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DOUBLE JEOPARDY AS A LIMIT ON PUNISHMENT

Carissa Byrne Hessick† & F. Andrew Hessick††

One of the most common reasons for a sentencing enhancement is that the defendant has a prior conviction. Courts have rejected claims that these recidivism enhancements violate the prohibition against double jeopardy. They have explained that the Double Jeopardy Clause does not prohibit the legislature from authorizing multiple punishments for one offense and that, in any event, the Double Jeopardy Clause does not apply at sentencing. This Article challenges these conclusions. It demonstrates that the central motivation for the Double Jeopardy Clause is the prohibition against multiple punishments and that allowing recidivism enhancements undermines this protection. The Article further explains that the reasons courts give in rejecting double jeopardy challenges to recidivism enhancements directly conflict with courts' reasons for rejecting Eighth Amendment challenges to those same enhancements. The consequence is an inconsistent body of law that maximizes the government's ability to punish at the expense of individual rights. The Article offers several reasons why the Double Jeopardy Clause is the appropriate constitutional provision to limit recidivism enhancements and sketches a framework under which jurisdictions may increase sentences for recidivists under some circumstances, while at the same time providing meaningful constitutional review of such sentences.

INTRODUCTION

Although criminal punishment is a hotly contested issue,¹ there is one punishment issue on which virtually everyone seems to agree: re-

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¹ Although there is a burgeoning literature showing widespread agreement about how to rank various crimes in relation to one another, *see, e.g.*, Paul H. Robinson & Robert Kurzban, *Concordance and Conflict in Intuitions of Justice*, 91 MINN. L. REV. 1829, 1892 (2007), agreement about how much to punish (in absolute terms) does not appear to exist, *see*

peat offenders ought to serve longer sentences than first-time offenders. This Article challenges that conventional wisdom. Increasing a defendant's punishment based on a previous conviction—a conviction for which the defendant has already served a sentence—constitutes a second punishment for the first crime of conviction. Consequently, that increase conflicts with the Double Jeopardy Clause. Put simply, the common practice of sentencing recidivists more harshly ought to be, if not absolutely prohibited, at least limited by the Constitution.

Historically, the right against double jeopardy was understood to prohibit both multiple prosecutions and multiple punishments for the same crime.² Over time, this view of double jeopardy has been eclipsed by a narrower vision of the right concerned primarily with prohibiting multiple prosecutions. Under current doctrine, the prohibition on multiple punishments places no limits on a legislature's ability to authorize multiple punishments for a single offense.³ Moreover, courts have held that the Double Jeopardy Clause does not apply at sentencing⁴—the stage in a criminal prosecution when a defendant's precise punishment is determined. This modern shift away from double jeopardy as a limit on punishment has rendered the Double Jeopardy Clause unintelligible and eviscerated its theoretical foundations.

Imposing lengthier sentences on recidivists is the most visible example of the modern disregard for the prohibition against multiple punishments. Every state legislature as well as Congress has enacted statutes providing at least some form of increased punishment for those who have previously been convicted of a crime.⁵ And even when not required to do so by statute, judges routinely enhance sentences based on defendants' prior convictions.⁶ Often—as with California's "Three Strikes Law"⁷—the incremental increase in punishment can be quite severe. While commentators have occasionally expressed concern over the length of the additional punishment im-

Donald Braman, Dan M. Kahan & David Hoffman, *Some Realism About Punishment Naturalism*, 77 U. CHI. L. REV. 1531, 1544–45 (2010).

² See *North Carolina v. Pearce*, 395 U.S. 711, 717 (1969) (“[T]he Fifth Amendment guarantee against double jeopardy . . . protects against a second prosecution for the same offense after conviction. . . . [and] protects against multiple punishments for the same offense.”).

³ See, e.g., *McDonald v. Massachusetts*, 180 U.S. 311, 312–13 (1901).

⁴ See, e.g., *Monge v. California*, 524 U.S. 721, 728 (1998).

⁵ *Parke v. Raley*, 506 U.S. 20, 26–27 (1992); U.S. DEP'T OF JUSTICE, NO. NCJ-129896, STATUTES REQUIRING THE USE OF CRIMINAL HISTORY RECORD INFORMATION (1991) [hereinafter STATUTES REQUIRING CRIMINAL HISTORY]; see *infra* notes 58–64.

⁶ See *infra* note 65.

⁷ See CAL. PENAL CODE §§ 667, 1170 (West 2010 & Supp. 2011); *Ewing v. California*, 538 U.S. 11, 14–17 (2003) (explaining the law's purposes and specific provisions).

posed on recidivists or whether such additional punishment is entirely consistent with the Double Jeopardy Clause,⁸ most have assumed the general propriety of increasing sentences based on prior convictions.⁹

This Article argues that the right against double jeopardy ought to limit the government's ability to increase punishments for recidivists. At the core of the prohibition on double jeopardy is a limitation on the government's ability to impose repeated punishment against one individual for a single offense. The proliferation of recidivism enhancements undermines that basic premise. Nor have other constitutional rights filled the gap left by the courts' overly narrow construction of the Double Jeopardy Clause. To the contrary, defendants have repeatedly challenged recidivism enhancements on a number of constitutional grounds—including the Eighth Amendment prohibition on cruel and unusual punishment¹⁰ and the Sixth Amendment right to a jury trial¹¹—but courts have rejected those challenges without satisfactory justifications. Indeed, the Supreme Court's explanations for why recidivism enhancements do not violate the Eighth Amendment directly conflict with the Court's explanations for why those same enhancements comport with the Double Jeopardy Clause. Through these decisions, the courts have abdicated their role in enforcing constitutional limits on punishment.

That the courts are failing to enforce any meaningful limits on the state's ability to incarcerate past offenders is especially troubling given the drastic increase in American prison populations over the last few decades.¹² As more people are convicted, more individuals become subject to recidivism enhancements, and the government gains

⁸ See, e.g., Carissa Byrne Hessick & F. Andrew Hessick, *Recognizing Constitutional Rights at Sentencing*, 99 CALIF. L. REV. 47, 58 n.50 (2011); Youngjae Lee, *Recidivism as Omission: A Relational Account*, 87 TEX. L. REV. 571, 575 n.12 (2009); Nathan H. Seltzer, *When the Tail Wags the Dog: The Collision Course Between Recidivism Statutes and the Double Jeopardy Clause*, 83 B.U. L. REV. 921, 932 (2003); Ahmed A. White, *The Juridical Structure of Habitual Offender Laws and the Jurisprudence of Authoritarian Social Control*, 37 U. TOL. L. REV. 705, 737–43 (2006).

⁹ See, e.g., GEORGE C. THOMAS III, *DOUBLE JEOPARDY: THE HISTORY, THE LAW* 228 (1998); Susan R. Klein & Katherine P. Chiarello, *Successive Prosecutions and Compound Criminal Statutes: A Functional Test*, 77 TEX. L. REV. 333, 373–74 (1998); Elizabeth T. Lear, *Double Jeopardy, the Federal Sentencing Guidelines, and the Subsequent-Prosecution Dilemma*, 60 BROOK. L. REV. 725, 741–48 (1994); Anne Bowen Poulin, *Double Jeopardy and Multiple Punishment: Cutting the Gordian Knot*, 77 U. COLO. L. REV. 595, 597 (2006); Julian V. Roberts, *The Role of Criminal Record in the Sentencing Process*, 22 CRIME & JUST. 303, 316–20 (1997); Seltzer, *supra* note 8, at 936; Note, *The Constitutionality of Statutes Permitting Increased Sentences for Habitual or Dangerous Criminals*, 89 HARV. L. REV. 356, 361 (1975).

¹⁰ E.g., *Ewing*, 538 U.S. at 25.

¹¹ E.g., *Almendarez-Torres v. United States*, 523 U.S. 224, 247 (1998).

¹² See, e.g., John F. Pfaff, *The Durability of Prison Populations*, 2010 U. CHI. LEGAL F. 73, 73 (noting that since the 1970s, the U.S. prison population “has quintupled in size, from just over 300 thousand inmates to more than 1.5 million”).

more power to impose punishment without any real constitutional limitations.

This Article presents a new framework for discussing constitutional limits on punishment for recidivists. It identifies the historical prohibition against multiple punishments embodied in the Double Jeopardy Clause and criticizes the modern shift in interpreting the Double Jeopardy Clause as primarily a prohibition on multiple prosecutions rather than also as a robust prohibition on multiple punishments. The Article argues that interpreting the Double Jeopardy Clause as essentially protecting against only multiple prosecutions renders the Clause unintelligible because, even if the Clause were only intended to protect individuals from multiple prosecutions, that protection would be incomplete and inadequate if it did not also protect against multiple punishments. This Article also explains how the intersection of the Court's decisions regarding the Double Jeopardy Clause and the Eighth Amendment results in a lack of any constitutional limitation on punishment for recidivists. It also clarifies how double jeopardy's limit on multiple punishments can be enforced in a way that accommodates the state's interest in reducing crime while at the same time providing a substantive limit on punishment.

This Article proceeds in three parts. Part I describes the historical pedigree of the right against multiple punishments and the current state of the law. Part II critiques the modern view of the Double Jeopardy Clause. It not only demonstrates how the Double Jeopardy Clause's limitation on multiple prosecutions is meaningless without a corresponding limit on multiple punishments, but it also illustrates the flaws in the courts' modern double jeopardy cases.

Part III explores the concept of constitutional limits on punishment. Both the Double Jeopardy Clause and the Eighth Amendment cabin the government's ability to punish, yet recent cases have curtailed these limitations. Instead of striving to protect individual rights through these doctrines, courts have focused on ensuring legislatures maximum latitude in designing punishments. In their efforts to do so, the courts have abandoned any pretense of logic or consistency. They have rejected double jeopardy challenges on the ground that recidivism enhancements *do not* punish for past offenses while at the same time rejecting Eighth Amendment challenges to those same recidivism enhancements on the ground that they *do* punish for past offenses. Although courts could limit recidivism enhancements through the Eighth Amendment, Part III explains why the Double Jeopardy Clause's prohibition on multiple punishments is best suited to serve as the constitutional limit on harsh sentencing practices aimed at recidivists.

I

DOUBLE JEOPARDY AND MULTIPLE PUNISHMENTS

The Double Jeopardy Clause provides that “nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb.”¹³ Although the text of the Double Jeopardy Clause does not explicitly protect against multiple punishments, the Supreme Court has repeatedly recognized that the Clause does provide such protection. The Court has explained that the Clause consists of three separate constitutional protections: “It protects against a second prosecution for the same offense after acquittal. It protects against a second prosecution for the same offense after conviction. And it protects against multiple punishments for the same offense.”¹⁴ As explained below, the protection against multiple punishments has a long, though not entirely consistent, historical pedigree. But despite its occasional statements that the Double Jeopardy Clause protects against multiple punishments, the Court has repeatedly failed to place any meaningful limitations on a legislature’s ability to punish an individual multiple times for the same offense. In particular, the Court has repeatedly allowed the imposition of higher punishment on those offenders who have previously been convicted of a crime.

¹³ U.S. CONST. amend. V.

¹⁴ *North Carolina v. Pearce*, 395 U.S. 711, 717 (1969) (footnotes omitted), *quoted in* *Schiro v. Farley*, 510 U.S. 222, 229 (1994), *Ohio v. Johnson*, 467 U.S. 493, 498 (1984), *Whalen v. United States*, 445 U.S. 684, 688 (1980), *and* *Brown v. Ohio*, 432 U.S. 161, 165 (1977); *see also* *Dep’t of Revenue of Mont. v. Kurth Ranch*, 511 U.S. 767, 793 (1994) (“[T]he double jeopardy clause prohibits merely *punishing* twice, or attempting a second time to punish criminally, for the same offense.” (quoting *Helvering v. Mitchell*, 303 U.S. 391, 399 (1938))) (O’Connor, J., dissenting); *Schiro*, 510 U.S. at 229 (noting that the Double Jeopardy Clause’s protections “stem from the underlying premise that a defendant should not be twice tried or punished for the same offense”); *Justices of Bos. Mun. Court v. Lydon*, 466 U.S. 294, 306–07 (1984) (“Our cases have recognized three separate guarantees embodied in the Double Jeopardy Clause: It protects against a second prosecution for the same offense after acquittal, against a second prosecution for the same offense after conviction, and against multiple punishments for the same offense.”); Note, *Twice in Jeopardy*, 75 *YALE L.J.* 262, 265–66 (1965) (“Three rules are central to the double jeopardy prohibition: the rules which bar retrial for the same offense after acquittal, retrial for the same offense after conviction, and multiple punishment for the same offense at one trial.” (footnotes omitted)).

Not all judges think that the right against multiple punishments derives from the Double Jeopardy Clause. Some have said that the right is protected by the Due Process Clause. *See, e.g., Kurth Ranch*, 511 U.S. at 800 (Scalia, J., dissenting) (arguing that any restriction on “multiple punishments . . . derive[s] exclusively from the due process requirement of legislative authorization”).

A. Historical Pedigree of Freedom from Multiple Punishments

The prohibition on multiple punishments has deep historical roots. Ancient Athenian,¹⁵ Jewish,¹⁶ Roman,¹⁷ and ecclesiastical law¹⁸ all contain some limitation on the imposition of multiple punishments. In England, although the right was not recognized in earliest days,¹⁹ common-law courts developed increasing protection against multiple punishments over time. For example in the 1610 decision *Dr. Bonham's Case*, Chief Justice Coke concluded that it was inappropriate to punish a person for the unlicensed practice of medicine both under one statute that punished a person who unlawfully practiced for one month and under another provision that punished the unlicensed practice for any amount of time.²⁰ He explained that “[*n*]emo debet bis puniri pro uno delicto”²¹—“no one should be punished twice for the same offence.” Blackstone repeated the sentiment in his Commentaries published in the 1760s.²² Likewise, William Hawkins, in his *Pleas of the Crown*, published in 1716, stated the principle: “the Party ought not to be brought twice into Danger of his Life for the

¹⁵ See 1 JOHN POTTER, *ARCHAEOLOGIAE GRAECAE: OR, THE ANTIQUITIES OF GREECE* 153 (1697) (“[T]here shall be no renewing of any thing dispatcht by *judges* either in the publick, or more private Courts, or by the People, according to the Enactions of their Decrees . . .”).

¹⁶ S. MENDELSON, *THE CRIMINAL JURISPRUDENCE OF THE ANCIENT HEBREWS* 178 (1890).

¹⁷ David S. Rudstein, *A Brief History of the Fifth Amendment Guarantee Against Double Jeopardy*, 14 WM. & MARY BILL RTS. J. 193, 198–200 (2005).

¹⁸ JAY A. SIGLER, *DOUBLE JEOPARDY: THE DEVELOPMENT OF A LEGAL AND SOCIAL POLICY* 3 (1969); see also *Bartkus v. Illinois*, 359 U.S. 121, 152 (1959) (Black, J., dissenting) (“[T]he idea that one trial and one punishment were enough remained alive through the canon law and the teachings of the early Christian writers.”).

¹⁹ Neither the Magna Carta nor the English Bill of Rights codified double jeopardy. Instead, the right was judicially created. The first mention of a prohibition on a second prosecution for the same offence was in 1201. See Rudstein, *supra* note 17, at 202–03; see also 2 BRACTON ON THE LAWS AND CUSTOMS OF ENGLAND 397 (George E. Woodbine ed., Samuel Thorne trans., 1968) (1235) (stating that an individual may “except against the appeal” on the ground that “he had earlier been appealed of the same deed by another and had departed quit by judgment”).

²⁰ *Dr. Bonham's Case*, (1610) 77 Eng. Rep. 638 (K.B.) 654. Other historical sources prohibited multiple punishments for the same offense. For example, under Hebrew law, a person could not be both flogged and fined for the same offense. See MENDELSON, *supra* note 16, at 178.

Modern laws regularly prescribe multiple components to a single punishment for a single conviction. For example, a conviction for mortgage fraud can result in both a fine of up to \$1,000,000 and a term of imprisonment of up to thirty years. 18 U.S.C. § 1014 (2006).

²¹ See *Dr. Bonham's Case*, 77 Eng. Rep. at 654; accord 4 EDWARD COKE, *THE REPORTS OF SIR EDWARD COKE*, IN THIRTEEN PARTS, pt. 7, at 377 (John Farquhar Fraser ed., 1826); see also 2 SAMUEL PUFENDORF, *DE JURE NATURAE ET GENTIUM LIBRI OCTO* 141 (James Brown Scott ed., C.H. Oldfather & W.A. Oldfather trans., Clarendon Press 1934) (1688).

