

# Character and Repeat-Offender Sentencing

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## Abstract

Repeat offenders receive longer sentences than first offenders in virtually every modern jurisdiction. Such prior-record enhancements are politically popular. Scholars are more divided, especially regarding severe enhancements. Retributivists have long disagreed about which enhancements, if any, are morally justifiable and on what basis. This article advances the debate, offering lessons for retributivists on all sides. I address an intuitive argument that justifies enhancements in terms of character. This argument has been caricatured and dismissed, with defenders of enhancements preferring character-independent arguments. I reconstruct an argument for enhancements that assumes recidivism constitutes evidence of culpability-aggravating character traits. The argument seems at least coherent, inferentially valid, and intuitively plausible. I then raise what I see as the real threats to the argument, which are neither conceptual nor normative, but empirical. I identify some formal features that the character argument requires of culpability-aggravating traits. To support enhancements, such traits must also correlate properly with criminal records. One place to look for characterizations of such traits, and evidence of correlation, is criminology, in theories of criminogenesis and criminality. I conclude that character arguments for prior-record enhancements cannot be dismissed, although their thorough evaluation awaits answers to complex empirical questions.

## I. Introduction

In every modern jurisdiction, sentencing authorities consider the convicted criminal's past conduct—actions that took place before the sentencing offense, often many years before.<sup>1</sup> Most jurisdictions sentence repeat offenders ('recidivists') more severely than first offenders convicted of the same crimes under legally identical circumstances. Many jurisdictions provide sentences that increase in length with the criminal record. Because most convicts today are repeat offenders, most receive increased sentences.<sup>2</sup>

Public opinion research reveals substantial support for recidivist sentencing.<sup>3</sup> Lawmakers and prosecutors also tend to support it without much consternation.<sup>4</sup>

1. Richard S Frase & Julian V Roberts, *Paying for the Past: The Case Against Prior Record Sentence Enhancements* (Oxford University Press, 2019) at xi. Western Australia may be the only exception to this generalization. *Ibid* at 1 n 2. My focus in this article is the criminal record, although some jurisdictions give credit for good deeds.

2. *Ibid* at 2.

3. See Julian V Roberts & Michael J Hough, *Understanding Public Attitudes to Criminal Justice* (Open University Press, 2005).

4. "[T]his topic has received little attention from researchers and policymakers—it has simply been assumed that repeat offenders merit greater punishment." Frase & Roberts, *supra* note 1 at xi.

Legal scholars and philosophers are more divided on the practice. Some oppose it altogether. Others support it, if not as enthusiastically as does the general public, nor to the extent reflected in established sentencing practices. Even within retributivist theory, scholars have long disagreed about the justice of recidivist sentencing.

I aim to advance the debate, offering something of value to all sides. I address a family of intuitive arguments for recidivist sentencing that has received, I think, insufficient attention: retributivist arguments from character traits. A crude version of the argument proceeds from the premise that repeat offenders are “people of bad character . . . [who are] more culpable when they reoffend,”<sup>5</sup> having “shown themselves, with each additional crime, to be more and more wicked and depraved, more anti-social and more indifferent to the rights of others.”<sup>6</sup> The thought is that repeat offenses provide evidence of negative character traits that first offenses do not provide and that such traits warrant harsher punishment.

Many people seem to accept character-based arguments pre-reflectively. As Richard S. Frase and Julian V. Roberts note, one “reason for the intuitive appeal of [prior-record enhancements] is that many people make character-based attributions regarding repeat offenders.”<sup>7</sup> Many published discussions of recidivist sentencing, for and against, allude to a character argument.<sup>8</sup> However, the argument itself remains underdeveloped in the literature. Despite its intuitive appeal to laypersons, it is often caricatured and dismissed by scholars. Even scholars who defend recidivist sentencing typically try to avoid appeals to character.

This article is neither ‘for’ nor ‘against’ recidivist sentencing, in theory. I try to reconstruct a character argument with greater precision than others have done. I propose that it can succeed only if certain character traits are relevant to proper punishment and some such traits are positively correlated to a sufficient degree with criminal history. Carefully reconstructed, the argument is, at least, inferentially valid, which has not been generally recognized. However, I also identify significant empirical objections that have not been directly addressed. Finally, I describe the evidence that would be required to answer such objections. I am not optimistic that the evidence can be found, but I offer some suggestions about where to look.

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5. Michael Tonry, “The Questionable Relevance of Previous Convictions to Punishments for Later Crimes” in Julian V Roberts & Andrew von Hirsch, eds, *Previous Convictions at Sentencing: Theoretical and Applied Perspectives* (Hart, 2010) 91 at 109. Tonry does not, himself, endorse this thought.
  6. Richard S Frase, “Prior-Conviction Sentencing Enhancements: Rationales and Limits Based on Retributive and Utilitarian Proportionality Principles and Social Equality Goals” in Roberts & von Hirsch, *supra* note 5 at 122.
  7. Frase & Roberts, *supra* note 1 at 10.
  8. Frase, *supra* note 6 at 122; Frase & Roberts, *supra* note 1 at 10; Tonry, *supra* note 5 at 109; Christopher Bennett, “‘More to Apologise For’: Can We Find a Basis for the Recidivist Premium in a Communicative Theory of Punishment?” in Roberts & von Hirsch, *supra* note 5 at 77.

The article proceeds as follows. After describing the practice of recidivist sentencing (§II), I sketch a generic, retributivist argument for it (§V), which I expand into an inference from criminal history, to character, to culpability, to desert (§VI). I then present a folk-psychological theory of character traits, theorize their relevance to culpability (§§VII-VIII) and address some objections to the *a priori* premises of the main argument (§IX). Next, I question the empirical adequacy of folk-psychological character traits and consider how defenders of the main argument might substitute revisionary conceptions of character traits suggested by contemporary virtue ethicists (§§X-XI). In §XII, I consult criminology for a criminogenic trait ('low self-control') that might meet the needs of the main argument. Then I introduce another *a posteriori* challenge to the main argument, this one concerning the distribution of culpability-aggravating traits across convict populations (§XIII). Before concluding, I review critically some retributivist attempts to rationalize recidivist sentencing without character ascriptions (§XIV). I conclude with suggestions for future inquiry and research (§XV).

## II. History-Sensitive Sentencing

I shall refer to the practice of increasing or decreasing a prospective sentence based on criminal history, or lack thereof, as 'history-sensitive sentencing' (HSS). HSS allows criminal history, or lack thereof, to function as *aggravating* or *mitigating* factors, respectively. Sentencing authorities practice HSS if and only if they give a repeat offender a heavier sentence, on account of the criminal record, than they would impose on an otherwise identical offender with a less extensive record.

We can classify sentencing regimes by how much HSS, if any, they prescribe and in what forms. The simplest regime, *flat-rate sentencing*, involves no HSS whatsoever. Courts sentence based exclusively on features of the charged offense.<sup>9</sup> If we plot the sentencing function with criminal history on the y-axis and sentences on the x-axis, its slope is flat.

Next, consider a sentencing function that slopes upward until the  $n_{\text{th}}$  offense and then flattens. Sentences plateau or 'cap' at a pre-established maximum. This is known as 'progressive loss of mitigation' (PLM).<sup>10</sup> A special case of capping is a function that slopes upward immediately after the first offense and flattens thereafter—the 'first-offender discount' (FOD).

The final category of HSS—usually the most severe, in practice—is known as 'prior-record enhancement' (PRE) or the 'recidivist premium' (RP). Under the RP, a repeat offender receives progressively heavier sentences, possibly with a cap on total years served.

9. The elements of which include, *inter alia*, type of criminal act, mens rea, circumstances, harm caused (if any).

10. PLM is found in some jurisdictions outside the USA. See Petter Asp, "Previous Convictions and Proportionate Punishment under Swedish Law" in Roberts & von Hirsch, *supra* note 5 at ch 11.

Different regimes implement different forms of HSS and use different legal mechanisms.<sup>11</sup> In some jurisdictions, sentencing authorities are authorized to take criminal history into account on a discretionary basis.<sup>12</sup> In the USA, such discretion is now usually restricted by statute and/or guided by published guidelines (mandatory or advisory). Some criminal statutes specify prior convictions as aggravators or define separate sentencing ranges for recidivists. Sentencing guidelines often permit the RP. The USA has, overall, the world's most severe prior-record enhancements.<sup>13</sup>

A criminal record includes, *inter alia*, arrests, indictments, convictions, sentences originally imposed, and months actually served. The federal guidelines assign convicts to one of six Criminal History Categories based on 'points' for different entries, subject to departures.<sup>14</sup> They also single out 'career offenders' for special treatment.<sup>15</sup> Guidelines in nineteen US states use grids or worksheets, assigning points or point ranges.<sup>16</sup>

I make some simplifying assumptions in this article because my interest is justifications for HSS, simpliciter. I use 'number of prior convictions' as a proxy for the record as a whole. This assumption is neither a reflection of positive law nor a prescription. If we find a sound rationale for HSS, we can then pose questions about which entries on the record to treat as enhancers and how much significance to give them.

Also for simplicity, I assume sequences of identical crimes. Real records typically contain diverse offenses of varying severity. *Graded* versions of HSS proportion enhancements to severity. *Ungraded* versions ignore severity, considering only the number of convictions. Some three-strikes laws, for example, mandate a relatively ungraded premium, treating as strikes all felonies, regardless of severity.<sup>17</sup> Some states include misdemeanors as sentence aggravators. Some allow convictions that are many decades old, including juvenile convictions, to greatly enhance sentences.

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11. "[E]xisting enhancement rules were adopted with very limited research or discussion, and vary widely across systems." Frase & Roberts, *supra* note 1 at xi.
  12. Kate Stith & Steve Y Koh, "The Politics of Sentencing Reform: The Legislative History of the Federal Sentencing Guidelines" (1993) 28:2 Wake Forest L Rev 223 at 225.
  13. Frase & Roberts, *supra* note 1 at xiii ("[E]nhancements are much stronger in the United States than in any other country").
  14. The ranges in the federal guidelines were originally mandatory but are now "effectively advisory." *United States v Booker*, 543 US 220 at 245-46 (2005).
  15. United States Sentencing Commission, *Guidelines Manual* (Washington, DC: Government Printing Office, 2016), §4B1.1, §5A [US Sentencing Commission, *Guidelines*].
  16. Different states compute these points by different methods. See Frase & Roberts, *supra* note 1 at 5.
  17. California eventually weakened its three-strikes policy. See David Mills & Michael Romano, "The Passage and Implementation of the Three Strikes Reform Act of 2012 (Proposition 36)" (2013) 25:4 Federal Sentencing Reporter 265.

### III. Forward-looking Considerations

A natural thought is that repeat offenders have shown themselves to be dangerous, incorrigible people who should be kept in prison to protect the public. Indeed, arguments for HSS often cite forward-looking reasons, chiefly those pertaining to crime control.<sup>18</sup> These include incapacitation (just mentioned), along with special deterrence, general deterrence, and (arguably) rehabilitation. If repeat offenders are more likely to reoffend than are first offenders, there may be arguments for HSS from incapacitation and special deterrence.<sup>19</sup>

Some commentators also make forward-looking arguments against HSS, especially the extreme RP employed in many of the United States. Long-term incarceration strains state budgets, destroys lives, and damages communities.<sup>20</sup>

This article mostly ignores forward-looking arguments (pro and con) for three reasons. First, my intended readers are philosophers and legal scholars engaged with the philosophy of criminal law. In these circles, forward-looking arguments are recognized, but never get the last word. Justice is considered at least as important as crime control.

