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## Criminal Sanctions in the Defense of the Innocent

Ehud Guttel

*Hebrew University of Jerusalem*

Doron Teichman

*Hebrew University of Jerusalem*

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# CRIMINAL SANCTIONS IN THE DEFENSE OF THE INNOCENT

Ehud Guttel\*  
Doron Teichman\*\*

*Under the formal rules of criminal procedure, fact finders are required to apply a uniform standard of proof in all criminal cases. Experimental studies as well as real world examples indicate, however, that fact finders often adjust the evidentiary threshold for conviction in accordance with the severity of the applicable sanction. All things being equal, the higher the sanction, the higher the standard of proof that fact finders will apply in order to convict. Building on this insight, this Article introduces a new paradigm for criminal punishments—a paradigm that focuses on designing penalties that will reduce the risk of unsubstantiated convictions. By setting mandatory penalties of sufficient size, the legal system can induce fact finders to convict only if sufficient admissible evidence proves a defendant's guilt. This Article applies this theoretical framework to three concrete contexts that involve a high risk of erroneous convictions: inchoate crimes, the right to silence, and the punishment of recidivists. It shows that a sanctioning regime that is attuned to the probative function of punishment can protect innocent defendants from unsubstantiated convictions while obeying the dictates of both deterrence and retribution.*

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\* Frieda & Solomon B. Rosenzweig Chair in Law, Hebrew University of Jerusalem; Visiting Professor, Duke Law School (2010–11).

\*\* Joseph H. and Belle R. Braun Senior Lecturer in Law, Hebrew University of Jerusalem.

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## INTRODUCTION

The rules of criminal procedure presume a fixed standard of proof. A person accused of any criminal offense can be convicted only if sufficient evidence proves her guilt “beyond a reasonable doubt.”<sup>1</sup> While legal scholarship has debated the standard’s precise probabilistic requirement,<sup>2</sup> it has uniformly assumed that its meaning is the same across different criminal contexts.<sup>3</sup> Whether the applicable penalty is a fine, probation, or imprisonment, fact finders are expected to apply an identical evidentiary standard in all criminal cases.

A rich body of empirical and experimental studies indicates, however, that fact finders adjust the burden of proof in accordance with size of the applicable sanction.<sup>4</sup> These studies, as well as real-world examples, show that, rather than applying a fixed standard, judges and jurors often elevate the probative threshold for conviction as the severity of the punishment increases. Keeping all other variables constant, courts demand that the prosecution present more convincing proof of the defendant’s guilt in the face of greater potential punishment. Thus, evidence that meets the threshold for obtaining a guilty verdict where a lenient penalty is involved does not necessarily meet the threshold for the same verdict where a harsher sanction is involved. Such behavior on the part of judges and jurors has been identified across a range of offenses and sanctions of varying severity.

As this Article demonstrates, legal scholars’ misperception of the way in which fact finders determine guilt overlooks the probative function of criminal sanctions.<sup>5</sup> Because the size of the applicable punishment often

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1. *In re Winship*, 397 U.S. 358, 364 (1970) (holding that the Constitution protects every criminal defendant “against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged”).

2. For a recent review of the literature and cases dealing with the question, see Peter Tillers & Jonathan Gottfried, *Case Comment—United States v. Copeland*, 396 *F. Supp. 2d* 275 (E.D.N.Y. 2005): *A Collateral Attack on the Legal Maxim That Proof Beyond a Reasonable Doubt Is Unquantifiable?*, 5 *L. PROBABILITY & RISK* 135 (2006).

3. See, e.g., Richard Lempert, *The Economic Analysis of Evidence Law: Common Sense on Stilts*, 87 *VA. L. REV.* 1619, 1664 (2001) (“[W]e do not adjust the criminal burden of proof based on likely sanctions.”).

4. For a review of this literature, see *infra* Part I.

5. An exception to the academic disregard of the possible interdependence of criminal sanctions and evidentiary thresholds is James Andreoni, *Reasonable Doubt and the Optimal Magnitude of Fines: Should the Penalty Fit the Crime?*, 22 *RAND J. ECON.* 385

determines the evidentiary threshold for conviction, criminal sanctions can adjust the standard of proof that fact finders apply. More specifically, this Article shows that the legal system may exploit this observed phenomenon to protect defendants against convictions founded on inadmissible or insufficient evidence. In cases in which fact finders decline to follow instructions regarding the information they may consider, designing a penalty that effectively raises the burden of proof can calibrate the scale for determining guilt. Similarly, where fact finders are likely to rely on unreliable incriminating evidence, raising the evidentiary bar by elevating the sanction can prevent the risk of unsubstantiated convictions.

Using criminal sanctions to incentivize fact finders enables the legal system to protect defendants in cases in which more direct approaches are unlikely to succeed. Arguably, convictions that are based on inadmissible or insufficient evidence can be prevented through regulation of the fact-finding process. Stringent jury instructions, for example, are expected to exclude inadmissible information from deliberations and to guide the jury as to the amount of evidence required to reach a conviction. Such direct regulation, however, has been proved ineffective in various contexts.<sup>6</sup> As observed both by scholars and practitioners, juries often disregard admonishing instructions and may convict defendants even when the prosecution fails to present an amount of admissible evidence that merits a conviction. By inducing fact finders to adjust their evidentiary standards, criminal sanctions can prevent unsubstantiated convictions in contexts in which the rules of evidence and criminal procedure fail to do so.

Legal analysis regarding the desirable levels of punishment has traditionally focused on retribution and deterrence.<sup>7</sup> Although these theories differ in many respects, they share the important premise that criminal sanctions should be designed in response to offenders' and victims' behavior.<sup>8</sup> Opposed to this offender- and victim-centered approach, the following discussion suggests the potential to construct penalties that will prevent unsubstantiated convictions. This insight—that sanctions can serve to protect defendants—introduces an overlooked paradigm in the context of criminal punishment. Furthermore, our analysis demonstrates that criminal sanctions can often be designed to protect defendants from erroneous convictions without sacrificing the dictates of either retribution or deterrence. A carefully crafted penal regime can reduce the number of defendants who are

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(1991). Using a stylized economic model, Andreoni highlights the need to consider this possible interdependence when devising sanctions that will produce optimal deterrence. Andreoni's analysis does not address, however, the value of using criminal sanctions to incentivize fact finders.

6. See, e.g., *infra* Section III.B.1 (presenting evidence regarding the ineffectiveness of rules that prohibit negative inferences from silence).

7. For recent reviews of the literature, see, for example, STEVEN SHAVELL, FOUNDATIONS OF ECONOMIC ANALYSIS OF LAW 473–530 (2004) (reviewing different deterrence models), and Gerard V. Bradley, *Retribution: The Central Aim of Punishment*, 27 HARV. J.L. & PUB. POL'Y 19 (2003) (reviewing theories of retribution).

8. For a review of these theories, see *infra* Part II.

wrongfully convicted, while at the same time subjecting guilty defendants to an appropriate sanction.

This Article shows how the legal system may harness fact finders' tendency to adjust the burden of proof in accordance with the size of the sanction in three concrete contexts: inchoate offenses (criminal attempts), the right to silence, and the punishment of recidivists. Legal scholarship has suggested that defendants in these circumstances often face a heightened risk of being convicted on the basis of inadmissible or insufficient evidence. The conventional tools that the legal system employs to ensure the integrity of the criminal process seem ineffective in such circumstances. This Article highlights the virtue of setting mandatory sanctions of sufficient size in these contexts. By applying such a regime, the legal system can prevent wrongful convictions in criminal attempt cases while sustaining the crime-control benefits associated with punishing incomplete offenses, strengthen the right to silence without harming those who exercise it, and reduce the risk of wrongful convictions for defendants who have a criminal record.

The paradigm that our analysis presents is tied to the current debate surrounding the increasingly mandatory nature of the American sentencing system. Since the 1980s judicial discretion with respect to sentencing has been systematically reduced.<sup>9</sup> This trend has recently been addressed in the Supreme Court's decision in *United States v. Booker*,<sup>10</sup> holding that the mandatory nature of the federal sentencing guidelines is unconstitutional because it violates defendants' right to a jury trial. While critics of this trend raise valid and important concerns,<sup>11</sup> they have neglected to acknowledge the potentially beneficial effect that a system incorporating this feature has on fact finders' decisions. As this Article's analysis shows, the imposition of mandatory sanctions of sufficient size can discourage fact finders from convicting absent sufficient admissible evidence.

This Article unfolds as follows. Part I presents the findings on the interplay between the severity of sanctions and the evidentiary threshold for conviction. These findings show that, contrary to conventional wisdom, fact finders do not apply a fixed standard of proof, but instead adjust it in proportion to the size of potential punishment. Part II claims that criminal sanctions should be used to correct for the risk of erroneous convictions. While criminal law scholarship has traditionally focused on offenders and victims, this Part shows the virtue of designing criminal sanctions as a means to protect defendants from wrongful convictions. Part III explores this claim in three concrete contexts: the punishment of criminal attempts, the right to remain silent, and the punishment of repeat offenders. It demon-

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9. For a descriptive account of this phenomenon, see Ryan Scott Reynolds, *Equal Justice Under Law: Post-Booker, Should Federal Judges Be Able To Depart from the Federal Sentencing Guidelines to Remedy Disparity Between Codefendants' Sentences?*, 109 COLUM. L. REV. 538, 540–46 (2009).

10. 543 U.S. 220, 245 (2005).