²² 4 WILLIAM BLACKSTONE, *COMMENTARIES* *311 (“[N]emo bis punitur pro eodem delicto.” (emphasis omitted)).

[s]ame Crime.”²³ This restriction on multiple punishments was embodied in the plea of *autrefois convict*, which could be raised by a defendant who had already been convicted.²⁴ A defendant who had previously been acquitted could raise the plea of *autrefois acquit* against subsequent prosecutions.²⁵

Early American law similarly recognized the prohibition on multiple punishments. The Massachusetts Bay Colony enacted the Body of Liberties in 1641, which provided that “[n]o man shall be twice sentenced by Civill Justice for one and the same Crime, offence, or Trespasse.”²⁶ In 1652, Connecticut adopted a similar provision, which stated that “no Person shall be twice sentenced by Civil Justice for one and the same Crime.”²⁷ Although other colonies did not adopt similar restrictions, courts in those colonies allowed defendants facing multiple prosecutions to plead *autrefois acquit* or *autrefois convict*.²⁸

The Founders also expressed concern over the imposition of multiple punishments. The original language of the Double Jeopardy Clause, as proposed by James Madison, provided that “[n]o person shall be subject, except in cases of impeachment, to more than one punishment or one trial for the same offence.”²⁹ Although several members of the House of Representatives objected to the inclusion of the words “one trial” on the ground that it might actually impair defendants’ rights,³⁰ no one objected to the restriction on multiple punishments. To the contrary, the only statement on that language was by Representative Egbert Benson, who noted that the “humane” reason

²³ 2 WILLIAM HAWKINS, A TREATISE OF THE PLEAS OF THE CROWN 377 (1739) (footnote omitted).

²⁴ See 1 JOHN FREDERICK ARCHBOLD, THE NEW SYSTEM OF CRIMINAL PROCEDURE, PLEADING AND EVIDENCE IN INDICTABLE CASES 111–14 (1852); 9 EDWARD E. BURNS, STANDARD ENCYCLOPAEDIA OF PROCEDURE 90–91 (Edgar W. Camp ed., 1914).

²⁵ See 1 ARCHBOLD, *supra* note 24, at 111; 9 BURNS, *supra* note 24, at 89–90; see also *Crist v. Bretz*, 437 U.S. 28, 40–41 (1978) (Powell, J., dissenting) (stating that “the Double Jeopardy Clause was directed” to address the “pleas of *autrefois acquit* and *autrefois convict*”); George C. Thomas III, *An Elegant Theory of Double Jeopardy*, 1988 U. ILL. L. REV. 827, 828 (identifying the pleas of *autrefois convict* and *autrefois acquit* as “the ‘core’ double jeopardy clause protection”).

²⁶ Rudstein, *supra* note 17, at 222 (alteration in original) (quoting Massachusetts Body of Liberties ¶ 42 (1641), reprinted in SOURCES OF OUR LIBERTIES: DOCUMENTARY ORIGINS OF INDIVIDUAL LIBERTIES IN THE UNITED STATES CONSTITUTION AND BILL OF RIGHTS 153 (Richard L. Perry & John C. Cooper eds., 1959)).

²⁷ *Id.*

²⁸ ARTHUR P. SCOTT, CRIMINAL LAW IN COLONIAL VIRGINIA 81–82 (1930); SIGLER, *supra* note 18, at 24–26; Rudstein, *supra* note 17, at 223–26; see also Akhil Reed Amar, *Double Jeopardy Law Made Simple*, 106 YALE L.J. 1807, 1814 (1997) (“At common law, the double jeopardy idea encompassed two basic pleas in bar, prior acquittal and prior conviction—in law French, *autrefois acquit de même felonie* and *autrefois convict de même felonie*.”).

²⁹ 1 ANNALS OF CONG. 451–52 (1789) (Joseph Gales ed., 1834).

³⁰ *Id.* at 782. At the time, defendants could request second trials following conviction in some circumstances, and the language was perceived potentially to undermine this right.

for a prohibition on double jeopardy was to prevent more than one punishment for a single offense.³¹

These debates suggest that the Clause was meant to prohibit multiple punishments, but they are not conclusive. Although the House approved Madison's version, the final version, which was introduced in the Senate, replaced the words "except in case of impeachment, to more than one trial, or one punishment" with "be twice put in jeopardy of life or limb." According to some, most notably Justices Antonin Scalia and Clarence Thomas, jeopardy encompasses only trials and not "punishment," and the Double Jeopardy Clause thus prohibits only "successive prosecution, not successive punishment."³²

The reason for the change in the Clause's language is unknown.³³ It may have been an effort to conform the language to Blackstone's description of the right, namely that it was a "universal maxim of the common law of England, that no man is to be brought into jeopardy of his life, more than once, for the same offence."³⁴ What *is* known, however, is that preventing multiple punishments was foremost in the Framers' thoughts, as demonstrated by the statements in the House.³⁵ Given that the House accepted the Senate's textual changes after the earlier statements in the House record that preventing multiple punishments was essential, it seems unlikely that Congress understood the new text to remove the protection against multiple punishments.³⁶

History also does not conclusively resolve whether the Double Jeopardy Clause prohibits recidivism enhancements. Although the colonies generally did not permit multiple punishments for the same offense, they did not consistently treat enhancements for recidivism as a second punishment for a prior offense. A few colonies had statutes that increased criminal penalties for some recidivists.³⁷ The Massa-

³¹ See *id.* at 781–82; John O. Bigelow, *Former Conviction and Former Acquittal*, 11 RUTGERS L. REV. 487, 488 (1957).

³² *Dep't of Revenue of Mont. v. Kurth Ranch*, 511 U.S. 767, 804–05 (1994) (Scalia, J., dissenting); see also *Witte v. United States*, 515 U.S. 389, 406–07 (1995) (Scalia, J., concurring in judgment) (interpreting "twice *put in jeopardy* of life or limb" to mean "twice *prosecuted* for the same offense"); *Lear*, *supra* note 9, at 742–43 ("[T]he Double Jeopardy Clause . . . authorize[s] additional punishment for previously adjudicated offenses upon conviction of a subsequent crime.").

³³ See Bigelow, *supra* note 31, at 489 ("The Annals of Congress do not show clearly the later moulding of Madison's amendments.").

³⁴ 4 BLACKSTONE, *supra* note 22, at *329; see also Bigelow, *supra* note 31, at 489 (hypothesizing that the language came from *Vaux's Case*, (1591) 76 Eng. Rep. 992 (K.B.) 993).

³⁵ See *supra* text accompanying notes 29–31.

³⁶ See Note, *supra* note 14, at 266 n.13 (noting that preventing multiple punishment under the Double Jeopardy Clause was foremost in the minds of the Framers).

³⁷ See, e.g., *Graham v. West Virginia*, 224 U.S. 616, 623 (1912); Jay A. Sigler, *A History of Double Jeopardy*, 7 AM. J. LEGAL HIST. 283, 302–03 (1963) (noting that in some colonies "[r]epeated criminal offenses also entailed the use of the death penalty").

achusetts Bay Colony, for example, enacted stiffer penalties for repeat robbers and burglars.³⁸ Similarly, in 1705, the Virginia House of Burgesses enacted a statute that provided increased penalties for repeat hog stealers.³⁹ The practice continued after the adoption of the Constitution. In 1796, both Virginia and New York enacted statutes providing for increased punishments for repeat offenders, and other states later followed suit.⁴⁰ These laws arguably suggest that the Double Jeopardy Clause was not understood to prohibit enhancements for prior offenses.⁴¹ On the other hand, most colonies did not enact statutes that increased criminal penalties for recidivists. Indeed, it was not until the early twentieth century that recidivism statutes became widespread.⁴²

It is not clear that the Double Jeopardy Clause meant to codify the laws and practices of the few colonies that permitted recidivism enhancements.⁴³ Unlike many other constitutional rights, the right against double jeopardy was missing from most colonial constitutions.⁴⁴ Including the Double Jeopardy Clause was a deliberate effort to provide more rights than most of the colonies provided. Furthermore, the Double Jeopardy Clause was not incorporated against the

³⁸ See Act for the Punishment of Criminal Offenders, § 4 (1692), in 1 THE ACTS AND RESOLVES, PUBLIC AND PRIVATE, OF THE PROVINCE OF MASSACHUSETTS BAY 52 (1869) (prescribing branding for the first conviction and hanging for the second); see also Note, *Selective Incapacitation: Reducing Crime Through Predictions of Recidivism*, 96 HARV. L. REV. 511, 511 n.1 (1982) (“The Massachusetts Bay Colony had recidivist laws for robbers and burglars at least as early as 1692.”). Although this legislation was enacted in 1692, the 1641 Massachusetts Bay Colony Body of Liberties prohibited the imposition of multiple punishments. See *supra* note 26 and accompanying text.

³⁹ 3 THE STATUTES AT LARGE; BEING A COLLECTION OF ALL THE LAWS OF VIRGINIA 276–78 (William Waller Hening ed., 1823) (1619).

⁴⁰ *Graham*, 224 U.S. at 623.

⁴¹ See *id.*; *Lear*, *supra* note 9, at 743 n.75.

⁴² See Michael G. Turner et al., “Three Strikes and You’re Out” Legislation: A National Assessment, 59 FED. PROBATION 16, 17 (1995) (noting that application of habitual-offender laws was “minimal” in early America, but that such laws “flourished in the U.S. throughout the 1920’s”).

⁴³ See Rudstein, *supra* note 17, at 227–28 (noting the public pressure to create a right against double jeopardy despite the absence of such a right in most colonies).

⁴⁴ See SIGLER, *supra* note 18, at 23, 300; Bigelow, *supra* note 31, at 487. Notably, the Massachusetts Bay Colony both prohibited multiple punishments and enacted a recidivism statute. See *supra* note 38. There may have been as much as a fifty-year delay between the prohibition of multiple punishments and the enactment of the recidivism statute. But even if the recidivism statute were enacted sooner, that does not necessarily mean that the right against multiple punishments does not prohibit recidivism enhancements. Soon after the Founding, Congress itself enacted various laws that seemed to conflict with the recently adopted Constitution. The Alien and Sedition Act, for example, severely curtailed freedom of the press, which “indisputably violated our present understanding of the First Amendment.” Rather than serving as an example of how narrowly we ought to interpret that right today, the Act instead serves as an example that “leaders who have drafted and voted for a text are eminently capable of violating their own rules.” *Van Orden v. Perry*, 545 U.S. 677, 726 n.27 (2005) (Stevens, J., dissenting).

states until 1969.⁴⁵ Before that time, only the federal government was bound by the Clause. Most states, accordingly, were not constrained by any facet of the Double Jeopardy Clause when enacting their recidivist statutes. So far as our research reveals, the federal government did not enact a recidivist statute until 1831.⁴⁶ Thus, the existence of a few recidivist statutes in early American history does not necessarily demonstrate that those statutes were consistent with the Double Jeopardy Clause in the Constitution.

In short, though history provides evidence that the Double Jeopardy Clause prohibits multiple punishments, the evidence is not conclusive. Nevertheless, courts have found the evidence supporting a right against multiple punishments in the Clause persuasive, consistently declaring that the Clause does indeed contain such a right.⁴⁷

B. Current State of the Law

Although proclaiming that the Double Jeopardy Clause protects against multiple punishments for the same offense,⁴⁸ the Supreme Court has largely failed to provide any real protection against multiple punishments.⁴⁹ Instead, it has developed doctrines that strip away virtually all substance from the right.

One way that courts have removed the substance of the prohibition on multiple punishments is by failing to enforce the prohibition against legislatures. Courts have held that, if the legislature authorizes

⁴⁵ *Benton v. Maryland*, 395 U.S. 784, 784 (1969).

⁴⁶ Act of March 2, 1831, ch. 37, § 1, 4 Stat. 448, 448 (imposing punishment for a "second conviction" of petty larceny).

There is a 1789 statute governing the registration of vessels that imposed a \$500 fine on anyone who failed to fulfill various duties imposed by the statute. A second conviction of the same offense carried the same fine, but it also disqualified that person from "holding any office of trust or profit under the United States." Act of Sept. 1, 1789, ch. 11, § 34, 1 Stat. 55, 65. This disqualification upon a second conviction could be characterized as a recidivism penalty; however, disqualification from public office is best understood as a collateral consequence rather than as a criminal punishment. See C. Roger Vinson, Special Project, *The Collateral Consequences of a Criminal Conviction*, 23 VAND. L. REV. 929, 941–50 (1970) (noting that the English common-law practice of declaring those convicted of treason and other felonies "attainted" resulted in the divestiture of many civil rights, including the right to hold public office); *id.* at 987–94 (describing the state and federal statutes and constitutional provisions that disqualify persons convicted of certain crimes from holding public office). The characterization of disqualification from public office as a collateral consequence is important to the double jeopardy question because courts ordinarily deem collateral consequences to be civil penalties rather than criminal penalties and thus not subject to double jeopardy challenges. See Michael Pinard, *An Integrated Perspective on the Collateral Consequences of Criminal Convictions and Reentry Issues Faced by Formerly Incarcerated Individuals*, 86 B.U. L. REV. 623, 640–41 (2006).

⁴⁷ See sources cited *supra* note 14.

⁴⁸ See, e.g., *Justices of Bos. Mun. Court v. Lydon*, 466 U.S. 294, 306–07 (1984); *North Carolina v. Pearce*, 395 U.S. 711, 717 (1969).

⁴⁹ See, e.g., *Poulin*, *supra* note 9, at 611–13 & n.69 (collecting cases where the Court has undercut the right against multiple punishments).

two punishments for one crime, then a court may impose both punishments on a defendant convicted of that crime.⁵⁰ Thus, the limit on multiple punishments is not a substantive constitutional limitation; legislatures may authorize multiple punishments through legislation. This deference stands in stark contrast to the Court's protection of the other primary protection afforded by the Double Jeopardy Clause—the right against multiple prosecutions. The Court has held that the Double Jeopardy Clause does create a substantive restriction on multiple prosecutions.⁵¹ In no situation may the government pursue successive prosecutions for the “same offense.”⁵²

Even so, courts have recognized that the rule against multiple punishments does impose a procedural constitutional limitation of sorts by limiting the *judiciary's* ability to impose punishment. The Double Jeopardy Clause, the courts have said, “does no more than prevent the sentencing court from prescribing greater punishment than the legislature intended.”⁵³ But this is no limitation at all. Legis-

⁵⁰ *Albernaz v. United States*, 450 U.S. 333, 344 (1981). Although concluding that the Double Jeopardy Clause does not prevent the legislature from authorizing multiple punishments for one crime, the Court has adopted a rule of statutory construction against multiple punishments for one offense. When two statutes authorize punishment for one offense, courts will presume that a defendant cannot be punished under both unless the legislature says otherwise. This presumption, however, does not derive from the Double Jeopardy Clause; instead, it is based on the common sense assumption that legislatures “ordinarily do[] not intend to punish the same offense under two different statutes.” *Whalen v. United States*, 445 U.S. 684, 692 (1980).

⁵¹ *United States v. Dixon*, 509 U.S. 688, 696 (1993).

⁵² The Court has not indicated that statutory construction and legislative intent are irrelevant considerations in cases involving claims of multiple prosecutions. Those claims often turn on whether two offenses are the “same” for double jeopardy purposes. Legislatures have not only the power to prescribe the amount of punishment for criminal offenses but also to define those offenses. See Thomas W. Merrill, *The Disposing Power of the Legislature*, 110 COLUM. L. REV. 452, 456–58 (2010); Poulin, *supra* note 9, at 606. Thus, in deciding whether an offense is the “same,” courts often treat the question as one of statutory construction and legislative intent. The constitutional power to define offenses, coupled with the Double Jeopardy Clause's limitation to offenses that are the “same,” has led some commentators to conclude that the protection against multiple prosecutions is a limit only on prosecutors and that the Clause imposes no substantive limitation on legislatures. See, e.g., THOMAS, *supra* note 9, at 67 (proposing that double jeopardy “is a procedural and not a substantive protection,” so that courts can do no more than “divine legislative intent” regarding double jeopardy concerns in all double jeopardy analyses including cases involving successive prosecutions). It seems unlikely, however, that the courts would permit the legislature to authorize a direct violation of the protection against successive prosecutions—for example, by enacting a statute that permits prosecutors to pursue successive prosecutions under the identical statute following either a conviction or an acquittal. And, in any event, the Court itself has not stated that the protection places no limitations on legislatures. See generally Poulin, *supra* note 9, at 609–11 (arguing that deference to legislatures in multiple-punishment cases does not and ought not extend to cases involving multiple prosecutions).