Secondly, existing sources of law imply rationales for HSS that are at least partly retributivist, using the language of *desert*, *culpability*, and *blame*: “[w]hether one accepts the retributive justifications or not, the reality is that many statutes and most guidelines schemes reflect or actively promote the view that repeat offenders are more blameworthy and hence deserving of more punishment.”<sup>21</sup>

The US federal sentencing guidelines, for example, mention deterrence and incapacitation, but also state, “A defendant with a record of prior criminal behavior is *more culpable* than a first offender and thus *deserving* of greater punishment.”<sup>22</sup>

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18. But see David A Dana, “Rethinking the Puzzle of Escalating Penalties for Repeat Offenders” (2001) 110:5 Yale LJ 733.

19. In recent decades, US jurisdictions have increasingly relied on risk-assessment at both the front end (sentencing) and the back end (e.g., during incarceration, at parole hearings). See John Monahan & Jennifer L Skeem, “Risk Assessment in Criminal Sentencing” (2016) 12:1 Annual Review of Clinical Psychology 489.

20. One need not review the data to suspect that recidivist sentencing has a disparately negative impact on socioeconomically disadvantaged people, especially people of color. There is empirical evidence supporting such claims, but I shall neither defend nor rely upon them in this article. I address normative questions about sentencing that would remain even if systematic social injustices were rectified. See e.g. Frase & Roberts, *supra* note 1 at 128-51; Lisa M Saccomano, “Defining the Proper Role of Offender Characteristics in Sentencing Decisions: A Critical Race Theory Perspective” (2019) 56:4 Am Crim L Rev 1693.

21. Frase & Roberts, *supra* note 1 at 11. State guidelines that explicitly reference retribution, justice, or desert as reasons for the RP include Alabama, Minnesota, Pennsylvania, and Utah. See Richard S Frase et al, *Criminal History Enhancements Sourcebook* (Robina Institute of Criminal Law & Criminal Justice, 2015) at table 1.1.

22. US Sentencing Commission, *Guidelines*, *supra* note 15 at ch 4, Part A, Introductory Commentary [emphasis added].

Thirdly, members of the general public support HSS at least in part because they agree that recidivists, as such, deserve heavier sentences.<sup>23</sup> Nevertheless, reconciling HSS with a developed retributivist theory has proved challenging.<sup>24</sup> In §§IV-IX, I consider an argument for HSS aiming for such reconciliation.

#### IV. Retributivist Sentencing

There are many retributivist principles in the literature, but all entail that what the convict deserves is relevant to sentence justification.<sup>25</sup> Retributive rationales for various forms of HSS have been debated in recent years.<sup>26</sup> Some writers have concluded that no form of HSS is, in fact, compatible with a defensible retributivism, such that they must choose between retributivism and HSS.<sup>27</sup> Most choose retributivism. As noted, HSS is part of the penal status quo worldwide, so their position entails that the status quo is unjust.

Other retributivists support HSS, but only in its weaker forms (typically the FOD or PLM).<sup>28</sup> Even retributivists who favor the RP overwhelmingly reject its more extreme forms.<sup>29</sup> Most retributivists oppose ungraded enhancements, such as three-strikes laws (see §II). Some insist that the “primary determinant” of a sentence should be the most recent conviction, not the convict’s history, which entails that sentences should not reflect judgments of “overall character” or “lifetime conduct.”<sup>30</sup> The primacy of the present conviction also implies that the maximum RP should remain low, in relative terms, such that the premium’s length should never exceed the sentence imposed for the same crime as a first

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23. See e.g. Rhys Hester et al, “Prior Record Enhancements at Sentencing: Unsettled Justifications and Unsettling Consequences” (2018) 47:1 *Crime & Justice* 209. Dan Kahan argues that laypeople disguise “expressive” concerns with retribution as deterrence concerns. See Dan M Kahan, “The Secret Ambition of Deterrence” (1999) 113:2 *Harv L Rev* 413.
  24. “There is widespread agreement that some degree of enhancement for repeat offending is usually appropriate, but much less agreement on how much additional punishment is necessary, or why.” Frase & Roberts, *supra* note 1 at xi.
  25. In this article, I shall accept retributivist principles, arguing, as derivative sentencing standards, if nothing more. I cannot endorse retributivist principles as first principles of justice.
  26. See essays in Claudio Tamburrini & Jesper Ryberg, eds, *Recidivist Punishments: The Philosopher’s View* (Lexington Books, 2012); Roberts & von Hirsch, *supra* note 5.
  27. See e.g. Richard L Lippke, “The Ethics of Recidivist Premiums” in Jonathan Jacobs & Jonathan Jackson, eds, *The Routledge Handbook of Criminal Justice Ethics* (Routledge, 2017) 17; Joshua Dressler, *Understanding Criminal Law*, 8th ed (Carolina Academic Press, 2018); RA Duff, *Punishment, Communication, and Community* (Oxford University Press, 2001); Mirko Bagaric, “Double Punishment and Punishing Character: The Unfairness of Prior Convictions” (2000) 19:1 *Criminal Justice Ethics* 10; Michael Davis, *To Make the Punishment Fit the Crime: Essays in the Theory of Criminal Justice* (Westview Press, 1992); Tonry, *supra* note 5; J Angelo Corlett, “Retributivism and Recidivism” in Tamburrini & Ryberg, *supra* note 26 at ch 1.
  28. Andreas von Hirsch defends the FOD, but rejects the RP. Andreas von Hirsch, *Deserved Criminal Sentences: An Overview* (Hart, 2017) at ch 7. Frase and Roberts support the FOD, followed by the RP with a low cap. Frase & Roberts, *supra* note 1 at 24. Assuming certain desert functions, the FOD gives first offenders lighter sentences than they deserve, as does PLM for low-*n* offenders (left of the plateau).
  29. See e.g. Frase & Roberts, *supra* note 1 at 11, 207-20.
  30. von Hirsch, *supra* note 28 at 73-75.

offense, or some small multiple thereof.<sup>31</sup> Others insist that the maximum RP should remain low, in absolute terms, which has been defined variously as “[no] more than one-half of the total sentence”<sup>32</sup> or “less than five additional years” or “substantially less than life without parole.”<sup>33</sup> However, more severe versions of the RP are implemented in many jurisdictions.<sup>34</sup> These policies are seen as unjust even by the retributivists most supportive of HSS.

## V. History, Desert, and Sentencing

The literature contains several arguments for HSS that purport to be compatible with familiar retributivist principles.<sup>35</sup> Below is the bare bones of such an argument, which I shall develop and evaluate.

1. A convict’s level of *negative desert* for the crime of which they are convicted is relevant to the *ideal sentence*.

[Premises 2-6 will be added in §VI]

7. A convict’s *criminal history*<sup>36</sup> constitutes prima facie evidence that is relevant to their level of negative desert for subsequent convictions. (History is Relevant to Desert, HRD)

Therefore,

8. A convict’s criminal history constitutes prima facie evidence that is relevant to the ideal sentences for their subsequent convictions.

Many find premise 7 (HRD) to be intuitive, but it remains controversial.<sup>37</sup> Some insist that the punishment should ‘fit the crime,’ not the record.<sup>38</sup> A convict’s history, in itself, seems to have no evidentiary relevance to his desert for subsequent crimes. Some complain that the RP “punish[es] a person twice for the

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31. “An assault committed by the most culpable offender should not result in a more severe penalty than that which is imposed for rape, even if the latter crime is committed by a first offender.” Julian V Roberts, *Punishing Persistent Offenders: Exploring Community and Offender Perspectives* (Oxford University Press, 2008) at 87.

32. Frase & Roberts, *supra* note 1 at 11.

33. von Hirsch, *supra* note 28 at 75.

34. See Frase & Roberts, *supra* note 1 at ch 10.

35. See contributions by Julian V Roberts, Christopher Bennett, Andrew von Hirsch, Youngjae Lee, and Richard S. Frase in Roberts & von Hirsch, *supra* note 5; and by J Angelo Corlett and Richard Dagger in Tamburrini & Ryberg, *supra* note 26; also Frase & Roberts, *supra* note 1 at ch 1.

36. In this article, ‘criminal history’ denotes criminal history or lack thereof. Everyone has a criminal history, so understood, although some of us have *null* criminal histories (i.e., clean records).

37. See generally *supra* note 27. HRD is easily misunderstood. It does not imply that criminal records should be admissible at trial or deemed relevant to verdicts. Because my topic is sentencing, you may safely assume that all convicts mentioned in this article were lawfully and justly convicted. The scope of HRD is limited to them.

38. See Mirko Bagaric, “The Punishment Should Fit the Crime—Not the Prior Convictions of the Person That Committed the Crime: An Argument for Less Impact Being Accorded to Previous Convictions in Sentencing” (2014) 51:2 San Diego L Rev 343.

same offense.”<sup>39</sup> Retributivists are “deeply divided on whether, why, and to what extent a repeat offender deserves more punishment.”<sup>40</sup> As Frase observes, “Desert theory is very underdeveloped when it comes to providing principles and practical decision rules that can both justify and limit prior-conviction enhancements.”<sup>41</sup> Even retributivists who accept HRD disagree with one another about how to defend it. The literature contains several arguments for it, none decisive.<sup>42</sup>

## VI. Character and Culpability

An intuitive way to support HRD involves inferring from criminal history, to character, to desert. Consider, first, the inference from character to desert. Could bad character, itself, warrant punishment?<sup>43</sup> It might seem otherwise. The act requirement requires bad acts (or omissions) for criminal conviction, precluding punishment for bad character, absent action.<sup>44</sup> Nevertheless, the state could, in theory, treat certain bad character traits as enduring, universal *aggravators* of negative desert for bad acts. For as long as a convict retained such traits, they would deserve more punishment for any crime they committed than would someone without such traits (if convicted of the same offense). Conversely, the state could treat good character traits as enduring, universal mitigators of negative desert.

Treating bad character as a basis for enduring, universal penalty enhancement is a conceivable policy. However, there is a conclusive, logical reason why evidence of bad character, *if based on criminal history*, cannot justify such a policy. For conviction, the prosecution must produce new evidence to prove that the defendant is more likely to be guilty than was previously established (very likely, in fact). Similarly, a convict should be sentenced to additional punishment for possessing a bad character trait only if the prosecution proves that the convict is more likely to possess the trait, or possesses it to a greater degree, *than was previously established*. Criminal history is, by definition, evidence available to the state before the trial began. Additional punishment is justified only if evidence presented at trial establishes that the convict is more likely to possess the bad trait, or possesses it to a greater degree, than the state previously knew. And that is possible only if the trait was a *cause* of new evidence presented. Character traits that are causally irrelevant to the sentencing offense are irrelevant to any argument for HSS that proceeds from criminal history, to character, to desert.

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39. See e.g. Bagaric, *supra* note 27 at 13. This claim is challenged in von Hirsch, *supra* note 28 at 71.

40. Frase & Roberts, *supra* note 1 at xi-xii.

41. Frase, *supra* note 6 at 120.

42. See generally *supra* note 35.

43. George Sher defends blame for bad character, but stops short of advocating punishment. See George Sher, *In Praise of Blame* (Oxford University Press, 2006) at 61, 66-67.

44. But see Douglas Husak, “The Alleged Act Requirement in Criminal Law” in John Deigh & David Dolinko, eds, *The Oxford Handbook of Philosophy of Criminal Law* (Oxford University Press, 2011) 107.



