one cannot seal his record, these offenses may not generate substantial stigma effects, since having committed these offenses does not say much about the person's character.

All points raised above are relevant and contain some truth, but they do not imply that gateway effects are likely to be small. First, as pointed out in the previous parts, the types of crimes that are likely to have gateway effects are exactly those for which the probability of conviction, per offense, is low, but opportunities to commit these crimes spontaneously present themselves to ordinary people. Thus, point (i) actually supports the conclusion that these acts generate gateway effects. Second, each point

101. *See, e.g.*, ARIZ. REV. STAT. § 13-3821 (2000 & Supp. 2013); CAL. PENAL CODE §§ 290, 314(1)-(2) (West 2014); CONN. GEN. STAT. ANN. §§ 53a-186, 54-250, 54-251 (West 2009 & Supp. 2016); GA. CODE ANN. §§ 16-6-8 (2011), 42-1-12 (2014 & Supp. 2016); IDAHO CODE ANN. §§ 18-4116,-8306,-8304 (2016); KY. REV. STAT. ANN. §§ 17.520, 500, 510.148, 510.150 (LexisNexis 2014); MASS. GEN. LAWS ANN. ch. 6 178G, 178C (2016), ch. 272, § 16 (2014); MICH. COMP. LAWS ANN. §§ 28.722–23 (West 2012 & Supp. 2015), 167(1)(f) (West 2008); N.H. REV. STAT. ANN. §§ 651-B:1, 651-B:2, 645:1(II), (III) (2015); OKL. ST. tit. 57 § 582.21, tit. 21 § 1021 (2015); S.C. CODE ANN. §§ 23 -3-430 (2007 & Supp. 2016); UTAH CODE ANN. §§ 76-9-702.5 (LexisNexis 2012 & Supp. 2016), 77-27-21.5 (LexisNexis 2012); VT. STAT. ANN. tit. 13, §§ 2601, 5407, 5401 (2009 & Supp. 2016).

102. Many of the above states whose laws have been cited in *supra* note 101 have unconditional registration requirements. *See, e.g.*, CAL. PENAL CODE §§ 290, 314(1)-(2) (West 2014).

103. *See, e.g.*, Blake Ellis & Melanie Hicken, *Shockingly Small 'Crimes' that Can Land You in Jail*, CNN (Apr. 10, 2015), http://money.cnn.com/2015/04/09/pf/arrest-warrant-jail/ ("Leave an old washing machine in your front yard, miss too many days of school or catch a fish during the wrong season, and you could end up in jail.").

104. *See, e.g.*, FLA. STAT. ANN. § 481.223 (West 2015).

105. *See, e.g.*, TEX. PARKS & WILD. § 66.023 (West 2002 & Supp. 2016).

106. *See, e.g.*, TEX. PARKS & WILD. § 76.109 (West 2002).

raised above is valid only when the potential convict has the prerequisite means, drive, and knowledge. People who are relatively poor and/or uneducated are less likely to find the time and monetary means to contest cases against them. Similarly, they are less likely to be informed of the availability and the intricacies associated with legal options, such as expungements, that allow the sealing of criminal records (when these options are possible). Finally, although it is not very relevant for a person who owns his private business whether he has a DUI or a marijuana-possession offense on his criminal record, it may be crucial for a person who has to apply for jobs.[107] This is especially true because rap sheets, unfortunately, often involve cryptic language, coding, and jargon, which makes it costly or impossible for employers to distinguish between criminal records generated by minor offenses versus serious crimes.[108]

These observations not only imply that an overbroad scope of criminal law is likely to generate gateway effects for a sizeable population, but also that these effects are likely to have greater impacts on less fortunate people and thereby exacerbate the prevalence of a vicious cycle of poverty and crime. However, because this Article does not (need to) rely on distributional effects in demonstrating the negative consequences associated with the existence of gateway crimes, I only focus on the first implication listed above (namely that gateway crimes are likely to cause recidivism effects for a sizeable population) while framing normative questions in Part III.

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107. There is an abundance of empirical as well as anecdotal evidence on the effect of convictions on the difficulty in securing jobs. For academic studies illustrating these facts, see, for example, ALEXANDER, *supra* note 3, at 148–54; John Schmitt & Kris Warner, *Ex-Offenders and the Labor Market*, 14 WORKINGUSA: J. LAB. & SOC'Y 87, 87 (2011) (finding that a prison record or felony conviction greatly lowers ex-offenders' prospects in the labor market). See also the following news articles and the sources cited therein: Jonathan Blanks, *Our Criminal Justice System is Making it Really Hard for People to Find Jobs*, WASH. POST (Sept. 30, 2014), https://www.washingtonpost.com/posteverything/wp/2014/09/30/our-criminal-justice-system-is-making-it-really-hard-for-the-poor-to-find-jobs/; Dan Fastenberg, *Ex Convict Goes Job Hunting: The Hardest Career Turnaround*, AOL (Mar. 9, 2013, 5:17 AM), http://jobs.aol.com/articles/2013/03/09/ex-convict-goes-job-hunting-the-hardest-career-turnaround/; Rhodan, *supra* note 6; Aaron Taube, *Here's What it's Like for People Trying to Find a Job after They're Released from Prison*, BUS. INSIDER (Oct. 14, 2014, 11:25 AM), http://www.businessinsider.com/getting-a-job-after-prison-2014-10; Kai Wright, *Boxed In: How a Criminal Record Keeps You Unemployed for Life*, NATION (Nov. 6, 2013), http://www.thenation.com/article/boxed-how-criminal-record-keeps-you-unemployed-life/; Sofia Yassine, *Petty Theft Charges Prevent Employment, Make Life Harder*, DAILY 49ER, (Feb. 21, 2010), http://www.daily49er.com/opinion/2010/02/21/petty-theft-charges-prevent-employment-make-life-harder/.