⁵³ See *Garrett v. United States*, 471 U.S. 773, 793 (1985) (quoting *Missouri v. Hunter*, 459 U.S. 359, 366 (1983)); see also *Albernaz*, 450 U.S. at 344 (“[T]he question of what punishments are constitutionally permissible is not different from the question of what punishments the Legislative Branch intended to be imposed.”).

latures hold the power to define punishments for criminal offenses, and courts may never impose a punishment greater than that authorized by the legislature.⁵⁴ Even without the Double Jeopardy Clause, a court could not impose a second punishment without legislative authorization.⁵⁵

The Court has justified its decision to exempt legislatures from the restriction on multiple punishments on the ground that legislatures have the power to set the punishments for criminal offenses. According to the Court, a statute authorizing two punishments of amount X is no different from a statute authorizing a single punishment of $2X$ for that same offense.⁵⁶ Thus, the Court has concluded that whether a person may be punished for one act under two statutes is ultimately a legislative question. Cumulative punishments may be imposed under separate statutes so long as the legislature has clearly authorized those punishments.⁵⁷ In that case, no double jeopardy protections apply.

A second way that courts have diluted the prohibition on multiple punishments is by refusing to apply it at sentencing. This is most apparent in the context of recidivism enhancements. Every state and the federal government has enacted statutes that punish recidivists more severely than first-time offenders.⁵⁸ Some statutes punish recidivists more severely by classifying second and subsequent offenses as a higher class of offense than first offenses.⁵⁹ Other statutes provide for

⁵⁴ See *United States v. Wiltberger*, 18 U.S. (5 Wheat.) 76, 95 (1820) ("It is the legislature, not the Court, which is to define a crime, and ordain its punishment."); see also *Whalen*, 445 U.S. at 689 ("The Fifth Amendment guarantee against double jeopardy embodies in this respect simply one aspect of the basic principle that within our federal constitutional framework the legislative power, including the power to define criminal offenses and to prescribe the punishments to be imposed upon those found guilty of them, resides wholly with the Congress.").

⁵⁵ That is not to say that judges lack authority to increase sentences based on a defendant's prior convictions if the legislature has failed to enact a habitual-offender statute. Because courts have held that double jeopardy does not apply at sentencing, see *infra* text accompanying notes 58–68, judges are free to increase the sentences of repeat offenders, so long as the sentence imposed does not exceed the maximum punishment authorized by the legislature.

⁵⁶ See *Albernaz*, 450 U.S. at 344; see also Note, *supra* note 14, at 302 (equating two convictions and sentencing for a single offense with one conviction and a doubled penalty for the same offense).

⁵⁷ *Whalen*, 445 U.S. at 688; *Brown v. Ohio*, 432 U.S. 161, 165 (1977) ("Where consecutive sentences are imposed at a single criminal trial, the role of the constitutional guarantee is limited to assuring that the court does not exceed its legislative authorization by imposing multiple punishments for the same offense.").

⁵⁸ STATUTES REQUIRING CRIMINAL HISTORY, *supra* note 5, at 11; see also Carissa Byrne Hessick, *Why Are Only Bad Acts Good Sentencing Factors?*, 88 B.U. L. REV. 1109, 1115 (2008) ("Every state has enacted legislation that punishes recidivists more severely than first offenders.").

⁵⁹ STATUTES REQUIRING CRIMINAL HISTORY, *supra* note 5, at 11. Sometimes the offense is classified as a more serious offense if the offender has a previous conviction for the same

the imposition of higher penalties on recidivists either through statutory mandatory minimum sentences or by increasing statutory maximum sentences.⁶⁰ Several states have adopted so-called “three strikes” laws, under which an offender must receive a sentence of life imprisonment if she is convicted three times (or sometimes two times⁶¹ or four times⁶²) of a certain class of felonies.⁶³ Sentencing guidelines also routinely call for increased punishment for those defendants with prior convictions.⁶⁴ And even when a statute or guideline does not mandate recidivism enhancements, many judges often use their sentencing discretion to increase sentences based on prior convictions.⁶⁵

The Supreme Court has repeatedly held that these sentencing enhancements do not violate the Double Jeopardy Clause.⁶⁶ The Court

crime. *E.g.*, COLO. REV. STAT. § 12-22-127 (2010) (“Any person who practices or offers or attempts to practice pharmacy without an active license issued under this article commits a class 2 misdemeanor . . . for the first offense, and any person committing a second or subsequent offense commits a class 6 felony . . .”). But sometimes a particular offense is classified as a more serious offense if the offender has any of a number of prior convictions. *E.g.*, IND. CODE ANN. § 35-47-2-23(d) (LexisNexis 2009) (“A person who violates section 22 [IC 35-47-2-22] of this chapter commits a Class A misdemeanor. However, the offense is a Class D felony if the person has a prior conviction of any offense under this subsection or subsection (c), or if the person has been convicted of a felony within fifteen (15) years before the date of the offense.” (alteration in original)).

⁶⁰ STATUTES REQUIRING CRIMINAL HISTORY, *supra* note 5, at 12.

⁶¹ *See, e.g.*, S.C. CODE ANN. § 17-25-45(A) (2003 & Supp. 2010).

⁶² *See, e.g.*, WYO. STAT. ANN. § 6-10-201(b)(ii) (2009).

⁶³ *See* James Austin et al., *The Impact of “Three Strikes and You’re Out,”* 1 PUNISHMENT & SOC’Y 131, 134–37 (1999) (describing various three strikes legislation and “strikeable offenses” across jurisdictions).

⁶⁴ *E.g.*, ALASKA STAT. § 12.55.155(c)(15) (2010); CAL. CRIM. R. CT. 4.421(b)(2); HAW. REV. STAT. ANN. § 706-662(1) (LexisNexis 2007); IDAHO CODE ANN. § 19-2521(1)(f) (2004); MINN. STAT. ANN. § 244 app. II.B (West 2010); OHIO REV. CODE ANN. §§ 2929.12(E)(2) (LexisNexis 2010); TENN. CODE ANN. § 40-35-114(1) (2010); WASH. REV. CODE ANN. § 9.94A.535(2)(d) (West 2010 & Supp. 2011); U.S. SENTENCING GUIDELINES MANUAL § 4A1.1 (2010); MODEL PENAL CODE SENTENCING § 6B.07 (2006); *see also* STATUTES REQUIRING CRIMINAL HISTORY, *supra* note 5, at 12 (“States have established sentencing guidelines that take prior convictions into consideration in setting sentence ranges for particular offenses or that permit judges to sentence above the recommended ranges for persons with specified prior convictions.”). In the federal system, an offender’s criminal history is one of the two major factors used to arrive at a Guideline sentence—the other being the offense for which the offender was convicted. KATE STITH & JOSÉ A. CABRANES, FEAR OF JUDGING: SENTENCING GUIDELINES IN THE FEDERAL COURTS, 72, 218 n.219.

⁶⁵ *See* *Almendarez-Torres v. United States*, 523 U.S. 224, 230 (1998) (“[P]rior commission of a serious crime . . . is as typical a sentencing factor as one might imagine.”); *Williams v. Oklahoma*, 358 U.S. 576, 585–86 (1959) (upholding a death sentence despite the fact that the judge imposed the sentence based on the defendant’s commission of another crime for which the defendant had already been convicted and sentenced); *see also* Hessick, *supra* note 58, at 1114–16 (“[P]rior convictions are widely recognized as aggravating sentencing factors and are often used to increase the sentences of individual defendants.”); Roberts, *supra* note 9, at 304 (“After the seriousness of the crime, the criminal history of the offender is the most important determinant of sentence severity in common-law jurisdictions.”).

⁶⁶ *Graham v. West Virginia*, 224 U.S. 616, 623, 631 (1912); *McDonald v. Massachusetts*, 180 U.S. 311, 312–13 (1901); *Moore v. Missouri*, 159 U.S. 673, 676–77 (1895); *see also*

has provided two justifications. The first is that the Double Jeopardy Clause protects only against multiple punishments for the same offense and an enhancement does not amount to an "offense." Rather, it is simply an aggravating factor to be considered in imposing a sentence for the offense of conviction.⁶⁷ The second justification is that the sentence increase is not a second punishment for the prior offense but is instead based on "the manner in which [the defendant] committed the crime of conviction."⁶⁸ These justifications are discussed in further detail below in Part II.B.

II EXPANDING DOUBLE JEOPARDY BEYOND ITS CURRENT BOUNDARIES

Despite the Court's statements to the contrary,⁶⁹ in practice it has not interpreted the Double Jeopardy Clause as providing any real protection against multiple punishments. This of course raises the question whether the Double Jeopardy Clause actually does provide such protection. Certainly, if the Clause does not do so, the Court should not continue to claim that the Clause does provide such protection, while at the same time not actually enforcing that right. Doing so obscures the law and undermines the legitimacy of the Court.⁷⁰

As this Part explains, the Clause does, or at least should, protect against multiple punishments. Protecting individuals against multiple punishments is logically a crucial component of the right against double jeopardy. Even if the Double Jeopardy Clause were only intended to protect individuals from multiple prosecutions, that protection would be incomplete and inadequate if it did not also protect

Oyler v. Boles, 368 U.S. 448, 451 (1962) (stating that the constitutionality of habitual-offender laws is "no longer open to serious challenge"). For a description of early state cases upholding such statutes, see White, *supra* note 8, at 730–33.

⁶⁷ *Monge v. California*, 524 U.S. 721, 728 (1998); *Gryger v. Burke*, 334 U.S. 728, 732 (1948).

⁶⁸ *Monge*, 524 U.S. at 728 (alteration in original) (quoting *United States v. Watts*, 519 U.S. 148, 154 (1997) (per curiam)); see also *Witte v. United States*, 515 U.S. 389, 402–03 (1995) ("To the extent that the Guidelines aggravate punishment for related conduct outside the elements of the crime . . . [,] the offender is still punished only for the fact that the *present* offense was carried out in a manner that warrants increased punishment, not for a *different* offense . . .").

⁶⁹ See *supra* note 14 and accompanying text.

⁷⁰ "[T]he Court's influence depends in large part on the reasoning in its written decisions. When that reasoning suffers from obvious inconsistencies or other shortcomings, the Court itself suffers as an institution—especially where those inconsistencies could potentially be interpreted as a lack of candor on the part of the Court." Carissa Byrne Hessick & F. Andrew Hessick, *Appellate Review of Sentencing Decisions*, 60 ALA. L. REV. 1, 39–40 (2008) (footnotes omitted); see also David L. Shapiro, *In Defense of Judicial Candor*, 100 HARV. L. REV. 731, 737 (1987) ("[L]ack of candor seldom goes undetected for long, and its detection only serves to increase the level of cynicism about the nature of judging and of judges.").

against multiple punishments. Moreover, the protection against multiple punishments should extend to recidivism enhancements. The only reason that the additional recidivism punishment is imposed is that the defendant was convicted for the earlier crime. It strains logic to claim that this additional punishment does not punish that earlier offense a second time.

A. Multiple Punishment Protection Is Essential to Double Jeopardy

To understand why the Double Jeopardy Clause should robustly protect against not only multiple prosecutions but also multiple punishments, one must begin by remembering that the Clause protects both those who have been previously acquitted and those who have been previously convicted. Those who have been previously acquitted have different interests at stake than those who have been previously convicted.

So far as double jeopardy is concerned, the principal interest of those who have been previously acquitted is to avoid multiple trials for the same offense. (They need not worry about being subjected to multiple punishments, because they have not yet suffered a punishment.) The threat of multiple trials undermines the finality of jury verdicts, exposes the defendant to government harassment, and leaves the defendant with the anxiety of potential prosecutions. More importantly, it impairs the defendant's ability to defend herself, not only because of mounting litigation costs, but also because each trial gives the government an opportunity to preview and adjust to the defense strategy.⁷¹ Similarly, multiple trials increase the probability that an innocent person will be convicted because the government may follow each acquittal with another prosecution until it finds a jury willing to convict.⁷²

As further discussed below, these problems largely arise only when the government seeks to bring a second prosecution against a person who has already been acquitted. Indeed, the right against double jeopardy has sometimes been described as a right necessary to guard against the conviction of innocent defendants.⁷³ Framing

⁷¹ See Peter Westen, *The Three Faces of Double Jeopardy: Reflections on Government Appeals of Criminal Sentences*, 78 MICH. L. REV. 1001, 1007 (1980); see also *Green v. United States*, 355 U.S. 184, 187 (1957) (stating that the right against double jeopardy ensures that "the State with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity").

⁷² Westen, *supra* note 71, at 1006; Note, *supra* note 14, at 278.

⁷³ See, e.g., *Green*, 355 U.S. at 187-88 (1957); see also Lear, *supra* note 9, at 744 (noting that "[p]unishment for prior convictions at sentencing is completely consistent with" the

double jeopardy as protecting against erroneous convictions is consistent with a number of other criminal procedure rights, such as the right to counsel, the right to confront witnesses, and the right to a jury trial. This focus on previously acquitted defendants explains the conclusion of courts and commentators that the primary aim of the Double Jeopardy Clause is to protect against multiple prosecutions.⁷⁴

But the right against double jeopardy is not limited to protecting only the previously acquitted. The text of the Clause makes no distinction between prior convictions and acquittals. It prohibits “be[ing] twice put in jeopardy of life or limb”—that is, being twice subject to the *possibility* of punishment—irrespective of the outcome in the prior case. Nor does history suggest that the right is limited to prior acquittals. As noted earlier, historically courts recognized a right against multiple punishments, and the possibility of a second punishment arises only when the defendant has been convicted. One of the direct historical antecedents of the Double Jeopardy Clause was the common-law plea *autrefois convict*, which could be raised by an individual who had already been convicted.⁷⁵ Those individuals who had been acquitted of a crime could terminate a subsequent prosecution for the same offense by pleading *autrefois acquit*.⁷⁶ If Double Jeopardy were intended only to protect the innocent, then the separate plea of *autrefois convict* would have been unnecessary.⁷⁷

What is more, if the Double Jeopardy Clause were intended only to protect those who have been acquitted of an offense, then the Clause would seem to be largely duplicative of the Sixth Amendment jury trial right.⁷⁸ Once a jury acquits a defendant, even if the acquittal seems contrary to law, the verdict may not be relitigated. Allowing

goals of double jeopardy in part because “[t]here is no question regarding the defendant’s legal innocence”).

⁷⁴ See *supra* text accompanying notes 71–73; see also Poulin, *supra* note 9, at 599 (characterizing the “core double jeopardy protection” as the “protection from successive prosecution[s]”).

⁷⁵ See *supra* notes 24–25 and accompanying text.

⁷⁶ See *supra* note 25.

⁷⁷ See Amar, *supra* note 28, at 1815 (“[T]he Double Jeopardy Clause, via the constitutionally guaranteed plea of *autrefois convict*, protects even the guilty.”); Peter Westen & Richard Drubel, *Toward a General Theory of Double Jeopardy*, 1978 SUP. CT. REV. 81, 107 (noting that the “principal interest” protected in the context of retrial following conviction “is that underlying the historical plea of *autrefois convict*, namely, to protect the defendant from being subjected to double punishment for the same offense”).

⁷⁸ “In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury” U.S. CONST. amend. VI. Indeed, some commentators have explained the double jeopardy right against subsequent prosecution after acquittal in terms of a Sixth Amendment jury trial right. See Akhil Reed Amar & Jonathan L. Marcus, *Double Jeopardy Law After Rodney King*, 95 COLUM. L. REV. 1, 57–59 (1995); Barry L. Johnson, *If At First You Don’t Succeed—Abolishing the Use of Acquitted Conduct in Guidelines Sentencing*, 75 N.C. L. REV. 153, 181–82 (1996); Westen, *supra* note 71, at 1012–18; Westen & Drubel, *supra* note 77, at 129–32.

relitigation would infringe upon the jury's role of preventing the government from punishing an individual whom the public believes should not be punished.⁷⁹ The Sixth Amendment already protects against retrial after acquittal, and ordinary principles of statutory and constitutional construction counsel against treating the Double Jeopardy Clause as surplusage.⁸⁰

Those who previously have been convicted do not have the same double jeopardy interests in avoiding multiple trials as those who have been acquitted. The primary evils associated with multiple prosecutions—in particular the dangers associated with the government previewing defense strategy and potential infringement on jury verdicts—simply are not present when a defendant has already been convicted. For defendants who have already been convicted, the government has already developed a successful strategy against the defense, and a second conviction is consistent with the jury's prior verdict.