For this reason, arguments with this structure cannot appeal to traits, simplifier, but only to traits for which the sentencing offense provides new evidence. These, by definition, are traits that figure in good causal explanations of the sentencing offense. This is to say that the traits must bear on desert in virtue of their relevance to the convict's *degree of culpability* for the sentencing offense, also called *scalar culpability* (i.e., how culpable they are, not whether they are culpable). Unsurprisingly, according to two leading experts on HSS, "most desert-based theories of prior record enhancement have been based on mitigated or enhanced offender culpability."<sup>45</sup>

Define a 'culpability-relevant character trait' as one that is relevant to an agent's scalar culpability for their (independently blameworthy) actions. Using that definition, I reconstruct the argument as follows:

2. A convict's level of negative desert is (at least partly) a function of their *scalar culpability*.
3. Certain character traits are relevant to scalar culpability.
4. Many convicts have culpability-relevant character traits.
5. A convict's criminal history can constitute prima facie evidence that they possess (or lack) culpability-relevant character traits.

Therefore,

6. A convict's criminal history can constitute prima facie evidence that is relevant to their scalar culpability for subsequent criminal convictions. (History is Relevant to Culpability, HRC)

All retributivists treat culpability as a desert input,<sup>46</sup> so all would accept premise 2. They should be interested in whether criminal history can constitute evidence of enhanced culpability.

Different theories of scalar culpability recognize different *culpability bases*. All theories assign weight to the nature of one's conduct<sup>47</sup> and mental states (e.g., beliefs, motives, intentions). Some also consider relevant the nature and extent of any harm caused, although this factor is controversial.<sup>48</sup> Premise 3 states that certain character traits can also be relevant—a 'character-sensitive theory of culpability' (CSTC).<sup>49</sup>

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45. Frase & Roberts, *supra* note 1 at 24-25.

46. See e.g. *ibid* at 1; von Hirsch, *supra* note 28 at ch 2.

47. In this article, criminal 'conduct' includes criminal omissions.

48. See e.g. Michael S Moore, *Causation and Responsibility: An Essay in Law, Morals, and Metaphysics* (Oxford University Press, 2009) at 22; Larry Alexander & Kimberly Kessler Ferzan, *Crime and Culpability: A Theory of Criminal Law* (Cambridge University Press, 2009); David Enoch & Andrei Marmor, "The Case Against Moral Luck" (2007) 26:4 Law & Phil 405.

49. See Mike Redmayne, *Character in the Criminal Trial* (Oxford University Press, 2015) at 234-37. Forward-looking arguments for HSS may also appear to treat criminal record as evidence of 'bad character,' but their reason for doing so is not that bad character reflects *greater culpability*. Rather, it is that bad character (ostensibly) predicts *future misconduct*. They treat the criminal record as having predictive power. Forward-looking arguments for HSS support punishing bad character as a means, not an end.

Character judgments abound in folk morality, law, and philosophical ethics.<sup>50</sup> Many of the traits of folk psychology are intuitively relevant to scalar culpability. Plausible examples include *greed, sadism, lechery, cowardice, dishonesty, disloyalty, treachery, laziness, vindictiveness, selfishness, callousness, intemperance*, maybe even *gluttony* (I hope not). However, there is no satisfactory theory of the relevance of traits to scalar culpability. My question concerns not the appropriateness of blaming someone for their traits, per se, but of judging them culpable to a greater (or lesser) degree for conduct that is connected in certain ways to certain traits of theirs. I present a theory of traits that can enhance culpability for otherwise blameworthy acts such that enhanced censure, including enhanced punishment, might be deserved and justified, in principle. I argue that such a theory is coherent and intuitively plausible, although its usefulness in justifying HSS is debatable.

In §§IX-XIII, I shall critically evaluate arguments for premise 6 (HRC) that rely explicitly upon a CSTC. However, the literature also contains important arguments for HRC that do not rely explicitly upon character ascriptions as a middle term. I postpone their discussion until §XIV.

For now, I shall insert propositions 2-6 into the generic argument from §V, yielding the *character argument for the relevance of criminal history to retributive sentencing* (the ‘Character Argument’):

1. A convict’s level of *negative desert* for the crime of which they are convicted is relevant to the *ideal sentence*.
2. A convict’s level of negative desert is (at least partly) a function of their scalar *culpability*.
3. Certain character traits are relevant to scalar culpability.
4. Many convicts have *culpability-relevant character traits*.
5. A convict’s *criminal history* constitutes prima facie evidence that they possess (or lack) culpability-relevant character traits.

Therefore,

6. A convict’s criminal history constitutes prima facie evidence that is relevant to their scalar culpability for subsequent criminal convictions (HRC, from 3, 4, 5).

Therefore,

7. A convict’s criminal history constitutes prima facie evidence that is relevant to their level of desert for subsequent convictions (HRD, from 2, 6).

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50. See generally Deborah L Rhode, *Character: What It Means and Why It Matters* (Oxford University Press, 2019).

Therefore,

8. A convict's criminal history constitutes prima facie evidence that is relevant to the ideal sentences for their subsequent convictions (i.e., some form of HSS is defensible) (from 1, 7).<sup>51</sup>

Premises 1-3 are *a priori*; 4 and 5 are *a posteriori*. My remaining project in this article is to understand and probe the Character Argument (CA).

## VII. The Nature of Character Traits

Premise 3 of the CA states that certain character traits are relevant to scalar culpability. To evaluate this premise, we must address some questions about character traits, simpliciter. Folk psychology is my point of departure, although not my final destination. In §§VII-VIII, I describe a folk-psychological conception of character traits. Whether such traits actually exist is another question—an empirical question—to be raised but not answered in §§X-XII.

### A. *Dispositional, Stable, Motivational*

Character traits are species of *personality traits*, which are species of *dispositions*.<sup>52</sup> Personality traits are, by definition, relatively extended over time. A trait is *stable* if and only if it is “reliably manifested in trait-relevant behavior over iterated trials of similar trait-relevant eliciting conditions.”<sup>53</sup> Folk psychology allows that over the years we lose some traits and acquire others (especially during our first two decades of life). But as middle age approaches, many of our traits settle and persist for years, or so we think.<sup>54</sup>

Traits can be motivational causes of behavior:

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51. Philosophical arguments about punishment must accommodate the fact that criminal justice systems are highly imperfect mechanisms for delivering just deserts in the real world. Philosophers distinguish between ‘ideal theory’ and ‘non-ideal theory.’ See A John Simmons, “Ideal and Nonideal Theory” (2010) 38:1 *Philosophy & Public Affairs* 5. The CA supports HSS in ideal theory. For any plausible ideal theory it will be the case that, in the real world, public officials impose some sentences of which the theory disapproves, whatever the sentencing standards in force may be. Such suboptimality is inevitable because public officials operate with finite time, resources, intelligence, information, and virtue, *inter alia*. See further discussion in §XIII.
52. See e.g. Bernard Gert, *Morality: Its Nature and Justification*, revised ed (Oxford University Press, 2005); Michael S Moore, *Placing Blame: A Theory of Criminal Law* (Clarendon Press, 1997) at ch 13.
53. John M Doris, *Lack of Character: Personality and Moral Behavior* (Cambridge University Press, 2002) at 22.
54. Traits can still change over time due to psychotropic interventions, psychiatric trauma, brain damage, emerging mental illness, or simply successful efforts at changing one's habits.

### Motivational Causation

A condition or event, *c*, is a *motivational cause* of an act,  $\phi$ , if either (i) *c* is a cause<sup>55</sup> of an inclination that is a cause of  $\phi$ ; or (ii) *c* impedes<sup>56</sup> an inclination that impedes (or would otherwise impede)  $\phi$ .

Because trait-relevant eliciting conditions may never arise, possessing a trait does not entail that it will, in fact, be a cause of anything. An agent has a stable trait if it *would* be “reliably manifested in trait-relevant behavior over iterated trials of similar trait-relevant eliciting conditions.”<sup>57</sup> Although a single action can provide prima facie evidence of a stable trait, such evidence may be rebutted by trait-contrary behavior.

### B. Consistent

The traits of folk psychology exhibit, in addition to stability, the property of cross-situational *consistency*. Traits are consistent if and only if they “reliably manifest themselves in trait-relevant behavior across a *diversity of trait-relevant eliciting conditions* that may vary widely in their conduciveness to the manifestation of the trait in question.”<sup>58</sup> This definition entails that consistent traits have *relatively wide scope* and manifest even in situations unconducive to manifestation. A trait is *robust* if and only if it is both highly stable and highly consistent.<sup>59</sup>

### C. Manifested

The discussion has already referenced another defining aspect of personality traits: *manifestation*.<sup>60</sup> Begin with some illustrative examples. Embezzling funds could manifest the negative traits of *dishonesty*, *disloyalty*, and *untrustworthiness*. Slashing the tires on an ex-lover’s automobile could manifest *vengefulness* and *vindictiveness*. Kicking homeless people for one’s own amusement: *cruelty*, *sadism*, and *malice*. In addition, many criminal acts could manifest *selfishness*, *disrespect*, *incivility*, or *unfairness*.<sup>61</sup>

The idea that acts (and mental states) can manifest traits is important to this discussion, but somewhat obscure. Manifestation is distinct from causation, but easily confused with it. Causation is neither necessary nor sufficient for manifestation. It is difficult to explain precisely why an act or mental state manifests one

55. I use the indefinite article to allow for causal overdetermination. A fuller account might require that such causes be ‘significant’ or the like.

56. To impede an inclination or action is to prevent it or make less it likely to occur.

57. Doris, *supra* note 53 at 22; see also Sher, *supra* note 43 at 58.

58. Doris, *supra* note 53 at 22 [emphasis added].

59. *Ibid* at 23.

60. Writers use a variety of other terms to denote manifestation: an act or mental state can *express*, *reveal*, or *indicate* a trait; it can be the *result of*, *determined by*, *explained by*, or *attributed to* a trait; it can be *evidentiary* of a trait, or (at least in the case of acts) an *exercise* of one. These terms are found in Moore, *supra* note 52 at 572, citing Robert Nozick, *Philosophical Explanations* (Harvard University Press, 1981) at 383.

61. I mean for each of the preceding statements to be plausible, but I qualify them with ‘could’ because circumstances matter and few circumstances are described.

trait, but not another. The idea is that actions and mental states can stand in various meaningful relations to traits. Michael S. Moore suggests that an act manifests a trait if traits of that type *typically* cause acts of that type.<sup>62</sup> This suggestion is surely too simple, but I adapt it below.

**Manifestation Principle**

An act, intention, or inclination set,<sup>63</sup> *m*, *manifests* a trait type, *t*, if *t*-type traits are typically causes (direct or indirect) of *m*-type acts, intentions, or inclination sets, respectively.

**Contra-Manifestation Principle**

An act, intention, or inclination set, *m*, *contra-manifests* a trait type, *t*, if *t*-type traits are typically impediments (direct or indirect) of *m*-type acts, intentions, or inclination sets, respectively.

The Manifestation Principle has the following implications. An inclination set manifests a trait if traits of that type are typically causes of inclinations of that type. An intention manifests an inclination set if inclinations of that type are typically causes of intentions of that type. An act manifests an intention if intentions of that type are typically causes of acts of that type.

We might call an act or inclination set ‘in character’ for an agent if it manifests one or more of their traits; ‘out of character’ if it contra-manifests one or more of their traits; and ‘character-neutral’ (i.e., neither in nor out of character) if it neither manifests nor contra-manifests any of their traits.