108. *See* JAMES B. JACOBS, THE ETERNAL CRIMINAL RECORD 47 (2015); *see also* Mungan, *Stigma Dilution and Over-Criminalization*, *supra* note 41, at 3, 21–22 (defining this phenomenon as "record indifference" and discussing its relevance).

II. MITIGATING GATEWAY EFFECTS

A number of institutional reforms can be implemented to mitigate or eliminate gateway effects arising from the broad reach of criminal law. Potential reforms form a continuum ranging from legalization at one end of the spectrum to simple educational responses close to the other end of the spectrum. Intermediate responses, such as decriminalizing various acts and allowing ex-convicts to seal their criminal records more often, fall towards the middle of this spectrum. Next, I discuss the channels through which these responses can mitigate gateway effects and how these methods differ from each other. I refer to the various features of these responses while discussing the normative desirability of using each method in Part III.

A. Legalization

The most obvious method to eliminate gateway effects is by disposing of the source that generates it. Because designating an act as illegal is what causes it to become a gateway crime, legalizing the act eliminates gateway effects generated by the punishment of that act. The disadvantage associated with this response is equally obvious: legalizing the act removes all incentives to refrain from committing the act.[109] Thus, if the act in question unambiguously causes social harm, legalization may not be ideal because it may reduce the deterrence of the act to suboptimal levels. In these cases, a superior method may be decriminalization rather than legalization, as I explain in Part II.B. However, if the act causes no harm, or if the expected harm from the act is questionable or small compared to the administrative costs associated with enforcing laws against it, legalization would be the best response. The latter conclusion, however, has little to do with gateway effects and more to do with the erroneous illegalization of the act in the first place. I discuss this issue further in Part III.

B. Decriminalization

Technically, legalization is a species of decriminalization. Thus, it is worth avoiding ambiguities by noting that when I refer to decriminalization in this article, I mean legally prohibiting an act but not enforcing the prohibition through criminal law. Although there are many different ways

109. This sentence obviously refers to all incentives that are generated by the criminal justice system and excludes incentives such as having a bad reputation among one's peers for engaging in various acts.

to decriminalize an act,[110] this mode of regulation significantly reduces—compared to the case where the act is criminalized—the collateral damage caused to the person who is sanctioned for committing the regulated act.

A frequently used mode of regulation is categorizing an act as a civil infraction: an offense whose commission constitutes no crime but is still deemed illegal and therefore subject to sanctions. Speeding and other traffic violations are categorized as civil infractions in many states. Decriminalizing acts that generate gateway effects, and designating them as civil infractions, generates intermediate incentive effects: because there is no criminal conviction, the offender suffers almost no stigma,[111] but the formal sanction continues to act as a deterrent. Moreover, because stigmatization is a prerequisite for gateway effects its elimination implies the elimination of gateway effects. Thus, decriminalization presents a milder method of eliminating gateway effects than complete legalization. Therefore, as I argue in Part III, it may be normatively more desirable to decriminalize rather than legalize acts that generate small but significant harms.

C. Expungements

Many jurisdictions allow people convicted of various crimes to seal their criminal records under certain circumstances.[112] As pointed out in the literature, these practices "may be referred to as 'expungement,' 'expunction,' 'sealing,' 'setting aside,' 'destruction,' 'purging,' or 'erasure.'"[113] To ease references, I will refer to these and similar legal practices[114] as expungements, which is a term used in many jurisdictions.

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110. One could, for instance, declare the act to constitute a civil infraction such that an offender could be fined for committing it (as in the case of speeding offenses in many states). In this case, the deterrent effect of enforcement naturally depends on the size of the sanction and how often it is enforced.

111. This is not to suggest that civil infractions cause no collateral damage at all. In fact, traffic offenses, for instance, can significantly increase insurance premia and/or cause the revocation of one's driving license. The main point is that these collateral damages are small compared to the stigmatization effect of criminal convictions.

112. *See, e.g.*, ALA. CODE § 41-9-645 (2012 & Supp. 2016); ALASKA STAT. § 12.62.180 (2016); ARK. CODE § 16-90-901 (2012) (repealed 2013); CAL. PENAL CODE § 851.8 (West 2008 & Supp. 2017); CONN. GEN. STAT. ANN. § 54-142A (2009 & Supp. 2016); DEL. CODE ANN. tit. 11, §§ 4371–4375 (2015); HAW. REV. STAT. ANN. § 831-3.2 (LexisNexis 2016); MISS. CODE ANN. § 99-19-71 (2015); N.C. GEN. STAT. §§ 15A-145 to -152 (2015); OHIO REV. CODE ANN. §§ 2953.31–.61 (West 2006 & Supp. 2016); OKLA. STAT. tit. 22, § 19 (2003 & Supp. 2017); TENN. CODE ANN. §§ 40-32-101-to-02 (2012 & Supp. 2016), 40-32-103-to-04 (2012); UTAH CODE ANN. § 77-40-102 (LexisNexis 2012).