11. See generally, e.g., Albert W. Alschuler, *The Failure of Sentencing Guidelines: A Plea for Less Aggregation*, 58 U. CHI. L. REV. 901 (1991) (criticizing the mandatory nature of the federal sentencing guidelines).

strates that by focusing on fact finders' incentives, the legal system can often protect defendants from erroneous convictions without sacrificing the other goals of punishment. Part IV addresses possible objections to this proposal from both doctrinal and practical perspectives. It shows that the proposed penal regime can be applied while maintaining the rules that shield fact finders from information regarding penalties, and that it can also give rise to concrete policies. Finally, the Conclusion highlights the potential implications of this Article's analysis beyond the realm of criminal sanctions.

### I. ENDOGENOUS EVIDENTIARY THRESHOLDS

This Part reviews the evidence regarding the connection between the size of sanctions imposed by the legal system and the amount of evidence that triers of fact require in order to convict defendants. Empirical studies, policymakers' and judges' experiences, and legal doctrine itself all show that the evidentiary threshold for conviction is correlated with the size of criminal punishments. This interdependence of sanctions' severity and the willingness of fact finders to convict exists along a continuum. At one end, when the size of punishment is disproportionately high, fact finders often refuse to convict even in the face of overwhelming incriminating evidence. Below the disproportional-penalty boundary, however, fact finders' willingness to convict is connected to the severity of the applicable sanction. As the sanction increases in size, fact finders require additional evidence in order to reach a guilty verdict.

Empirical studies examining courts' decisions identify a clear correlation between fact finders' willingness to convict and the severity of the charges that the defendant faces.<sup>12</sup> For example, Professor Myers explores this question using data from a random sample of 201 cases that were tried in front of juries.<sup>13</sup> Myers's analysis shows that an inverse relation exists between the severity of the charge and the frequency of conviction. As the severity of the charge increases, the willingness of the jury to convict decreases.<sup>14</sup> Myers interprets this result as support for the claim that jurors raise the evidentiary standard as the stakes of the case become higher. As she notes, "[w]here the crime is not as serious, juries may accept a lower standard of proof."<sup>15</sup> Three later studies provide similar results, further

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12. See, e.g., James Andreoni, *Criminal Deterrence in the Reduced Form: A New Perspective on Ehrlich's Seminal Study*, 33 *ECON. INQUIRY* 476, 479–82 (1995) (using regression analysis to demonstrate a negative connection between the level of punishment and conviction rates); Martha A. Myers, *Rule Departures and Making Law: Juries and Their Verdicts*, 13 *LAW & SOC'Y REV.* 781, 793–94 (1979); Carol M. Werner et al., *The Impact of Case Characteristics and Prior Jury Experience on Jury Verdicts*, 15 *J. APPLIED SOC. PSYCHOL.* 409, 471 (1985).

13. Myers, *supra* note 12, at 785.

14. *Id.* at 793–94.

15. *Id.*

demonstrating the inverse relationship between the size of sanctions and conviction rates.<sup>16</sup>

While these empirical studies suggest that fact finders are sensitive to the level of punishment when determining guilt, the studies alone do not provide a clear-cut conclusion. Several factors may explain their findings. As the literature has suggested, the drop in conviction rates for more severe charges may be caused, for example, by defendants' increased expenditures on legal defense, and not by a higher evidentiary standard employed by the trier of fact.<sup>17</sup> Experimental studies specifically designed to control for various variables can thus offer a more complete and accurate picture of the actual effect of sanctions' severity on the burden of proof.

Psychologists and legal scholars investigating fact finders' behavior have employed two methodologies. Under one approach, both judges and potential jurors are asked to indicate the evidentiary threshold they would apply in determining whether the defendant had committed the offense for which she was charged.<sup>18</sup> Under a different approach, using hypothetical cases and random grouping of participants, researchers examine the effect of sanctions' severity on the final verdict.<sup>19</sup> Both methodologies demonstrate that as the severity of the sanction rises, fact finders demand evidence with greater probative strength to support a conviction.

In a wide-ranging study focusing on public opinion regarding the death penalty, Professors Ellsworth and Ross found that the existence of a mandatory death penalty raises the amount of evidence required by jurors in order to convict.<sup>20</sup> More specifically, among *supporters* of the death penalty—participants who expressed a willingness to convict in capital cases if defendant's guilt is proved beyond a reasonable doubt—over 60% indicated that as jurors they would have required “much more” or “somewhat more” evidence to render a guilty verdict.<sup>21</sup> Ellsworth and Ross's findings demonstrate the interdependence of the size of the sanction and the evidentiary threshold. The introduction of the death penalty raises the stakes in the case, and as a consequence, jurors raise the amount of evidence they demand.

Ellsworth and Ross's study focuses on a single criminal context (the death penalty). By contrast, an experiment conducted by Professors Simon

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16. See Werner et al., *supra* note 12, at 414, 417, 419–20; Andreoni, *supra* note 12, at 481–82; Fusako Tsuchimoto & Libor Dušek, Responses to More Severe Punishment in the Courtroom: Evidence from Truth-in-Sentencing Laws 11, 17 (Dec. 14, 2009) (unpublished manuscript), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1441703](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1441703).

17. See Andreoni, *supra* note 12, at 476, 481 (acknowledging the difficulty in disentangling these effects in empirical studies).

18. See *infra* notes 20–24 and accompanying text.

19. See *infra* notes 25–30 and accompanying text.

20. Phoebe C. Ellsworth & Lee Ross, *Public Opinion and Judicial Decision Making: An Example from Research on Capital Punishment*, in CAPITAL PUNISHMENT IN THE UNITED STATES 152, 169 (Hugo Adam Bedau & Chester M. Pierce eds., 1976).

21. See *id.* Among opponents of the death penalty, 40 percent indicated that they would never vote in favor of a guilty verdict, while another 40 percent indicated that they would require “much more” or “somewhat more” evidence in order to convict. *Id.*

and Mahan explores fact finders' behavior across a spectrum of criminal offenses.<sup>22</sup> In their study, Simon and Mahan presented a list of criminal offenses—ranging from petty larceny to murder—to groups of judges and mock jurors. Participants were then asked to indicate, in probabilistic terms, the level of proof they would require to convict in these cases. In each group, participants adjusted the burden of proof in accordance with the severity of the offense. In the group of mock jurors, participants interpreted the beyond a reasonable doubt standard to require the probability that the defendant committed the crime to be 75% to support a petty larceny conviction, 82% to support a burglary conviction, and 95% to support a murder conviction.<sup>23</sup> Among judges the discrepancy was smaller, but there was nevertheless a noticeable difference between the various offenses. For example, whereas judges interpreted the standard as requiring a certainty of 87% to support a conviction in petty theft cases, they required 92% certainty in murder cases.<sup>24</sup>

Professor Kerr used a more complex design to directly test the effect of sanctions' severity on evidentiary thresholds.<sup>25</sup> Kerr presented participants with a hypothetical case of a defendant who caused the death of another person in the course of a robbery.<sup>26</sup> To examine the connection between the level of sanctions and conviction rates, participants were randomly assigned to groups that were each informed of a different sanction in the case of conviction, and then read written testimony that referred to the question whether the shooting was intentional or accidental.<sup>27</sup> Participants were asked several questions regarding the evidentiary criteria they used to determine whether to convict.<sup>28</sup> Kerr's findings demonstrate that the penalty attached to the crime has a direct bearing on the conviction rate. All else being equal, as the severity of the punishment rises, conviction rates drop. In the severe-penalty condition the conviction rate was 62%, compared with 69.4% in the mild-penalty condition.<sup>29</sup> Furthermore, calculating the relative effect of the various variables, Kerr shows that this result is caused by an upward adjustment of the evidentiary threshold for conviction employed by the participants. As he explains, "[i]ncreasing the severity of the prescribed penalty for an offense resulted in an adjustment

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22. Rita James Simon & Linda Mahan, *Quantifying Burdens of Proof: A View from the Bench, the Jury, and the Classroom*, 5 LAW & SOC'Y REV. 319 (1971).

23. *Id.* at 328.

24. *Id.*

25. Norbert L. Kerr, *Severity of Prescribed Penalty and Mock Jurors' Verdicts*, 36 J. PERSONALITY & SOC. PSYCHOL. 1431 (1978) [hereinafter Kerr, *Severity of Prescribed Penalty*]; see also Norbert Kerr, *Stochastic Models of Juror Decision Making*, in INSIDE THE JUROR: THE PSYCHOLOGY OF JUROR DECISION MAKING 126–29 (Reid Hastie ed., 1993) (discussing the experiment's results and implications).

26. Kerr, *Severity of Prescribed Penalty*, *supra* note 25, at 1435.

27. *Id.*

28. *Id.*

29. *Id.* at 1437.



of subjects' conviction criteria such that more proof of guilt was required for conviction and thus resulted in a reduced probability of conviction."<sup>30</sup>

The insight that fact finders adjust the burden of proof in proportion to the severity of punishment has been recognized not only in academic studies, but also by policymakers and judges. Politicians involved in the design of criminal prohibitions have long since alluded to this phenomenon as a consideration that should be taken into account when setting the size of criminal penalties. Judges, based on their actual courtroom experience, have also acknowledged the interplay between sanction severity and evidentiary thresholds for conviction. Both politicians' and judges' accounts corroborate the experimental findings and suggest their external validity.

