

JUSTIFYING THE USE OF PREVIOUS CONVICTIONS AS AN AGGRAVATING FACTOR AT SENTENCING

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A INTRODUCTION

One of the most contested questions in the field of criminal sentencing is the question of whether previous convictions should be taken into account when deciding the quantum of punishment.¹ Two decisions of the Court of Criminal Appeal have left the law regarding the use of previous convictions at sentencing, to say the least, relatively unsettled. In *People (DPP) v GK*,² the court decided to treat previous convictions as an aggravating factor at sentencing. In doing so, the Court stated that previous convictions could be taken into account as contributing to the seriousness of the offence. It is submitted that such an approach is desirable. However, it is not certain whether the Court will continue to regard previous convictions as such; indeed, it seems unlikely after the decision in *People (DPP) v PS*.³ Nevertheless, if the Court should decide to continue to treat previous convictions as an aggravating factor it is necessary to put forward a retributivist justification for doing so.

When one talks about the recidivist premium, one immediately thinks of it as a basis for giving recidivists harsher sentences.⁴ What is often forgotten is that the recidivist premium, as well as being in line with most people's intuition that repeat offenders deserve harsher sentences, can also be used as a negative constraint to limit the recidivist's punishment.⁵ The absence of such a justification could pose difficulties for policymakers and judges in creating legislation and in reaching decisions. The risk being that our cardinal principle of proportionality⁶ will be threatened in that repeat offenders may receive too lenient or too harsh a sentence.

It is important to set out what this article does not propose to achieve. This paper is strictly concerned with dealing with repeat offenders within a just-deserts perspective and does not look at the difficult question of whether the state is ever justified in punishing repeat offenders beyond the level allowed by just-deserts. Dealing with repeat offenders by means of deterrence⁷ or incapacitation⁸ is a very controversial issue. The subject is a sensitive one that is worthy of separate study and it is for this reason the article is strictly focused on a just-deserts perspective.

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¹ J Roberts & A Von Hirsch (eds) *Previous Convictions at Sentencing: Theoretical and Applied Perspectives* (Hart Publishing Oxford 2010) vi.

² *People (DPP) v GK* [2008] IECCA 110.

³ *People (DPP) v PS* [2009] IECCA 1.

⁴ For example: Bagaric 'Double Punishment and Punishing Character: The Unfairness of Prior Convictions' (2000) 19 Criminal Justice Ethics 10.

⁵ Lee 'Recidivism as Omission: A Relational Account' (2009) 87 Texas Law Review 571, 577.

⁶ O'Malley *Sentencing Law and Practice* (2nd edn Thomson Round Hall Dublin 2006) [5.01].

⁷ Lungren 'Three Cheers for Three Strikes' (1996) Nov-Dec Policy Review 34.

⁸ Dilulio 'Instant Replay: Three Strikes Was the Right Call' (1996) Summer *The American Prospect* 12.

This article begins by examining the current Irish practice with regards to dealing with previous convictions. It then moves onto an analysis of the progressive loss of mitigation theory and gives reasons for rejecting such an approach. Lee's "Recidivism as Omission" theory is set out in the third section of this essay, followed by a breakdown of how such an approach fits within Ireland's system of sentencing. Before concluding, the essay responds to the more popular criticisms against the recidivist premium and explains why their worries are unwarranted.

B CURRENT IRISH PRACTICE

1 Legislation

As this article supports a recidivist premium, one would think that it would also support any legislation that gave repeat offenders harsher sentences. However, this is not the case.

Current legislation suggests there is a trend in Ireland of importing crime control innovations from our Western neighbours,⁹ especially with regard to mandatory minimum sentences for habitual offenders. Growing concerns about crime and politicians fearful of appearing "soft" on crime have accelerated such measures.