Instead of seeking to avoid potential government advantage at a second trial, the primary interest of a defendant who has already been convicted is to avoid the consequences of a second trial—that is, a second punishment. For the previously convicted defendant, the Double Jeopardy Clause serves to ensure that she does not face another punishment for an offense after already serving the punishment for that offense duly meted out through the judicial process.

To be sure, retrying defendants who have already been convicted exposes them to the threat of harassment by repeat litigation and litigation expenses.⁸¹ But these concerns are less central to the right against double jeopardy than the concern with governmental advantage over the defendant. The law regularly distinguishes between the harm arising from deprivations of rights (such as due process) and the harm resulting from exposure to harassment and expense. It affords substantial protections against the former, and ordinarily re-

⁷⁹ See Amar, *supra* note 28, at 1846 (“Under the Sixth Amendment, however, a criminal jury has the right to acquit a defendant even in the face of indisputable factual evidence of guilt.” (footnote omitted)); Westen, *supra* note 71, at 1016 (“[I]nsofar as the criminal jury may dispense mercy to defendants by vetoing or nullifying the law, the criminal jury does possess authority to decide the law.”).

⁸⁰ See *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 174 (1803) (“It cannot be presumed that any clause in the [C]onstitution is intended to be without effect . . .”).

⁸¹ A number of commentators have characterized prevention of government harassment as a key value protected by the Double Jeopardy Clause. See Monroe G. McKay, *Double Jeopardy: Are the Pieces the Puzzle?*, 23 WASHBURN L.J. 1, 18 (1983); Susan R. Klein, *Double Jeopardy's Demise*, 88 CALIF. L. REV. 1001, 1027–36 (2000) (reviewing THOMAS, *supra* note 9); Note, *supra* note 14, at 286–92. But see THOMAS, *supra* note 9, at 50–52 (noting a number of problems with construing the Clause as a protection against harassment). Justice O'Connor also suggested that the Double Jeopardy Clause was intended to protect against government oppression. *Garrett v. United States*, 471 U.S. 773, 796 (1985) (O'Connor, J., concurring).

quires parties to bear the costs of the latter.⁸² Moreover, if the goal of the Double Jeopardy Clause were to prevent government harassment, as opposed to preventing multiple punishments, one would expect a Clause targeting not just harassment through multiple prosecutions, but government harassment generally, including through law-enforcement tactics.⁸³ What is more, it is unclear that a successive trial is, indeed, an unwarranted drain on the defendant. All trials consume resources, but the tradeoff is that trials provide process. If multiple punishments are allowed, one would think that it is better if they were imposed after a second verdict, which was the subject of that process, instead of being based solely on the first conviction.⁸⁴

Nor does the argument based on harassment from repeated prosecutions carry much weight. A second trial is harassing only if the trial carries some potential punishment; otherwise it could be ignored.⁸⁵ If the government is prohibited from *seeking to punish* a person a second time after conviction, *a fortiori*, the government must be prohibited from *imposing* a second punishment, for it would be nonsensical to prohibit the government from seeking to do something that it is allowed to do.⁸⁶

⁸² Compare *In re Nat'l Presto Indus., Inc.*, 347 F.3d 662, 663 (7th Cir. 2003) (stating that "unrecoverable costs of litigation . . . do not" warrant mandamus), and *Sherri A.D. v. Kirby*, 975 F.2d 193, 204 n.15 (5th Cir. 1992) (reasoning that "increased cost of litigation alone" does not warrant interlocutory appeal), with *Covino v. Patrisi*, 967 F.2d 73, 77 (2d Cir. 1992) (concluding that a possible deprivation of constitutional rights sufficiently demonstrated a likelihood of irreparable harm warranting injunctive relief).

⁸³ Commentators have sometimes suggested that there is a due process right against government harassment. See, e.g., Amar & Marcus, *supra* note 78, at 36 n.184; Nancy J. King, *Portioning Punishment: Constitutional Limits on Successive and Excessive Penalties*, 144 U. PA. L. REV. 101, 130-34 (1995). But remarks in judicial opinions suggest that government harassment may not be subject to constitutional challenge—or at least that it is unlikely to be captured and remedied by ordinary criminal justice processes. See, e.g., *Hudson v. Palmer*, 468 U.S. 517, 530 (1984) (suggesting that a prisoner must resort to "state tort and common-law remedies" rather than the Fourth Amendment to address "calculated harassment" by prison officials); *Terry v. Ohio*, 392 U.S. 1, 13-15 & n.9 (1968) (noting that police "may accost a woman in an area known for prostitution as part of a harassment campaign designed to drive prostitutes away without the considerable difficulty involved in prosecuting them" and that "[t]he wholesale harassment by certain elements of the police community, of which minority groups, particularly Negroes, frequently complain, will not be stopped by the exclusion of any evidence from any criminal trial" (footnote omitted)).

⁸⁴ The Supreme Court's decision in *Almendarez-Torres v. United States*, 523 U.S. 224 (1998), makes clear that a defendant's sentence may be increased based on a prior conviction without requiring the government to prove to a jury either the fact of the previous conviction or the facts underlying that conviction. *Id.* at 227, 241.

⁸⁵ Cf. *Poulin*, *supra* note 9, at 619 ("Successive prosecution often goes hand-in-hand with the threat of additional punishment. . . . Consequently, discussion of successive prosecution often focuses not only on the successive trials, but also on the additional multiple punishment that would be imposed if each trial ended in conviction.").

⁸⁶ The Supreme Court appeared to recognize the secondary nature of this interest in *Ex parte Lange*, 85 U.S. (18 Wall.) 163 (1873), in which the Court suggested that the prohibition on multiple trials was a common-law extension of the prohibition on multiple punishments. See *id.* at 169 ("The common law not only prohibited a second punishment for

What all this suggests is that preventing multiple punishments is the animating principle of the Double Jeopardy Clause, and the limitation on multiple trials for previously convicted defendants is simply a *means* to enforce the prohibition on that restriction on multiple punishments.⁸⁷ For this reason, current double jeopardy doctrine ought to be expanded to encompass a robust right against multiple punishments.

Justices Scalia and Thomas have resisted this argument on the ground that the Clause's text does not prohibit multiple punishments because it prohibits only repeat "jeopardy," not repeat punishments.⁸⁸ On this view, even if the reason for the Clause is to protect against multiple punishments, the Clause accomplishes this goal by prohibiting multiple trials instead of by barring multiple punishments directly. But this argument puts form before function.

At the time of the drafting of the Clause, a separate prohibition on multiple punishments would have been extraneous: "During colonial times and at the Founding, the process of sentencing was virtually indistinguishable from the process of conviction. A judge ordinarily did not conduct a separate sentencing proceeding following a defendant's conviction; instead, most crimes carried a particular penalty."⁸⁹ Because punishment could be imposed only following a trial, prohibiting successive trials would effectively prevent multiple punishments.⁹⁰ In short, by prohibiting multiple trials, the Founders likely thought that they were simultaneously protecting against multiple punishments.

Moreover, the Court has generally rejected the textualist approach advocated by Justices Scalia and Thomas in interpreting the Double Jeopardy Clause. Consider the phrase "life or limb." The Supreme Court has not interpreted that phrase to limit the Clause's protection to only those offenses bearing a penalty of death or loss of limb. Instead, it has interpreted the Clause to apply to fines, terms of imprisonment, and other forms of punishment.⁹¹ Another example

the same offence, but it went further and forbid a second trial for the same offence . . ."). Further evidence that the prohibition on multiple punishments was more highly valued than the prohibition on multiple trials is the Court's occasional greater concern with second trials following conviction rather than acquittal. See *In re Nielsen*, 131 U.S. 176, 187–90 (1889).

⁸⁷ "The primary purpose of foreclosing a second prosecution after conviction . . . is to prevent a defendant from being subjected to multiple punishments for the same offense." *Justices of Bos. Mun. Court v. Lydon*, 466 U.S. 294, 307 (1984).

⁸⁸ See *supra* notes 14 & 32 and accompanying text.

⁸⁹ Hessick & Hessick, *supra* note 8, at 51. But see *infra* note 120.

⁹⁰ There are a few historical exceptions to this general rule—namely, there appear to have been a small number of habitual-offender statutes in effect around the time of the Founding. See *supra* text accompanying notes 37–40.

⁹¹ See, e.g., *Ex parte Lange*, 85 U.S. (18 Wall.) at 168–73.

comes from the phrase "same offence." Under a literal approach, "same" should mean same—the Double Jeopardy Clause should apply to only identical offenses.⁹² But neither history nor practice support that view. The restriction was not historically limited to identical offenses, as is clear from Blackstone's claim that double jeopardy barred prosecutions for both manslaughter and murder.⁹³ Nor has the Court required strict identity of offenses. Instead, it has employed a number of tests, ranging from whether the elements of the offenses overlap, to whether the offenses involved the same conduct, to determine whether two offenses are the same.⁹⁴

Since the Fifth Amendment's adoption, the imposition of punishment has greatly changed. The amount of punishment a defendant receives is no longer determined solely by the offense of conviction. Judicial discretion within a sentencing range or sentencing guidelines permits different defendants to receive different sentences even if they have been convicted of the same crime.⁹⁵ And the proliferation of statutes increasing criminal penalties for defendants with prior convictions significantly postdates the Founding. In fact, such provisions do not appear to have become common until the late nineteenth and early twentieth centuries.⁹⁶ The mere fact that punishment and trials are no longer inextricably linked does not mean that the Double Jeopardy Clause ought not be interpreted in a fashion that accounts for

⁹² See Amar, *supra* note 28, at 1814–18.

⁹³ 4 BLACKSTONE, *supra* note 22, at *330.

⁹⁴ See, e.g., *Dep't of Revenue of Mont. v. Kurth Ranch*, 511 U.S. 767, 776–77 (1994); *United States v. Dixon*, 509 U.S. 688, 696–97 (1993); *Grady v. Corbin*, 495 U.S. 508, 510 (1990); *Blockburger v. United States*, 284 U.S. 299, 304 (1932); *In re Nielsen*, 131 U.S. 176, 188 (1889). This departure from text is not unique to the Double Jeopardy Clause. Constitutional controversies often arise because the text of the Constitution is inconclusive. In interpreting the text, courts frequently resort to the reasons underlying the constitutional provision. And often those reasons embodied in the text prompt the courts to extend the constitutional protection beyond its text. Consider the Fourth Amendment. Courts do not limit its protection to "persons, houses, papers, and effects." U.S. CONST. amend. IV. Rather, they extend it to anything in which a person has a reasonable expectation of privacy. See *Tashjian v. Republican Party of Conn.*, 479 U.S. 208, 215 n.5 (1986); see also *infra* text accompanying notes 98–100. More importantly, courts have extended constitutional protection to nontextual unenumerated rights when those rights are implicit within enumerated rights. For example, the Supreme Court has held that the First Amendment's protections on speech and religion implicitly create a broader right to associate with others to engage in those activities. *Roberts v. U.S. Jaycees*, 468 U.S. 609, 622 (1984) ("An individual's freedom to speak, to worship, and to petition the government for the redress of grievances could not be vigorously protected from interference by the State unless a correlative freedom to engage in group effort toward those ends were not also guaranteed. . . . Consequently, we have long understood as implicit in the right to engage in activities protected by the First Amendment a corresponding right to associate with others in pursuit of a wide variety of political, social, economic, educational, religious, and cultural ends."). According to courts, the right to freedom of speech would be too weak without the ability to associate with others to exercise that right.

⁹⁵ See Hessick & Hessick, *supra* note 8, at 52–53.

⁹⁶ See *supra* note 42 and accompanying text.

these changes in the criminal justice system. Rather, the Clause ought to be interpreted in a fashion that continues to protect defendants against the imposition of multiple punishments in light of these changes.

Courts regularly adopt greater flexibility in interpreting constitutional provisions when the circumstances surrounding those provisions have changed.⁹⁷ Consider, for example, the Fourth Amendment, which protects the “right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures.”⁹⁸ As technology has advanced, police are now able to conduct investigations through such means as thermal imaging and electronic eavesdropping that infringe upon personal privacy without conducting physical searches of “persons, houses, papers, [or] effects.”⁹⁹ These technological advances have forced courts to restructure the right, analyzing the question of Fourth Amendment protection in terms of the underlying right of privacy.¹⁰⁰ In other words, the Court identified the overarching interest protected by the specific language in the Amendment and has interpreted it as prohibiting state actions that impermissibly infringe upon that interest, even when those actions do not seem to implicate the specific examples in the constitutional text. Because both the logic and the history of the Double Jeopardy Clause suggest that it was intended to protect not

⁹⁷ See, e.g., *Graham v. Florida*, 130 S. Ct. 2011, 2021–22 (2010) (interpreting the Eighth Amendment based on current societal notions of what constitutes appropriate punishment); *Lawrence v. Texas*, 539 U.S. 558, 575 (2003) (relying on principles underlying the Due Process Clause to bar laws outlawing sodomy); *Tashjian*, 479 U.S. at 226–27 (interpreting Article I, Section 2 of the Constitution according to its underlying principle); *Brown v. Bd. of Educ.*, 347 U.S. 483, 495 (1954) (interpreting Equal Protection Clause to promote the principle of equality). Even originalists have endorsed an approach under which constitutional provisions are interpreted according to their underlying principles. See *Vasan Kesavan & Michael Stokes Paulsen, The Interpretive Force of the Constitution's Secret Drafting History*, 91 GEO. L.J. 1113, 1132 (2003) (advocating that the Constitution be interpreted according to how it “would have been understood by a hypothetical, objective, reasonably well-informed reader of those words and phrases, in context, at the time they were adopted, and within the political and linguistic community in which they were adopted”); see also Jack M. Balkin, *Original Meaning and Constitutional Redemption*, 24 CONST. COMMENT. 427, 432–36 (2007) (advocating a method of interpreting the Constitution according to the principles underlying its provisions).

⁹⁸ U.S. CONST. amend. IV.

⁹⁹ E.g., *Kyllo v. United States*, 533 U.S. 27, 39–30 (2001) (thermal imaging); *Katz v. United States*, 389 U.S. 347, 348 (1967) (electronic eavesdropping).

¹⁰⁰ See *Katz*, 389 U.S. at 361 (Harlan, J., concurring); *Boyd v. United States*, 116 U.S. 616, 630 (1886) (“It is not the breaking of his doors, and the rummaging of his drawers, that constitutes the essence of the offence; but it is the invasion of his indefeasible right of personal security, personal liberty and private property . . .”); see also *Hudson v. Michigan*, 547 U.S. 586, 603 (2006) (“[P]rivacy and security in the home are central to the Fourth Amendment’s guarantees . . .”); *Wilson v. Layne*, 526 U.S. 603, 610 (1999) (noting that the Fourth Amendment “embodies [the] centuries-old principle of respect for the privacy of the home”).

only against multiple prosecutions but also against multiple punishments, modern double jeopardy doctrine ought to expand to accommodate both protections.

B. Recidivism Enhancements Constitute Multiple Punishments

If the Double Jeopardy Clause bars multiple punishments for a single offense, the Double Jeopardy Clause should also prohibit recidivism enhancements at sentencing where the defendant has already been punished for the earlier crime of conviction. Sentencing enhancements are a form of punishment, and an individual who receives a recidivism enhancement based on a prior conviction suffers two punishments for the same offense. The first is the punishment following the first conviction, and the second is the enhancement authorized by the recidivism statute that is triggered by that original conviction. The statutory offense that formed the basis of the first conviction is the basis for both punishments; thus the defendant is receiving multiple punishments for the same offense.¹⁰¹

Courts have provided a variety of justifications for rejecting double jeopardy challenges to sentencing enhancements for prior offenses. One common justification is the assertion that offenders are not being punished for their previous crimes, but rather that the offenders' previously committed offenses render their present offenses "aggravated" and deserving of more punishment.¹⁰² This argument

¹⁰¹ As the Court explained in *Ex parte Lange*.

If there is anything settled in the jurisprudence of England and America, it is that no man can be twice lawfully punished for the same offence. And though there have been nice questions in the application of this rule to cases in which the act charged was such as to come within the definition of more than one statutory offence, or to bring the party within the jurisdiction of more than one court, there has never been any doubt of its entire and complete protection of the party when a second punishment is proposed in the same court, on the same facts, for the same statutory offence.