An illustrative example of policymakers' concerns surrounding the evidentiary implications of criminal sanctions can be found in drug offense legislation. Although deterrence-oriented legislatures often advocate enhancing the sanctions for crimes, in the context of drug-related offenses, legislatures have sometimes *reduced* the level of punishment. Given fact finders' flexible evidentiary standards, diminishing the size of the punishment can serve to increase the likelihood of obtaining guilty verdicts. More lenient punishments that induce high conviction rates can in turn provide greater deterrence than harsher punishments that trigger low conviction rates. For example, in the late 1960s, Nebraska lowered the penalty for marijuana possession from a prison sentence of two to five years to a maximum penalty of a seven-day incarceration.<sup>31</sup> The goal of this policy change was not to weaken the punitive attitude toward marijuana but rather to strengthen it by overcoming the hurdle of securing convictions in the face of harsher punishment.<sup>32</sup> As the senator who promoted the bill noted: "With the 7 day penalty for the possession of a nominal amount, the courts will rather promiscuously [sic] based on the evidence, apply these penalties."<sup>33</sup>

More recently, the focal point for tough-on-crime legislation has shifted to the area of sex offenses. Although the general trend has moved toward increasing the penalty for such offences, policymakers have emphasized the need to curb the level of sanctions in order to avoid an increase in the burden of proof. For example, during a recent legislative debate surrounding the enactment of a new law punishing sex offenders, Maine legislators decided to opt for a milder version of the law. Their concern was that the tougher bill would make it harder to secure convictions, and would force prosecutors to make victims take the stand in order to present more evidence

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30. *Id.* at 1439.

31. John F. Galliher et al., *Nebraska's Marijuana Law: A Case of Unexpected Legislative Innovation*, 8 LAW & SOC'Y REV. 441, 442 (1974).

32. *Id.* at 444-46.

33. *Id.* at 446 (alteration in original) (internal quotation marks omitted).

to the court.<sup>34</sup> Representative Stan Gerzofsky, a member of the Criminal Justice Committee, noted as follows:

The bottom line is, the original version of Jessica's law would have put more dangerous sex offenders on the streets, without any incarceration or supervision. . . . *The bill would have dramatically increased the burden of proof needed to get a conviction*, and that would put young victims in jeopardy and more predators on the street.<sup>35</sup>

In light of this concern, and notwithstanding public pressure, the Maine legislature decided to avoid adopting a harsh twenty-five-year mandatory minimum sentence to enforce the new legislation.<sup>36</sup>

Several other examples reflect prosecutors' concerns that tough sanctions for sex offenders will raise the burden of proof for sex crimes. In California, for instance, prosecutors worried that raising the penalty for rape would elevate the amount of evidence needed to secure a conviction, such that evidence that was sufficient for a conviction under the lighter sanction would not suffice under the harsher penalty. As one local newspaper reported: "Acquaintance rape cases often boil down to the victim's word against her alleged attacker's, and some prosecutors worry that juries may be reluctant to convict acquaintance rape suspects if the punishment has to be life behind bars."<sup>37</sup>

Anecdotal evidence regarding judges' sentencing practices provides additional support for the correlation between evidentiary standards and the level of punishment. Prior to the Supreme Court's holding in *Apprendi v. New Jersey*,<sup>38</sup> it was formally permissible to prove disputed facts at sentencing hearings by a preponderance of the evidence. Nevertheless, in a pre-*Apprendi* survey of judges for the Eastern and Southern Districts of New York, judges acknowledged that they applied a more flexible approach.<sup>39</sup> More specifically, nearly half of the judges stated that they relied "on a sliding-scale approach, in which the burden of proof changes

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34. Press Release, Maine House Democrats, House Vote Overwhelmingly to Pass Jessica's Law (Apr. 27, 2006), available at <http://www.maine.gov/tools/whatsnew/index.php?topic=HouseDems+News&id=16002&v=Article>.

35. *Id.* (emphasis added) (internal quotation marks omitted).

36. *Id.*

37. Ken Chavez Bee, *Wilson Seeks 1 Strike for Rape: Uses Carter Case To Push for Life Terms for First Time Sex Offenders*, SACRAMENTO BEE, Mar. 28, 1994, at A1. Similarly, the chairman of the legislative committee of Iowa's County Attorneys Association lobbied against an Iowa bill that would have raised sanctions for sex offenders. Underlying the objection to this proposed bill was the concern that "[w]hen the penalties are set so high, it makes it difficult to get a conviction without rock-solid evidence." Editorial, *Legislature Deaf to Law Enforcement's Wishes; Prosecutors Should Have Been Involved in Drafting the Sexual Predator Law*, TEL. HERALD (Dubuque, Iowa), Aug. 3, 2005, at A4.

38. 530 U.S. 466, 490 (2000) (ruling that "any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt").

39. See Jack B. Weinstein, *A Trial Judge's Second Impression of the Federal Sentencing Guidelines*, 66 S. CAL. L. REV. 357, 360-64 (1992).

relative to the effect on the defendant of the issue being proved.”<sup>40</sup> Thus, for facts that would significantly enlarge a defendant’s sentence, these judges often required clear and convincing evidence or even proof beyond a reasonable doubt.<sup>41</sup> The remaining judges, while they did not explicitly acknowledge this practice, still admitted that the degree of certainty they required might change depending on the impact of their finding on the defendant.<sup>42</sup>

At times, judges have even openly acknowledged that they hold the prosecution to a higher evidentiary standard in cases where the defendants might be subjected to stiff penalties. In one publicized child molestation case in Louisiana involving a defendant with prior convictions, the court ruled that the evidentiary threshold the prosecution must satisfy “is a heightened burden of proof because this defendant faces a life sentence.”<sup>43</sup>

Finally, despite its assumption of a fixed evidentiary threshold, legal doctrine itself offers evidence regarding the interplay between the severity of sanctions and the standard of proof. Under the current legal regime, jurors generally do not receive information regarding the penalty the defendant faces if convicted.<sup>44</sup> This rule has often been justified as a means to prevent attempts by the defense to induce jury nullification when the sanction is perceived to be beyond the disproportional-penalty boundary.<sup>45</sup> However, some cases also suggest that this rule may actually serve to prevent attempts by the prosecution or by trial judges to induce conviction by referring to the leniency of the applicable sanction. Indeed, numerous court decisions have underscored the point that providing information regarding mitigating factors may cause fact finders to lower the evidentiary threshold for a conviction, which may ultimately lead to unsubstantiated convictions.

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40. *Id.* at 361.

41. *Id.*

42. *Id.* at 362 (quoting one of these judges as stating that “[t]he more serious the impact of the decision on the defendant’s punishment, the more reliable the type of proof I require to make up my mind”).

43. Joe Darby, *Alleged Molester Faces New Charges; Judge Defends Acquittal Decision*, TIMES-PICAYUNE (New Orleans, La.), Dec. 4, 1999, at A1. Interestingly, critics of the court’s decision, referring to the accepted legal wisdom, emphasized that the burden of proof is expected to be equal for all cases. As the chief of felony trials for the local district attorney’s office noted, “[t]he state shouldn’t be held to a higher burden of proof just because a defendant faces a life sentence.” *Id.* Nevertheless, and consistent with his position regarding the prosecution’s higher burden of proof, the judge found the prosecution’s evidence insufficient and acquitted the defendant. *Id.*

44. Kristen K. Sauer, Note, *Informed Conviction: Instructing the Jury About Mandatory Sentencing Consequences*, 95 COLUM. L. REV. 1232, 1232 (1995) (noting that in most states jurors receive no information regarding the consequences of a guilty verdict).

45. See, e.g., *United States v. Manning*, 79 F.3d 212, 219 (1st Cir. 1996) (ruling that attorneys may not provide information regarding the severity of the punishment in order to induce jury nullification).

In *United States v. Greer*,<sup>46</sup> for example, a United States deputy marshal conveyed to the jury information that indicated that the defendant might be eligible to be sentenced under the Federal Youth Corrections Act. The court found this information prejudicial because “if the jury is convinced that a defendant will receive a light sentence, it may be tempted to convict on weaker evidence.”<sup>47</sup> A related strand of cases deals with situations in which trial judges encourage hung juries to reach a guilty verdict by assuring them that they will treat the defendant with leniency, or by allowing the jury to recommend leniency. In one such case, *United States v. Glick*,<sup>48</sup> the trial judge informed a hung jury that they could recommend leniency as part of their verdict, and soon thereafter the jury delivered a guilty verdict. The Court of Appeals for the Second Circuit overturned the conviction, noting that “one or more jurors entertaining doubts as to appellants’ guilt agreed to vote for conviction because [they believed] they had it in their power to soothe their consciences by causing little or no punishment to be imposed.”<sup>49</sup>

The combination of empirical and experimental findings, policymakers’ experience, judges’ practices, and legal doctrine itself indicates that the conventional presumption of a fixed standard of proof is misguided. Instead, fact finders often adjust the evidentiary standard for conviction in accordance with the severity of the punishment. As the next Part argues, this behavioral pattern should be considered when designing criminal punishments.

## II. A THEORY OF PUNISHMENT AND INNOCENT DEFENDANTS

A large body of legal, economic, and philosophical literature confronts the problem of setting the size of criminal sanctions. Scholars have proposed several theories concerning the factors that should be considered when determining the proper level of sanctions. While these different theories offer competing rationales for punishing crime, their focal points have been limited to the perpetrators of crime and their victims.

The prevailing paradigm among theories of punishment focuses on the perpetrators of crime. In this context, two approaches have been particularly dominant. Deontologists have often advocated that criminal punishment should be based on retribution and just desert.<sup>50</sup> Advocates of this approach argue that the level of punishment should be calibrated to

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46. 620 F.2d 1383, 1384 (10th Cir. 1980).

47. *Greer*, 620 F.2d at 1385.

48. 463 F.2d 491, 492 (2d Cir. 1972).

49. *Glick*, 463 F.2d at 494 (alteration in original) (quoting *United States v. Louie Gim Hall*, 245 F.2d 338, 341 (2d Cir. 1957)); see also *Rogers v. United States*, 422 U.S. 35, 40–41 (1975) (reversing guilty verdict after trial judge allowed jury to recommend he exercise “extreme mercy”).