It is submitted that the recidivist statutes, such as the Three Strikes legislation in California, are detrimental to sentencing systems.¹⁰ They have essentially eroded the principle of proportionality, enshrined in the Eighth Amendment, as can be seen in the now infamous *Lockyer*¹¹ and *Ewing*¹² decisions. The impetus for the majority of these laws is not in giving the recidivist what he *deserves* but more in their impractical *symbolic value*.¹³

Ireland has a number of statutory provisions stipulating higher maximum sentences for reconvicted persons. For example, interference with judicial discretion, in dealing with repeat offenders, can be seen in the shape of the Criminal Justice Act 2006 and the Criminal Justice Act 2007. The 2006 Act provides for absolute mandatory minimums for repeat offenders but in a very narrow category of cases. However, s. 25 of the 2007 Act provides for a much broader category of offender although the severity of this section is saved by s. 25(3), where it states that a judge may avoid the mandatory minimum sentence where he is satisfied the sentence 'would be disproportionate in all the circumstances of the case'.

It is acknowledged that Ireland's legislation is by no means as harsh as that which exists in the US. At the centre of both the 2006 and 2007 Acts is the rationale of combating organised crime. Each Act falls into the remit of this legitimate objective. This can be contrasted with the broader rationales that underlie the legislation in dealing with repeat offenders in the UK and US. As well as this, we cannot say that judicial discretion has been impeded to any great extent. At least, it hasn't when one compares it to California's Three Strikes laws.

⁹ C Fitzgerald 'Californication of Irish Sentencing Law' (2008) 18(2) Irish Criminal Law Journal 42, 42.

¹⁰ However, it enjoys much support in some sectors. See: Lungren (n 7).

¹¹ *Lockyer v Andrade* 538 US 63 (2003).

¹² *Ewing v. California* 538 US 11 (2003).

¹³ T Jones & T Newburn, 'Three Strikes and You're Out: Exploring Symbol and Substance in American and British Crime Control Policies' (2006) 46 British Journal of Criminology 781.

However, if we continue to draw inspiration from the US and UK in dealing with repeat offenders, it may well lead us down a dangerous road whereby repeat offenders are no longer given proportionate sentences and where the rationales of incapacitation and deterrence may prove more influential.

It is submitted that this is a major reason why a retributivist account of the recidivist premium is essential. Lee notes that without such a justification, it would not be possible to raise justice or fairness arguments against habitual-offender statutes that impose harsh increases on repeat offenders on the basis of the above rationales.¹⁴

2 Case Law

An examination of Irish case law reveals that proportionality is the most fundamental principle of sentencing so far developed by the Irish courts.¹⁵ This principle seems not only to be a rule of law but also a constitutional imperative. In the case of *People (DPP) v. C(W)*,¹⁶ the Court of Criminal Appeal found that ‘the selection of the particular punishment to be imposed on an individual offender is subject to the constitutional principle of proportionality’.¹⁷ The constitutionality of this principle was subsequently confirmed by the Supreme Court in *People (DPP) v. M.*,¹⁸ where it found a constitutional protection to exist in determining that the punishment must first be proportionate to the offence but also proportionate to the personal circumstances of the offender. In essence, this principle demands that a sentencing court should first locate the specific offence on the overall scale of gravity and then proceed to make any necessary allowance for relevant personal circumstances. It is within this cardinal principle that criminal record must be assessed in affecting the quantum of punishment to be imposed on the offender.

As can be seen above, statute law offers little guidance on the significance and weight to be attributed to previous convictions at sentencing and it has been left to the courts to fashion the authoritative guidance on the matter.¹⁹ Commentators have noted that in Ireland the progressive loss of mitigation theory provides the foothold for permitting evidence of past criminal record to be considered at sentencing.²⁰ However, two recent decisions of the Court of Criminal Appeal have left the law on this matter in quite a precarious position.

In July 2008, in *People (DPP) v. GK*,²¹ the Court of Criminal Appeal held that previous convictions could be treated as an aggravating factor. The applicant, in this case, had two previous convictions for rape. He had been charged with rape and a threat to kill but he later pleaded guilty to aggravated sexual assault on the understanding that the threat to kill could be

¹⁴ Lee (n 5) 577.

¹⁵ O’Malley (n 6) [5.01].

¹⁶ *People (DPP) v C(W)* [1994] 1 ILRM 321.

¹⁷ *ibid per Flood J.*

¹⁸ *People (DPP) v M* [1994] 3 IR 306.

¹⁹ O’Malley ‘Sentencing Recidivist Sex Offenders: A Challenge for Proportionality’ in Bacik & Heffernan (eds) *Criminal Law and Procedure: Current Issues and Emerging Trends* (Firstlaw Dublin, 2009) 113.