## VIII. Aggravation and Mitigation

The model of personality traits just presented aims to capture how folk psychology conceives them: as dispositional, motivationally causal, stable over time, consistent across situations, and potentially manifested in inclination and action. We can now address the relevance of traits to scalar culpability. In doing so, we narrow our focus to character traits—the subset of personality traits directly relevant to moral appraisal of agents.<sup>64</sup>

I propose a specification of a CSTC comprising two principles. Each principle includes two relevance conditions, individually necessary and jointly sufficient. The first condition in each case links agents with traits. The second links traits with acts. The principles are:

**Aggravation Principle**

An agent’s character trait, *t*, *aggravates* their culpability for an act,  $\phi$ , if and only if *t* is 1) agency-implicating and 2) a cause of, and manifested by, a culpability-aggravating inclination set that is a cause of  $\phi$ .

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62. Moore, *supra* note 52 at 574.

63. Define an ‘inclination set’ as some subset of an agent’s motives and motivated desires.

64. For example, as having virtues, vices, continent or incontinent tendencies; as being blameworthy or praiseworthy.

### Mitigation Principle

An agent's character trait, *t*, *mitigates* their culpability for an act,  $\phi$ , if and only if *t* is 1) agency-implicating and 2) a cause of a culpability-mitigating inclination set that either (i) is a cause of  $\phi$  and manifests *t*; or (ii) is a motivational impediment to  $\phi$  and contra-manifests *t*.<sup>65</sup>

Aggravation and Mitigation are *ceteris paribus* principles. To say that a trait aggravates an agent's culpability for an act is to say that, holding constant their other culpability-relevant attributes (e.g., nature of act, content of inclination set, any harm caused, etc.), the agent is more culpable for the act if the trait is a cause of the operative inclination set and manifested thereby.<sup>66</sup> An agent's inclination set is culpability-aggravating if they are more culpable than they would otherwise be for a blameworthy act if the set is a cause thereof and manifested thereby. An inclination set is more culpability-aggravating, *ceteris paribus*, if a culpability-aggravating trait is a cause of and manifested by it.

Which inclination sets aggravate culpability? One could simply use folk judgments about positive and negative motives and desires, but for purpose of discussion I suggest the following analysis: an inclination set aggravates culpability if and only if acting from it manifests insufficient concern for the legally or morally protected interests of others.<sup>67</sup>

Aggravation and Mitigation reference 'agential implication'—a two-place relation between agent and trait. A trait that is not agency-implicating cannot serve the CA, even if it meets all other conditions for culpability-relevance. A trait is agency-implicating for agents if and only if it bears on our normative appraisal of them. However, philosophers disagree about the conditions under which traits are agency-implicating. Some claim, for example, that a trait is agency-implicating only if it is part of the agent's *deep self* or *real self*.<sup>68</sup>

65. There could also be morally neutral *personality* traits (e.g., symptoms of certain mental illnesses) that diminish moral competence and mitigate culpability.

66. Similarly, with some adjustments, for mitigation.

67. Alexander and Ferzan define a legally blameworthy act as one motivated by "insufficient concern for the legally protected interests of others." Alexander & Ferzan, *supra* note 48 at ch 2. We should define culpability-aggravating inclinations in terms of blameworthiness, not impermissibility. Some inclinations cause acts that, although impermissible, are blameless. Certain mental illnesses, for example, might generate such inclinations. Of course, most individuals with mental illnesses do not act impermissibly any more often than do the rest of us. However, there are conditions (e.g., rare psychoses) that often cause impermissible conduct while also diminishing *moral competence* or *capacity*. Such conditions, and the aspects and symptoms thereof, should not be understood as culpability-aggravating. They are, if anything, culpability-mitigating. See e.g. John Martin Fischer & Mark Ravizza, *Responsibility and Control: A Theory of Moral Responsibility* (Cambridge University Press, 1998). The criminal law acknowledges this effect to some extent via the insanity defense and doctrine of diminished capacity. See e.g. *Clark v Arizona*, 548 US 735 (2006); Stephen J Morse, "Undiminished Confusion in Diminished Capacity" (1984) 75:1 J Crim L & Criminology 1.

68. See e.g. classic defenses collected in Gary Watson, *Agency and Answerability: Selected Essays* (Oxford University Press, 2004); Harry G Frankfurt, *The Importance of What We Care About: Philosophical Essays* (Cambridge University Press, 1988). More recent treatments include Chandra Sripada, "Self-Expression: A Deep Self Theory of Moral Responsibility" (2016) 173:5 *Philosophical Studies* 1203; Angela Smith, "Control, Responsibility, and Moral Assessment" (2008) 138:3 *Philosophical Studies* 367.

Others deny this.<sup>69</sup> Some claim, while others deny, that the agent must be morally responsible for the trait, itself.<sup>70</sup> Whether a trait is agency-implicating, and therefore useful to the CA, depends on the correct theory of agential implication and whether the trait meets its conditions (see §XII.D for further discussion).

We now have a provisional account of the character traits of folk psychology and principles linking them to culpability: Aggravation and Mitigation. These imply that criminals are more culpable for their crimes, *ceteris paribus*, if they possess agency-implicating traits that are causes of and manifested by culpability-aggravating inclination sets that are causes of their crimes. They are less culpable if either condition is not met, although they remain culpable for crimes that reflect their wrongful *choices* (see §IX.C). They are still less culpable, *ceteris paribus*, if their crimes either 1) manifest and are caused by culpability-mitigating traits; or 2) contra-manifest and are impeded by culpability-mitigating traits.

I turn next to some philosophical objections to traits as culpability-aggravating.

## IX. Objections to Traits as Aggravating Culpability

### A. Punishing for Character

Some reject altogether the idea that we should hold agents accountable for their character,<sup>71</sup> especially via state punishment, stating “punishing bad character violates the fundamental principle that people are punished for what they have done (and with what intent), not for who or what they are.”<sup>72</sup>

Such objections appear in various contexts.<sup>73</sup> Lawyers might invoke a broad principle of Anglo-American law against ‘punishing character’—citing various legal doctrines in support. As already noted, the act requirement precludes criminalizing the *mere* possession of bad character, absent bad acts or omissions. There are established restrictions on the admissibility of character evidence against defendants at trial. It is settled at common law that the prosecution is forbidden to introduce character evidence, including prior bad acts, to persuade the factfinder that the accused is, in fact, the perpetrator.<sup>74</sup>

69. See e.g. Susan Wolf, *Freedom within Reason* (Oxford University Press, 1990).

70. Supporters of the claim include e.g. *ibid* at 37; Peter Arenella, “Character, Choice and Moral Agency: The Relevance of Character to Our Moral Culpability Judgments” (1990) 7:2 *Social Philosophy & Policy* 59; Fischer & Ravizza, *supra* note 67. Opponents include Carissa Byrne Hessick, “Motive’s Role in Criminal Punishment” (2006) 80:1 *S Cal L Rev* 89 at 120; Pamela Hieronymi, “The Force and Fairness of Blame” (2004) 18:1 *Philosophical Perspectives* 115.

71. See e.g. Neil Levy, *Hard Luck: How Luck Undermines Free Will and Moral Responsibility* (Oxford University Press, 2011); Galen Strawson, “The Impossibility of Moral Responsibility” (1994) 75:1 *Philosophical Studies* 5; Jeremy Horder, “Criminal Culpability: The Possibility of a General Theory” (1993) 12:2 *Law & Phil* 193 at 206; Youngjae Lee, “Repeat Offenders and the Question of Desert” in Roberts & von Hirsch, *supra* note 5 at 51-55.

72. Frase & Roberts, *supra* note 1 at 34.

73. For criticisms of a CSTC see Lee, *supra* note 71 at 51-55; Horder, *supra* note 71 at 206.

74. In the USA, this principle is codified for federal courts in Rule of Evidence 404, which makes character evidence inadmissible to prove that the accused acted in conformity with their

However, there is no general legal principle deeming character irrelevant. Various departments of the law make it relevant in one way or another.<sup>75</sup> Most relevantly, many jurisdictions allow the prosecution to introduce character evidence as an aggravating factor at sentencing.<sup>76</sup> Character evidence is even admissible at trial for certain purposes. For example, the accused may introduce good character evidence to create reasonable doubt about whether they are the perpetrator. The prosecution may then introduce bad character evidence to rebut.<sup>77</sup>

There are also familiar objections from liberal political morality to criminalizing activities for the sole reason that lawmakers deem them to reflect ‘bad character’ (e.g., marital infidelity; marijuana possession; refusal to accept gainful employment). However, the target of such objections is not the punishment of bad character, *per se*. Rather, some liberals oppose criminalizing activities (or associated traits) that are none of the state’s business. Others oppose violating the liberal requirement that legislation remain neutral on conceptions of the good. Neither objection applies to the CA.<sup>78</sup>

Some intuitive objections to blaming or punishing for ‘character’ might stem from neglect of the difference between global and local character judgments. Calling someone ‘a person of bad (or good) character’ makes a global judgment, referencing multiple traits.<sup>79</sup> Calling someone ‘cowardly’ or ‘honest’ makes a local judgment—ascribing one trait. Scalar culpability for acts depends on local judgments, not global ones. A CSTC does not imply that all character traits are culpability-relevant, or that possessing some culpability-aggravating character traits entails bad character, overall, or that convicts are persons of bad character, overall. It simply holds that many convicts possess specific traits that are relevant to their scalar culpability for specific crimes to which said traits are related in specific ways.

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character on the occasion in question. See Barrett J Anderson, “Recognizing Character: A New Perspective on Character Evidence” (2012) 121:7 Yale LJ 1912.

75. Examples include tort actions for defamation of character and the widespread use of ‘character and fitness’ tests for membership in the bar and for public office. See generally Rhode, *supra* note 50 and the excellent discussion in Redmayne, *supra* note 49.
76. See generally Anderson, *supra* note 74. Some US jurisdictions also allow the defense to introduce evidence of good character as a mitigating factor.
77. See generally David P Leonard, “Character and Motive in Evidence Law” (2000) 34:2 Loy LA L Rev 439.
78. See Roberts, *supra* note 31 at 87; Redmayne, *supra* note 49 at 237-40.
79. Youngjae Lee criticizes character arguments that classify recidivists as “bad people” and “heinous human beings.” Youngjae Lee, “Recidivism as Omission: A Relational Account” (2009) 87:3 Tex L Rev 571 at 584, 618. He also suggests that character arguments treat traits as “deeply ingrained” such that recidivists are “beyond repair.” Lee, *supra* note 71. The CA does not imply that recidivists are “bad people,” overall, or that their traits are immutable. See insightful discussion in Ekow N Yankah, “Good Guys and Bad Guys: Punishing Character, Equality and the Irrelevance of Moral Character to Criminal Punishment” (2004) 25:3 Cardozo L Rev 1019.



### B. Criminal Responsibility

Readers familiar with debates about criminal responsibility might worry that a CSTC presupposes a controversial theory thereof: a *character theory*. Character theorists hold that bad character is necessary for criminal responsibility, with criminal acts serving only as evidence of the character traits manifested thereby.<sup>80</sup> Character theorists can easily embrace a CSTC and may even be committed to one.

Opposing character theories are *choice theories*, which hold that the defendant's choice to offend is sufficient for criminal responsibility, character traits notwithstanding.<sup>81</sup> Choice theorists are not committed to a CSTC, but they can affirm, without self-contradiction, that bad character, although unnecessary for culpability, may aggravate it when present. Such affirmation is possible because a CSTC does not entail that juries should acquit a defendant of generally good character upon proof that their bad act was out of character (or at least not in character) for them. Therefore, a CSTC does not contradict the choice theorist's claim that bad choices suffice for responsibility. A CSTC is compatible with both character and choice theories.

I have not attempted to prove the truth of a CSTC (i.e., Aggravation and Mitigation Principles). I appealed to intuitive considerations. I also considered several legal and philosophical objections and found none compelling.