85 U.S. (18 Wall.) 163, 168 (1873).

¹⁰² *E.g.*, *Monge v. California*, 524 U.S. 721, 728 (1998) ("Nor have sentence enhancements been construed as additional punishment for the previous offense; rather, they act to increase a sentence 'because of the manner in which [the defendant] committed the crime of conviction.'" (alteration in original) (quoting *United States v. Watts*, 519 U.S. 148, 154 (1997) (per curiam))); *Nichols v. United States*, 511 U.S. 738, 747 (1994) ("Enhancement statutes, whether in the nature of criminal history provisions such as those contained in the Sentencing Guidelines, or recidivist statutes that are commonplace in state criminal laws, do not change the penalty imposed for the earlier conviction. As pointed out in the dissenting opinion in *Baldasar*, '[t]his Court consistently has sustained repeat-offender laws as penalizing only the last offense committed by the defendant.'" (alteration in original) (quoting *Baldasar v. Illinois*, 446 U.S. 222, 232 (1980) (Powell, J., dissenting))); *Gryger v. Burke*, 334 U.S. 728, 732 (1948) (stating that a recidivism enhancement "is not to be viewed as either a new jeopardy or additional penalty for the earlier crimes" but as "a stiffened penalty for the latest crime, which is considered to be an aggravated offense because a repetitive one"); *Graham v. West Virginia*, 224 U.S. 616, 623 (1912) ("They are not punished the second time for the earlier offense, but the repetition of

tries to obscure substance behind semantics.¹⁰³ The mere fact that a consideration has been *labeled* an aggravating sentencing factor in no way means that the defendant is not being punished because of that consideration.¹⁰⁴ After all, those defendants without a prior conviction do not face the potential additional punishment.¹⁰⁵ Indeed, in identifying prior convictions as an aggravating sentencing factor, courts have logically conceded the point that the additional punishment is directly attributable to those previous offenses.¹⁰⁶

criminal conduct aggravates their guilt and justifies heavier penalties when they are again convicted.”); *McDonald v. Massachusetts*, 180 U.S. 311, 312 (1901) (“The fundamental mistake of the plaintiff in error is his assumption that the judgment below imposes an additional punishment on crimes for which he had already been convicted and punished in Massachusetts and in New Hampshire. But it does no such thing. . . . The punishment is for the new crime only, but is the heavier if he is an habitual criminal.”); *Baker v. Duckworth*, 752 F.2d 302, 304 (7th Cir. 1985) (“[A] habitual criminal who receives an enhanced sentence pursuant to an habitual offender statute does not receive additional punishment for his previous offenses, or punishment for his recidivist status as such, but rather receives a more severe punishment for his most recent felonious offense.”).

At least two Justices have acknowledged that this analysis is flawed. Justice Scalia (joined by Justice Thomas) has explained that he does not believe that the Double Jeopardy Clause prohibits multiple punishments for the same offense; instead, he believes that the Clause protects only against multiple *prosecutions*. See *Witte v. United States*, 515 U.S. 389, 406–07 (1995) (Scalia, J., concurring in the judgment); *Dep’t of Revenue of Mont. v. Kurth Ranch*, 511 U.S. 767, 804–05 (1994) (Scalia, J., dissenting). Scalia’s conclusion seems to be based at least in part on his perception that the Court cannot interpret the Clause as providing protection against multiple punishments without either prohibiting recidivism enhancements or creating a false distinction between enhancements and punishment. See *Witte*, 515 U.S. at 406–07.

¹⁰³ Commentators have occasionally noted the weakness of this judicial analysis, but they nonetheless conclude that a defendant with prior convictions should receive more punishment. See *Lear*, *supra* note 9, at 726, 747–48 (describing the distinction between punishment and sentencing enhancement as a “convenient yet dangerous fiction,” but nonetheless endorsing the additional punishment for recidivists); Seltzer, *supra* note 8, at 932, 936 (stating that the Court’s analysis “rests substantially on a less-than-clear distinction between ‘punishment’ and sentencing under ‘enhancement regimes,’” and arguing that double jeopardy may pose a constitutional bar to habitual-offender statutes when “a recidivism enhancement is substantial and the triggering conviction is relatively insignificant,” but also conceding that the Court’s punishment versus enhancement analysis “may make sense in ‘ordinary’ cases” and ultimately concluding that, so long as the recidivism penalty is not too large, “recidivism statutes are generally constitutional”); Jason White, Note, *Once, Twice, Four Times a Felon: North Carolina’s Unconstitutional Recidivist Statutes*, 24 *CAMPBELL L. REV.* 115, 122, 130 (2001) (noting the “fictional distinction between actual punishment and enhancement of punishment in order to rationalize the constitutionality of recidivist statutes” but nonetheless concluding that “properly drafted” recidivist laws are “legitimate” and “an essential element of American criminal law”).

¹⁰⁴ Cf. *Kurth Ranch*, 511 U.S. at 777 (1994) (“[T]he legislature’s description of a statute as civil does not foreclose the possibility that it has a punitive character.”).

¹⁰⁵ See Hessick & Hessick, *supra* note 8, at 58–60 (making a similar argument in the context of sentencing enhancements for acquitted conduct).

¹⁰⁶ Perhaps unconvinced by its own reasoning, the Court has at times abandoned the distinction between conceptualizing a recidivism enhancement as punishment for a previously committed offense or as an aggravating factor triggering higher punishment. In *Witte*, for example, the majority opinion notes that the Court’s prior cases discussing recidivism enhancements “make clear that a defendant in that situation is punished, for double

Another justification courts have given is that a sentencing enhancement is not an "offense"; it is simply an aggravating factor to be considered in the imposition of sentence for the offense of conviction.¹⁰⁷ This may be true. But the relevant question is not whether the recidivism enhancement is an offense; instead, it is whether the enhancement constitutes a second punishment for an offense for which the defendant was already punished. It certainly meets that definition, since the enhancement depends on the earlier conviction.

A third reason courts have given to justify sentencing enhancements for prior convictions is that the Double Jeopardy Clause does not apply at sentencing.¹⁰⁸ This reasoning is but one example of a more general phenomenon of courts refusing to enforce constitutional rights at sentencing.¹⁰⁹ As we have explained elsewhere, "judges routinely make sentencing decisions based on considerations that could not constitutionally be considered in the decision whether to punish an individual in the first place."¹¹⁰

The reason most commonly given in support of permitting judges to consider constitutionally suspect sentencing factors is the need to maximize the information available at sentencing. In rejecting constitutional challenges to sentencing factors, courts often invoke a "long-standing principle that sentencing courts have broad discretion to

jeopardy purposes, only for the offense of which the defendant is convicted." 515 U.S. at 397; see also *id.* at 403–04 ("We hold that, where the legislature has authorized such a particular punishment range for a given crime, the resulting sentence within that range constitutes punishment only for the offense of conviction for purposes of the double jeopardy inquiry."). This statement seems to acknowledge that the Court has adopted a specialized definition of punishment "for double jeopardy purposes"—in other words, that it has redefined the term "punishment" in order to circumvent the Double Jeopardy Clause.

¹⁰⁷ *Monge*, 524 U.S. at 728; *Gryger*, 334 U.S. at 732; *Baker*, 752 F.2d at 304; *Davis v. Bennett*, 400 F.2d 279, 281–82 (8th Cir. 1968).

¹⁰⁸ See *Monge*, 524 U.S. at 728 ("Historically, we have found double jeopardy protections inapplicable to sentencing proceedings . . ."); *Nichols v. United States*, 511 U.S. 738, 747 (1994) ("Reliance on [a prior] conviction is also consistent with the traditional understanding of the sentencing process, which we have often recognized as less exacting than the process of establishing guilt."); see also Elizabeth T. Lear, *Is Conviction Irrelevant?*, 40 UCLA L. REV. 1179, 1219–20 (1993) ("[T]he Double Jeopardy Clause does not apply at sentencing . . .").

¹⁰⁹ See Hessick & Hessick, *supra* note 8, at 66 n.94–95, 68 n.106, 85 n.198 (collecting sources). Notably, the Supreme Court recently observed that "sentencing courts' discretion . . . is subject to constitutional constraints," citing a Second Circuit case that forbade the consideration of a defendant's race or nationality at sentencing. *Pepper v. United States*, 131 S. Ct. 1229, 1240 n.8 (2011) (citing *United States v. Leung*, 40 F.3d 577, 586 (2d Cir. 1994)). But while courts have uniformly rejected race as a relevant sentencing factor, Carissa Byrne Hessick, *Race and Gender as Explicit Sentencing Factors*, 14 J. GENDER RACE & JUST. 127, 132 (2010); Hessick & Hessick, *supra* note 8, at 55, they continue to permit consideration at sentencing of a number of factors that appear to infringe upon constitutional rights, Hessick & Hessick, *supra* note 8, at 56–73.

¹¹⁰ Hessick & Hessick, *supra* note 8, at 49.

consider various kinds of information,” including information that might be constitutionally protected.¹¹¹

This information-maximization argument derives from the Supreme Court’s decision in *Williams v. New York*.¹¹² Williams had been sentenced to death by a state court judge based not only on his crime of conviction, but also on the judge’s assessment of Williams’ “past life, health, habits, conduct, and mental and moral propensities.”¹¹³ New York law allowed judges to gather this information through affidavits and reports to which the defendant had no access. Williams challenged his sentence, arguing that the consideration of these materials violated his right to confrontation under the Sixth Amendment.¹¹⁴ The Supreme Court rejected the challenge, explaining that courts can fashion adequately individualized sentences only by knowing facts related to the defendant and that forbidding courts from relying on sources of information not subject to cross examination would unduly hamper the courts’ ability to gather that information.¹¹⁵ Although raised in the context of the procedural right of confrontation, courts have applied the argument in *Williams* to challenges regarding the type of information a judge may consider at sentencing. Those courts have concluded that judges must be able to consider all information, including information that might be constitutionally protected.¹¹⁶

¹¹¹ *United States v. Watts*, 519 U.S. 148, 151 (1997) (per curiam); see also *Payne v. Tennessee*, 501 U.S. 808, 820–21 (1991) (“[T]he sentencing authority has always been free to consider a wide range of relevant material.”); *United States v. Tucker*, 404 U.S. 443, 446 (1972) (“[I]n determining what sentence to impose . . . a judge may appropriately conduct an inquiry broad in scope, largely unlimited either as to the kind of information he may consider, or the source from which it may come.”); *Cross v. United States*, 354 F.2d 512, 515 (D.C. Cir. 1965) (“[S]entencing judges do, and are entitled to, take into account a wide range of facts and impressions gleaned from a variety of sources.”); *United States v. Magliano*, 336 F.2d 817, 822 (4th Cir. 1964) (“The District Court has been given a wide latitude in the receipt and use of information as an aid to the sentencing process After conviction, everything of possible pertinency may be considered”).

¹¹² 337 U.S. 241 (1949).

¹¹³ *Id.* at 244–45.

¹¹⁴ *Id.* at 245.

¹¹⁵ *Id.* at 248–50. The Court justified the need for comprehensive information about a defendant on the ground that the information was necessary for courts to make intelligent assessments about the defendant’s prospects of rehabilitation. See *id.* at 247–48.

¹¹⁶ See, e.g., *Watts*, 519 U.S. at 151–52 (relying on *Williams* in holding that courts may increase sentences based on acquitted conduct); *State v. Carico*, 968 S.W.2d 280, 287 (Tenn. 1998) (relying on *Williams* in holding that a sentence could be enhanced based on uncharged conduct without violating the Sixth or Fourteenth Amendments).

Williams does not provide a firm foundation for the information-maximization argument.¹¹⁷ *Williams* itself is no longer good law.¹¹⁸ And as more recent decisions such as *Apprendi v. New Jersey*¹¹⁹ recognize, *Williams* is based on a factually inaccurate premise that at the Founding, judges had broad discretion to consider facts at sentencing. Instead, at the Founding, judges had virtually no discretion at sentencing but were obliged to impose sentences based solely on the offense of conviction.¹²⁰

¹¹⁷ Justice Stevens has relied on a slightly different rationale in rejecting double jeopardy challenges to recidivism enhancements—that a defendant’s prior crimes are a permissible sentencing consideration because they provide the sentencing court with important information about the defendant’s character. See *Witte v. United States*, 515 U.S. 389, 409–10 (1995) (Stevens, J., concurring in part and dissenting in part). According to Justice Stevens, a sentence is “determined in part by the character of the offense and in part by the character of the offender,” and those character determinations do not implicate the Double Jeopardy Clause. *Id.* But, Justice Stevens warns, the Double Jeopardy Clause prohibits enhancements based on “the offense as aggravation of the underlying offense,” because in that situation, “the defendant is being punished for having committed the offense at issue, and not for what the commission of that offense reveals about his character.” In such cases, the “defendant has been ‘put in jeopardy’ of punishment for the offense because he has in fact been punished for that offense.” *Id.* at 410.

Justice Stevens is not alone in attempting to distinguish between punishing recidivists based on their character and punishing them based on their actions. A number of retributivists have argued that recidivism enhancements are justified under a theory of punishment based on choice, as opposed to merely punishment based on character. See, e.g., Andrew von Hirsch, *Desert and Previous Convictions in Sentencing*, 65 MINN. L. REV. 591, 605, 619 (1981). But neither Justice Stevens nor the retributivists seem to be able to sustain the distinction. See *Witte*, 515 U.S. at 402–03 (critiquing Justice Stevens’ analysis); Hessick, *supra* note 58, at 1143–46 (critiquing von Hirsch). In any event, whether a defendant is subject to additional punishment because her previous crimes provide information about her character or whether they simply provide information about her past misdeeds, the fact remains that the information being considered are the crimes themselves. The defendant is being punished multiple times for committing one crime; double jeopardy prohibits the imposition of multiple punishments for the same offense, regardless of whether the government has some alternative explanation for why it is punishing an individual a second time. See Hessick & Hessick, *supra* note 8, at 85 (“The Constitution’s limitations restrict the government regardless of its ultimate aim.”).

¹¹⁸ *Williams* was overruled in the death penalty context by *Gardner v. Florida*, 430 U.S. 349, 362 (1977) and superseded by Federal Rule of Criminal Procedure 32(e) in the non-death penalty context.

¹¹⁹ 530 U.S. 466 (2000).

¹²⁰ *Id.* at 478–81. While *Apprendi* and its progeny seem to reject the historical account in *Williams* of sentencing practices at the Founding, a recent Supreme Court decision regarding district court discretion under the post-*Booker* advisory Federal Sentencing Guidelines quoted language from the *Williams* opinion that emphasized:

both before and since the American colonies became a nation, courts in this country and in England practiced a policy under which a sentencing judge could exercise a wide discretion in the sources and types of evidence used to assist him in determining the kind and extent of punishment to be imposed within limits fixed by law.

Pepper v. United States, 131 S. Ct. 1229, 1240 (2011) (quoting *Williams*, 337 U.S. at 246).

The recent opinion did not discuss any of the historical precedent cited in *Apprendi*, but instead relied on *Williams* and other pre-*Apprendi* cases for the proposition that “It has been uniform and constant in the federal judicial tradition for the sentencing judge to

More important, allowing the goal of individualized sentencing to trump constitutional rights turns constitutional law on its head. It is a basic principle of constitutional law that the government cannot ignore the Constitution simply because it impedes the government from accomplishing some goal. Thus, the general need for information about a defendant to impose an individualized sentence does not justify the refusal to recognize double jeopardy rights at sentencing. Indeed, courts themselves have recognized that information maximization does not trump all constitutional rights, holding that the Constitution forbids certain considerations—such as race, ethnicity, and gender—from influencing a sentence.¹²¹

Finally, the refusal to recognize double jeopardy's application at sentencing allows the government to circumvent not only the restrictions on multiple punishments but also the restriction on multiple prosecutions. For example, because double jeopardy is held not to apply at sentencing, courts have permitted prosecutors to seek increased sentences based on criminal conduct for which a defendant has been acquitted.¹²² Refusing to recognize double jeopardy at sentencing provides a means for the government to seek punishment for a defendant's alleged offense without formally relitigating the defendant's guilt or innocence. It also permits the government to seek additional punishment at trial for a crime that the defendant has not yet been charged with,¹²³ and then permits the government to bring such charges and obtain a formal conviction and a second punishment at a later date.¹²⁴ The consequence of failing to recognize the applicability of the Double Jeopardy Clause at sentencing is not simply that the

consider every convicted person as an individual and every case as a unique study in the human failings that sometimes mitigate, sometimes magnify, the crime and the punishment to ensue." *Pepper*, 131 S. Ct. at 1239–40 (quoting *Koon v. United States*, 518 U.S. 81, 113 (1996)). We have not conducted our own independent historical research to determine which of the Court's accounts of sentencing practices at the Founding is accurate.