²⁰ Fitzgerald ‘The Role of Criminal Record in Sentencing and the Principle of Proportionality’ (2010) 20(3) Irish Criminal Law Journal 79.

²¹ *People (DPP) v GK* (n 2).

taken into account for sentencing purposes. The present offence, concerning a serious and prolonged sexual attack on a woman on her way home from work, took place only a few months after the applicant was released from prison. A life sentence was imposed by the trial judge; however, this was varied to a sixteen-year sentence by the Court of Criminal Appeal, taking effect from March 2006, with the last three years suspended. This sentence was coupled with a ten-year post-release supervision order.

Of particular significance, for the present purposes, is the Court's treatment of previous convictions. While direct precedents are noticeably absent when dealing with this issue, the Court did give weight to the judgement of *People (DPP) v Melia*.²² In this case, a man pleaded guilty to numerous sexual offences and robberies against four women in Dublin, during a short period of time in 1997. In *Melia*, Keane J stated that account had to be taken of the 'disquieting fact' that he had a previous rape conviction and increased his sentence from eight to twelve years.

In *People (DPP) v. GK*,²³ while continuing to declare its allegiance to proportionality the court went on to "controversially" state that while previous good character may be held to be a mitigating factor relevant to the character and circumstances of the accused, *previous convictions are relevant not in relation to mitigation of sentence but in aggravation of the offence*. The Court declared:

This court is satisfied that while previous good character is relevant to the character and circumstances of the accused which may be mitigating factors in terms of sentence, previous convictions are relevant not in relation to mitigation of sentence but in aggravation of the offence. Accordingly in determining an appropriate sentence in this case it follows that the learned trial judge was entitled to have regard to the two previous convictions of rape, the fact that the offence was committed within six months of having been released from prison for an offence of rape and the matters disclosed in the Probation Service report. These circumstances are relevant not just in terms of their absence in mitigation of sentence but also in terms of assessing an appropriate sentence in terms of the seriousness of the offence, which sentence will be proportionately more severe than would be the case were these circumstances absent.²⁴

The above reasoning is a clear departure from what was considered to be the dominant approach to dealing with previous convictions at sentencing and that the presence of previous convictions no longer just reduced any deserved mitigation.²⁵ According to the Court, previous convictions could now go towards the assessment of the gravity of the offence. However, later in its judgement, the Court stated that the previous convictions must be for 'like offences'. The Court also importantly stated, that fear of future offending is not a sufficient ground for future offending.²⁶

²² Court of Criminal Appeal (November 29, 1999).

²³ *People (DPP) v GK* (n 2).

²⁴ *ibid.*

²⁵ O'Malley (n 19) 116.

²⁶ *People (DPP) v GK* (n 2).

In January 2009, less than a year after the *GK* decision, the Court of Criminal Appeal in *People (DPP) v. PS*,²⁷ was again called to consider the question of how to deal with previous convictions at sentencing. The applicant in this case, had been given multiple life sentences, coupled with determinate sentences for sexual offences committed against two young males. He also had several similar previous convictions. The Court took into consideration a number of mitigating factors such as an early guilty plea, cooperation with the police and what appeared to be a genuine expression of remorse. It was the Court's opinion that in such circumstances it was better to select a determinate rather than an indeterminate sentence. The Court of Criminal Appeal quashed the applicant's life sentence and replaced it with a fifteen-year sentence with the last two-and-a-half years provisionally suspended, coupled with a ten-year post-release supervision order.

Of central concern to this article however, was that the Court seems to have returned to its progressive loss of mitigation approach stating that the presence of previous convictions will normally be regarded as an absence of a mitigating factor. The Court of Criminal Appeal, *per* Finnegan J, stated:

Accepting that in relation to the previous offences the applicant has already been punished and should not on the occasion of sentencing for the present offences be punished again for those former offences and that previous offending will normally be regarded as an absence of a mitigating factor.²⁸