113. *See* Amy Shlosberg et al., *Expungement and Post-exoneration Offending*, 104 J. CRIM. L. & CRIMINOLOGY 353, 356 (2014) (internal citations omitted).

114. Other practices include pardons, which is sometimes used as a tool to reduce the stigmatization of ex-offenders. For instance, Delaware Governor Jack Markell has used pardons almost 1,600 times during his six years of service. Cris Barrish & Jonathan Starkey, *Dramatic Rise in Pardons*

Expunging records as a potentially permissible legal device is gaining popularity among American legislators, academics, judges, and other governmental actors.[115] Despite this, there is currently large state-by-state variation in both the legal jargon used to describe expungements and the circumstances under which one can seal his criminal record.[116] Thus, to enable a meaningful discussion of the potential effects of expungements, I will focus on the primary function of this legal device, which, when used properly, is the mitigation of stigma by significantly reducing the visibility of one's record.

As a preliminary matter, it is worth noting that one can distinguish between conditional expungements[117] and automatic expungements,[118] and both types of expungements exist in different states. This distinction refers to whether the sealing of the criminal record is made conditional on the ex-convict performing a certain task (which may or may not include paying a certain expungement fee) or whether it is automatically granted.

Theoretically, a regime where expungements are automatically granted to ex-convicts who have committed a particular offense is very similar to a regime where that offense is decriminalized and is only regulated through civil sanctions. The primary difference between the two regimes is that in the expungement regime the criminal temporarily suffers the full stigma of being branded a criminal. This is because there is a lag between the time the person is convicted and the time at which his record is automatically expunged. Thus, for purposes of reducing gateway effects, decriminalization appears to be a superior alternative to automatically expunging records generated through the commission of particular crimes.[119]

Conditional expungements, on the other hand, possess a unique property which cannot be replicated through decriminalization. By requiring the ex-convict to incur a cost in exchange for wiping his record clean, conditional expungements can effectively separate between people based on how much they value their records. Moreover, as I argue

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in Delaware, DEL. ONLINE (Apr. 25, 2015, 5:10 PM), http://www.delawareonline.com/story/news/local/2015/04/25/dramatic-rise-pardons-delaware/26374339/.

115. *See, e.g.*, Mungan, *supra* note 22, at 1–2 (discussing how expungements are gaining popularity).

116. *See* Shlosberg, *supra* note 113, 355–65 (surveying expungement laws).

117. A condition can include, for instance, the payment of a fee. *See, e.g.*, FLA. STAT. ANN. § 943.0585(2)(b) (West 2015).

118. Some states require the automatic expungement of juvenile court records. *See, e.g.*, 705 ILL. COMP. STAT. ANN. 405/5-915 (West 2007 & Supp. 2016).

119. One may argue that by sealing criminal records simultaneously with the conviction, one may achieve the same type of stigma elimination as in the case of decriminalization. This is theoretically correct, but since decriminalization is a simpler process, absent further functional differences between the two regimes, decriminalization still appears more appealing.

elsewhere,[120] the value a person attaches to having a criminal record is inversely related to his criminal tendency.[121] This is because people who intend to lead a life of crime know that they will commit further crimes in the future (with or without a record) and therefore are not willing to incur large costs to expunge their records.[122] Thus, at the cost of slightly oversimplifying the issue, people who elect to expunge their records at a cost may be called low-criminal-tendency individuals. Conversely, we may call the ex-convicts who elect not to expunge their records high-criminal-tendency individuals.[123]

This separating effect of conditional expungements has important implications. First, allowing conditional expungements does not reduce the ex ante deterrence effect of punishment as much as decriminalization does, and this is true for all types of individuals. This conclusion is obvious for people with high criminal tendencies: because they do not expunge their records, high-criminal-tendency individuals' ex ante incentives are unaffected by the presence of this option.[124] On the other hand, low-criminal-tendency people do not suffer as large a stigma as they would otherwise have because they elect to expunge their records, but they still incur the cost of expunging their records. This type of cost is not present in the decriminalization context; thus, the ex-ante deterrence reduction associated with conditional expungements is smaller than the corresponding effect under decriminalization.

Second, conditional expungements remove gateway effects precisely for those people who are most prone to these effects. Recall that low-criminal-tendency people are exactly those individuals who are not willing to commit serious crimes unless they have a criminal record.[125] Thus, by providing these people an opportunity to expunge their records, the law removes the perverse incentives that would otherwise be generated for them. The incentives of high-criminal-tendency people to commit serious crimes, on the other hand, are less affected by whether they have a criminal record. Thus, the gateway effects to be eliminated among this group are small to begin with.

To summarize, conditional expungements are likely to cause limited ex ante deterrence effects but eliminate sizeable gateway effects for low-

120. *See* Mungan, *supra* note 22.