I conclude that the reasoning of the CA is valid and its *a priori* premises (1-3) not implausible. One of the most insightful writers on HSS, Youngjae Lee, who rejects character-based arguments, acknowledges that he has not refuted them.<sup>82</sup> Whatever their position on HSS, retributivists should take another look at such arguments.

### X. The Nature and Incidence of Culpability-Relevant Traits

The CA may be coherent and inferentially valid, with plausible *a priori* premises, but its soundness is far from demonstrated. The remainder of this article is more critical of the CA, shifting attention to *a posteriori* premises, beginning with premise 4, which states that many convicts have culpability-relevant character

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80. See Lee, *supra* note 79 at 578-83; Victor Tadros, *Criminal Responsibility* (Oxford University Press, 2007); Holly M Smith, "Non-Tracing Cases of Culpable Ignorance" (2011) 5:2 *Criminal Law and Philosophy* 115; George P Fletcher, "The Theory of Criminal Negligence: A Comparative Analysis" (1971) 119:3 *U Pa L Rev* 401 at 417 (retributivism requires the law to "fathom the kind of a man" someone is in order to assess desert). The provocation defense of the Model Penal Code recognizes that "one who kills in response to certain provoking events should be regarded as demonstrating a significantly different *character deficiency* than one who kills in their absence." United States MODEL PENAL CODE § 210.3 Cmt 5(a) at 55 (Am L Inst, Official Draft & Revised Commentaries, Pt II, Vol 1, 1980) [emphasis added].

81. See Moore, *supra* note 48; Alexander & Ferzan, *supra* note 48; Horder, *supra* note 71. Antony Duff questions the choice/character dichotomy in RA Duff, "Choice, Character, and Criminal Liability" (1993) 12:4 *Law & Phil* 345.

82. See Lee, *supra* note 71 at 55.

traits. The following objection directly challenges premise 4 as to culpability-aggravating traits:<sup>83</sup>

**No-Such-Traits Objection**

- i. A trait type is culpability-aggravating only if it is robust (stable and consistent) and manifested in blameworthy acts.
- ii. Traits that are robust and manifested in blameworthy acts are very rare or non-existent in the general population.

Therefore,

- iii. Culpability-aggravating character traits are very rare or non-existent in the general population.
- iv. If a trait is very rare or non-existent in the general population, then it is very rare or non-existent in convict populations.

Therefore,

- v. Culpability-aggravating character traits are very rare or non-existent in convict populations.

This conclusion (v) contradicts premise 4 of the CA as to culpability-aggravating traits. However, premise (ii) of the No-Such-Traits Objection (NSTO) contradicts folk psychology, which posits a diverse set of robust character traits (see §VII). It is intuitively plausible that some such traits manifest in blameworthy acts. Therefore, premise (ii) is counterintuitive.

Nevertheless, premise (ii) must be entertained, because the incidence of robust traits is empirically controversial. For over a century, experimental psychologists have mounted sweeping challenges to the folk psychology of personality traits. Some experiments suggest that robust traits are not widespread in the general population and that non-trait factors, rather than traits, are the dominant causes of behavior. The emerging psychological hypotheses are known as ‘situationism.’<sup>84</sup> I shall refer to the cited experiments as the ‘character experiments.’ The more famous of these include Stanley Milgram’s obedience experiment at Yale, the Stanford prison experiment, and the Good Samaritan experiments conducted in Princeton, New Jersey. There are hundreds of others in the situationist literature.<sup>85</sup> Many involved randomized, controlled, experimental manipulation of situations, ensuring that the subject’s encountering the situation cannot itself be attributed to any stable traits (e.g., traits that might lead one to seek out such situations). The typical finding reveals that a particular type of behavior varies more for one agent across different situation-types than it does across different

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83. Hereafter, I restrict attention to culpability-aggravating traits, disregarding culpability-mitigating traits.

84. See Lee Ross & Richard E Nisbett, *The Person and the Situation: Perspectives of Social Psychology* (Temple University Press, 1991); Walter Mischel, *Personality and Assessment* (Lawrence Erlbaum Associates, 1996).

85. Discussed in detail in Doris, *supra* note 53.

agents facing one situation-type. In such cases it appears that the situation-type, not individual personality traits, is the dominant determinant of the behavior.

One conclusion drawn by psychologists is that slight variations in the agent's situation (e.g., whether they are in a hurry or have recently received some good news or have been instructed to act) make a surprisingly strong difference to their likelihood of behaving as a given trait would indicate under the circumstances. The experimental subjects' behavior tracks variations that everyone, including the subjects, themselves, would consider morally irrelevant.<sup>86</sup> Much of our behavior appears susceptible to influences we would not reflectively endorse as good reasons for action. Traits appear to play much less of a role than folk psychology predicts.

Some psychologists and philosophers have interpreted these results as posing a serious challenge to the folk psychology of character. Some conclude that robust traits are very rare or non-existent in the general population.<sup>87</sup> Arguments from empirical inadequacy defy quick summary, but cannot be quickly dismissed, as they are based on extensive study of the scientific literature.

## XI. Beyond Folk Psychology

Debate continues about the lessons of the character experiments. Their methodologies have been questioned, as have interpretations of the results as supporting skepticism about robust traits.<sup>88</sup> This is not the place to survey that debate. I focus instead upon a complementary tactic for rebutting the NSTO. This tactic challenges premise (i), which states that a trait type is culpability-relevant only if robust and manifested in blameworthy/praiseworthy acts. Suppose there is an alternative conception of traits, one that survives the character experiments. If traits so conceived exist and are relevant to culpability, premise (i) is false.

One might find such a conception in recent defenses of virtue ethics against empirical inadequacy critiques. Critics such as John Doris argue that virtue ethics presupposes the folk-psychological conception of character traits and that the character experiments reveal such traits to be so rare that virtue ethics is not a realistic prescriptive theory for human beings.<sup>89</sup> Virtue ethicists have responded by clarifying and refining their philosophical commitments, frequently distancing

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86. See Jonathan Webber, "Character, Consistency, and Classification" (2006) 115:459 *Mind* 651.

87. See e.g. Doris, *supra* note 53; Peter BM Vranas, "The Indeterminacy Paradox: Character Evaluations and Human Psychology" (2005) 39:1 *Noûs* 1; Gilbert Harman, "Moral Philosophy Meets Social Psychology: Virtue Ethics and the Fundamental Attribution Error" (1999) 99:1 *Proceedings of the Aristotelian Society* 315. A useful overview is found in Redmayne, *supra* note 49 at ch 2.

88. See e.g. discussions and sources cited in Doris, *supra* note 53; John Sabini & Maury Silver, "Lack of Character? Situationism Critiqued" (2005) 115:3 *Ethics* 535.

89. See John M Doris & Stephen P Stich, "As a Matter of Fact: Empirical Perspectives on Ethics" in Frank Jackson & Michael Smith, eds, *The Oxford Handbook of Contemporary Philosophy* (Oxford University Press, 2005) 114; Maria Merritt, "Virtue Ethics and Situationist Personality Psychology" (2000) 3:4 *Ethical Theory & Moral Practice* 365; Gilbert Harman, "The Nonexistence of Character Traits" (2000) 100:1 *Proceedings of the Aristotelian Society* 223.

themselves from folk psychology in the process.<sup>90</sup> They suggest alternative conceptions of traits that could prove useful in challenging premise (i) of the NSTO. Several virtue ethicists emphasize that traits do not invariably produce behavior. Rather, they generate pro tanto inclinations that vary along the dimension of *strength*.<sup>91</sup>

Another conceptual refinement advocated by some virtue ethicists qualifies the dimension of cross-situational consistency introduced in §VII.B. The width of a trait reflects the diversity of situations in which it manifests. According to Doris, both folk psychology and virtue ethics posit wide traits. However, some virtue ethicists reply that they are not (and, perhaps, were never) committed to wide traits, folk psychology notwithstanding.

The question remains whether narrower traits are culpability-relevant to the extent required by the CA. Let us define ‘revisionary traits’ as any that differ from folk psychology and are weak enough and/or narrow enough to survive the character experiments. Notwithstanding the experiments, certain revisionary traits might be widely instantiated in the general population. Even critics of robust traits believe in certain revisionary traits. Doris appears to endorse revisionary traits that are relatively strong, but very narrow.<sup>92</sup> If such traits are widespread in the general population, it is plausible that criminals also have them. Perhaps it is even the case that, as compared to law-abiding citizens, the average criminal has more numerous revisionary traits that are negative and fewer that are positive.

Assume, *arguendo*, that certain negative, revisionary traits are pervasive in criminal populations. The next question is whether such traits are culpability-aggravating. We must proceed with caution. Folk moral judgments presuppose folk psychology, not empirical psychology. Folk judgments of culpability-relevance refer to robust traits, not revisionary ones. As we revise our conception of traits away from folk psychology, we compromise our ability to rely on associated folk-moral judgments. Whether or not folk psychology posits revisionary traits alongside robust ones, it is not obvious that folk morality sees revisionary traits as culpability-relevant at all, much less to the extent the CA requires. Folk judgments of relative culpability might be implicitly calibrated to robust traits, not revisionary ones.

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90. Defenses of character traits against empirical challenges are found in Candace Upton, “The Empirical Argument Against Virtue” (2016) 20:4 *The Journal of Ethics* 355; Travis J Rodgers & Brandon Warmke, “Situationism Versus Situationism” (2015) 18:1 *Ethical Theory & Moral Practice* 9; Christian B Miller, *Moral Character: An Empirical Theory* (Oxford University Press, 2013); Neera K Badhwar, “The Milgram Experiments, Learned Helplessness, and Character Traits” (2009) 13:2 *The Journal of Ethics* 257; Gopal Sreenivasan, “Character and Consistency: Still More Errors” (2008) 117:467 *Mind* 603; Erik J Wielenberg, “Saving Character” (2006) 9:4 *Ethical Theory & Moral Practice* 461; Julia Annas, “Comments on John Doris’s Lack of Character” (2005) 71:3 *Philosophy & Phenomenological Research* 636; Rachana Kamtekar, “Situationism and Virtue Ethics on the Content of Our Character” (2004) 114:3 *Ethics* 458.

91. Jonathan Webber suggests, contra behaviorism, that a character trait is a disposition to be inclined to certain behavior, not a disposition to behave. Jonathan Webber, “Virtue, Character and Situation” (2006) 3:2 *Journal of Moral Philosophy* 193 at 209.

92. Doris, *supra* note 53 at 65-66.

In a similar vein, some legal scholars have worried that revisionary conceptions of character threaten something more fundamental than the CA—the very idea of criminal responsibility.<sup>93</sup> Anders Kaye wonders if “the more modest character traits sufficient . . . for virtue theory can adequately sustain attributions of responsibility.”<sup>94</sup> Donald Dripps worries that “[a] virtue theory that did describe traits defined narrowly enough to be recognized in the psychological research . . . would have to account for an unmanageably large number of predispositions.”<sup>95</sup>

I shall not argue that revisionary traits are incapable of supporting legal and moral responsibility. My question is more modest: can they serve the CA? The Aggravation Principle entails that a trait aggravates culpability only if it is motivationally causal, manifested in blameworthy action, and agency-implicating. Therefore, the CA requires traits that are manifested in criminal acts (which implies that they are crime-causing, ‘criminogenic’) and agency-implicating. Such traits must be relatively stable, by definition, and instantiated in the criminal population. They must be narrow and/or weak enough to survive the character experiments, but also wide enough and strong enough to be both manifested in criminal acts and agency-implicating. The widest, strongest traits are agency-implicating and plausibly manifested, but the character experiments suggest they are not empirically adequate. The narrowest, weakest traits may be empirically adequate, but it remains to be established that they are sufficiently manifested in crime.