However, the decision can be criticised on two main issues. The first is with regard to its confusing reference to the possible future offending of the defendant. In its judgement, the Court stated that 'account must be taken of the applicant's record of previous offending which indicates that he will represent a continuing danger to the public'.²⁹ Such an approach would seem to be contrary to the principle set out in *People (Attorney General) v. O'Callaghan*,³⁰ which prohibits the punishment of offences not yet committed. In the *GK* judgement, the Court was explicit in stating that fear of future of offending was not a sufficient ground for increasing punishment. The second, and more important, criticism is that the Court made no reference to *GK*, leaving the law in a very uncertain state.³¹

The main problem highlighted from these two cases, is the lack of authoritative guidance as to how previous convictions should be dealt with at sentencing. Below, it is argued that the Court was correct in its decision in *GK* and a theory is set out in support of its decision. If the Court should follow its decision in *GK*, a retributive justification must be put forward for the recidivist premium. However, it is necessary first to evaluate the traditional approach taken in Ireland.

C REJECTING THE PROGRESSIVE LOSS OF MITIGATION APPROACH

²⁷ *People (DPP) v PS* (n 3).

²⁸ *ibid.*

²⁹ *ibid.*

³⁰ *The People (Attorney General) v. O'Callaghan* [1966] IR 501.

³¹ O'Malley (n 19) 117.

Some argue that recidivists are not punished for their latest offence but, instead, are being punished for ‘being recidivist’. However, how can one ‘be’ a recidivist? Is a person who commits a crime, is convicted for it, and then commits another similar crime, not the exact same person who committed the earlier crime? The issue, it is submitted, is not whether the offender has become a worse person but rather that the offender has not changed at all.

The lapse model or discount theory could be adopted to explain why the ‘same person’ may be treated differently.³² By allowing the first offender a discount, the court gives the offender the benefit of the doubt, believing the current offence to be out of character. Therefore, the second time around one could not infer that the act was out of character. At this theory’s core are the ideas of mercy and the epistemic-limitation of the criminal justice system, which is its inability to assess whether a first time offence was out of character.

The purpose of this article is to justify the recidivist premium within a just deserts framework. The discount model described above could not justify the recidivist premium as themes such as mercy and forgiveness lie at its heart, as opposed to the idea of desert. The theory explains why there should be some differential treatment between first offenders and those with criminal records. However, it cannot explain the intuition that a recidivist *deserves more* punishment.

Another problem that the lapse theory has trouble explaining is why convictions rather than multiple offending are significant. If a criminal record merely has the role of revealing one’s character, then criminal record could be ignored if there was a better way to measure a person’s character.

Having highlighted the problems associated with the progressive loss of mitigation approach it is now time to set out an alternative method to dealing with previous convictions. This paper defends the commonly held intuition that repeat offenders are more culpable³³ and that sentencing enhancements are justifiable on retributive grounds. The theory provided in this paper recognises the significance of retributivism in sentencing in this jurisdiction³⁴ and that previous convictions have a key role to play in such a system, despite much opposition to the contrary.³⁵ It will also be argued that in order for punishment to be proportional to the crime, it is imperative that prior convictions be taken into account.

D ADOPTING THE CUMULATIVE APPROACH

³² A Von Hirsch ‘Criminal Record Rides Again’ (1991) 10 *Criminal Justice Ethics* 2; Ryberg ‘Recidivism, Retributivism and the Lapse Model of Previous Convictions’ in J Roberts & A Von Hirsch (eds) *Previous Convictions at Sentencing* (Hart Publishing Oxford 2010).

³³ Roberts ‘Public Opinion, Criminal Record, and the Sentencing Process’ (1996) 39 *American Behavioural Scientist* 488, 491.

³⁴ Fitzgerald (n 20).

³⁵ For example: Morse ‘Blame and Danger: An Essay on Preventative Detention’ (1996) 76 *Boston University Law Review* 113, 146-47.