¹²¹ See *Hessick & Hessick*, *supra* note 8, at 54–56 (collecting sources); see also *Pepper*, 131 S. Ct. at 1240 n.8 (noting that "sentencing courts' discretion . . . is subject to constitutional constraints").

¹²² See *Lear*, *supra* note 108, at 1181–82. A number of jurisdictions permit the consideration at sentencing of criminal conduct for which a jury entered an acquittal. See, e.g., *United States v. Watts*, 519 U.S. 148, 156–57 (1997) (per curiam); *People v. Dunlap*, No. 217123, 2001 WL 776752, at *3 (Mich. Ct. App. Jan. 16, 2001) (per curiam); *State v. Clark*, 197 S.W.3d 598, 602 (Mo. 2006) (en banc); *State v. Winfield*, 23 S.W.3d 279, 282–83 (Tenn. 2000). In those jurisdictions, when a defendant is found not guilty of the charged crime, if the jury convicted on any charge, the judge is permitted to increase the defendant's sentence based on the crimes for which she was acquitted.

¹²³ See *Lear*, *supra* note 108, at 1182–83. Sentencing increases based on uncharged conduct or arrests that did not result in conviction are common. See, e.g., *Williams*, 337 U.S. at 244; *State v. Green*, 303 A.2d 312, 320–23, 325 (N.J. 1973); *State v. Carico*, 968 S.W.2d 280, 287–88 (Tenn. 1998).

¹²⁴ See *Witte v. United States*, 515 U.S. 389, 412 (1995) (Stevens, J., concurring in part and dissenting in part).

government may avoid the restriction on double jeopardy during that particular proceeding; it allows the government to seek punishment in a way that provides overall fewer procedural protections to the defendant.¹²⁵

III

CONSTITUTIONAL LIMITS ON PUNISHMENT

What should be clear at this point is that the Double Jeopardy Clause ought to be interpreted to place meaningful limits on multiple punishments. Doing so is consistent with the logic and history of the Clause. A further reason to read the Clause as significantly limiting multiple punishments is that current double jeopardy doctrine is inconsistent with the Supreme Court's decisions regarding the Eighth Amendment's limit on cruel and unusual punishment.¹²⁶

As with the Double Jeopardy Clause, the Court has consistently rejected Eighth Amendment challenges to enhanced sentences for recidivists.¹²⁷ But the Court has done so on grounds that directly conflict with the reasoning underlying the Court's rejection of Double Jeopardy challenges to those same enhancements. That the Court has

¹²⁵ For example, courts have routinely rejected challenges to increasing punishment for acquitted conduct, *see* Hessick & Hessick, *supra* note 8, at 58, sometimes explicitly relying on the idea that the imposition of punishment need not satisfy the procedural requirements of a trial. *See, e.g., Watts*, 519 U.S. at 155–57 (“The Court of Appeals failed to appreciate the significance of the different standards of proof that govern at trial and sentencing. We have explained that ‘acquittal on criminal charges does not prove that the defendant is innocent; it merely proves the existence of a reasonable doubt as to his guilt.’” (quoting *United States v. One Assortment of 89 Firearms*, 465 U.S. 354, 361 (1984))); *United States v. Milton*, 27 F.3d 203, 208–09 (6th Cir. 1994) (“This circuit clearly allows district courts to consider acquitted conduct at sentencing. . . . under the theory that a determination of guilt requires proof beyond a reasonable doubt while sentencing considerations only require proof by a preponderance of the evidence.” (citations omitted)).

¹²⁶ “Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.” U.S. CONST. amend. VIII.

¹²⁷ *See, e.g., Ewing v. California*, 538 U.S. 11, 30–31 (2003); *Lockyer v. Andrade*, 538 U.S. 63, 77 (2003); *Rummel v. Estelle*, 445 U.S. 263, 284–85 (1980). The Court's repeated failure to find that harsh noncapital sentences run afoul of the Eighth Amendment has led some commentators to despair over whether the Eighth Amendment continues to operate as anything more than a rhetorical limit on legislative power. *See, e.g., Rachel E. Barkow, The Court of Life and Death: The Two Tracks of Constitutional Sentencing Law and the Case for Uniformity*, 107 MICH. L. REV. 1145, 1156 (2009) (“[T]he Court has been steadfast in its refusal to police disproportionate sentences outside the capital context.”); Youngjae Lee, *The Constitutional Right Against Excessive Punishment*, 91 VA. L. REV. 677, 695 (2005) (arguing that the Court's decision in *Ewing* “all but defines the right against excessive punishment out of existence”); Carol S. Steiker & Jordan M. Steiker, *Opening a Window or Building a Wall? The Effect of Eighth Amendment Death Penalty Law and Advocacy on Criminal Justice More Broadly*, 11 U. PA. J. CONST. L. 155, 184 (2008) (“[T]he Court's non-capital proportionality doctrine [has] bec[o]me more limited in its scope of relevant considerations and so deferential to state interests as to make Eighth Amendment challenges to excessive incarceration essentially non-starters.”).

resorted to these inconsistencies suggests that its rejection of challenges to multiple punishments lacks a foundation.

This Part explores the intersection of double jeopardy and Eighth Amendment doctrine. It begins by identifying the conflict between the Double Jeopardy Clause and the Eighth Amendment in the context of recidivism enhancements. It then explains that, given the current inability of Eighth Amendment proportionality review to assess recidivism enhancements and other punishment practices that are predicated on utilitarian crime-control concerns, the Double Jeopardy Clause appears to be the best vehicle for placing constitutional limits on punishment aimed at recidivism. This Part concludes by sketching a framework that would permit legislatures to enact legislation aimed at recidivism while, at the same time, ensuring that the Double Jeopardy Clause's prohibition on multiple punishments provides some constitutional limit on recidivism enhancements.

A. Inconsistency Between Double Jeopardy and the Eighth Amendment

As currently interpreted, the Double Jeopardy Clause does not bar legislatures from prescribing multiple punishments,¹²⁸ including punishments aimed specifically at recidivists. In so concluding, the Supreme Court has explained that a sentencing enhancement for a prior conviction is not a second punishment for the prior offense. Instead, it is a punishment only for the instant crime of conviction. As the Court has put it, the enhancement reflects “the manner in which [the defendant] committed the crime of conviction.”¹²⁹

The Double Jeopardy Clause is not the only constitutional provision under which defendants have challenged recidivism enhancements. They have also invoked the Eighth Amendment's prohibition on cruel and unusual punishment.¹³⁰ According to the Court, a punishment violates the Eighth Amendment if it is disproportionate to the defendant's crime. The three factors used to determine whether a sentence is so disproportionate that it violates the Eighth Amendment are: “(i) the gravity of the offense and the harshness of the penalty; (ii) the sentences imposed on other criminals in the same jurisdiction; and (iii) the sentences imposed for commission of the same crime in other jurisdictions.”¹³¹ The Court does not require “strict proportion-

¹²⁸ See *supra* notes 48–57 and accompanying text.

¹²⁹ *Monge v. California*, 524 U.S. 721, 728 (1998) (alteration in original) (quoting *Watts*, 519 U.S. at 154); see also *Witte*, 515 U.S. at 398 (noting that in determining the proper sentence a judge is entitled to consider the circumstances of the crime at issue, including a separate crime of which the defendant was convicted).

¹³⁰ See *supra* note 127 and accompanying text.

¹³¹ *Solem v. Helm*, 463 U.S. 277, 292 (1983). The *Ewing* Court seems to have endorsed the continuing validity of these factors. See *Ewing*, 538 U.S. at 22. But see *Barkow, supra*

ality between crime and sentence. Rather, it forbids only extreme sentences that are 'grossly disproportionate' to the crime."¹³²

As with the Double Jeopardy Clause, the Court has nearly always rejected Eighth Amendment challenges claiming that lengthy sentences for recidivists are disproportionate.¹³³ In doing so, the Court has adopted reasoning that directly conflicts with the reasoning in its double jeopardy decisions. When addressing Eighth Amendment challenges, the Court has explained that the increased sentence is not solely attributable to the latest offense of conviction, but is based in part on the defendant's prior convictions. *Ewing v. California*¹³⁴ provides an example. That case involved a challenge to California's Three Strikes Law, which prescribes a life sentence for a defendant convicted of her third serious felony.¹³⁵ Ewing was convicted of stealing three golf clubs.¹³⁶ Although theft ordinarily carries a penalty of no more than three years, Ewing was sentenced to life imprisonment because the theft was his third serious felony.¹³⁷ Ewing argued that the sentence of life imprisonment was a disproportionately harsh punishment for stealing golf clubs, and thus violated the Eighth Amendment. The Court rejected this argument, commenting that Ewing had "incorrectly frame[d] the issue."¹³⁸ The Court explained that the proportionality of Ewing's sentence depended not only on the seriousness of his "triggering offense"—stealing the golf clubs—but also on his previous convictions.¹³⁹

By considering not only the crime underlying the present conviction but also the previous convictions, the Court's proportionality

note 127, at 1157 n.61 (suggesting that Justice Kennedy's concurrence from *Harmelin v. Michigan*, 501 U.S. 957 (1991), has displaced the three-part test from *Solem*); Lee, *supra* note 127, at 693–94 (arguing Justice Kennedy's *Harmelin* concurrence made the second and third steps of the *Solem* inquiry discretionary).

¹³² *Harmelin*, 501 U.S. at 1001 (Kennedy, J., concurring).

¹³³ "There has been only a single case in the Court's history in which a term of incarceration, standing alone, was held to be disproportionate to an otherwise validly defined crime." Barkow, *supra* note 127, at 1160 (referring to *Solem*, 463 U.S. at 303, in which the Court rejected as unconstitutional a mandatory life sentence without the possibility of parole for a defendant who had six prior nonviolent felonies and who wrote a "no-account" check for \$100).

¹³⁴ 538 U.S. 11, 30–31 (2003).

¹³⁵ *Id.* at 16.

¹³⁶ *Id.* at 18–19.

¹³⁷ *Id.* at 20.

¹³⁸ *Id.* at 28.

¹³⁹ *Id.* ("The gravity of his offense was not merely 'shoplifting three golf clubs.' Rather, Ewing was convicted of felony grand theft for stealing nearly \$1,200 worth of merchandise after previously having been convicted of at least two 'violent' or 'serious' felonies."); see also *Rummel v. Estelle*, 445 U.S. 263, 276 (1980) (holding that "[i]n this case, however, we need not decide whether Texas could impose a life sentence upon Rummel merely for obtaining \$120.75 by false pretenses," because "at the time that he obtained the \$120.75 by false pretenses, he already had committed and had been imprisoned for two other felonies").

analysis is inconsistent with its statements in the double jeopardy context that recidivist penalties do not punish offenders for their previous crimes.¹⁴⁰ These inconsistent approaches to recidivism statutes result in virtually no constitutional limit on the punishments that may be assessed against recidivists. They establish a heads-I-win-tails-you-lose situation for the government. Instead of protecting an individual's right against multiple or excessive punishments, the conflicting doctrines maximize the ability of the government to punish individuals.

Given the inconsistencies in the theories underlying the Court's Eighth Amendment and double jeopardy decisions, one of those lines of decisions must be incorrect. Either recidivism enhancements do punish for past offenses and consequently should be barred by the Double Jeopardy Clause, or they do not and consequently should receive more stringent review under the Eighth Amendment.

B. Implementing Double Jeopardy as a Limit on Punishment

It is, of course, possible to restore constitutional limits on punishment by more rigorously policing incarceration sentences under the Eighth Amendment. Many commentators have suggested such an approach.¹⁴¹ And the Supreme Court's recent decision in *Graham v. Florida*,¹⁴² which held that the Eighth Amendment prohibits a sentence of life without parole for juveniles convicted of nonhomicide crimes, may signal that the Court will be amenable to more robustly enforcing the Eighth Amendment in future non-death penalty cases.¹⁴³

But double jeopardy's prohibition on multiple punishments plays a different role from the Eighth Amendment's limit on excessive punishments. The Eighth Amendment does not categorically forbid recidivism enhancements. Rather, it precludes only those sentences that constitute excessive punishment. The Double Jeopardy Clause, by contrast, places a limit on all multiple punishments.¹⁴⁴ Accordingly, merely altering the Eighth Amendment doctrine to account for recidivism enhancements would not necessarily result in constitutional review of all multiple punishments.

¹⁴⁰ See *supra* notes 102 & 129 and accompanying text.

¹⁴¹ E.g., Richard S. Frase, *Excessive Prison Sentences, Punishment Goals, and the Eighth Amendment: "Proportionality" Relative to What?*, 89 MINN. L. REV. 571, 634–35 (2005); King, *supra* note 83, at 125–26; Klein, *supra* note 81, at 1006; Poulin, *supra* note 9, at 598–99; Thomas, *supra* note 25, at 838; Westen & Drubel, *supra* note 77, at 114.

¹⁴² 130 S. Ct. 2011 (2010).

¹⁴³ See *id.* at 2033–34. The Court's Eighth Amendment review in capital cases has been far more searching than in noncapital cases. See Barkow, *supra* note 127, at 1155–62.

¹⁴⁴ A single act may violate multiple constitutional provisions. For instance, prohibiting an individual from expressing political opinions because of her race violates both the First Amendment and the Equal Protection Clause.

Moreover, extending the Eighth Amendment to limit recidivism enhancements would require substantial reworking of Eighth Amendment doctrine. The Court's Eighth Amendment proportionality test appears to be incapable of evaluating punishments aimed specifically at recidivists. Proportionality is a retributive concept.¹⁴⁵ It measures punishment based on the defendant's culpability and the harm caused by her acts.¹⁴⁶ But recidivism enhancements are not generally justified in retributive terms.¹⁴⁷ Instead, the primary justification for increased punishment aimed at recidivism is the utilitarian argument that they reduce future crimes by repeat offenders through deterrence or incapacitation.¹⁴⁸

To be sure, the Supreme Court has stated that its Eighth Amendment proportionality review also takes account of "the State's public-safety interest in incapacitating and deterring recidivist felons."¹⁴⁹ But as others have noted, including deterrence and incapacitation as considerations renders proportionality review nonsensical.¹⁵⁰ Whether a

¹⁴⁵ *Ewing*, 538 U.S. at 31 (Scalia, J., concurring in the judgment) ("Proportionality—the notion that the punishment should fit the crime—is inherently a concept tied to the penological goal of retribution."); see also Lee, *supra* note 127, at 734 ("Some may argue that the *Ewing* Court remained within the proportionality framework and merely applied an extremely deferential version of the proportionality test, but given the emphasis the Court placed on California's deterrence and incapacitation rationales in virtually every paragraph of the opinion, it is impossible to read the opinion in that way.")

¹⁴⁶ GEORGE P. FLETCHER, *RETHINKING CRIMINAL LAW* 461 (1978); Andrew Ashworth, *Desert*, in *PRINCIPLED SENTENCING* 181, 182 (Andrew von Hirsch & Andrew Ashworth eds., 1992).

¹⁴⁷ *But see* U.S. SENTENCING COMM'N, *SUPPLEMENTARY REPORT ON THE INITIAL SENTENCING GUIDELINES AND POLICY STATEMENTS* 41 (1987), available at http://www.fd.org/pdf_lib/Supplementary%20Report.pdf ("From a just punishment perspective, a defendant with a criminal history is deemed more culpable and deserving of greater punishment than a first offender."); Lee, *supra* note 8, at 621 (articulating a retributive justification for recidivism enhancements); von Hirsch, *supra* note 117, at 593 (same).

¹⁴⁸ See, e.g., U.S. SENTENCING COMM'N, *supra* note 147, at 41 ("Enhancing a defendant's sentence on the basis of a criminal history furthers the crime control goals of general and specific deterrence, and incapacitation."); Paul H. Robinson, *Punishing Dangerousness: Cloaking Preventive Detention as Criminal Justice*, 114 *HARV. L. REV.* 1429, 1435–38 (2001) (explaining why current recidivism enhancement regimes are explainable only under a utilitarian rationale); Turner et al., *supra* note 42, at 16 (identifying the policy behind three strikes legislation across the country as incapacitation); Michael Vitiello, *California's Three Strikes and We're Out: Was Judicial Activism California's Best Hope?*, 37 *U.C. DAVIS L. REV.* 1025, 1071–72 (2004) (noting that recidivist statutes are utilitarian rather than retributivist).