With these constraints in mind, I can now post a ‘job description’ for traits that could serve as the culpability-aggravators driving the CA. They should be 1) relatively stable; 2) at least medium-width; 3) at least moderately strong; 4) agency-implicating; and 5) significantly crime-manifested, which implies 6) significantly criminogenic.

## XII. Candidate Traits

As we search for traits with the aforementioned qualifications, criminologists are natural expert witnesses. This section begins that consultation, in a speculative and rudimentary way. For illustrative purposes, I focus on a trait for which there is actual evidence of criminogenesis. I proceed to evaluate it against the rest of the job description. My conclusions are mixed.

Some theories of criminogenesis assign personality traits no role or only a minimal role.<sup>96</sup> Such theories complement the character experiments. Just as folk

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93. See Andrew E Lelling, “A Psychological Critique of Character-Based Theories of Criminal Excuse” (1998) 49:1 *Syracuse L Rev* 35; Donald A Dripps, “Fundamental Retribution Error: Criminal Justice and the Social Psychology of Blame” (2003) 56:5 *Vand L Rev* 1383; Anders Kaye, “Does Situationist Psychology Have Radical Implications for Criminal Responsibility?” (2008) 59:3 *Ala L Rev* 611.

94. Kaye, *ibid* at 651.

95. Dripps, *supra* note 93 at 1431.

96. Criminologists are overwhelmingly interested in explanation, prediction, prevention, incapacitation, and rehabilitation, not retribution, desert, culpability, or blame. Many of the factors that criminologists investigate as potentially criminogenic seem irrelevant to culpability, especially

psychology posits causal personality traits in the general population, it posits criminogenic traits in the criminal population. The character experiments suggest that folk psychology is unreliable with respect to character in general. Criminogenic theories that deemphasize personality traits imply that folk psychology is similarly unreliable with respect to criminal character.<sup>97</sup> If personality traits are not criminogenic, they cannot be relevant to culpability under a CSTC. Therefore, the defender of the CA must hope that criminologists on the opposing side of the debate—those positing criminogenic personality traits—are closer to the truth.

I cannot review the vast criminogenesis literature, but use an illustrative example: a theory of criminogenesis that might support the existence of a personality trait suited to the purposes of the CA. This is the *self-control theory* (SCT), a widely cited theory of criminogenesis that is central to Michael Gottfredson and Travis Hirschi's controversial *general theory of crime*. Gottfredson and Hirschi posit a "stable construct," a single, unidimensional, latent trait—degree of self-control—and assert that it is "the individual characteristic relevant to the commission of criminal acts."<sup>98</sup> Some of their theses with significance for my purposes are as follows:

- The main cause of crime is *low self-control*.
- Someone with high self-control is substantially less likely to commit crimes at every stage of his life.
- Someone is more likely to commit crimes the less self-control he has.
- Someone with low self-control will not inevitably commit crimes.
- Low self-control has many manifestations, only some of which are criminal.<sup>99</sup>

It is crucial to distinguish colloquial meanings of 'self-control' from this criminological term of art. In a colloquial sense of 'self-control,' any properly convicted criminal lacked self-control, by definition, when they offended, because they did not 'control' themselves. In this sense, it is tautological that convicts *lacked* self-control (past tense).

In criminology, by contrast, 'self-control' denotes a particular empirical construct: a stable disposition that can be given an operational definition.<sup>100</sup> Using such a definition, the proposition that criminals have less 'self-control'

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distal factors such as gender, family of origin, and education level. See Joanne Savage, ed, *The Development of Persistent Criminality* (Oxford University Press, 2009) chs 1-9.

97. See e.g. Christopher Birkbeck & Gary LaFree, "The Situational Analysis of Crime and Deviance" (1993) 19:1 *Annual Review of Sociology* 113; Daniel S Nagin & Raymond Paternoster, "Enduring Individual Differences and Rational Choice Theories of Crime" (1993) 27:3 *Law & Soc'y Rev* 467.
98. Michael R Gottfredson & Travis Hirschi, *A General Theory of Crime* (Stanford University Press, 1990) at 88. The theory is debated in Erich Goode, ed, *Out of Control: Assessing the General Theory of Crime* (Stanford University Press, 2008).
99. Gottfredson & Hirschi, *supra* note 98 at ch 5 [emphasis added].
100. Operational definitions of low self-control are found in Harold G Grasmick et al, "Testing the Core Empirical Implications of Gottfredson and Hirschi's General Theory of Crime" (1993) 30:1 *Journal of Research in Crime & Delinquency* 5.

than non-criminals is a falsifiable empirical hypothesis about stable dispositions, not a tautology about past criminal activity.

According to Gottfredson and Hirschi, low self-control (LSC) is associated with the following attributes, *inter alia*:

- Present oriented (tendency to respond to tangible stimuli in the immediate environment)
- Absence of diligence, tenacity, or persistence in a course of action
- Little interest in and unprepared for long-term occupational pursuits
- Adventurousome, active, physical
- Self-centered, indifferent, or insensitive to suffering and needs of others
- Temper (minimal tolerance for frustration)
- Possibly limited cognitive skills
- Sociable.<sup>101</sup>

They claim that these attributes, which are at least indirectly observable, are correlated with one another and collectively constitute evidence of an underlying trait they call ‘low self-control.’ I can now address the relationship between self-control, as the SCT understands it, and my project. How, if at all, does degree of self-control map onto personality traits? Is LSC, itself, a personality trait or an effect or aspect of one? Is there one trait (or set thereof) that correlates with high self-control and another with low self-control? Assume, for the purpose of this section, that LSC is non-trivially instantiated in the general population and that there is, indeed, a personality trait that correlates with it. I shall call it a ‘trait of low self-control’ (TLSC), to distinguish it conceptually from LSC, simpliciter, which might or might not satisfy my definition of a trait.

My next question is whether a TLSC is culpability-aggravating and, if so, to the extent required by the CA. As discussed in §XI, viable candidates will be 1) relatively stable; 2) at least medium-width; 3) at least moderately strong; 4) agency-implicating; and 5) significantly crime-manifested, which implies 6) significantly criminogenic. In a preliminary way, I shall assess a TLSC against these criteria.

### ***A. Stability and Width***

I shall spend little time on the stability criterion, which a TLSC appears to meet.<sup>102</sup> Regarding width, a TLSC also appears to be on solid ground. Gottfredson and Hirschi emphasize that LSC impacts many different types of conduct, so a TLSC could be relatively wide.<sup>103</sup> There is, however, a concern about the interaction between width and culpability-aggravation. Traits inherit culpability-aggravation from the inclination sets that manifest them. The more aggravating an inclination set, the more aggravating the trait types manifested

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101. Gottfredson & Hirschi, *supra* note 98 at 89-91.

102. *Ibid* at 230-31.

103. *Ibid* at 91-94.

thereby. Many of the diverse actions of which LSC is a cause are blameworthy, but many are not self-evidently so. It is not obvious that either the total number of blameworthy acts of which LSC is a cause, or the blameworthy percentage thereof, is sufficient for a TLSC to be as culpability-aggravating as the CA needs it to be.

### ***B. Affirmative Motivation***

Many of the traits that folk psychology might suggest as criminogenic would appear to operate as affirmative motivational causes: driving the agent toward crime or making crime appear attractive. Imagine a twisted world in which the trait of *sadism*, for example, operates in this way—in which most criminals possess sadism in varying degrees, sadism is a motivational cause of most crimes, and each convict’s degree of manifested sadism aggravates accordingly their scalar culpability.

That is not the real world, however, and a TLSC tells a different story. Gottfredson and Hirschi conclude that LSC is criminogenic, but they emphasize that LSC does not generate affirmative motives. They deny that LSC is a “predisposition to criminal behavior.”<sup>104</sup> LSC does not make crime appear attractive to the agent or drive them toward crime, as could sadism or other folk-psychological traits mentioned in §VII (e.g., greed, lechery). Unlike such salient vices, LSC is *negative*, representing the absence of, or an impediment to, an internal mechanism that would otherwise drive the agent away from crime—a “repulsion mechanism.”<sup>105</sup> According to Gottfredson and Hirschi, the affirmative motivations to offend constitute forms of self-interest that are widely shared by criminals and non-criminals alike. However, the fact that LSC operates negatively, rather than affirmatively, does not preclude it from serving as a motivational cause of crime under the definition in §VII.A: LSC ‘impedes an inclination that impedes (or would otherwise impede)’ criminal acts. That is consistent with motivational causation.

### ***C. Strength***

Criminogenesis, simpliciter, is not enough. Traits can serve the CA only if they are *moderately strong* motivational causes of crime. Is a TLSC strong enough? Gottfredson and Hirschi emphasize that LSC does not ‘cause’ its possessors to attempt crimes. Individuals with low self-control often refrain from committing crimes. Those with high self-control sometimes offend. Opportunity matters greatly to criminal attempt decisions.<sup>106</sup> The SCT is consistent with the hypothesis that morally irrelevant factors (e.g., situational factors) predict *whether or*

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104. *Ibid* at 87-88, 256.

105. I borrow the term from Alexander Sarch, “Who Cares What You Think? Criminal Culpability and the Irrelevance of Unmanifested Mental States” (2017) 36:6 Law & Phil 707 at 728.

106. Gottfredson & Hirschi, *supra* note 98 at 22-44.



*not one commits crimes and whether or not one engages in deviant behavior* (not reflected on criminal record, e.g., bad grades, excessive drinking) more accurately than do the observable attributes Gottfredson and Hirschi associate with low self-control. The theory seems consistent with morally irrelevant factors (e.g., boredom, peer pressure, air temperature, recent good fortune) being better predictors of criminal activity than LSC. This is to say that a TLSC seems to generate only pro tanto inclinations and not be extremely strong. It might or might not be strong enough to serve the CA.

#### ***D. Agential Implication***

If a TLSC is to serve the CA, it must also be agency-implicating. How demanding this condition is depends on our theory of agential implication (see §VIII). One issue is that a TLSC compromises practical rationality in a rather general way. The agent with a TLSC disregards the legally protected interests of others, but they are also compromised in their long-term, prudential rationality. Many of a TLSC's effects counter the agent's own medium-term interests, maybe even their desires. A TLSC may well be a major cause of wrongful actions, but because it has such broad, unfortunate implications for the agent's own flourishing, it may also compromise not just their disinclination to offend, but their *capacity* to comply. At some point, a TLSC begins to resemble a potentially exculpatory mental illness more than a candidate for culpability-aggravation. A negative trait cannot implicate one's moral agency if it compromises that very agency.

It may also be relevant to what extent the agent is, themselves, morally responsible for possessing the trait. Gottfredson and Hirschi emphasize that LSC results from distal factors (many concerning childhood environment).<sup>107</sup> These are factors over which individuals have little control or responsibility. Lack of such responsibility may constitute another strike against a TLSC as agency-implicating.<sup>108</sup>

### **XIII. Traits and Criminal History**

The inconclusive lesson of the previous section is that a TLSC—an initially promising candidate—might or might not serve the purposes of the CA. Of course, other revisionary traits could be described and assessed as alternatives. For the sake of this section, let us assume that some traits—perhaps a TLSC, perhaps others—are culpability-aggravating and possessed by many convicts. Premise 5 of the CA rests on the answer to yet another empirical question, which concerns how traits are distributed across convict populations such as this one:

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<sup>107.</sup> *Ibid* at 94-108.