The dominant theory in terms of sentencing in Ireland is the retributive or just deserts approach.³⁶ Following this approach, offenders are seen as moral agents who deserve censure in the form of punishment for their misconduct. However, the quantum of punishment for crimes should, on grounds of justice, be proportionate to their relative seriousness and the offender's level of culpability.³⁷ Desert theorists have generally been opposed to use of prior record in enhancing sentences,³⁸ stating a crime is a crime and it does not change whether it has been committed by a first time offender or a repeat offender.³⁹ Others allow previous convictions a limited role at sentencing by giving first time offenders a reduction in penalty⁴⁰ and such an approach has traditionally been adopted in this jurisdiction.⁴¹

This section will argue against the prevailing view among desert theorists by claiming that repeat offenders are more culpable and that sentencing enhancements are justified on retributivist grounds for prior convictions. Roberts has humorously stated that a plausible justification for the recidivist sentencing premium has proved as elusive as the legendary resident of Loch Ness.⁴² However, the fact that no plausible justifications have as yet been put forward does not mean that there are no strong desert-like intuitions about the justifiability of the premium. The theory favoured in this paper, to support previous convictions being taken into account, is the 'Recidivism as Omission' theory put forward by Lee.⁴³ It will however, be influenced by Bennet's 'More to Apologise For' theory,⁴⁴ as well as considering the theories of other proponents of the Recidivist Premium.⁴⁵

Lee's omission theory argues that we should think of the recidivist premium as stemming from what the offender failed to do between the time of the previous conviction and the time of the new offence. This differs from the justifications of other recidivist premiums which would validate the recidivist premium by reference to the repeat offender's bad character, enhanced knowledge or allegedly defiant attitudes. Lee states that once an offender is convicted and punished, his relationship with the state has changed, therefore justifying punishment as a matter of desert for such omissions. Under this new relationship the offender is obliged to take steps to organise his life in a way that steers clear of criminality.

It is important to note that this theory does not advocate that repeat offenders are treated more harshly. Rather, Lee notes that as a retributivist account, it can serve as both an affirmative basis for increasing an offender's punishment and as a negative constraint, limiting the amount of

³⁶ The Law Reform Commission Consultation Paper on Sentencing (LRC, March 1993).

³⁷ Von Hirsh, Ashworth and Roberts (eds) *Principled Sentencing* (3rd edn Hart Publishing Oxford 2009) 102.

³⁸ Fletcher *Rethinking Criminal Law* (Boston 1978) 462-466; cf (n 4).

³⁹ Singer *Just Deserts: Sentencing Based on Equality and Desert* (Cambridge 1979) 67-74.

⁴⁰ Von Hirsch, Ryberg (n 2).

⁴¹ O' Malley (n 6) [6.45].

⁴² Roberts 'Punishing Persistence: Explaining the Enduring Appeal of the Recidivist Sentencing Premium' (2008)

48 *British Journal of Criminology* 469.

⁴³ Lee (n 5) 571.

⁴⁴ Bennett 'More to Apologise For: Can a Basis for the Recidivist Premium Be Found within a Communicative Theory of Punishment?' in Roberts & Von Hirsch (eds) *Previous Convictions at Sentencing* (Hart Publishing Oxford 2010).

⁴⁵ For example: MacPherson 'The Relevance of Prior Record in the Criminal Law: A Response to the Theory of Professor von Hirsch' (2002) 28 *Queen's Law Journal* 177.

permissible punishment.⁴⁶ This account explores individual cases where the correct approach would be to either mitigate or even cancel the recidivist premium. The theory does not promote harsher sentences but provides a framework to think through the culpability of repeat offenders.

Focusing on the moment of offending has been seen as one of the conceptual difficulties of the recidivist premium, in that the offence looks the same whether it has been committed by a first time offender or a repeat offender. However, the recidivism as omission theory removes itself from this difficulty by viewing the criminal offence not in isolation but as a series of events and circumstances.⁴⁷ The additional punishment a repeat offender receives is for the previous steps taken by him that enabled the latest crime to be committed. The repeat offender should be punished for his omission to take steps to prevent himself from committing this crime.

Are not all persons obliged to organise their lives in such a way that steers clear of criminal activity? Why is there a sudden change in the normative position between non-offenders and convicted offenders with regard to the state? The omission theory points to the fact that the institution of punishment has a communicative, expressive dimension.⁴⁸ It communicates to the offender that what he has done is wrong, that he is being punished for this crime and that he shall not offend again when his punishment is complete. According to this theory, this process should prompt a period of reflection on the part of offender to determine how they ended up committing this crime. This self-diagnosis should lead to appropriate prescriptions that one should follow after serving a sentence. A repeat offence by someone that should have gone through this process infers that the offender failed to organise their lives properly and are therefore more culpable. However, it is submitted that this reasoning is suspect as it fails to explain why the process of conviction confers a legally binding obligation on the offender to take steps to reform. Therefore, a divergence from Lee's theory is necessary for this purpose.