50. See *Bradley*, *supra* note 7, at 22–26.

the seriousness of the transgressor's crime.<sup>51</sup> More specifically, the seriousness of the crime should be determined by examining two primary factors: the wrongfulness of the act and the culpability or accountability of the perpetrator.<sup>52</sup> The first factor focuses on the moral quality of the act itself,<sup>53</sup> and the second denotes the degree of the offender's moral responsibility.<sup>54</sup>

Consequentialists, on the other hand, argue that punishing crime should serve the goal of minimizing the social cost of crime.<sup>55</sup> Proponents of this theory have mostly focused on general deterrence as the mechanism through which this policy goal can be achieved.<sup>56</sup> Punishment is viewed as a price tag that the legal system sets for undesirable activity in order to discourage potential transgressors from engaging in that activity.<sup>57</sup> According to this theory, the two main factors that should determine the size of the appropriate punishment are the social harm created by the transgressor's acts and the probability of punishing him.<sup>58</sup>

Although retribution and deterrence theories seek to promote different goals and often reach different conclusions regarding the desirable size of penalties, they are similarly offender-centered.<sup>59</sup> They both assume that criminal punishment should be designed in response to the behavior of actual and potential offenders. Recent legal scholarship, however, has suggested that the offender-centered approach is incomplete. Determining just desert and promoting the efficient prevention of harm also require considering victims' conduct.<sup>60</sup> Scholarship has thus shown that the desirable level

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51. See ANDREW VON HIRSCH, *DOING JUSTICE: THE CHOICE OF PUNISHMENTS* 90 (1976) ("The principle of commensurate deserts calls for maintenance of a 'proportion' between the seriousness of the crime and the severity of the penalty.").

52. For a discussion of these two factors, see GEORGE P. FLETCHER, *RETHINKING CRIMINAL LAW* §§ 6.6–6.7, at 454–504 (1978).

53. See Stuart P. Green, *Why It's a Crime To Tear the Tag Off a Mattress: Overcriminalization and the Moral Content of Regulatory Offenses*, 46 EMORY L.J. 1533, 1551 (1997) (referring to wrongfulness as "conduct that violates a moral norm or standard").

54. See *id.* at 1547 (referring to culpability as "the moral value attributed to a defendant's state of mind during the commission of a crime").

55. See LOUIS KAPLOW & STEVEN SHAVELL, *FAIRNESS VERSUS WELFARE* 292–94 (2002) (presenting the basic normative framework of welfare economics and punishment).

56. See, e.g., *id.* at 294 (noting that analysis will focus on deterrence).

57. See SHAVELL, *supra* note 7, at 473–530 (analyzing the deterrent effect of criminal sanctions).

58. The argument that optimal punishment should be designed in order to account for imperfect enforcement originates with Gary S. Becker, *Crime and Punishment: An Economic Approach*, 76 J. POL. ECON. 169 (1968).

59. See George P. Fletcher, *The Place of Victims in the Theory of Retribution*, 3 BUFF. CRIM. L. REV. 51, 51 (1999) ("[T]he theory of criminal law has developed without paying much attention to the place of victims in the analysis of responsibility or in the rationale for punishment.").

60. For a review of the literature supporting this view, see Adam J. MacLeod, *All for One: A Review of Victim-Centric Justifications for Criminal Punishment*, 13 BERKELEY J. CRIM. L. 31 (2008).

of punishment can actually be lower or higher than offender-centered theories suggest. For example, while punishment should be mitigated at times in order to discourage victims from investing excessively in precautions against crime,<sup>61</sup> in other instances it should be aggravated in order to promote an egalitarian distribution of risks among potential victims.<sup>62</sup>

The differences between existing theories of punishment, however, conceal a largely unnoticed consensus. Both offender-centered and victim-centered approaches confine the boundaries of the debate to the parties who benefit and lose from criminal activity. While doing so, both approaches ignore the possible effect of punishment on other parties. More specifically, they overlook the implications that the size of sanctions may have on innocent defendants, namely, those defendants whose guilt cannot be proved by admissible and reliable evidence.

To be sure, the lack of attention to the effect of punishment size on innocent defendants does not indicate indifference to the need to protect such defendants. Both deontological and consequentialist approaches, whether they focus on offenders or victims, view the conviction of innocent defendants as an undesirable outcome. From a deontological perspective it is morally impermissible to punish the innocent,<sup>63</sup> and as just desert is a necessary condition for punishment, penalizing the innocent violates a basic tenet of retributivist theories.<sup>64</sup> From a consequentialist approach, penalizing the innocent undercuts the goal of minimizing the social costs of crime.<sup>65</sup> If defendants are punished even when they observe the law, incentives to comply with legal rules are diluted and deterrence goals are undermined.

The existing theories of punishment view the rules of evidence and the rules of criminal procedure—not the substantive rules of criminal law—as the legal vessels charged with protecting innocent defendants.<sup>66</sup> Procedural and evidentiary rules achieve this goal by controlling two key elements of the litigation process. First, they regulate the quality of the evidence that will affect the fact finders' determination. Second, they set the level of persuasion

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61. See generally Omri Ben-Shahar & Alon Harel, *The Economics of the Law of Criminal Attempts: A Victim-Centered Perspective*, 145 U. PA. L. REV. 299 (1996) (arguing that the punishment for criminal attempt should be decreased in order to provide proper incentives to victims).

62. See generally Alon Harel & Gideon Parchomovsky, *On Hate and Equality*, 109 YALE L.J. 507 (1999) (presenting a victim-centered rationale for hate crime legislation).

63. See, e.g., Michael Philips, *The Inevitability of Punishing the Innocent*, 48 PHIL. STUD. 389, 389 (1985) ("It is widely held by moral philosophers that it is always wrong to punish the innocent.").

64. See Joshua Dressler, *Hating Criminals: How Can Something That Feels So Good Be Wrong?*, 88 MICH. L. REV. 1448, 1451 (1990) (book review) ("[J]ust deserts is a necessary condition of punishment.").

65. See Louis Kaplow, *The Value of Accuracy in Adjudication: An Economic Analysis*, 23 J. LEGAL STUD. 307, 348–52 (1994) (showing that letting guilty defendants go unpunished and penalizing innocent defendants both undermine the goal of deterrence equally).

66. See Talia Fisher, *The Boundaries of Plea Bargaining: Negotiating the Standard of Proof*, 97 J. CRIM. L. & CRIMINOLOGY 943, 977 (2007) ("The central objective of criminal procedures and rules of evidence is to protect the innocent from wrongful conviction.").

required to render a guilty verdict. Because of their direct bearing on the way in which fact finders arrive at decisions, rules of evidence and criminal procedure (rather than substantive criminal laws) are assumed to be the best safeguards against the punishment of innocent defendants.<sup>67</sup>

The interdependent relationship between sanction size and the evidentiary thresholds that fact finders apply, however, challenges the conventional perception concerning the division of labor between substantive criminal law and the rules of evidence and criminal procedure. Given fact finders' behavior, substantive criminal law can also affect the quality of courts' decisions. By increasing the size of the relevant sanction, the legal system may elevate the standard of proof, thereby incentivizing fact finders to require more evidence to substantiate a guilty verdict. To this extent, not only do offenders and victims have a vested interest in the structure of criminal sanctions, but innocent defendants do as well.

This insight does not merely underscore that substantive criminal law has greater significance than conventionally assumed. It also highlights the potential to use criminal sanctions as a means to protect defendants in situations where the rules of evidence and criminal procedure fail to provide that protection. When fact finders disregard instructions as to the information they may consider, or when they are required to make decisions in highly uncertain cases, criminal sanctions can be an effective tool to reduce the risk of erroneous decisions.

The analysis presented thus far does not suggest that the substantive rules of criminal law should be structured exclusively to eliminate the risk of wrongful convictions. Arguably, this goal could be achieved by adopting a regime of extraordinarily harsh penalties that would raise the evidentiary threshold to a level where it would be impossible to convict *any* defendant, guilty or not. The challenge facing policymakers is to identify those areas of law in which penalties can be structured in such a way that will defend the innocent on one hand but not undermine the goals of punishment on the other. The next Part elaborates on the legal system's ability to design such penalties.

### III. CRIMINAL SANCTIONS AND THE DETERMINATION OF GUILT: APPLICATIONS

The preceding discussion presented in the abstract the argument that criminal sanctions should be used to incentivize fact finders. Arguably, this new perspective on punishment is subject to a wide range of criticisms. We defer our discussion of these criticisms to the next Part of the Article in order to describe first how penalties that are designed to incentivize fact finders will operate in practice. This Part analyzes three concrete situations in which the risk of convictions based on insufficient or inadmissible evidence is significant. It shows that when direct regulation of the fact-finding process is unlikely to be effective, the imposition of mandatory

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67. *See id.*

sanctions of sufficient size can often induce fact finders to determine guilt appropriately.

### A. *The Law of Criminal Attempts*

The analysis in this Section focuses on the punishment of criminal attempts. While punishing attempts helps fight crime, it also increases the risk of erroneous convictions. As criminal law scholarship has shown, the legal system addresses this risk in two ways. One way is by setting stringent *actus reus* requirements for conviction in attempt cases, which reduce the likelihood of finding innocent defendants guilty. Another way is by establishing that the sanction for attempt is more lenient than the sanction for a complete crime, which diminishes the social costs of erroneous verdicts. Policymakers, judges, and scholars have argued, however, that these solutions fail to provide satisfactory results. Contrary to the conventional understanding, this Section demonstrates the advantage of broadening *actus reus* requirements and enhancing sanctions for attempts. Such a regime, it is shown, allows the legal system to penalize defendants who intend to commit a crime while simultaneously minimizing the risk of wrongful convictions.