<sup>108.</sup> Perhaps we could hold agents morally responsible for failure to improve their own characters over time. That would be to treat a second-order trait, not a TLSC, itself, as the ultimate culpability-aggravator, but this possibility should be explored. See §XIV.B, *infra*, for related discussion.

Define the *Florida Burglars* as a set comprising everyone convicted of simple burglary in the State of Florida in the year 2018. Some Florida Burglars are first offenders, others are second offenders, third offenders, et cetera.

For any version of HSS, the CA can support it only if it is possible, in principle, to sort a subpopulation of convicts, such as the Florida Burglars, by scalar culpability into at least as many distinct clusters as the prescribed number of sentence enhancement tiers.<sup>109</sup> The FOD has two tiers, so it requires two clusters, representing the degrees of culpability ascribable to first offenders versus repeat offenders. PLM, by contrast, has at least three tiers and requires at least three clusters. Finally, the RP might require more than three clusters to match its tiers. Consider the following definition:

‘Bimodality’ applies to a set of convicts if and only if it is possible, in principle, to sort its members into two distinct clusters on the basis of character traits relevant to culpability for the respective crimes for which they are being sentenced, such that members of the first cluster possess a significantly higher degree of character-attributable culpability for their respective crimes than do members of the second.

Imagine bimodality holds for the Florida Burglars: they bifurcate into clusters based on culpability-relevant traits. I shall use the FOD as my representative version of HSS. The FOD imposes a longer sentence on every repeat-offender within the Florida Burglars than on every first offender. These are ideal sentences according to premise 1 of the CA (§VI) only if the higher-culpability cluster consists entirely of repeat offenders and the lower-culpability cluster entirely first offenders. In other words, every first offender has more culpability-aggravating traits and fewer culpability-mitigating traits than does every repeat offender.

This is unrealistic, of course. The correlation between recidivism and bad character is surely imperfect. But the CA does not require perfect bimodality. The correlation just needs to be positive and sufficiently strong. Sentencing standards and practices are always crude, relative to psychological and normative realities. We must not expect too much precision of them. That is why premise 5 (§VI) requires only that the convict’s criminal history constitute prima facie evidence. However, premise 5 is true only if there is a positive, linear correlation between the number of prior convictions and culpability-aggravating character traits.

Some readers will read this condition and wonder how it could be doubted. Is it not obvious that repeat offenders are *morally worse* than first offenders, *ceteris paribus*? The first offender has made one blameworthy choice. The repeat offender has made more than one. The second is, to that extent, morally worse than the first offender. Compare two forty-year-olds, Laurel and Hardy, each of whom was recently convicted of burglary. The entirety of Laurel’s criminal

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109. This is necessary if the state is to reliably infer character defects from the record. See Lee, *supra* note 71 at 54-55.

record is fourteen prior convictions for burglary. Hardy has no prior convictions. The two have lived otherwise similar lives. Laurel chose to burgle fifteen times. Hardy chose to do so only once. Laurel made fifteen times as many blameworthy choices as Hardy. Making a blameworthy choice fifteen times is much worse (maybe about fifteen times worse) than making a similar choice only once. No retributivist denies that Laurel deserves more aggregate punishment over the course of their life than Hardy. Even flat-rate sentencing reflects this difference, giving the state fifteen sequential opportunities to punish Laurel for their fifteen choices, potentially putting Laurel behind bars for fifteen times as long as Hardy.<sup>110</sup>

However, these facts do not support premise 5 of the CA unless they provide evidence of *character differences*. It is remarkably easy to slide from the obvious fact that Laurel's *record of choices* is worse than Hardy's to the much stronger conclusion that Laurel's *character* is worse. Of course, one can restate the comparison in characterological language: Laurel has more of a 'burgling character' and is 'more of a burglar' than Hardy. Those statements are true if they mean simply that Laurel burgled more than Hardy. But culpability-relevant traits are not reducible to behavior (§VII.A). Rather, they are dispositional.<sup>111</sup>

Does Laurel have stronger *burgling dispositions* than Hardy? Yes, in a sense. For any convict, it is always possible to reference 'whatever internal states functioned as but-for causes of his criminal choices.' One need not know anything about these states to affirm their existence. If these states are relatively stable, relatively strong, and relatively consistent, they might constitute traits on my definition. Laurel's record warrants inferring a 'burgling trait.' Hardy's record warrants no such inference.

But the trait properly ascribed to Laurel, not Hardy, is not a candidate for culpability-aggravation unless it is also of a type that is relatively well-manifested in blameworthy conduct. And the crimes for which the defendant has already been punished do not count for this purpose, on pain of circularity. Laurel's fourteen prior burglaries cannot count simultaneously as both 1) evidence that Laurel possesses a trait that is a cause of the fifteenth burglary; and 2) evidence that this trait aggravates culpability beyond the culpability for the burglaries themselves. Ascribing a culpability-aggravating trait on the basis of a criminal record is warranted only if the record provides reliable (if indirect) evidence of internal dispositions that are *wider than the narrowest disposition compatible with the criminal record itself*. Attributing a convict's history to a particular negative character trait requires fitting their crimes into a larger conduct pattern that has predictive and/or explanatory power. Does Laurel have, for example, lower self-control (a TLSC) than Hardy? That is an open, empirical question.

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110. Indeed, adding to a convict's original sentence for his crime would violate the Double Jeopardy Clause of the US Constitution. See Frase & Roberts, *supra* note 1 at 25.

111. Although Duff argues that possession of certain character traits necessarily involves their manifestation in action. See Duff, *supra* note 81 at 372.

Using revisionary traits further complicates the answer. A wider trait is, by nature, one for which a wider range of conduct constitutes evidence of possession. The narrower a trait, the less likely it is that a given conviction on the record constitutes evidence of its possession.

Here is another way to think about it. If we understand character traits as moderately strong (i.e., as dispositions to generate pro tanto inclinations), but non-trait factors predict criminal behavior more accurately than do such traits, then non-trait factors play a dominant role in determining the *length and content of the criminal record itself*. The record cannot then be used as reliable evidence of culpability-aggravating traits, so understood.

Stepping back, I can now articulate more completely what the CA needs from traits. It needs traits that are culpability-relevant, which entails both manifestation and agential implication. Manifestation, in turn, requires relative stability, relative width, and relative strength (implying criminogenesis). The traits must also be positively correlated with criminal history to a sufficient degree. Perfect bimodality or multi-modality is not required, but some clustering must emerge. The CA supports the FOD, for example, only if there is a sufficiently high correlation between second offenses and greater scalar culpability (holding constant severity of crimes). Going beyond the FOD to PLM, and then to the full-blown RP, we might also suppose that third offenders are more culpable than second offenders, and fourth more than third, ad infinitum. The CA needs traits that differentiate, not just offenders from non-offenders, but first offenders from second offenders and, possibly, tenth from eleventh.

I cannot disprove the existence of such traits. But the burden is on the CA proponents to describe them and produce evidence that recidivists possess them. Criminology might yet provide such evidence. A TLSC is one candidate. Other theories of criminality recognizing criminogenic personality traits should also be considered.

It would be informative to ascertain the degree of correlation, if any, between recidivism and *other* indicia of culpability-aggravating traits. How might we do so, as an empirical matter? Experimenters could examine, retrospectively, the life histories of a large sample of Florida Burglars (with comparable lifespans), distinguishing those who committed one burglary in their lifetimes from those who committed two. Blinded to the burglaries, themselves, they could ‘score’ the lifetime conduct records—including non-criminal conduct—based on observable evidence of culpability-relevant traits. (Again, a TLSC might or might not fit the bill.) Would they find statistically significant differences between the scores of the single-offender and double-offender populations? Between the double offenders and the triples? Does the fact that someone commits a second burglary provide evidence that they possess a larger number of culpability-aggravating traits than do first offenders, or that their traits are collectively *more* culpability-aggravating than those of first offenders?

Perhaps. I confess I find affirmative answers to such questions to be *intuitively* plausible. But I do not trust my intuitions in this area as much as I did before contemplating the character experiments. My intuitions also assured me that most

of us have robust character traits that predict most of our behavior. My intuitions probably still reflect various folk-psychological assumptions: that recidivism manifests negative traits that are relatively wide, relatively strong, agency-implicating, and concentrated in the recidivist population. The experiments call into broad question the reliability of my intuitions about such matters. If the proponent of the CA invites me to ‘trust my gut’ on this, I must decline the invitation and seek empirical evidence. My preliminary examination of a TLSC has not yet persuaded me that there are empirically validated traits with the features required if the CA is to support even the FOD, much less PLM or the RP. The absence of such evidence is significant because many retributivists support the FOD and some support modest forms of PLM.

Such evidence might yet appear. But if it does, a countervailing concern arises. Given the right evidence, the CA could support the RP, perhaps even extreme versions. This would be a significant result because most retributivists oppose the RP, especially extreme versions. One message of this article is that anyone using the CA who favors modest forms of HSS (e.g., the typical FOD) over both flat-rate sentencing and more severe forms of HSS (e.g., the typical RP) must hope that just the right empirical evidence emerges.

This observation complements practical concerns others have expressed about proportionality in application. On what basis should the magnitude of the RP be determined? How might we set a non-arbitrary upper bound?<sup>112</sup> I think it premature to try to answer such questions before we have the empirical facts needed to support HSS, simpliciter.

A broader objection to the CA would run as follows. Assume, for the moment, that we have isolated a particular character trait and concluded that it is culpability-aggravating. Assume, also, that there are statistically significant correlations between this trait and criminal records. Could we justify sentencing practices on the basis of mere correlations?<sup>113</sup>

This objection raises a basic question about the implementation of retributive sentencing principles. If lawmakers wish to justify, in retributive terms, a sentencing rule that treats a particular attribute as a factor, how confident must they be that it constitutes reliable evidence of negative desert? There is no generally accepted answer to this question of non-ideal retributive theory.<sup>114</sup> If the standard is reasonable doubt, for example, experimental findings are unlikely to vindicate the CA. For any such trait, I do not anticipate experiments establishing that a repeat offender’s conviction record proves, beyond a reasonable doubt, that they possess it.

However, a reasonable doubt standard is probably too high for any retributivist who wants to endorse the use of sentencing factors in the real world. In any case, I have not addressed questions about how, if at all, sentencing guidelines should incorporate prior convictions. The conclusion of the CA is merely that

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112. Frase & Roberts, *supra* note 1 at 34.

113. Thanks to an anonymous reviewer for raising this objection.

114. See generally *supra* note 51 on ideal theory.

prior convictions are prima facie evidence that is relevant to scalar culpability. If experimental findings persuade us to endorse the *a posteriori* premises of the CA, the question remains how much weight prior convictions should receive in guidelines. I would advise that the retributivist's answer should reflect the strength of the experimental findings. The stronger the statistical correlation between prior convictions and culpability-aggravating traits, the greater the weight retributivists could justifiably direct courts to place on prior convictions, as a class. If the correlation is weak or non-existent, perhaps HSS is simply indefensible. If the correlation is modest, perhaps a weak and rebuttable presumption of aggravated culpability would be appropriate, subject to mitigating evidence concerning individual character and other culpability-relevant factors. Sentencing is an individualized process, by design, in which courts balance competing considerations.

#### XIV. Aggravated Culpability Without Bad Character

At this point, retributivists might reply that they never much liked character arguments, anyway. In this section, I consider arguments for HRD that replace premises 3-5 of the CA with premises that are ostensibly character-independent. The literature contains several such arguments, all of which face objections on their own merits. I shall contend that some of these arguments implicitly presuppose that criminal history correlates with specific character or personality traits. If so, these arguments may be vulnerable to the *a posteriori* objections of §§X-XIII, in addition to objections advanced by others.