Bennett argues the way the state expresses condemnation of the offender through punishment should be based on the practice of apology.⁴⁹ According to Bennett, all past offenders should be thought of as under an obligation to reform, whether they have explicitly apologised or not. The obligation could be accounted for if we see punishment as expressing proportionate condemnation by symbolising how sorry the offender *should be* for the offence and by drawing appropriate symbols from the act of apologising, where the person apologising undertakes an obligation to reform.⁵⁰ As Bennett cleverly notes, "how can act of condemnation fully express that an act is wrong if it does not also say that the person who does it has an obligation not to do it again?" This clarification allows us to return to Lee's omission theory.

The omission theory does not require offenders to transform themselves into people with different traits, preferences or attitudes. It does not suggest that the process of conviction and sentence should alter a person from bad to good. There are only the normative expectations for an offender to behave in a way which avoids exposing himself to certain desires or opportunities.

⁴⁶ Lee 'Repeat Offenders and the Question of Desert' in Roberts & Von Hirsch (eds) *Previous Convictions at Sentencing* (Hart Publishing Oxford 2010) 50.

⁴⁷ *ibid* 60.

⁴⁸ *ibid* 61.

⁴⁹ Bennet (n 43).

⁵⁰ *ibid* 88.

Another important clarification to make, for the purposes of this article, is that although the recidivist premium, discussed here, punishes for an omission, this omission is not in itself a crime that an offender can be punished for. It would be wrong to suggest that the failure to prevent oneself from committing a crime should be criminalised on its own; *it can simply be a culpability enhancer*.⁵¹

However, there are some situations where it would be an obvious injustice if one were to infer that there was a failure to reform for all reoffenders. It is easy to imagine a person planning to live as a model citizen, after having been convicted and served their sentence. Unfortunately, many of those, upon release, may find their options at cleaning up their act few and far between, even after making all reasonable efforts to adopt a law-abiding lifestyle. It seems unfair that such a person should be punished for a failure to reform. Lee's theory has developed two ways in which to deal with such repeat offenders.⁵² The first involves using the formal defences which already exist in the common law such as duress and insanity. One has a genuine defence against the recidivist premium or even against the conviction itself by proving that the repeat offence falls into one of these two categories. The second involves the offender rebutting the inference. Repeat offenders ought to be able to present the ways in which they reasonably and sincerely tried to steer clear of criminal activity and receive a reduction in the recidivist premium for their efforts.

Now that the theory, that is proposed to be adopted in this jurisdiction to justify the recidivist premium, is clearly set out, it is now time to see how exactly it is proposed to be implemented into current Irish sentencing policy. However, before doing so it is necessary to set out the reasons this theory has been chosen over others to justify the recidivist premium.

One of the main advantages this account has over other theories of the recidivist premium is that it is able to justify the extra resentment felt against repeat offenders.⁵³ The point of the punishment system is to express and communicate blameworthiness for the offence and to point out to the offender that it should not be done again. It does not just point to the offender that what he did carries a price. Offenders are expected to change their lives and when they fail to so an extra resentment is felt because of this expectation. Theories opposed to the recidivist premium and those which support mitigation for first time offenders, such as the progressive loss of mitigation model currently practised in this jurisdiction, have trouble explaining such an intuition.

Obedience and character models suffer from the weakness of being unable to explain why one's prior record, which does not necessarily indicate how many times one has committed a crime, should be the sole determinant of discovering an offender's character.⁵⁴ The omission theory avoids this problem by linking the recidivist premium to additional obligations that arise from the relationship between the state and the previous offender.

⁵¹ Lee (n 5) 65.

⁵² *ibid* 65-66.

⁵³ Roberts *Punishing Persistent Offenders: Exploring Community and Offender Perspectives* (Oxford 2008) 172-74.

⁵⁴ Yankah 'Good Guys and Bad Guys: Punishing Character, Equality and the Irrelevance of Moral Character to Criminal Punishment' 25 *Cardozo Law Review* 1019, 1033.