¹⁴⁹ *Ewing*, 538 U.S. at 29; see also *Rummel v. Estelle*, 445 U.S. 263, 276 (1980) ("[T]he interest of the State of Texas here is not simply that of making criminal the unlawful acquisition of another person's property; it is in addition the interest, expressed in all recidivist statutes, in dealing in a harsher manner with those who by repeated criminal acts have shown that they are simply incapable of conforming to the norms of society as established by its criminal law.")

¹⁵⁰ *Ewing*, 538 U.S. at 31–32 (Scalia, J., concurring in the judgment) ("[I]t becomes difficult even to speak intelligently of 'proportionality,' once deterrence and rehabilitation are given significant weight []—not to mention giving weight to the purpose of California's Three Strikes Law: incapacitation." (citation omitted) (quoting *Harmelin v. Michi-*

defendant would abstain from committing another crime because he is incapacitated or deterred is irrelevant to whether the punishment is proportionate to the crime. That is not to say that one cannot articulate a theory of excessive punishment under utilitarian punishment theories of deterrence, incapacitation, and rehabilitation.¹⁵¹ But such a theory would not be based on proportionality. Thus, before the Eighth Amendment could impose any real limits on recidivism enhancements, the Court would have to rework its Eighth Amendment doctrine to determine whether and how to incorporate these utilitarian concerns.¹⁵²

gan, 501 U.S. 957, 989 (1991)); see also Lee, *supra* note 127, at 732 (noting that the *Harmelin* Court “starts out with a statement that grossly disproportionate sentences are unconstitutional but ends with a non sequitur that what really matters is whether ‘the law . . . has [any] chance of success’ for deterrence purposes” (omission and alteration in original) (quoting *Harmelin*, 501 U.S. at 1008)).

¹⁵¹ See Lee, *supra* note 127, at 738–39. At least one commentator has argued that “a requirement of proportionality is consistent with the penological goals of deterrence, incapacitation, and rehabilitation.” Ian P. Farrell, *Gilbert & Sullivan and Scalia: Philosophy, Proportionality, and the Eighth Amendment*, 55 VILL. L. REV. 321, 323 (2010). By their own terms, utilitarian theories of punishment place limits on excessive punishment—“[p]unishment is justified only to the extent that the positive consequences outweigh the negative.” *Id.* at 343. But the mere fact that utilitarian punishment theories place limits on punishment does not mean that those punishments incorporate a proportionality principle—at least not the sort of proportionality contemplated in the Court’s Eighth Amendment cases. A utilitarian cost–benefit analysis may result in punishment decisions that do not coincide with the gravity of an offender’s crime. See Lee, *supra* note 127, at 739 (“[G]iven two crimes of differing seriousness, *A* and *B*, there is no requirement within the utilitarian framework that whichever is the more serious crime will be punished more harshly. If *A* causes the harm of one hundred units and *B* causes the harm of two hundred units, the utilitarian theory would favor punishing *B* more harshly than *A* sometimes, but not other times; it depends as much on the probability of conviction as on the seriousness of the crimes.”). The Court’s Eighth Amendment cases clearly contemplate a proportionality analysis based on the gravity of an offender’s crime. See, e.g., *Ewing*, 538 U.S. at 28 (“We first address the gravity of the offense compared to the harshness of the penalty.”); *Solem*, 463 U.S. at 290 (“[W]e hold as a matter of principle that a criminal sentence must be proportionate to the crime for which the defendant has been convicted.”).

¹⁵² At present, the Court does not seem to have incorporated these utilitarian concerns into its review of sentences; rather, it has simply deferred to the states’ selection between multiple theories of punishment. For example, the Court in *Ewing* stated:

A sentence can have a variety of justifications, such as incapacitation, deterrence, retribution, or rehabilitation. Some or all of these justifications may play a role in a State’s sentencing scheme. Selecting the sentencing rationales is generally a policy choice to be made by state legislatures, not federal courts. . . . We do not sit as a ‘superlegislature’ to second-guess these policy choices. It is enough that the State of California has a reasonable basis for believing that dramatically enhanced sentences for habitual felons ‘advance[s] [sic] the goals of [its] criminal justice system in any substantial way.’

538 U.S. 25, 29 (alterations in original) (citation omitted) (quoting *Solem v. Helm*, 463 U.S. at 297 n.22). As Youngjae Lee has noted, this analysis in *Ewing* is problematic because it “dictates that the analysis come to an end if a legitimate purpose of punishment is advanced, period. In other words, [this analysis] essentially dissolves the constraint part of the goal-constraint framework that characterizes much of the Eighth Amendment jurisprudence.” See Lee, *supra* note 127, at 737.

What is more, even if the Court excluded these utilitarian concerns and conducted its proportionality test based solely on retributivism, it is unclear how the Court would engage in proportionality review of recidivism enhancements.¹⁵³ Those retributivists who support longer sentences for recidivists do so on the theory that a repeat offender is more culpable than a first-time offender.¹⁵⁴ But while making a comparative culpability assessment of recidivists and first-time offenders may be possible, quantifying that difference in culpability and translating the difference into an amount of punishment are difficult to do.¹⁵⁵ A prior conviction does not suggest a set amount of additional culpability for his second crime; culpability depends on the circumstances of that crime.¹⁵⁶

Nor is reworking the proportionality standard all that would be necessary to create an Eighth Amendment doctrine that could serve as a constitutional limit on punishment for recidivists. Current doctrine does not appear to provide for any meaningful judicial review of punishments. The Court has said that a punishment comports with the Eighth Amendment so long as the government “has a reasonable basis for believing” that the sentence will “advance[] the goals of [its] crim-

¹⁵³ Notably, in *Ewing* “[n]o one argue[d] for Ewing’s inclusion within the ambit of the three strikes statute on grounds of ‘retribution.’” 538 U.S. at 51–52 (Breyer, J., dissenting).

¹⁵⁴ For academic accounts of how a theory of retributivism supports higher sentences for recidivists than for first-time offenders, see Lee, *supra* note 8, at 586–89; von Hirsch, *supra* note 117, at 597–604. For its part, the Supreme Court has stated that “the repetition of criminal conduct aggravates their guilt and justifies heavier penalties when they are again convicted.” *Graham v. West Virginia*, 224 U.S. 616, 623 (1912). Many retributivists have disputed that retribution supports recidivism enhancements. See, e.g., FLETCHER, *supra* note 146, at 460–66; RICHARD G. SINGER, JUST DESERTS: SENTENCING BASED ON EQUALITY AND DESERT 67–74 (1979); Alexis M. Durham III, *Justice in Sentencing: The Role of Prior Record of Criminal Involvement*, 78 J. CRIM. L. & CRIMINOLOGY 614, 620–21 (1987); Ekow N. Yankah, *Good Guys and Bad Guys: Punishing Character, Equality and the Irrelevance of Moral Character to Criminal Punishment*, 25 CARDOZO L. REV. 1019, 1029–37 (2004).

¹⁵⁵ See *supra* note 1. For example, Paul Robinson has noted:

By committing an offense after a previous conviction, an offender might be seen as ‘thumbing his nose’ at the justice system. Such disregard may justify some incremental increase in punishment over that deserved by a first-time offender, but it seems difficult to justify the doubling, tripling, or quadrupling of punishment because of nose-thumbng.

Robinson, *supra* note 148, at 1436.

¹⁵⁶ See Roberts, *supra* note 9, at 325 (“A [sentencing] guideline system that simply assigned criminal history scores on the basis of the raw number of previous convictions would be crude, indeed, and would not follow theoretical principles relating to desert or dangerousness.”). Some critics have made this argument in opposition to the recidivism penalties imposed in a number of jurisdictions. See, e.g., STITH & CABRANES, *supra* note 64, at 72 (criticizing the relevance of prior convictions under the Federal Sentencing Guidelines because they fail to capture the difference in culpability regarding when the prior convictions occurred and whether the prior conviction “has any relation to the current offense”); Roberts, *supra* note 9, at 331 (critiquing the Federal Sentencing Guidelines for failing to consider the degree of similarity between previous and current offenses).

inal justice system in any substantial way.”¹⁵⁷ For the Eighth Amendment to impose any real limitations on punishment, the Court would have to adopt something less deferential than this low-level rational basis review.¹⁵⁸ Indeed, even outside of the recidivism context, the Court probably should reconsider the rational basis test for Eighth Amendment claims given that that test runs counter to the general principle that claims of individual rights violations must be protected by something more than rational basis review.¹⁵⁹ In short, the Eighth Amendment doctrine is currently ill-equipped to handle recidivism enhancements and would require a wholesale restructuring to do so.

By contrast, courts could develop doctrine regarding recidivism punishment under the Double Jeopardy Clause’s prohibition on multiple punishments with relative ease. Fashioning this doctrine would not require the courts to unravel an entire existing doctrine, as would using the Eighth Amendment. The Court has failed to develop a doctrine relating to double jeopardy at sentencing, and so it would be writing on a blank slate. Moreover, because there is no underlying doctrine based on retributivism, the prohibition on multiple punishments is not fundamentally incompatible with the utilitarian crime-control concepts underlying recidivism enhancements.¹⁶⁰ Nor would a double jeopardy limit on multiple punishments require courts to assess whether a recidivism enhancement is permissibly proportional to the crime. Rather, courts would simply ask whether a second punishment is being imposed for the same offense; if it is, then that enhancement triggers double jeopardy protection.

To be sure, many people are bound to argue that prohibiting recidivism enhancements overly constricts the legislature’s power to deal with crime. Prior convictions are widely believed to provide relevant information about a defendant’s future behavior.¹⁶¹ As a group, those individuals who have previously committed a crime are more likely to commit future crimes than those who have not.¹⁶² For this

¹⁵⁷ *Ewing*, 538 U.S. at 28 (second alteration in original) (quoting *Solem*, 463 U.S. at 297 n.22).

¹⁵⁸ See *Lee*, *supra* note 127, at 741–42 (suggesting that the test is akin to rational basis).

¹⁵⁹ See *Dist. of Columbia v. Heller*, 554 U.S. 570, 634–35 (2008).

¹⁶⁰ See *supra* text accompanying notes 148–52 (discussing how utilitarian crime-control concepts are inconsistent with the Eighth Amendment’s retributive proportionality doctrine).

¹⁶¹ See, e.g., *Witte v. United States*, 515 U.S. 389, 397–99 (1995); *Nichols v. United States*, 511 U.S. 738, 747 (1994).

¹⁶² U.S. SENTENCING COMM’N, *MEASURING RECIDIVISM: THE CRIMINAL HISTORY COMPUTATION OF THE FEDERAL SENTENCING GUIDELINES 10* (2004) [hereinafter *MEASURING RECIDIVISM*], available at http://www.ussc.gov/Research/Research_Publications/Recidivism/2004_05_Recidivism_Criminal_History.pdf; see also ALLEN J. BECK & BERNARD E. SHIPLEY, BUREAU OF JUSTICE STATISTICS, *RECIDIVISM OF PRISONERS RELEASED IN 1983 7* (1989) [hereinafter *RECIDIVISM 1983*], available at <http://bjs.ojp.usdoj.gov/content/pub/pdf/rpr83.pdf> (“The percents of those rearrested among released prisoners were systematically related to the

reason, courts and others have insisted that recidivism enhancements are necessary to deter future lawbreaking.¹⁶³ They have also argued that repeated lawbreaking requires incapacitation or rehabilitation through longer sentences in order to protect public safety.¹⁶⁴

But the mere fact that the government has a good reason to impose recidivism enhancements does not necessarily overcome the Double Jeopardy Clause's prohibition on multiple punishments. Even though, as a group, prior offenders may be more likely to commit future offenses than those who have not previously committed an offense, that predilection does not automatically justify empowering the government to impose higher punishments on recidivists. Even if increased sentences would result in reduced crime, that reduction must be weighed against the cost of sacrificing the right against multiple punishments.

This sort of balance explains why race and gender, for example, are not permissible sentencing considerations. Studies show that blacks are more likely to recidivate than whites,¹⁶⁵ and that men are

extensiveness of the prior records."); Martin Wasik, *Desert and the Role of Previous Convictions*, in *PRINCIPLED SENTENCING*, *supra* note 146, at 233, 235 ("The research evidence is that the more convictions recorded against a defendant, the greater the likelihood that he will be reconvicted.").

¹⁶³ See, e.g., *Parke v. Raley*, 506 U.S. 20, 27 (1992) ("States have a valid interest in deterring and segregating habitual criminals."); Benjamin B. Sendor, *The Relevance of Conduct and Character to Guilt and Punishment*, 10 *NOTRE DAME J.L. ETHICS & PUB. POL'Y* 99, 127 (1996) ("If a review of the defendant's record shows that he is an inveterate recidivist—that he has a strong and enduring inclination to break the law—then that fact shows that previous intervention by the state has not deterred him from criminal activity and that more severe punishment is warranted in order to deter him from future criminal conduct.").

¹⁶⁴ See, e.g., *Ewing v. California*, 538 U.S. 11, 25 (2003) ("When the California Legislature enacted the three strikes law, it made a judgment that protecting the public safety requires incapacitating criminals who have already been convicted of at least one serious or violent crime."); *Marshall v. United States*, 414 U.S. 417, 430 (1974) (holding that Congress could reasonably conclude that persons with two or more prior felony convictions were less likely to be rehabilitated than those with less than two prior convictions). Courts have also on occasion framed the justification for recidivism enhancements in retributive terms. See, e.g., *United States v. Watts*, 519 U.S. 148, 154–55 (1997) (*per curiam*).

¹⁶⁵ *MEASURING RECIDIVISM*, *supra* note 162, at 12 ("[T]he race of the offender is associated with recidivism rates. Overall, Black offenders are more likely to recidivate (32.8%) than are Hispanic offenders (24.3%). White offenders are the least likely to recidivate (16.0%)."); see also *PATRICK A. LANGAN & DAVID J. LEVIN, BUREAU OF JUSTICE STATISTICS, RECIDIVISM OF PRISONERS RELEASED IN 1994* 7 (2002) [hereinafter *RECIDIVISM 1994*], available at <http://bjs.ojp.usdoj.gov/content/pub/pdf/rpr94.pdf> (noting that blacks were more likely than whites to recidivate (28.5% versus 22.6%)); *MILES D. HARER, FED. BUREAU OF PRISONS, RECIDIVISM AMONG FEDERAL PRISONERS RELEASED IN 1987* 2 (1994), available at http://www.bop.gov/news/research_projects/published_reports/recidivism/oreprrecid87.pdf [hereinafter *RECIDIVISM 1987*] ("Recidivism rates were higher among blacks and Hispanics than among whites and non-Hispanics"); *RECIDIVISM 1983*, *supra* note 162, at 5 ("Blacks had slightly higher recidivism rates than whites, approximately 5 to 8 percentage points higher for each measure.").

more likely to recidivate than women.¹⁶⁶ But those considerations are not permitted to play a role in sentencing determinations because, even though an offender's race or gender may provide information about her statistical likelihood to recidivate, the government's interest in preventing crime is not as important as the individual's interest in equal protection under law.¹⁶⁷ This point is easily generalized to other constitutional rights that limit the government's ability to accomplish its goals. For example, the right to a jury trial impairs the government's ability to punish those who have committed crimes.¹⁶⁸ The reason we nonetheless retain the jury trial right is that the interest underlying the right—protecting against arbitrary government action by requiring the government to prove its case to a group of disinterested citizens¹⁶⁹—is more significant than the government's interest in convicting all guilty defendants.¹⁷⁰

Of course, in those instances where the costs of upholding a constitutional right are intolerably high because of the harm to society, the government's interest may trump the constitutional right. Courts have developed a number of doctrinal tests under which rights yield when the social costs of enforcing those rights are too high compared to the interests protected by them.¹⁷¹ For example, under the strict scrutiny doctrine, courts will allow the government to infringe on even

¹⁶⁶ See *MEASURING RECIDIVISM*, *supra* note 162, at 11; see also *RECIDIVISM 1994*, *supra* note 165, at 7 (noting that men were more likely than women to recidivate (26.2% versus 17.3%)); *RECIDIVISM 1983*, *supra* note 162, at 5 (“Men were more likely than women to be rearrested, reconvicted, and reincarcerated after their release from prison.”). *But see RECIDIVISM 1987*, *supra* note 165, at 3 (“Recidivism rates were almost the same for males and females; 40.9 percent of the males recidivated compared to 39.7 percent of the females.”).