121. *See id*. at 1, 8.

122. *Id*. at 2.

123. *Id.* at 5–6 offers a more generalized analysis of this issue and shows that results summarized here extend to cases where there are many (and even a continuum of) types of offenders.

124. This assumes, among other things, that the magnitude of stigma is unaffected by the sealing of records by low-criminal-tendency people. Assuming otherwise would actually imply some positive deterrence effects for this group: because stigma is suffered only by high-tendency people in equilibrium, the stigma would be imposed on fewer people and therefore would be more concentrated.

125. *See supra* Part I.B.

criminal-tendency people. On the other hand, they have no effects on the incentives of high-criminal-tendency individuals. The normative implications of these observations are discussed in Part III.

D. Education and Information Dissemination

Softer measures that can be employed to reduce gateway effects include simply disseminating more information, perhaps through educational programs, regarding the likelihood and significance of being convicted for committing gateway crimes. This type of social investment can mitigate gateway effects by reducing the prevalence of optimism bias and present bias. The value of these programs is related to how effectively they can mitigate gateway effects and how costly they would be to implement. Although these measures may be valuable, in the remaining parts of this Article I focus on legalization, decriminalization, and more frequently allowing expungements as potential methods to reduce gateway effects.

III. SIMPLE NORMATIVE IMPLICATIONS

Part I illustrates that the criminal designation of various acts generates gateway effects, which carry social costs, but that criminalization also leads to the increased deterrence of these acts, which eliminates another type of social costs when these acts are, in fact, harmful. Thus, an important normative question is, under what circumstances and to what degree should gateway costs be traded off against ex ante deterrence costs by using one of the three methods discussed in Part II?

Clearly, this is an extremely difficult question, and the specific ways in which any institutional response is implemented will affect its normative desirability. Moreover, there are many additional benefits associated with decriminalization and legalization that I am not considering here, "including promotion of individual liberties and desirable behavior not intended to be regulated by criminal law; lower enforcement costs; decreased opportunities for corruption and rent-seeking; and the alignment of law enforcer incentives to the proper goals of law enforcement,"[126] as well as preventing a phenomenon called stigma dilution,[127] which I explain in Part IV.

Despite these caveats, an uncomplicated, yet important, corollary follows from the identification of gateway effects: the optimal scope of criminal law is narrower than it would be but for the existence of gateway

126. Mungan, *Stigma Dilution and Over-Criminalization*, *supra* note 41, at 89.

127. *Id.*

effects. This is because broadening the scope of criminal law generates a cost that is ignored in an analysis that overlooks gateway effects.

Moreover, simple observations allow the identification of principles that ought to guide institutional responses to mitigate gateway effects, when it is desirable to do so. Next, I focus on efficiency as the normative criterion, as is conventional in the economic analyses of criminal law, to identify these principles. This assumes that one can compare the magnitude of the average harm caused by the commission of the act whose legality is in question and the average harm from gateway effects in the form of increased harms due to the commission of more serious crimes. Thus, to abbreviate expressions, let

$$H(X) = \frac{Average\ harm\ from\ act\ X}{Average\ gateway\ harm}$$

where *X* refers to the act whose legal designation is being considered.

Ceteris paribus, the effect of *H(X)* on the normative desirability of using one of the three methods listed in Part II to reduce gateway effects is relatively obvious: the greater *H(X)* is, the less socially desirable it is to move away from criminalization, and vice versa. This can be illustrated by considering the extreme examples where *H(X)=0* and where *H(X)* is extremely large, and considering less extreme cases as falling in between these two limiting examples.

When *H(X)* is very low, e.g., in the extreme case where it is 0, it is obviously efficient to completely legalize *X*, since deterring *X* eliminates negligible harms by reducing the commission of *X* and generates some administrative costs and/or harms from gateway effects. On the other hand, when *H(X)* is extremely large, it is not desirable to trade off any amount of deterrence of *X* in exchange for a gain in the form of the elimination of gateway harms, and thus, criminalizing *X* is the optimal solution. Finally, when *H(X)* is intermediate, the optimal solution may be either decriminalization or allowing the expunging of records generated through convictions of *X*.

In this set of more complicated cases where *H(X)* is intermediate, it is difficult to identify precise conditions under which expungements are superior to decriminalization. However, a simple observation is that expungements generate benefits that are a function of their separation function, which is not available through decriminalization. Thus, expungements are more likely to be superior in circumstances where the people who commit *X* consist of both a large group of people who have low criminal tendencies and a large group of people who are likely to commit crimes even when they have clean records. In these circumstances, conditional expungements, which involve greater administrative costs than

decriminalization, preserve the deterrence of *X* to a large extent without causing a large recidivism effect.

To summarize, the existence of gateway effects implies that the optimal scope of criminal law is narrower than one would conclude through an analysis that ignores gateway effects. Moreover, it is most likely optimal to reduce gateway effects (i) through legalization if *H(X)* is very low; (ii) through decriminalization if *H(X)* is intermediate but *X* does not signal much about the actor's criminal propensities; and (iii) through more frequently allowing expungements if *H(X)* is intermediate and the ex-offender can credibly signal his low criminal propensity by incurring significant costs to expunge his record.