#### 1. The Problem of Uncertain Intentions

Most penal systems include an array of primary offenses and, in conjunction with those offenses, a general inchoate crime that criminalizes attempts to commit those offenses.<sup>68</sup> Attempts can be divided into two categories: incomplete and complete.<sup>69</sup> Incomplete attempts are situations in which the transgressor fails to take all the steps that constitute the crime.<sup>70</sup> Punishing incomplete crimes thus requires defining the minimum behavior that qualifies as an attempt. Legal systems distinguish between acts of “preparation,” which are legal (defendant bought a gun), and behaviors that reach a more advanced stage, which qualify as criminal attempts (defendant pointed a gun toward the victim and was caught before shooting).<sup>71</sup> Complete attempts, by contrast, are situations in which the offender committed all of the acts that constitute the crime, but his plan did not succeed. Complete attempts fail to become full offenses either because the offender does not succeed in bringing about the consequences that define

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68. R.A. DUFF, *CRIMINAL ATTEMPTS* 1 (1996).

69. See ANDREW ASHWORTH, *PRINCIPLES OF CRIMINAL LAW* 445–47 (5th ed. 2007) (reviewing the two types of attempts).

70. See, e.g., MODEL PENAL CODE § 5.01(1)(c) (Official Draft and Revised Comments 1985) (criminalizing acts that constitute only a substantial step toward the commission of a crime).

71. For a review of Anglo-American case law on this point, see DUFF, *supra* note 68, at 33–61; see also Hamish Stewart, *The Centrality of the Act Requirement for Criminal Attempts*, 51 U. TORONTO L.J. 399, 402–11 (2001).



the full offense (defendant shot at his victim but missed)<sup>72</sup> or because one of the circumstances essential for completing the full offense did not exist (defendant shot the victim, but he was already dead).<sup>73</sup>

Criminalizing attempts promotes two main policy goals. First, it serves to enhance deterrence.<sup>74</sup> Under a regime that punishes attempts, transgressors are punished whether or not their plan succeeded.<sup>75</sup> Penalizing attempts thus raises the probability of punishment and thereby increases the expected sanction that offenders face.<sup>76</sup> Moreover, raising the probability of punishment by criminalizing attempts, rather than by other means (such as hiring more policemen), is socially inexpensive since “opportunities to punish attempts often arise as a by-product of society’s investment to apprehend parties who actually do cause harm.”<sup>77</sup> A rule that allows the police to apprehend not only successful burglars but also unsuccessful ones does not increase police operating costs, yet can significantly increase the likelihood of apprehension. Criminalizing attempts, therefore, weakens potential transgressors’ incentives to engage in criminal activity.

Second, to the extent that transgressors are not deterred and still choose to engage in illicit behavior, punishing attempts helps prevent harm. Such prevention is achieved both through police intervention prior to the completion of the criminal act and through incapacitation of individuals who demonstrate a propensity for criminal activity.<sup>78</sup> Consider, for example, an assassin who is about to shoot his victim. Criminalizing attempted murder enables the police to arrest the assassin before he fires the lethal bullet, thereby thwarting the materialization of the harm. Alternatively, if the assassin shoots and misses the victim, it enables the legal system to incapacitate him (through incarceration) such that he will be unable to complete the crime in the future.

While punishing attempts is beneficial from a crime control perspective, it generates a considerable risk of wrongful convictions when compared to the punishment of complete crimes. Criminal attempts always involve situations in which at least one of the objective elements of the crime is absent.<sup>79</sup> This, in turn, leaves fact finders to conjecture about the missing elements

72. See, e.g., MODEL PENAL CODE § 5.01(1)(b) (Official Draft and Revised Comments 1985).

73. See, e.g., *id.* § 5.01(1)(a).

74. See generally Steven Shavell, *Deterrence and the Punishment of Attempts*, 19 J. LEGAL STUD. 435 (1990).

75. *Id.* at 436–37.

76. *Id.*

77. Steven Shavell, *Criminal Law and the Optimal Use of Nonmonetary Sanctions as a Deterrent*, 85 COLUM. L. REV. 1232, 1250 (1985).

78. See WAYNE R. LAFAVE, CRIMINAL LAW § 11.2(b) (5th ed. 2010) (analyzing criminal attempt from the perspective of early prevention); Shavell, *supra* note 74, at 458 (analyzing criminal attempts from the perspective of incapacitation).

79. Arnold N. Enker, *Impossibility in Criminal Attempts—Legality and the Legal Process*, 53 MINN. L. REV. 665, 673 (1969).

and increases the likelihood of erroneous determinations.<sup>80</sup> This is especially true with respect to incomplete attempts, in which there is uncertainty as to the defendant's actual act. The insight also holds true with respect to complete attempts, since the lack of harm might raise doubts as to the defendant's true intentions. The commentators of the American Law Institute alluded to this aspect of criminal attempts, noting that criminalizing any act taken toward the completion of a crime "would allow prosecutions for acts that are externally equivocal and thus create a risk that innocent persons would be convicted."<sup>81</sup>

More specifically, uncertainty in attempt cases can arise in one of three ways. First, it might not be evident whether the defendant intended to commit any crime. For example, in the case where the defendant shot at the victim but did not inflict any harm, fact finders might not be able to determine with sufficient certainty whether the defendant truly intended to shoot the victim or was only engaged in legal hunting and mistakenly fired toward the victim.<sup>82</sup> Second, even if the defendant clearly has an illicit intention, it might be impossible to decipher the actual offense the defendant intended to commit. For instance, fact finders might not be able to decide unequivocally whether the defendant intended to kill the victim or only to frighten him.<sup>83</sup> Finally, even if it is possible to identify the defendant's initial intention, it might still be uncertain whether the defendant would have had the resolve to execute the crime. For example, in a case in which the defendant was caught prior to actually shooting, fact finders might not be able to determine whether he would have voluntarily retracted before completing the crime.<sup>84</sup>

Criminalizing attempts thus creates a tension between the desire to reduce crime and the need to protect innocent defendants. Expanding the boundaries of attempt doctrine enhances the benefits the legal system can derive from making inchoate crimes punishable. At the same time, however, it increases the risk of convicting innocent defendants.

## 2. Reducing Error Costs in Incomplete Offenses

As mentioned, the legal system employs two tools in order to deal with the increased risk of wrongful convictions created by criminalizing attempts. The first focuses on the probability of mistaken convictions, and aims to minimize it by narrowly structuring the rules of attempt law. With respect to incomplete attempts, stringent requirements have often been

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80. *See id.* at 670–76.

81. MODEL PENAL CODE § 5.01(5)(f) (Official Draft and Revised Comments 1985).

82. *See* Jerome Hall, *Criminal Attempt—A Study of Foundations of Criminal Liability*, 49 YALE L.J. 789, 824 (1940) (alluding to the problem and noting that "[a] person carries a gun in his possession. Is his purpose to defend himself, to hunt or to kill a man?").

83. *See id.* at 824–25 (noting that when a person puts his hand into another person's pocket he might have a lewd or a larcenous purpose).

84. *See* ASHWORTH, *supra* note 69, at 446 (noting the uncertainty associated with retraction since "it may take greater nerve to do the final act which triggers the actual harm than to do the preliminary acts").

applied regarding the actus reus element. Under these requirements, a defendant's conduct will be considered an "attempt"—rather than merely "preparation"—only if it approximated the advanced stages of executing the crime. Courts have tailored tests such as "dangerous proximity to success" and "near to accomplishment" in order to ensure that only defendants who manifest an unequivocal intent to commit the offense will be penalized.<sup>85</sup> Scholars analyzing this body of case law acknowledge the evidentiary purpose underlying these tests, noting that "the preparation-attempt distinction is the result of difficulty in proving purpose."<sup>86</sup>

While the risk of wrongful convictions is relatively smaller in cases involving complete attempts, courts have also narrowed the attempt definition in these cases so as to reduce the risk of errors. For example, in the well-known decision in *United States v. Oviedo*,<sup>87</sup> the district court convicted the defendant of attempted distribution of heroin despite the fact that the substance in question turned out not to be an illegal substance. The Court of Appeals for the Fifth Circuit overturned this conviction, and expressed its concern that the lack of objective elements in attempt cases will lead to convictions based on "speculation and abuse."<sup>88</sup> The court adopted a strict definition of the acts that constitute attempt, and required that "the objective acts performed, without any reliance on the accompanying *mens rea*, mark the defendant's conduct as criminal in nature."<sup>89</sup>

The second way in which the legal system minimizes the error costs associated with criminalizing attempts is by diminishing the harm of wrongful convictions, rather than by reducing their likelihood. Most legal systems, both within the United States and abroad, have traditionally punished attempts less severely than completed crimes.<sup>90</sup> The accepted practice among many jurisdictions in this regard is to punish an attempt with half of the sanction that is attached to the completed crime.<sup>91</sup> Although it is difficult to justify this practice from the perspective of optimal deterrence and harm prevention, scholars have emphasized the need to adjust the level of punishment to account for the significant risk of erroneous convictions. As

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85. See, e.g., *Gaskin v. State*, 31 S.E. 740, 741 (Ga. 1898) (distinguishing between mere preparation and an attempt to commit a crime); *Commonwealth v. Kelley*, 58 A.2d 375, 376 (Pa. 1948) (noting that an attempt must be sufficiently proximate to the intended crime).

86. Herbert Wechsler et al., *The Treatment of Inchoate Crimes in the Model Penal Code of the American Law Institute: Attempt, Solicitation, and Conspiracy*, 61 COLUM. L. REV. 571, 591 (1961).

87. 525 F.2d 881 (1976).

88. *Oviedo*, 525 F.2d at 885.