The third, and perhaps most important, advantage of this account lies in its ability to specify more clearly as to how much extra punishment is necessary. Following Bennett's theory, punishment should be proportionate to how sorry the offender ought to be for the offence.

E INCORPORATING THE CUMULATIVE APPROACH IN IRELAND

The duty of a sentencing court is to pass an appropriate sentence taking into account the particular circumstances of the crime and the particular circumstances of the convicted person.⁵⁵ Mitigating factors are taken into account within the ambit of the "particular or personal circumstances" of a specific offender.⁵⁶ Therefore, previous good character is relevant to the character and circumstances of the accused which may be mitigating factors at sentence.⁵⁷

One can draw from the above therefore, that previous convictions can be considered relevant not in relation to mitigation of offence but in aggravation of offence, as was found in *GK*. It is submitted that previous convictions are relevant not to an absence of mitigating factors but also to assessing the seriousness of the offence. Sentence should be *proportionately* more severe therefore, than if these circumstances were absent.

Such an approach, involving Lee's theory, would not constitute a form of preventative justice. Preventative justice has never been pursued in this jurisdiction and it is submitted that it never should. It can therefore, be distinguished from cases such as *The People (AG) v. O'Callaghan* where it was held that bail could not be refused merely because of the likelihood that offences would be committed while on bail.⁵⁸

While it has been argued above that the court should have regard to previous convictions in determining an appropriate sentence in terms of the seriousness of the offence, the court must also have due regard to the cardinal principle of proportionality and not impose an inappropriately severe sentence where it apprehends the commission of further like offences. Under the formula to establish a proportionate sentence one must look '... first at the range of penalties appropriate to the offence and then decide whereabouts on the range the particular case should be. The mitigating circumstances should then be looked at and an appropriate reduction made'.⁵⁹ Jurisprudence of the Court of Criminal Appeal and the Supreme Court state that gravity of the offence is determined by the culpability of the offender, the harm caused and the behaviour of the offender in relation to the particular offence.⁶⁰ It is submitted that a proportionate punishment is best found by utilising Lee's omission theory, described above, in assessing the culpability of the offender.

⁵⁵ *The People (DPP) v Tiernan* [1988] 1 IR 250.

⁵⁶ *People (DPP) v M* (n 18).

⁵⁷ *The People (Attorney General) v McClure* [1945] 1 IR 275.

⁵⁸ *The People (Attorney General) v O'Callaghan* (n 9).

⁵⁹ *People (DPP) v M* (n 18) *per* Egan J.

⁶⁰ *People (DPP) v GK* (n 2).

F ARGUMENTS AGAINST THE RECIDIVIST PREMIUM

1 Punishing Character

The strongest and most enduring argument put forward against the recidivist premium is that it constitutes punishment of an offender's character, rather than of the offence committed.⁶¹ The argument goes that society should punish those who carry out actions that are symptomatic or indicative of bad behaviour.⁶² In essence, this involves punishing people for who they are, rather than what they do. Such an approach carries clear dangers for a retributive account of sentencing.⁶³ However, Lee's theory circumvents this by focusing on the moral agency of the offender. The offender makes a choice whether or not to organise his life in such a way as to avoid criminal activity. If the offender makes a decision not to do so he can be held more culpable, this can then be taken into account when assessing the seriousness of offence. Such an approach fits neatly within this jurisdiction's retributive system of sentencing.

Another reason why one may show tolerance to people who only infrequently violate moral norms such as in the progressive loss of mitigation theory traditionally adopted in Ireland, is that such behaviour is not truly indicative of their *character*.⁶⁴ Under a system governed by law surely there is no basis for giving weight to character. People should be punished for what they do, not for what they are and to do otherwise,⁶⁵ according to Walker, would '... assume a superhuman level of insight into the individual.'⁶⁶ Thus, it is submitted that the recidivist premium put forward in this paper, which puts itself to great lengths to distinguish itself from character theory,⁶⁷ is more in line with a retributive model of sentencing than a progressive loss of mitigation approach.