IV. RELATIONSHIP TO OTHER STRANDS OF ACADEMIC LITERATURE AND IMPLICATIONS RELATED TO PUBLIC POLICY DEBATES

The existence of gateway crimes and related dynamics are ignored in some of the existing and relevant literature that inform public policy debates, although claims made therein are affected by the existence of gateway crimes. In this part, I discuss how public policy arguments formed in this manner may be misguided.

A. Is Marijuana a Gateway Drug?

"In truth, the primary cause for concern about marijuana use may be that it potentially leads to the use of more hazardous illegal drugs such as cocaine. This premise . . . is known as the *gateway hypothesis*."[128]

-Jeffrey DeSimone

"I believe marijuana should be illegal in this country. It is the pathway to drug usage by our society, which has made great scourges; it is one of the great causes of crime in our cities."[129]

-Mitt Romney, October 4, 2007

The first quote above is from an economics article, written in 1998, that shares the title of this part and perfectly explains what people mean when they refer to marijuana as a gateway drug. The second quote illustrates how

128. Jeffrey DeSimone, *Is Marijuana a Gateway Drug?*, 24 E. ECON. J. 149, 149 (1998).

129. Erik Altieri, *The Republican Candidates on Marijuana*, ALTERNET (Jan. 9, 2012), http://www.alternet.org/story/153699/the_republican_candidates_on_marijuana (citing Livefreenh, *Gov Mitt Romney on Medical Marijuana*, YOUTUBE (Oct. 5, 2007), https://www.youtube.com/watch?feature=player_embedded&v=_L0kwNkrhv8#).

politicians, including presidential candidates, may conclude that marijuana ought to be illegal because it is a gateway drug. Hence, these two quotes highlight the importance of two interrelated questions. First, is marijuana a gateway drug? And, second, if it is, does this provide sufficient reason to illegalize marijuana?

Scholars from many different disciplines, including psychiatry,[130] public policy,[131] public health,[132] economics,[133] epidemiology,[134] neurosciences,[135] behavioral sciences,[136] and criminology,[137] have conducted studies to measure the gateway effects associated with marijuana consumption. The question phrased in many of these studies is whether previous marijuana consumption causes an increase in a person's current consumption of other, more harmful drugs, such as cocaine.[138]

It is hard to summarize the findings of these studies because they do not lead to a consensus as to whether marijuana is in fact a gateway drug. For instance, Mary Ellen Mackesy-Amiti and her coauthors find that "for a large number of serious drug users, marijuana does not play the role of a 'gateway drug,'"[139] while Jeffrey DeSimone "provide[s] strong confirmation of the gateway hypothesis."[140] Thus, as one scholar notes, "the original proposer of the gateway hypothesis, Denise Kandel, concludes that the existing evidence for the gateway effect is at best mixed, because of the lack of a clear neurological mechanism."[141] Despite the lack of a

130. *See, e.g.*, Wayne D. Hall & Michael Lynskey, *Is Cannabis a Gateway Drug? Testing Hypotheses About the Relationship Between Cannabis Use and the Use of Other Illicit Drugs*, 24 DRUG & ALCOHOL REV. 39 (2005); Mary Ellen Mackesy-Amiti et al., *Sequence of Drug Use Among Serious Drug Users: Typical vs Atypical Progression*, 45 DRUG & ALCOHOL DEPENDENCE 185 (1997);.

131. *See, e.g.*, Andrew Golub & Bruce D. Johnson, *The Shifting Importance of Alcohol and Marijuana as Gateway Substances Among Serious Drug Abusers*, 55 J. STUD. ON ALCOHOL 607 (1994); Hall & Lynskey, *supra* note 130.

132. *See, e.g.*, Mackesy-Amiti et al., *supra* note 130.

133. *See, e.g.*, DeSimone, *supra* note 128.

134. *See, e.g.*, Louisa Degenhardt et al., *Evaluating the Drug Use "Gateway" Theory Using Cross-National Data: Consistency and Associations of the Order of Initiation of Drug Use Among Participants in the WHO World Mental Health Surveys*, 108 DRUG & ALCOHOL DEPENDENCE 84 (2010).

135. *See id.*

136. *See, e.g.*, Andrew R. Morral et al., *Reassessing the Marijuana Gateway Effect*, 97 ADDICTION 1493 (2002).

137. *See, e.g.*, Rashi K. Shukla, *Inside the Gate: Insiders' Perspectives on Marijuana as a Gateway Drug*, 35 HUMBOLDT J. SOC. REL. 5 (2013).