¹⁶⁷ See Hessick & Hessick, *supra* note 8, at 81–83.

¹⁶⁸ Indeed, in the very case in which the Supreme Court held the Sixth Amendment right to a jury trial in criminal cases applied to the states, it acknowledged the “weaknesses and the potential for misuse” of the process. *Duncan v. Louisiana*, 391 U.S. 145, 156 (1968).

¹⁶⁹ *Cf.* Laura I. Appleman, *The Lost Meaning of the Jury Trial Right*, 84 *IND. L.J.* 397, 405 (2009) (noting that the Sixth Amendment includes both an individual procedural right as well as a communal right to “decid[e] punishment for criminal offenders and . . . to determine moral blameworthiness”).

¹⁷⁰ There are similar explanations for other constitutional rights. Consider the Eighth Amendment's prohibition against cruel and unusual punishments. A particularly barbaric punishment might be necessary to achieve optimal deterrence, but the punishment is forbidden because of our society's respect for human dignity and its revulsion at such punishments. Nor is the idea limited to constitutional protections. For example, Federal Rule of Evidence 404 generally prohibits the admission of prior bad acts to prove that the defendant has a propensity to commit crimes. See *FED. R. EVID.* 404(b) (“Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith.”). But given that prior offenders are more likely to commit future offenses, evidence of prior offenses may be probative. Nevertheless, the evidence is prohibited to protect the more important interest that an individual not be convicted based on a prior offense.

¹⁷¹ See Hessick & Hessick, *supra* note 8, at 90–91.

fundamental rights if necessary to protect a compelling public interest.¹⁷²

But there is reason to doubt that many current recidivism enhancements meet such a heightened threshold. Although promoting public safety through the reduction of crime is undoubtedly a compelling public interest,¹⁷³ it is less clear whether recidivism enhancements are narrowly tailored to achieve the goal of crime reduction and thus ought to outweigh the constitutional prohibition on multiple punishments. Strict scrutiny requires courts to prioritize government interests over individual rights only to the extent necessary to avoid intolerable costs. To be sure, prior offenders appear to be more likely to commit future offenses as a class. But not all prior offenders present the same threat. Indeed, there is some data suggesting that an individual's age may be a better predictor of recidivism than prior convictions,¹⁷⁴ so older offenders do not pose the same risk as younger offenders.¹⁷⁵ And logic alone tells us that those who were previously convicted of shoplifting may be more likely to offend again than those who engaged in mortgage fraud. Current laws often fail to draw these distinctions and instead call for increased punishments for all or most prior crimes.¹⁷⁶

Nor is punishment calibrated to accomplish the marginal deterrence or incapacitation necessary to offset the increased likelihood that the offender will offend again. Take California's Three Strikes

¹⁷² See Richard H. Fallon, Jr., *Strict Judicial Scrutiny*, 54 UCLA L. REV. 1267, 1306–08 (2007).

¹⁷³ *Schall v. Martin*, 467 U.S. 253, 264 (1984) (“The legitimate and compelling state interest in protecting the community from crime cannot be doubted.” (internal quotation marks omitted)).

¹⁷⁴ RECIDIVISM 1983, *supra* note 162, at 11 (“[A]ge when released is found to have the largest impact [on re-arrest odds], followed by the number of prior arrests The contribution to the predicted log odds of rearrest by prisoners who were age 24 or younger (.721) is larger than that by those with 7 or more prior arrests (.694) . . .”).

That age is a better predictor of recidivism than prior convictions may also be relevant for strict scrutiny analysis. See Fallon, *supra* note 172, at 1327 (noting that while the Supreme Court often emphasizes that “governmental infringements on fundamental rights must not be ‘underinclusive’” and that its suspicion toward underinclusive laws may “reflect[] an insistence that the government not infringe on rights when doing so will predictably fail to achieve purportedly justifying goals,” this does not mean “that every underinclusive statute is therefore necessarily unconstitutional”).

¹⁷⁵ “Among all offenders under age 21, the recidivism rate is 35.5 percent, while offenders over age 50 have a recidivism rate of 9.5 percent.” MEASURING RECIDIVISM, *supra* note 162, at 12.

¹⁷⁶ While some jurisdictions distinguish between offenders based on the precise nature of the previous felonies, see Austin, et al., *supra* note 63, at 134–37, there are a number of jurisdictions that increase sentences for recidivists without making such distinctions, see, e.g., ALA. CODE § 15-18-9 (LexisNexis 1995); ALASKA STAT. § 12.55.125(c)(3)(4) (2010); ARIZ. REV. STAT. ANN. § 13-703 (2010); WASH. REV. CODE ANN. § 9.94A.525 (West 2010); U.S. SENTENCING GUIDELINES MANUAL § 4A1.1 (2010).

Law.¹⁷⁷ A sentence of life imprisonment for a third felony is likely harsher than necessary to prevent some, if not all, offenders from committing future crimes. In other words, the infringement on the double jeopardy rights of recidivists seem much higher than necessary to accomplish the government's goal of crime prevention, and thus the law is likely not justified.¹⁷⁸

Of course, the absence of reliable data about the interaction of penalty increases, recidivism, and crime prevention may be attributable to the fact that current doctrine does not call for this sort of balancing in making double jeopardy determinations.¹⁷⁹ Courts rarely consider the government's interest in assessing whether a prosecution or punishment is permitted under the Double Jeopardy Clause.¹⁸⁰ Instead, courts ask simply whether the prosecution (or, in limited circumstances, the punishment) is for the same offense as an earlier one.

¹⁷⁷ A number of states have enacted three strikes laws. See *supra* notes 61–63.

¹⁷⁸ See Fallon, *supra* note 172, at 1328–29 (describing how overinclusive statutes often fail strict scrutiny analysis); cf. *United States v. Chester*, 628 F.3d 673, 683 (4th Cir. 2010) (stating that the government failed to carry its burden in the intermediate scrutiny context where “[t]he government has offered numerous plausible reasons why the disarmament of domestic violence misdemeanants is substantially related to an important government goal; however, it has not attempted to offer sufficient evidence to establish a substantial relationship between § 922(g)(9) and an important governmental goal”); *Wessmann v. Gittens*, 160 F.3d 790, 804 (1st Cir. 1998) (rejecting anecdotal evidence and requiring statistical evidence to satisfy strict scrutiny).

¹⁷⁹ See *Maine v. Taylor*, 477 U.S. 131, 144 (1986) (recognizing “the empirical component” of strict scrutiny). Even if the courts were to recognize that the Double Jeopardy Clause protects against recidivism enhancements, it is not clear what empirical showing the government would have to demonstrate in order to satisfy strict scrutiny. See *Nixon v. Shrink Mo. Gov’t PAC*, 528 U.S. 377, 391 (2000) (“The quantum of empirical evidence needed to satisfy heightened judicial scrutiny of legislative judgments will vary up or down with the novelty and plausibility of the justification raised.”). There is ample empirical evidence demonstrating that those with prior convictions are as a group more likely to reoffend. See sources cited *supra* note 162. But cases suggest that a challenge to recidivism enhancements is more likely to succeed if the defendant points to empirical evidence that contradicts or complicates the recidivism question. See, e.g., *Nixon*, 528 U.S. at 394 (“There might, of course, be need for a more extensive evidentiary documentation if respondents had made any showing of their own to cast doubt on the apparent implications of *Buckley*’s evidence and the record here”); *City of Los Angeles v. Alameda Books, Inc.*, 535 U.S. 425, 438–39 (2002) (making a similar observation in the intermediate scrutiny context).

¹⁸⁰ One notable exception to this general practice is in the context of mistrials. If a court declares a mistrial, a subsequent prosecution will be prohibited unless “manifest necessity” requires a second prosecution. See *Oregon v. Kennedy*, 456 U.S. 667, 672 (1982); *Illinois v. Somerville*, 410 U.S. 458, 463 (1973); *United States v. Perez*, 22 U.S. (9 Wheat.) 579, 580 (1824). That standard balances the defendant’s interests under the Double Jeopardy Clause against “the public’s interest in fair trials designed to end in just judgments.” *Wade v. Hunter*, 336 U.S. 684, 689 (1949); see also *Westen*, *supra* note 71, at 1036 (characterizing the Double Jeopardy Clause as “represent[ing] a ‘balancing’ of the defendant’s interest in finality against ‘the societal interest in [law enforcement]’” (second alteration in original) (quoting *United States v. Tateo*, 377 U.S. 463, 466 (1964))).

This lack of doctrinal nuance may explain the courts' refusal to protect meaningfully against multiple punishments.¹⁸¹

CONCLUSION

Prior convictions are a well-accepted sentencing factor in today's sentencing systems. But the acceptance of the practice does not make it constitutional. The Double Jeopardy Clause prohibits multiple punishments for a single offense, and this prohibition restricts the government's ability to enhance criminal sentences based on an offender's prior conviction.

The current trend of conceptualizing the Double Jeopardy Clause as providing robust limits only on multiple prosecutions, as opposed to multiple punishments, neglects the animating reason for the Clause: to prevent the government from having multiple opportunities to impose punishments on an individual. Prohibiting multiple prosecutions is a poor tool for achieving that goal in today's legal system. Although it limits the government's power to seek punishment through new criminal charges, it does nothing to stop the government from accomplishing the same ends through sentencing enhancements based on prior convictions. What is more, the same doctrines that have permitted sentencing increases for recidivists have also provided an end run around some of the principles underlying the prohibition against multiple prosecutions. In particular, those doctrines have permitted the government to seek sentencing increases based on conduct for which a defendant has already been acquitted.¹⁸²

Accepting that the Double Jeopardy Clause limits the imposition of multiple punishments does not necessarily spell the doom of all recidivism enhancements. Courts could develop a doctrine that simultaneously protects double jeopardy's limitation on multiple punishments and accommodates the government's interest in protecting the public from repeat offenders. For example, courts might employ something akin to strict scrutiny, which permits infringements of fundamental rights where the law is narrowly tailored to achieve a compelling government interest.¹⁸³ The prevention of crime is generally

¹⁸¹ If current double jeopardy doctrine were more nuanced and permitted the balancing of governmental and defendant interests, courts might be more receptive to recognizing that recidivism enhancements constitute multiple punishments. Cf. Daryl J. Levinson, *Rights Essentialism and Remedial Equilibration*, 99 COLUM. L. REV. 857, 884-85 (1999) (discussing the concept of remedial deterrence and noting that in some instances "the threat of undesirable remedial consequences motivat[es] courts to construct . . . right[s] in such a way as to avoid those consequences").

¹⁸² See *supra* text accompanying notes 123-25.

¹⁸³ See *Wooley v. Maynard*, 430 U.S. 705, 715-16 (1977).

seen as a compelling government interest,¹⁸⁴ and if prosecutors can adequately demonstrate that particular past offenses accurately predict whether a person will offend again, then recidivism statutes may be appropriate—at least in some circumstances.

That said, it is difficult to believe that past offenses are a good predictor of future offenses in many individual cases. In fact, there are a number of factors other than prior convictions that are correlated with likelihood of recidivism.¹⁸⁵ Nor is it clear that recidivism enhancements have been precisely tailored to accomplish the goal of reducing recidivism.¹⁸⁶ Some recidivism laws undoubtedly provide for more punishment than is necessary to stop a particular defendant from reoffending. For example, although there is ample evidence that even career offenders tend to stop committing crimes as they get older, a number of states incarcerate third-time offenders for life.¹⁸⁷ And recidivism laws doubtlessly affect more individuals than necessary to prevent future crimes. Even though, as a group, individuals with prior convictions recidivate at a higher rate than first time offenders, a sizable percentage does not reoffend.¹⁸⁸

The consequences of restricting recidivism enhancements are difficult to predict. Prohibiting sentencing enhancements for prior con-

¹⁸⁴ See *Schall v. Martin*, 467 U.S. 253, 264 (1984) (identifying the prevention of crime as a compelling interest).

¹⁸⁵ See *MEASURING RECIDIVISM*, *supra* note 162, at 11–13 (noting a relationship between recidivism rates and gender, age, race, employment status, educational attainment, marital status, and illicit drug use); see also Hessick, *supra* note 58, at 1140–41 (noting that “[t]here are many other reliable recidivism predictors in addition to prior convictions that modern sentencing systems, including the federal system, do not currently consider as appropriate sentencing factors,” and surmising that “[t]he decision not to use these factors in sentencing suggests recidivism prediction and selective incapacitation are not the primary sentencing goals, at least in the federal system”).

¹⁸⁶ [T]he narrow tailoring requirement insists that infringements of protected rights must be necessary in order to be justified. The Supreme Court sometimes expresses essentially the same demand when it says that the government’s chosen means must be “the least restrictive alternative” that would achieve its goals. A law would not be necessary to achieve its ends if the government could accomplish the same result while inflicting lesser burdens on protected rights.

Fallon, *supra* note 172, at 1326 (footnotes omitted) (quoting *Ashcroft v. ACLU*, 542 U.S. 656, 666 (2004)). If increased sentences are not necessary in all cases to prevent recidivists from reoffending, then the government inflicts greater burdens on the double jeopardy rights of recidivists than necessary to achieve its goal of reduced crime.

¹⁸⁷ See *supra* notes 61–63.

¹⁸⁸ Studies of convicted offenders tend to show high rates of recidivism. For example, a Department of Justice Report of prisoners released in 1994 showed that, within three years of their release, 46.9% were convicted of a new crime. *RECIDIVISM 1994*, *supra* note 165, at 1; see also *RECIDIVISM 1983*, *supra* note 162, at 1 (reporting a 46.8% reconviction rate three years after release). Although these rates are high, a majority of offenders are not convicted of subsequent crimes. What is more, a significant proportion of offenders have either no prior convictions or very little previous criminal history. Roberts, *supra* note 9, at 312.

victions may simply result in shorter sentences for recidivists. But it may also result in longer sentences for all, because legislatures may respond by increasing sentences for all offenses if their recidivism enhancement schemes do not pass constitutional muster. But the mere fact that the government may try to respond to increased protection of rights in one area by being more aggressive in another does not mean that rights ought not be protected. Moreover, both public opinion¹⁸⁹ and current doctrine¹⁹⁰ seem more protective of first-time offenders than recidivists. So if increased penalties include first-time offenders, they may face more political and judicial opposition.

The Supreme Court repeatedly asserts that the Double Jeopardy Clause protects not only against multiple prosecutions, but also multiple punishments.¹⁹¹ Logic and history both suggest that the Clause was intended to provide such protection. Yet recidivism enhancements—which punish an offender a second time based on a previous conviction—flourish. If the Double Jeopardy Clause does indeed limit multiple punishments for the same offense, then this Article explains why it must also limit recidivism enhancements.

How, precisely, to limit recidivism enhancements in order to satisfy double jeopardy principles is an open question.¹⁹² But the first step is recognizing that courts currently do not adequately protect those principles.

¹⁸⁹ See, e.g., JULIAN V. ROBERTS & LORETTA J. STALANS, PUBLIC OPINION, CRIME, AND CRIMINAL JUSTICE 205 (1997) (noting that “public sentencing preferences are to a degree influenced by criminal history information,” in that survey respondents support increasing sentences based on prior convictions); Gary Langer, *Crime and Punishment: Poll Finds Americans Forgiving of Nonviolent and First-Time Offenders*, ABCNEWS.COM (Mar. 8, 2002), http://abcnews.go.com/sections/us/DailyNews/crime_punish_poll020307.html (“[T]wo-thirds of Americans favor jail time, rather than treatment programs, for repeat drug offenders. But for first-time drug offenders, the numbers again are reversed: Nearly nine in 10 prefer treatment, not jail.”).

¹⁹⁰ As explained above, current Eighth Amendment doctrine seems ill-equipped to limit punishment aimed at recidivists, see *supra* text accompanying notes 153–58, but it can—at least in theory—act as a substantive check on punishment for first-time offenders, but see *Harmelin v. Michigan*, 501 U.S. 957, 961 (1991) (upholding a mandatory life sentence for a first-time offender convicted of possessing 672 grams of cocaine).

¹⁹¹ See *supra* note 14.

¹⁹² Cf. Roberts, *supra* note 9, at 350–51 (sketching briefly how to construct a recidivism enhancement that was sensitive to the actual risk an offender would pose and noting the difficulties).