89. *Id.*

90. See Ben-Shahar & Harel, *supra* note 61, at 318–19 & n.44 (reviewing the punishment for attempts in different jurisdictions).

91. See, e.g., CAL. PENAL CODE § 664 (West 2011) (determining—subject to a few qualifications—that a person convicted of attempt "shall be punished by imprisonment in the state prison or in a county jail, respectively, for one-half the term of imprisonment prescribed upon a conviction of the offense attempted"); Canada Criminal Code, R.S.C. 1985, c. C-46, s. 463 (providing that the punishment for attempt is "one-half of the longest term to which a person who is guilty of [the complete] offence is liable").

Judge Posner argues, attempts should be punished less severely “since there is a higher probability that an attempter really is harmless.”<sup>92</sup> The law and economics literature has elaborated on this insight and demonstrated the benefits of such discounting.<sup>93</sup> Because courts possess incomplete information in attempt cases both with respect to the actual intention of the offender and the potential harm, the imposition of a mitigated sanction allows the legal system to reduce the costs of erroneous judgments.<sup>94</sup>

Notwithstanding the legal system’s efforts to minimize the probability and costs of erroneous decisions in attempt cases, the existing rules have been subject to much criticism. Legal scholarship has highlighted how the current doctrine of criminal attempt is both underinclusive and overinclusive. On the one hand, it enables defendants to escape liability, even when the evidence against them is overwhelming. On the other hand, despite the adoption of safeguards against wrongful convictions, the current doctrine nevertheless fails to protect innocent defendants adequately.

The problem of underinclusiveness, as both courts and policymakers have emphasized, stems from the stringent actus reus requirements aimed to decrease the probability of wrongful convictions. While these requirements reduce the risk of penalizing innocent defendants, they also prevent the punishment of defendants who clearly intended to execute the crime. This concern is most apparent in the context of incomplete attempts. Even if the evidence regarding their intention is clear, when defendants are caught before executing a significant part of their illicit behavior, the existing rules of criminal attempt make conviction impossible. As Professors Bierschbach and Stein recently noted, defendants “go free under the various tests for attempt not because there is any question about their intent to commit a crime or the harm they stood to cause, but simply because they were apprehended at too early a point in the process.”<sup>95</sup>

An illustrative example can be found in a recent case involving child abuse. In *State v. Duke*,<sup>96</sup> the defendant solicited a twelve-year-old girl to engage in sexual acts through an internet chat room. Unbeknownst to the

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92. Richard A. Posner, *An Economic Theory of the Criminal Law*, 85 COLUM. L. REV. 1193, 1217–18 (1985).

93. See, e.g., Shavell, *supra* note 74, at 452–55 (arguing that punishment of incomplete crimes should be mitigated as a means to reduce error costs).

94. Among deontologists, the imposition of mitigated sanctions for incomplete crimes is sometimes justified on retribution grounds. According to this understanding, since incomplete crimes do not result in actual harm they involve a lower degree of moral blameworthiness. See, e.g., Leo Katz, *Why the Successful Assassin Is More Wicked Than the Unsuccessful One*, 88 CALIF. L. REV. 791, 794–811 (2000). Yet the intensified risk of error characterizing attempt cases has also been recognized by deontologists as a rationale for lowering the punishment for attempts. See, e.g., David Enoch & Andrei Marmor, *The Case Against Moral Luck*, 26 LAW & PHIL. 405, 415–16 (2007). Our analysis thus applies both to deontologist and consequentialist approaches that advocate downward adjustment of the punishment to account for the risk of wrongful conviction.

95. Richard A. Bierschbach & Alex Stein, *Mediating Rules in Criminal Law*, 93 VA. L. REV. 1197, 1238 (2007).

96. 709 So. 2d 580 (Fla. Dist. Ct. App. 1998).

defendant, the “girl” was actually a detective searching for child molesters. The defendant and the detective arranged to meet at a parking lot. When the defendant arrived at their meeting point, he was arrested and later accused of attempted sexual battery. The appellate court, although convinced by the evidence regarding the defendant’s intention to carry out the offense, rendered a not-guilty verdict on the grounds that the defendant’s act did not go far enough to meet the actus reus requirements. The court referred to the overrestrictiveness of these requirements and called on the legislature to remedy this problem.<sup>97</sup>

The concern regarding the underinclusiveness of the current criminal-attempt doctrine has similarly led to proposals for legislative reforms in England. In *R. v. Geddes*,<sup>98</sup> the twenty-nine-year-old defendant had been found in the boys’ lavatory at a school equipped with a large knife, some lengths of rope, and a roll of masking tape. The defendant was charged with attempted false imprisonment. Overruling the lower court’s decision, the court of appeal—“with the gravest unease”—found the defendant’s acts merely preparatory and rendered a not-guilty verdict.<sup>99</sup> A recent Royal Commission report responded to this decision by recommending significant expansion of the scope of criminal attempt law by adopting a more comprehensive definition of the actus reus requirement.<sup>100</sup>

While the application of strict actus reus tests has created insufficient criminal liability, it has also been suggested that these tests only partially resolve the problem of wrongful convictions. As legal scholarship has demonstrated, possessing additional knowledge about defendants’ conduct does not always enable fact finders to discover their actual intentions. Therefore, even under the most stringent actus reus standards, innocent defendants may still face a significant risk of conviction.<sup>101</sup>

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97. *Duke*, 709 So. 2d at 582. For additional examples of cases in which defendants engaging in illicit behavior were not convicted due to the fact that they did not take a “substantial step” toward the commission of the crime, see *United States v. Harper*, 33 F.3d 1143, 1147–48 (9th Cir. 1994) (holding that the defendants had not taken a substantial step toward robbing a bank when they sat in a car outside of a bank at 10:00 p.m. equipped with two handguns, ammunition, a roll of duct tape, a stun gun, and a pair of latex surgical gloves, and had tampered with the bank’s ATM in order to draw service personnel to the bank), and *United States v. Still*, 850 F.2d 607, 608 (9th Cir. 1988) (holding that the defendant had not taken substantial steps toward robbing a bank where he sat in a car near a bank wearing a blond wig and carrying a fake bomb, a pouch with a demand note taped to it, a police scanner, and a notebook containing drafts of demand notes; even where he later confessed that the police caught him “five minutes before he was going to rob a bank”).

98. (1996) 160 J.P. 697 (Eng.).

99. *Geddes*, 160 J.P. at 705–06.

100. LAW COMM’N, CONSPIRACY AND ATTEMPTS 19 (2007) (Consultation Paper No. 183) (U.K.) (offering to expand the definition of criminal attempt and concluding that “the very narrow reading of the 1981 Act . . . has given rise to decisions such as *Geddes*”).

101. See Lawrence Crocker, *Justice in Criminal Liability: Decriminalizing Harmless Attempts*, 53 OHIO ST. L.J. 1057, 1088 (1992) (criticizing existing doctrine and arguing that attempt liability should be attached only to the “last act that imposes sufficient objective risk”); Lawrence Crocker, *Justification and Bad Motives*, 6 OHIO ST. J. CRIM. L. 277, 287 n.22 (2008) (describing current attempt doctrine as overly inclusive).

As noted, criminal attempt cases involve three types of uncertainty. With respect to the first—the intention to commit a crime—the application of stringent actus reus requirements may indeed reduce the likelihood of incorrect judgments. The determination whether the defendant's intention is legal is likely to become easier as the defendant takes additional steps towards her goal.

The focus on the defendant's conduct, however, will often provide no guidance with respect to the two other forms of uncertainty. In the context of the second type of uncertainty—the actual offense intended—the behavior of the defendant might be similar across various possible offenses. Consequently, even in cases in which the defendant completed her conduct, the court might wrongfully convict her of a crime she never intended to commit. To illustrate, consider the case of a defendant who maliciously shot at another individual while not causing any physical harm. Clearly, such an act satisfies the most stringent actus reus requirements, as the defendant took the last step toward the completion of a crime. Nonetheless, the potential for error is still substantial, since different possible crimes—assault (frightening the victim), attempted battery (injuring the victim), and attempted murder (killing the victim)—are all consistent with the actual behavior of the defendant (shooting at the victim).

Similarly, even the most stringent actus reus requirements cannot resolve the third form of uncertainty—the possibility of retraction. A criminal may withdraw from her plan at any stage where, according to these requirements, her acts already constitute an attempt. As Professors Dubber and Kelman point out, retraction can occur even after the criminal took the last step toward completing the crime.<sup>102</sup> Dubber and Kelman illustrate this point with their example of the “metaphoric slow fuse.”<sup>103</sup> In this example, the defendant has lit a fuse that will cause a fire, but the fuse will burn for hours before actually igniting the fire. While this defendant completed her illicit behavior by lighting the fuse, given the interval between her conduct and the materialization of harm, she is still capable of retracting her plan (e.g., by stepping on the fuse).

Legal scholarship has therefore demonstrated how criminal attempt law is deficient in both directions; it is simultaneously underinclusive and overinclusive. The conventional regime—application of stringent actus reus requirements along with mitigated sanctions—may prevent punishing criminals even when the evidence against them is clear. However, it also leads to the conviction of individuals even when the evidence regarding their guilt is insufficient. From a policymaking perspective, these deficiencies seem to mandate two contradictory changes. On the one hand, the legal system must expand liability in criminal attempt cases in order to address the problem of underinclusiveness. On the other hand, it must also make the standard of liability more stringent to address the problem of overinclusiveness. These

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102. MARKUS D. DUBBER & MARK G. KELMAN, *AMERICAN CRIMINAL LAW: CASES, STATUTES AND COMMENTS* 441 (2d ed. 2009).