138. DeSimone, *supra* note 128, at 149–50.

139. Mackesy-Amiti et al., *supra* note 130, at 185.

140. DeSimone, *supra* note 128, at 150.

141. Chu, *supra* note 28, at 489 (citing Denise B. Kandel, *Does Marijuana Use Cause the Use of Other Drugs?*, 289 JAMA 482 (2003)).

clear answer to this question, people use the gateway drug rhetoric in public policy debates to suggest that marijuana ought to be criminalized.[142]

Here, I take the opposite approach and demonstrate that even a clear finding that marijuana is a gateway drug would not be sufficient grounds for its criminalization. In particular, the policy conclusion that marijuana ought to be criminalized to reduce consumption of other drugs is flawed in an important way that is very closely related to the observations made in this Article. Criminalizing the use of marijuana increases the incentives of marijuana consumers to use other drugs through at least two channels, which are interrelated. First, in such a regime a person who consumes marijuana risks a criminal conviction, and therefore the marginal expected cost to him from contemporaneously consuming other illegal drugs is lower compared to analogous marginal costs in a regime where marijuana consumption is not a crime. Second, a regime that criminalizes marijuana consumption causes some people who consume marijuana to have criminal records. These individuals risk little reputation by using other, more harmful drugs since they have already been stigmatized. Thus, criminalizing marijuana may actually increase the gateway drug effect of marijuana consumption.

Proponents of criminalizing marijuana consumption may argue against these observations along the following lines. Criminalization may increase gateway effects for marijuana consumers due to the reasons explained above. Nevertheless, criminalization is still likely to reduce the consumption of more harmful drugs because it will reduce the number of people who try marijuana in the first place and thereby preclude gateway effects. Stated differently, criminalizing marijuana use may increase the magnitude of gateway effects, but it is likely to reduce the frequency of gateway effects.

The above claim cannot be refuted through any theoretical argument because it is an empirical elasticity assertion. However, existing evidence on marijuana consumption makes the above proposition highly doubtful. The raw numbers presented in the preceding parts may be sufficient to demonstrate this point. People consume marijuana even when it is illegal to do so, as reflected by a national survey that estimates that over 111 million people had tried marijuana in 2012.[143]

To summarize, the above observations highlight that, contrary to what some may argue, criminalizing marijuana is likely to increase the incentives of marijuana consumers to use other drugs if, in fact, marijuana is a gateway drug. Moreover, because laws against marijuana consumption

142. See, for example, the discussions in John Kleinig, *Ready for Retirement: The Gateway Drug Hypothesis*, 50 SUBSTANCE USE & MISUSE 971 (2015) on how this rhetoric is used.

143. *See supra* note 26 and accompanying text.

seem to have little deterrent effect, criminalization is not likely to reduce marijuana use to an extent that would be necessary to lower the aggregate consumption of other drugs caused by marijuana use.

B. The Relationship Between the Legal Status of Marijuana and Crime Rates

Given recent reforms to decriminalize marijuana-related offenses, it is unsurprising that many have attempted to measure the impact of the legal status of marijuana on crime rates.[144] Some have argued that marijuana use and laws that make marijuana easier to obtain may lead to an increase in crime rates through at least three channels: (i) marijuana consumption may trigger the consumption of other drugs such as cocaine and heroin, which in turn may increase people's criminal propensities[145] (i.e., the gateway drug effect discussed *supra* Part IV.A); (ii) "newly opened medical marijuana dispensaries provide criminals with a highly attractive target with their repository of high quality marijuana and customers carrying large amounts of cash"[146] and this may increase the number of home invasions and burglaries;[147] and (iii) marijuana consumption may directly cause an increase in people's propensities to commit crime.[148]

Despite the claims listed above, existing research provides, at best, mixed results regarding the effect of marijuana consumption on crime rates, with studies showing both types of effects (increases as well as reductions).[149] Moreover, very recent research on the effect of medicinal marijuana laws find either a negative correlation between the legalization of medicinal marijuana and some crime rates, or find no statistically significant effects (most of which are still negative). For instance, Robert Morris and his coauthors find results that "did not indicate a crime exacerbating effect of [Medical Marijuana Laws (MML)] on any of the Part I offenses [i.e., homicide, rape, robbery, assault, burglary, larceny, and auto theft]. Alternatively, state MML *may* be correlated with a reduction in

144. *See, e.g.*, Robert G. Morris et al., *The Effect of Medical Marijuana Laws on Crime: Evidence from State Panel Data, 1990-2006*, PLOS ONE, Mar. 2014. at 1 and sources cited therein; Edward M. Shepard & Paul R. Blackley, *Medical Marijuana and Crime: Further Evidence from the Western States*, 46 J. DRUG ISSUES 122 (2016), http://jod.sagepub.com/content/early/2016/01/12/0022042615623983.full.pdf+html.

145. Morris et al., *supra* note 144, at 1.

146. *Id*.

147. *Id.*

148. *See id.* and sources cited therein.

149. Shepard and Blackley, *supra* note 144, at 125 ("A growing body of evidence from prior research provides mixed and inconclusive evidence about the drugs and crime nexus and, more specifically, uncertainty about the effects of marijuana on crime.").

homicide and assault rates, net of other covariates."[150] Similarly, Edward Shepard and Paul Blackley find that "[t]here is no evidence of negative spillover effects from medical marijuana laws (MMLs) on violent or property crime. Instead, we find significant drops in rates of violent crime associated with state MMLs."[151]

Thus, intuitively, either none of the claims listed in (i)–(iii) are significant, or legalizing marijuana must have some negative effects on people's criminal propensities. A number of plausible mechanisms through which legalizing (or decriminalizing) marijuana may reduce crime can be listed. For instance, law enforcement resources that would otherwise be used to enforce marijuana-related crimes can be diverted towards the enforcement of other crimes,[152] or as explained in Part IV.E, legalizing marijuana may increase the stigma attached to committing other crimes and thereby lead to increased deterrence. Gateway effects caused by criminalization of marijuana, as explained in detail in the preceding parts of this Article, can be added to this list of dynamics through which marijuana legalization may reduce crime rates.