##### A. Ignorance, Notice, Defiance, Lapse

Consider Julian V. Roberts' *ignorance argument* for the FOD. The idea is that the more fully an agent understands the criminality of their act, the more culpable they are, and second offenders understand the criminality of their acts, prior to offending, better than do first offenders. Therefore, second offenders are more culpable than first offenders. Roberts analogizes first offenses to non-premeditated offenses and second offenses to those committed with premeditation—a culpability-aggravating mental state.<sup>115</sup>

The ignorance argument has two key premises: 1) that the 'average' second offender better understands that their act is criminal, when they decide to offend, than does the average first offender; and 2) that such superior understanding entails greater culpability. These premises can be doubted, but let us grant them, *arguendo*, to ask another question: does the argument, as advertised, actually avoid implications about character?

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115. "An impulsive offender can argue that the offence was an aberration: 'Had I reflected more, my personality would have asserted itself and I would have refrained from offending.' The offence was therefore 'out of character.' The offender who plans an offence can make no such appeal for leniency." Roberts, *supra* note 31 at 80.

It does so if ‘character’ denotes overall character. The argument does not imply that second offenders are worse people, overall, than first offenders. The question is whether the argument presupposes any particular traits. It might appear that the answer is negative, again. On its face, the ignorance argument presupposes only that the second offender has a certain *mental state* (knowledge of criminality) when they commit their second offense that they lack when committing the first. However, some second offenders lack such knowledge and some first offenders possess it. The following disjunction applies to every second offender. Either 1) they were, at the time of their second offense, relatively ignorant of the criminality of such acts, perhaps as ignorant as they were before their first offense; or 2) they knew it was criminal, but did not care or were not sufficiently motivated to comply.

The ignorance argument supports enhanced culpability for *knowing* second offenders (the second category). But HRC posits enhanced culpability for *ignorant* second offenders, as well (the first category). On what basis might we ascribe enhanced culpability to the second offender who remains as ignorant of criminality as they were the first time? A plausible answer is that their second offense manifests a problematic *trait*—a standing disposition not to adopt reasonable beliefs about criminality (even after these have been reinforced by authority figures, such as the sentencing judge in the first trial). Perhaps this trait enhances culpability for actions manifesting it. But this would be a trait-based rationale, after all. As such, it must overcome variants of the objections from §§X-XIII.

Resembling the ignorance argument are arguments from notice, defiance, and lapse. The notice argument holds that a first conviction puts the convict on ‘heightened notice’ that crime is wrong, enhancing their culpability for the second offense. The defiance argument holds that recidivists ‘show defiance’ to the state and society by reoffending, which defiant display also renders them more culpable. The lapse argument (for the FOD) assumes that first offenders had ‘lapses’ or exhibited ‘human frailty.’ I shall not dwell on these arguments, as others have ably criticized them.<sup>116</sup>

### **B. Omission**

An especially original defense of HSS is the omission theory, proposed by Youngjae Lee and endorsed with modifications by Richard Dagger.<sup>117</sup> Lee suggests that the recidivist deserves enhancement because of certain omissions between their previous conviction and their most recent crime. Upon conviction, the first offender enters a new, thicker relationship with the state which incurs new, associative obligations, including an obligation to “organise his life in a

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116. See Lee, *supra* note 71 at 52, 55-59; Andrew von Hirsch, “Proportionality and the Progressive Loss of Mitigation: Some Further Reflections” in Roberts & von Hirsch, *supra* note 5 at 2; von Hirsch, *supra* note 28 at 73.

117. See Lee, *supra* note 79; Richard Dagger, “Playing Fair with Recidivists” in Tamburrini & Ryberg, *supra* note 26 at ch 3.

way that minimizes the risk of reoffending.”<sup>118</sup> Every failure to do so enhances culpability. Recidivism is indirect evidence of such omissions.

Lee’s theory has been criticized,<sup>119</sup> but it has much to recommend it. I offer my own criticisms. Omission theory holds that recidivism aggravates culpability because it is evidence of omitted efforts to “reorganize one’s life.” But recidivism is not direct evidence of such omitted efforts. It is direct evidence only of a disjunction: such efforts either failed or were not made. Recidivism is, at best, indirect evidence of omissions. It is an empirical question whether and to what extent recidivism correlates with such omissions. What form might these omitted efforts take?

Assume, first, that convicts have criminogenic traits. In that case, the omitted efforts might include efforts to revise one’s criminogenic traits. If, as Lee asserts, first offenders are obligated to make such efforts, then the criminogenic traits are (at least indirectly or conditionally) culpability-enhancing. Lee’s theory would entail that the recidivist’s culpability is enhanced because of a conjunction: 1) the recidivist has one or more criminogenic traits; and 2) they omitted efforts to purge themselves of such traits, when obligated to do so.

Lee might want to avoid relying on traits. So let us assume convicts do not, in fact, have first-order, criminogenic traits. Instead, assume that the dominant causes of crimes are criminogenic situations. Accordingly, the omitted efforts are efforts to avoid such situations. If so, then a second offense provides direct evidence of only one culpable omission by the offender: their failure to avoid the particular criminogenic situation that prompted their second offense. However, that omission cannot make them more culpable for the second offense than they were for the first. A second offense provides evidence of greater culpability only if it is evidence of *unobserved, culpable omissions* that occurred prior to the second offense. Such omissions are the criminogenic situations that the offender should have avoided, but presumably did not. By definition, such situations did *not* culminate in convictions (or even, perhaps, in criminal acts). A second offense cannot provide direct evidence of unobserved omissions but only indirect evidence, at best. Such indirect evidence, I suggest, must be evidence of certain second-order traits or the absence thereof. For the omission argument to work, on these assumptions, there must be a type of second-order trait that either 1) causes its possessors to make efforts to avoid criminogenic situations, or 2) impedes its possessors’ efforts to do so. A second offense must provide evidence that the offender either lacks the first trait or possesses the second.

I conclude that the omission argument entails trait attributions. They are not attributions of globally ‘bad character’ or ‘heinousness,’ but of relatively local traits—the second-order traits just described. But they are trait attributions, nonetheless. In fact, these implicit trait attributions may account for some of the intuitive plausibility of the omission argument.

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118. Lee, *supra* note 71 at 50.

119. See e.g. Bennett, *supra* note 8 at 81-83; Tonry, *supra* note 5 at 104-06.



If the omission argument imputes traits to repeat offenders, as I suggest, then it relies on tacit empirical premises about such traits, just as the CA does. Therefore, empirical facts partially determine the forms of HSS, if any, supportable by the omission argument. Lee claims the argument supports the FOD over flat-rate sentencing. Like most retributivists, he rejects the uncapped RP and holds that the RP should never exceed the sentence for the sentencing offense. He opposes three-strikes laws.<sup>120</sup> However, if recidivism provides weak evidence of omitted efforts (or no evidence at all), the argument might not support even the FOD over flat-rate sentencing. Conversely, if recidivism provides strong evidence of omitted efforts, the argument might support harsher forms of the RP than Lee favors. Proponents of the CA who favor the FOD over both flat-rate sentencing and the RP must hope that the facts work out just right. So must Lee.

### **XV. Implications and Directions for Further Inquiry**

Retributivists who support HSS have generally rejected character-based arguments for philosophical reasons. I have tried to formulate such an argument (the CA) clearly and charitably. I conclude, perhaps surprisingly, that the CA is a valid argument for HSS in ideal theory. I found no compelling objections to its inferential validity or *a priori* premises. If retributivism is a viable, prescriptive theory of sentencing, then the CA could, in theory, support certain forms of HSS, maybe even some of the severer features found in the USA, which most scholars condemn.

In practice, however, the CA is sound only if two conditions hold: 1) convicts have culpability-aggravating traits; and 2) criminal history correlates properly with such traits and provides *prima facie* evidence thereof. Little work has been done to support the empirical hypotheses embedded in these premises. The character experiments challenge the prevalence of folk-psychological character traits, although the implications of this research are far from settled.

Although the traits needed by the CA need not be identical to the robust traits of folk psychology, I have suggested that they cannot be too revisionary if they are to be culpability-aggravating. Also, there is little evidence that criminal history is trait-correlated as the CA requires. For these reasons, I am unconvinced that either of the aforementioned conditions holds. Therefore, I have no confidence that the CA supports any version of HSS in the real world.

For similar reasons, I question any intuitive sense we have that repeat offenders have distinctive traits in virtue of which they deserve harsher penalties. Most retributivists grant considerable epistemic authority to our intuitive judgments about relative desert and associated ordinal and cardinal judgments about deserved sentences. However, our moral intuitions about these matters track our folk-psychological character judgments and likely reflect whatever inaccuracies

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120. See Lee, *supra* note 79 at 578; Lee, *supra* note 71 at 66-67.

afflict the latter. Voters, public officials, and theorists may have assumed that recidivism provides evidence of traits that are relatively wide and relatively strong—wider and stronger, perhaps, than the evidence supports. They may, therefore, have given too much weight to repeated offenses as culpability-aggravators.

Absent contrary evidence, perhaps it was reasonable to allow folk psychology to inform sentencing policy.<sup>121</sup> In the face of contrary evidence, however, the burden shifts to defenders of HSS and the penal status quo. If lawmakers consult public opinion as a guide to desert, it becomes more important than ever to correct public opinion if it proceeds from misconceptions about moral psychology.

One approach to reinforcing the CA would combine an empirically validated conception of culpability-relevant traits with an empirically validated model of the relationship between criminal record and traits, so conceived. Revisionist conceptions of personality traits exist. Criminology supplies some candidates for the job that aspire to empirical adequacy over fidelity to folk psychology, a TLSC being one example. The essential question is whether such traits, revisionary or not, are sufficiently relevant to culpability and correlated with criminal record to support any version of HSS via the CA. Criminogenesis is only one of the necessary attributes. The agential implication of a TLSC, in particular, has not been established.

Even if we conclude that the CA is sound, we must answer empirical questions to determine which versions of HSS it can support. If repeat offenders do not deserve longer sentences than first offenders, retributivists can endorse either flat-rate sentencing or, at most, the weakest forms of HSS—those with caps or plateaus no higher than what first offenders deserve. These are both politically awkward options because stronger forms of HSS remain popular with public officials and voters. Yet no one claims that first offenders actually deserve sentences as long as the caps found in many jurisdictions.

Someone committed to stronger forms of HSS might, instead, reject retributivism as a prescriptive sentencing principle. They might still be able to defend stronger HSS without claiming that repeat offenders actually deserve longer terms. Non-retributivists can try to defend it for crime-control reasons. Assuming repeat offenders are more likely to reoffend, longer periods of incapacitation might be justified for such reasons, even if such sentences exceed desert. Of course, there might not be good crime-control rationales for HSS, either, unless the efficacy of longer sentences is empirically validated.<sup>122</sup>

Anyone committed to both retributivism and stronger forms of recidivist sentencing must either defend a character argument or develop an alternative

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121. See e.g. Paul H Robinson, “Democratizing Criminal Law: Feasibility, Utility, and the Challenge of Social Change” (2017) 111:6 *Nw UL Rev* 1565.

122. See e.g. Frase & Roberts, *supra* note 1 at ch 4; Dana, *supra* note 18. It is an interesting question, beyond the scope of this article, whether the empirical psychology of character also bears on forward-looking arguments for HSS.

argument for the desert-relevance of criminal history, one that does not rely, either directly or indirectly, on traits as a negative desert base. I have raised concerns about the *a posteriori* premises of the character argument. Whether these concerns can be answered remains an open question.

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