103. *Id.*

seemingly contradictory changes both become possible, though, once the effect of increased sanctions on evidentiary thresholds is incorporated into the theory of criminal attempt. It provides that switching the current regime—that is, applying *broad* (rather than stringent) actus reus tests and imposing *full* (rather than mitigated) sanctions—will enable the legal system to address both deficiencies.

The problem of underinclusiveness, as demonstrated earlier, results from a narrow definition of what behavior constitutes a criminal attempt (as opposed to merely a preparatory act). Modifying this definition such that it encompasses a larger set of fact patterns will broaden criminal attempt liability to include cases that the current regime does not permit. A more expansive definition will remove the obstacle to penalizing defendants who are caught at an early stage of their conduct but demonstrate a clear intent to complete a crime. Once the actus reus element no longer requires a nearly completed crime, courts will be able to convict *Geddes*-like defendants.

The drawback of the proposed expansive approach is the increased risk of wrongful convictions. Courts might reach an erroneous conclusion regarding the defendant's guilt in cases in which they possess limited information about his actual behavior. This increased risk, however, can be offset by augmenting the size of the applicable sanction. Because fact finders elevate the evidentiary threshold in accordance with the severity of the punishment, the imposition of a more significant punishment will be followed by an upward adjustment in the burden of proof. Under this elevated standard, evidence with greater probative strength will be required for conviction. Thus, while a broad definition of criminal attempt will enable fact finders to convict defendants who are caught at an early stage, the fact finders will do so only if sufficient evidence demonstrates that those defendants intended to execute the crime.

Elevating the sanction for criminal attempts similarly addresses the overinclusiveness concern. As noted, even if the legal system applies stringent actus reus requirements, there still remains significant uncertainty with respect to both the actual crime intended by the defendant and the possibility of retraction. Consequently, the law of criminal attempt is particularly susceptible to unjustified guilty verdicts. The likelihood of such erroneous decisions, however, depends on the evidentiary standards that fact finders apply. The higher the standards, the less likely fact finders are to convict a defendant in the absence of sufficient evidence. In the shooting hypothetical, fact finders will be more inclined to find the defendant guilty of attempted murder (rather than merely assault or attempted battery) if the applicable sanction for that crime is lenient. In the same manner, fact finders who are unsure whether the defendant would have retracted will be more likely to convict if the punishment for attempt is reduced. Increasing the punishment for criminal attempt thus diminishes the likelihood of error.

The interdependence of the size of sanctions and evidentiary standards also suggests that the problem of overinclusiveness might be exacerbated by the current practice of mitigated sanctions for criminal attempts. Thus, con-

trary to Posner's theory and subsequent law and economics literature,<sup>104</sup> reducing the sanction for attempts might be a counterproductive way of minimizing the error costs associated with punishing incomplete crimes. Posner's analysis, following the conventional perception, assumes that the punishment for attempt can be set while holding the probability of error constant. In reality, however, these two variables—the size of punishment and the risk of error—are inversely related. To this extent, Posner's approach reduces the costs of wrongful convictions but simultaneously increases their likelihood. A more effective approach might endeavor to minimize the risk of error by raising the evidentiary threshold for conviction. If the effect on fact finders is sufficiently large, raising the sanction level can reduce the costs associated with wrongful convictions by lowering their occurrence.

The preceding analysis regarding the desirable structure of attempt law is supported by recent legal developments. First, reforms concerning the *actus reus* requirement have broadened the definition of what behavior constitutes attempt. A representative example is the definition proposed by the Model Penal Code ("MPC"). Under the MPC, a defendant can be convicted of a criminal attempt if he took "a substantial step in a course of conduct planned to culminate in his commission of the crime."<sup>105</sup> The MPC, as commentators emphasize, "shifts the focus of attempt law from what remains to be done . . . to what the actor has already done."<sup>106</sup> The motivation for this shift is to "broaden the scope of attempt liability."<sup>107</sup>

A second emerging development can be observed with respect to sentencing policies. While traditionally the punishment for an incomplete offense was lower than the punishment for the consummated offense, in recent years a number of reforms have been proposed that aim to increase the punishment for attempt. The MPC, for example, provides that the punishment for criminal attempt is "of the same grade and degree" as the execution of the completed crime.<sup>108</sup> Several jurisdictions, both within the United States and abroad, have followed the MPC's approach and equalized the punishment for complete and incomplete offenses.<sup>109</sup>

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104. See *supra* notes 92–93 and accompanying text.

105. MODEL PENAL CODE § 5.01(1)(c) (Official Draft and Revised Comments 1985).

106. JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW 409 (3d ed. 2001).

107. MODEL PENAL CODE § 5.01(6)(a) (Official Draft and Revised Comments 1985).

108. *Id.* § 5.05(1).

109. See, e.g., CONN. GEN. STAT. ANN. § 53a-51 (West 2007) (providing that attempt is a crime "of the same grade and degree as the most serious offense which is attempted"); DEL. CODE ANN. tit. 11, § 531 (West 2001) (providing that "[a]ttempt to commit a crime is an offense of the same grade and degree as the most serious offense which the accused is found guilty of attempting"); HAW. REV. STAT. ANN. § 705-502 (LexisNexis 2007) (providing that attempt is a crime "of the same grade and degree as the most serious offense which is attempted"); IND. CODE ANN. § 35-41-5-1(a) (West 2004) (providing that an "attempt to commit a crime is a felony or misdemeanor of the same class as the crime attempted"); N.H. REV. STAT. ANN. § 629:1(IV) (West 2007) (providing that the "penalty for attempt is the same as that authorized for the crime that was attempted"). England also adopted an equal sanction regime in 1981. See Criminal Attempts Act, 1981, c. 47, § 4(1)(b) (Eng. & Wales) (providing that a



While these developments are seemingly unrelated, the preceding analysis suggests that they complement one another. The first trend expands the basis of liability for incomplete offenses; the second adjusts the burden of proof upward to avoid overexpansion. Coupled together, both trends enable the legal system to address the high risk of wrongful convictions in criminal attempts while also maintaining an effective crime control policy.

### B. *The Right to Silence*

The value of using sanctions to incentivize fact finders is not limited to situations in which the risk of erroneous convictions stems from the lack of sufficient evidence regarding defendants' actual acts and intentions. This Section extends the analysis to situations where choices made by the defendant during her trial create a bias that increases the likelihood of an unsubstantiated conviction. It establishes that the rules of evidence and criminal procedure alone cannot protect defendants from such biases, and that mandatory sanctions of sufficient size can be harnessed to strengthen defendants' rights at trial.

In a landmark decision, the Supreme Court in *Griffin v. California*<sup>110</sup> ruled that the Fifth Amendment privilege against self-incrimination prohibits fact finders from inferring guilt from defendants' silence. The Court reasoned that allowing such an inference would "cut[] down on the privilege by making its assertion costly."<sup>111</sup> In *Mitchell v. United States*,<sup>112</sup> the Court expanded *Griffin* and held that the right to silence applies to the sentencing stage of the criminal process as well. Thus, under the current doctrine, defendants who remain silent cannot be subjected to a harsher punishment than defendants who testify.<sup>113</sup>

This Section demonstrates that, contrary to the Court's assumption, imposing a harsher sanction on defendants who do not testify actually strengthens the right to silence. Notwithstanding *Griffin*, evidence shows that fact finders exhibit a bias against silent defendants. Because they expect the innocent to take the stand, fact finders assign probative weight to defendants' refusals to testify. Against this backdrop, the following analysis explores the implication of punishing defendants who choose to remain silent. It shows that if silence is rendered costly, fact finders will demand

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person convicted of attempt shall be subject "to any penalty to which he would have been liable on conviction on indictment of [the complete] offense").

110. 380 U.S. 609 (1965).

111. *Griffin*, 380 U.S. at 614.

112. 526 U.S. 314, 330 (1999) (holding that it is impermissible to impose a "burden on the exercise of the constitutional right against compelled self-incrimination").

113. In *Mitchell*, the defendant admitted to distributing cocaine. During the sentencing stage, however, the defendant refused to testify to refute the testimony of a coconspirator regarding the actual amount she had sold. In a five-to-four decision, the Court ruled that no adverse inference could be made from her silence. *Mitchell*, 526 U.S. at 317–28. The majority also refused to declare that a defendant's silence can be used against her in the context of section 3E1.1 of the Federal Sentencing Guidelines, which allows a downward adjustment in sanctions if the defendant accepts responsibility and demonstrates remorse. *Id.* at 330.

more evidence to convict silent defendants. Punishing defendants' silence thus offsets the bias against silent defendants and restores the power of the privilege against self-incrimination.

### 1. Inferring Guilt from Defendants' Refusals to Testify

The right to silence, in its current form, allows defendants to avoid taking the stand at no cost.<sup>114</sup> Even when silence appears to indicate guilt, triers of fact are prohibited from assigning probative value to a defendant's preference not to testify. This prohibition, as the Supreme Court has emphasized many times, manifests the accusatorial structure of the criminal process—the requirement that the prosecution establish its case through its “own independent labors.”<sup>115</sup>

Despite the clear rule on the matter, fact finders have been shown to respond negatively to parties' decisions not to testify. Scholars analyzing fact finders' behavior in the context of the right to silence have argued that “evidence [indicates] that juries tend to look unfavorably upon those who choose not to testify and that, prosecutorial silence and judicial admonitions notwithstanding, they tend to factor in the refusal to testify when deciding whether to convict or acquit.”<sup>116</sup>

Jurors' (and to a lesser degree, judges') difficulties in disregarding inadmissible yet probative information has been documented in a long line of studies.<sup>117</sup> Researchers have shown that attempts to induce jurors to overcome this tendency have been rather ineffective. Clear and specific instructions to disregard such evidence or the provision of detailed explanations regarding the relevant evidentiary rules usually fail to induce jurors to fully ignore inadmissible information when making their decision.<sup>118</sup>

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114. See generally WAYNE R. LAFAVE ET AL., CRIMINAL PROCEDURE § 2.10(b) (3d ed. 2007) (discussing the rule against drawing adverse inferences from defendants' silence).