C. The Broken Windows Theory and Policing

The broken windows theory (BWT), introduced in an article by Kelling and Wilson in 1982,[153] asserts that serious crimes can be reduced by combatting simpler disorders such as loitering and prostitution. The rationale behind this theory is that the presence of simple and visible disorders may lead people to acquire a belief that their wrongdoings may go unpunished. Kelling and Wilson's original description of the idea is as follows:

> Social psychologists and police officers tend to agree that if a window in a building is broken and is left unrepaired, all the rest of the windows will soon be broken. . . . [O]ne unrepaired broken window is a signal that no one cares, and so breaking more windows costs nothing. (It has always been fun.)[154]

Building on this insight, Kelling and Wilson suggest that people who observe minor disorders going unpunished may be more inclined to commit

150. Morris et al., *supra* note 144, at 122.

151. Shepard et al., *supra* note 144, at 1.

152. *See, e.g.*, Jérôme Adda et al., *Crime and the Depenalization of Cannabis Possession: Evidence from a Policing Experiment*, 122 J. POL. ECON. 1130, 1133 (2014); Bruce L. Benson & David W. Rasmussen, *Relationship between Illicit Drug Enforcement Policy and Property Crimes*, 9 CONTEMP. POL'Y ISSUES 106, 106 (1991).

153. Kelling & Wilson, *supra* note 36.

154. *Id.*

more serious crimes.[155] This theory has received much attention and has even served as the theoretical foundation for a law enforcement method which focuses on aggressively policing minor misdemeanors.[156] For instance, Rudolph Giuliani, the 107th Mayor of New York City, "made the 'Broken Windows' theory an integral part of [New York City's] law enforcement strategy."[157] This has allowed scholars to focus on changes in law enforcement trends to empirically test the validity of BWT, and these analyses provide mixed results.[158]

The theory presented in this Article provides a plausible explanation for why aggressive enforcement may have not produced the intended result.[159] Aggressive policing strategies are likely to signal to potential offenders a high probability of punishment, but they also require the conviction of many people, including some people who without a criminal record would be deterred from committing serious crimes. Thus, the overall effect of these policing strategies depends on the relative magnitudes of these countervailing effects, which may explain why there is no consensus on whether these methods deliver their intended results. Thus, future empirical studies can benefit from investigating the link between aggressive broken window policing strategies and recidivism, which may in the long run increase crime rates.

In sum, public policy arguments supporting aggressive policing of minor offenses based on the implications of BWT overlook the gateway effects that these policies may generate. These countervailing gateway effects should be taken into account as potential costs while considering the social desirability of these policies.

D. On Other Conceptions of Gateway Crimes

I have clearly specified what constitutes a gateway crime in Part I: acts that are committed by a large number of people who are not interested in committing other, more serious crimes unless they have criminal records. However, a universally accepted definition of the phrase "gateway crimes" does not exist, and therefore some other scholars have occasionally used the phrase to convey a different meaning.[160] Next, to eliminate potential

155. *See id.*

156. Bernard E. Harcourt & Jens Ludwig, *Broken Windows: New Evidence from New York City and a Five-City Social Experiment*, 73 U. CHI. L. REV. 271, 271 (2006).

157. Rudolph W. Giuliani, *The Next Phase of Quality of Life: Creating a More Civil City*, ARCHIVES OF RUDOLPH W. GIULIANI (Feb. 24, 1998), www.nyc.gov/html/rwg/html/98a/quality.html.

158. *See, e.g.*, Hope Corman & Naci Mocan, *Carrots, Sticks, and Broken Windows*, 48 J.L. & ECON. 235, 235 (2005); Harcourt & Ludwig, *supra* note 156, at 271.

159. See Harcourt & Ludwig, *supra* note 156, for other plausible explanations.

160. *See, e.g.*, Laura Woods Fidelie, *Stalking Regulation: Issues and Recommendations*, 4 CRITICAL ISSUES JUST. & POL. 49, 50, 61 (2011); L.E. Neal, *Criminals and Culture Makers*, DISSENT,

misinterpretations of my arguments, I describe how this phrase has been used in some previous academics studies and reiterate that I am not using it to refer to these alternative meanings.

A gateway is a means to enter a new area from the area in which one currently stands. Thus, when the word is used in metaphors, it usually conveys the idea that a "gateway X" is something that allows or pushes the person engaging in or using a type of X (call it A) to use or engage in another, perhaps more sophisticated, type of X (call it B).[161] This definition of a metaphorical gateway carries an ambiguity which causes people to use it in different manners.[162] In particular, is engaging in A merely necessary for engaging in B, or does A cause B, or both?