2 Double Punishment

The practice of considering previous convictions as anything other than a mitigating factor, at the time of sentencing, could be perceived as though society is punishing the offender again for his first offence.⁶⁸ MacPherson refers to this as the "double punishment trap".⁶⁹ Evidence of recidivism alone cannot justify an increase in punishment. What is it about recidivist offending that justifies the increased punishment? Obviously to punish a person twice is unjust and it

⁶¹ Bagaric (n 4).

⁶² Bayles 'Character, Purpose and Criminal Responsibility' (1982) 1 Law & Philosophy 5.

⁶³ Durham 'Justice in Sentencing' (1987) 78 Journal of Criminal Law & Criminology 614 at 614.

⁶⁴ Bagaric (n 4) 15.

⁶⁵ Wasik and Von Hirsch 'Section 29 Revised: Previous Convictions in Sentencing' (1994) Criminal Law Review 408, 410.

⁶⁶ Walker *Punishment Danger and Stigma: The Morality of Criminal Justice* (Basil Blackwell Oxford 1980) 138-139.

⁶⁷ Lee (n 5) 578-589.

⁶⁸ Bagaric (n 4).

⁶⁹ MacPhearson (n 14) [56].

violates two key virtues of the criminal justice system-that of certainty and finality. Such an approach would also prevent past offenders from moving on with their lives.

Lee's justification again provides a response to this criticism. As explained above, it is only if the subsequent offence demonstrates an additional culpable choice by the actor not to organise his life in a way that would best steer clear of criminality. It is this additional choice, and not the repeat offending, that is used to justify additional punishment. Only previous offenders will have gone through a process with the state that has created a relationship with the state, the point of which was to ensure that whatever led the offender to the status of being a convict should be avoided in the future.

3 Threat to Proportional Punishment

Proportionality is a purely backward looking exercise. Punishment in this jurisdiction, cannot be determined by looking forward at the offender's future prospects. Does the above theory put forward by Lee threaten proportional sentencing? It is submitted that it does not, as the offender's level of culpability does not carry the same weight as the seriousness of the crime.⁷⁰ Proportional sentencing demands that a relationship exists between the severity of sentence imposed and the seriousness of the crime and the level of culpability, while at the same time taking into account the personal circumstances of the offender. In order for this jurisdiction not to violate ordinal proportionality, a key component of desert-based sentencing,⁷¹ the sentencing system must be concerned with condemning acts rather than actors. It can do this by ensuring that culpability considerations do not exceed, or even match, the seriousness of the offence as a determinant of sentence severity. By keeping the variables as such, the focus remains on the offence rather than the offender and stays in line with the principle of proportionality.

G CONCLUSION

The law with regard to the treatment of repeat offenders stands in a precarious position, whereby it is still uncertain whether or not previous convictions can be treated as an aggravating factor or whether their absence can be treated as a mitigating factor. Tonry, one of the leading scholars in sentencing, said that there is something to be said for saying what you believe - as Oliver Wendell Holmes (1881) did about what he saw as the defensible inevitability of executing innocent people- even if others disagree.⁷² That is why it is felt that this article must defend the use of previous convictions as an aggravating factor at sentencing, not only because of the deeply held intuition that repeat offenders *deserve* more but also because justice requires it both for the recidivist himself and for all law abiding citizens.

⁷⁰ Roberts (n 41) 475.

⁷¹ Von Hirsch *Censure and Sanctions* (Clarendon Press Oxford 1993).

⁷² Tonry 'The Questionable Relevance of Previous Convictions' in Roberts & Von Hirsch (eds) *Previous Convictions at Sentencing* (Hart Publishing Oxford 2010).

It supports the decision of the Court of Criminal Appeal in *GK* and proposes that Lee's 'recidivism as omission' theory, with slight alterations, be adopted to justify the Courts in reaching such decisions. Its adoption is paramount if justice and fairness are to prevail in our sentencing system. Its absence risks repeat offenders being treated too leniently or too harshly in both legislation and judicial decisions, meaning the cardinal principle of proportionality is in jeopardy. This article also responded to many of the criticisms put forward against the recidivist premium, revealing that many of the worries of desert theorists were unwarranted. It is submitted that a theory such as Lee's, be adopted if the Court continues to treat previous convictions as an aggravating factor as it did in *GK*.