My usage of the phrase is more similar to the second formulation: the commission of a gateway crime and a subsequent conviction implies the commission of more serious crimes. Thus, engaging in A *and* subsequent criminal convictions cause B, but one need not commit A and be subsequently convicted to commit B. The implication, as discussed in the preceding parts, is that if A is decriminalized (or if the stigma that A causes is removed), gateway effects vanish. These observations can compactly be expressed as follows:

A is a Gateway Crime (for a specific person) in the current Article if:

$$[A\ and\ Conviction] \Rightarrow B$$

thus:

$$[A\ and\ No\ Conviction] \not\Rightarrow B$$

When, however, the phrase is used to imply that conduct A is necessary for the commission of B, the above reasoning is no longer valid. In particular, to remove gateway effects of this type, it is necessary to prevent the commission of A. Thus, if one uses this alternative formulation, one may naturally argue the opposite of what I have argued in the preceding parts, namely that A ought to be punished criminally and enforced aggressively so that people are deterred from committing A in the first place.[163] Or, in symbols:

A is a Gateway Crime according to some previous work if:

Summer 2014, at 15, 18; Vanessa Neumann, *Grievance to Greed: The Global Convergence of the Crime-Terror Threat*, 57 ORBIS 251, 252, 258 (2013); Neha Sharma, *Pipelined Framework for Analyzing Identity Theft Behaviors Using Text Mining*, 2 MULTIDISCIPLINARY J. OF RES. ENGINEERING & TECH. 846, 846 (2015).

161. See, for example, Kleinig, *supra* note 142, at 971–72 for additional comments on how this phrase is used.

162. *See* sources cited *supra*, note 160.

163. *See generally* Kleinig, *supra* note 142 (making related points and questioning whether the gateway metaphor is used properly in various debates).

$$A \Leftarrow B$$

Thus, the contrapositive of this statement is:

$$[not\ A] \Rightarrow [not\ B]$$

It is unsurprising that scholars who have used this alternative definition come to very different conclusions regarding what offenses constitute gateway crimes and the policy implications related to the identification of various acts as gateway crimes.[164] Some scholars have argued, for instance, that auto theft, corruption, and identity theft are gateway crimes, and have concluded, unsurprisingly, that it is desirable to implement prevention/ intervention methods to fight these crimes.[165]

My objective here is not to argue that one definition is more correct than the other; rather, it is to ensure that my definition of gateway crimes is not misunderstood and to emphasize that the policy implications I have proposed follow from this definition of gateway crimes and not from the alternative definitions used in some prior scholarship.

E. Stigma Dilution

This Article proposes a dynamic theory in which criminalization of some acts may cause an increase in the rate at which other crimes are committed. While doing so, it abstracts from potential positive static effects,[166] i.e., effects that do not rely on specific deterrence effects but do rely on simpler general deterrence effects. One may wonder whether criminalization may also generate static effects and whether these effects are in the opposite or the same direction as the dynamic effects identified in this Article. As I explain in Parts IV.A–C, there may be multiple static effects, but one particular effect, which I call stigma dilution,[167] closely complements the theory I have proposed in this Article.

Stigma dilution occurs when the criminalization of an act causes a substantial increase in the number of criminals in society and thus reduces the gap between the criminal tendencies of an average citizen and an

164. *See* sources cited *supra*, note 160.

165. *See* Neumann, *supra* note 160, at 252, 258; Sharma, *supra* note 160, at 846.

166. Although, this Article explicitly considers negative general deterrence effects, as in *supra* Part I.

167. This phrase is defined and formalized in Mungan, *Stigma Dilution and Over-Criminalization*, *supra* note 41, at 89–92.

average criminal.[168] As a result, a criminal record does not provide as accurate a signal as it would under a regime where that act is decriminalized. This reduces the stigma attached to committing more serious crimes, and therefore the deterrence of these crimes is reduced.[169]

According to these theories, the commonality between stigma dilution and gateway crimes is that both of these effects are likely to be substantial when they are caused by the criminalization of an act that is committed by a large number of people. Thus, they point to the same positive and normative conclusion: Criminalizing acts that a substantial number of people have a high demand for generates unintended consequences in the form of increased commission of more serious crimes. This trade-off must be considered while assessing the normative desirability of criminalizing a particular act.

CONCLUSION

Criminal law is a dangerous social tool that has the potential of destroying lives and families. The normative view that the utmost care must be exercised in using criminal law against citizens is reflected in procedural protections that are afforded to criminal defendants. Thus, the expansion of criminal law, which now enables it to reach ordinary citizens, should be very troubling for a variety of reasons.

In this Article, I have proposed a theory which formalizes an additional, and perhaps hidden, danger associated with the expansion of criminal law. By stigmatizing ordinary people and causing them to be excluded from society, criminal law may perform the opposite of its intended function; it may increase the criminal harm inflicted by offenders by causing them to commit more serious crimes. These unintended consequences caused by the overbroad reach of criminal law can be reversed, at least partially, through the decriminalization of acts that cause questionable or small harms and by giving ex-offenders costly opportunities to seal their criminal records.

168. *Id.* at 89 ("Increasing the scope of criminal law, in particular, can cause stigma dilution by broadening the pool of criminals, and therefore reducing their average deviation from the average citizen.").

169. Proposition 3 in *id.* at 101 formalizes this result within an economic model of law enforcement.