115. Doe v. United States, 487 U.S. 201, 213 n.11 (1988); see also LAFAVE ET AL., *supra* note 114, § 2.10(d) (arguing that the “accusatorial” rationale is the Court's most common explanation for the right to silence); *infra* note 146 (discussing other justifications for the right to silence).

116. Michael S. Green, *The Privilege's Last Stand: The Privilege Against Self-Incrimination and the Right To Rebel Against the State*, 65 BROOK. L. REV. 627, 642–43 (1999).

117. See Saul M. Kassin & Christina A. Studebaker, *Instructions To Disregard and the Jury: Curative and Paradoxical Effects*, in INTENTIONAL FORGETTING: INTERDISCIPLINARY APPROACHES, 413, 413–34 (Jonathan M. Golding & Colin M. MacLeod eds., 1998) (concluding that juries often fail to disregard probative information that was obtained illegally, even when explicitly instructed about admissibility rules). For a comprehensive study regarding judges' ability (or inability) to disregard inadmissible evidence, see Andrew J. Wistrich et al., *Can Judges Ignore Inadmissible Information? The Difficulty of Deliberately Disregarding*, 153 U. PA. L. REV. 1251 (2005) (presenting results of several experiments in which professional judges were only partly able to disregard inadmissible evidence).

118. See Joel D. Lieberman & Jamie Arndt, *Understanding the Limits of Limiting Instructions: Social Psychological Explanations for the Failures of Instructions To Disregard Pretrial Publicity and Other Inadmissible Evidence*, 6 PSYCHOL. PUB. POL'Y & L. 677, 703

More specifically, researchers have demonstrated that invocation of the right to silence is frequently interpreted by fact finders as evidence of guilt. In a series of post-*Griffin* studies, Professor Shaffer and his colleagues presented mock jurors with evidence regarding the possible involvement of defendants in certain crimes.<sup>119</sup> Jurors were divided into two groups, both of which reviewed the same evidence. The only difference between the groups involved the defendant's decision whether to testify. In one group, the defendant testified and provided a possible explanation for the incriminating evidence. In the second group, this explanation was provided via a friend's testimony, while the defendant himself invoked the Fifth Amendment.<sup>120</sup> In another version of these experiments, participants in one group were told that the defendant denied the allegation but refused to testify, whereas in the other group the defendant took the stand but his testimony included only a general denial (thus providing no other information).<sup>121</sup> In both experiments, the researchers found a clear bias against silent defendants: "[T]his bias against defendants who invoked the Fifth Amendment was apparent even though the judge had affirmed the defendant's right to so plead and had instructed jurors that they were to draw no inferences about the defendant's innocence or guilt from his use of this constitutional privilege."<sup>122</sup>

Studies applying a qualitative rather than quantitative analysis have confirmed Shaffer's results. Professors Hans and Vidmar interviewed a large group of participants regarding their attitudes about various aspects of the evidentiary and trial processes.<sup>123</sup> Among their research topics, Hans and Vidmar explored participants' perceptions of criminal defendants who choose not to testify.<sup>124</sup> Based on participants' replies, Hans and Vidmar concluded that "exercising the right against self incrimination is not viewed favorably. 'Taking the Fifth' is, to some, an apparently odious and self-incriminating act."<sup>125</sup> Shaffer and his colleagues obtained similar results when, as part of their study, they documented and analyzed mock jury deliberations. According to their findings, "80 percent of the comments made about the defendant's refusal to take the stand were negative in their implication."<sup>126</sup>

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(2000) ("[T]he majority of extant empirical research indicates that jurors do not adhere to limiting instructions.").

119. David R. Shaffer, *The Defendant's Testimony*, in *THE PSYCHOLOGY OF EVIDENCE AND TRIAL PROCEDURE* 124, 140-45 (Saul M. Kassin & Lawrence S. Wrightsman eds., 1985) (summarizing the experiments' formats and results).

120. *Id.* at 141-42. Both testimonies—the defendant's and the friend's—were given to the participants in a written format, thus negating the possibility that the gap in the groups' assessments stemmed from a difference in the witnesses' testimonial skills or other personal characteristics.

121. *Id.*

122. *Id.* at 143.

123. VALERIE P. HANS & NEIL VIDMAR, *JUDGING THE JURY* 144 (1986).

124. *Id.*

125. *Id.*

126. Shaffer, *supra* note 119, at 143.

Statistical data regarding the right to silence, although rather limited, provide further support of the existence of a bias against silent defendants. Professor Werner and her colleagues, conducting an archival analysis of over 200 criminal cases, found a positive correlation between defendants' silence and guilty verdicts.<sup>127</sup> Researchers have also argued that the significant percentage of defendants who choose not to invoke the privilege shows their lack of trust that jurors would respect their right to remain silent.<sup>128</sup> Taking the stand is a risky strategy, particularly if the defendant has a prior record (as evidence regarding prior convictions can become admissible in light of the defendant's testimony). Nevertheless, studies have shown that nearly 50 percent or more of defendants with a prior record opt not to invoke their privilege to remain silent.<sup>129</sup> Such behavior becomes sensible, however, if fact finders indeed assign a significant probative value to defendants' refusals to testify. Given this practice, taking the stand might be the lesser of two evils.

Perhaps the clearest indication of the existence of a bias against silent defendants in American courts is a 2003 comprehensive survey of actual jurors in criminal cases where defendants invoked the privilege.<sup>130</sup> In their study, Professors Frank and Broschard, with the assistance of presiding judges, collected reports regarding juror experiences during trial from nearly 1,000 jurors immediately after they had delivered verdicts.<sup>131</sup> Based on these reports, Frank and Broschard found that:

[M]ore than one third, 38.3%, discussed what they were told they should "[never] be concerned" with [the defendant's silence]. Roughly one in five admitted either that it mattered to the jury that the defendant did not testify (21%), or, worse yet, he or she "had an obligation to testify" (18%).<sup>132</sup>

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127. Werner et al., *supra* note 12, at 414.

128. See, e.g., Green, *supra* note 116, at 642 n.51 (discussing Kalven and Zeisel's Chicago Jury Study according to which nearly 74 percent of defendants with prior records choose to testify and arguing that this high rate "suggests that jurors draw adverse inferences from silence").

129. See Gordon Van Kessel, *Quieting the Guilty and Acquitting the Innocent: A Close Look at a New Twist on the Right to Silence*, 35 IND. L. REV. 925, 950–51 (2002) (reviewing studies exploring the rate of silence among defendants and concluding that the "extent of refusal to testify varies from one-third to over one-half"). A recent study, using data from over 300 criminal trials in four large counties, found that the rate of defendants, with and without prior convictions, who testify in their trial was 45 percent and 62 percent, respectively. See Theodore Eisenberg & Valerie P. Hans, *Taking a Stand on Taking the Stand: The Effect of a Prior Criminal Record on the Decision To Testify and on Trial Outcomes*, 94 CORNELL L. REV. 1353, 1371 (2009).

130. Mitchell J. Frank & Dawn Broschard, *The Silent Criminal Defendant and the Presumption of Innocence: In the Hands of Real Jurors, Is Either of Them Safe?*, 10 LEWIS & CLARK L. REV. 237 (2006).

131. *Id.* at 240–43 (describing the survey's format).

132. *Id.* at 265 (alteration in original) (footnote omitted).

Frank and Broschard also examined the actual influence of jurors' biases on silent defendants' chances of being convicted.<sup>133</sup> Their analysis showed that "[d]efendants who exercised their Fifth-Amendment privilege were clearly in jeopardy as a result."<sup>134</sup> Since the survey involved self-reporting, and considering the likely reluctance of some jurors to admit that they did not follow the court's instructions, it is likely that the rate of fact finders who associate silence with guilt is even greater than that indicated by the survey's results.

Given the fundamental status of the Fifth Amendment privilege in guarding defendants' rights, the tendency of fact finders to disregard this privilege raises a challenge. The legal system must facilitate the conviction of defendants in cases where sufficient inculpatory evidence exists, yet it must also protect silent defendants from unsubstantiated convictions. The failure of judicial instructions to induce compliance with the privilege suggests that tinkering with conventional procedural and evidentiary rules is unlikely to resolve the problem. As the next Section shows, however, redesigning the relevant substantive criminal law rules can provide an effective solution.

## 2. The Virtue of Punishing Silence

Legal analysis has shown that defendants' actual benefits from *Griffin* depends on the evidentiary circumstances.<sup>135</sup> In some cases, defendants will choose to remain silent even if the law does not prohibit inferring guilt from such behavior. In other instances, defendants will opt to testify even if a negative inference is explicitly prohibited. In a third group of cases, defendants' decisions to testify directly hinge on whether the law allows or prohibits drawing a negative inference from their silence. This analysis provides a framework that identifies when fact finders' disregard of *Griffin* is most likely to harm defendants. Such a framework also allows for an exploration of the implications of penalizing defendants' silence.

The advantage that defendants derive from *Griffin* has been shown to be contingent on two primary factors. First, and rather intuitively, the rule against adverse inference plays no role when defendants' self-exonerating accounts serve to effectively refute the charges against them. In such cases, it is in the self-interest of the defendant to talk. *Griffin* only becomes important when defendants—whether innocent or guilty—expect their testimony (and the subsequent cross-examination) to substantiate the prosecution's allegations. The Fifth Amendment privilege enables such

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133. *Id.* at 268.

134. *Id.* at 264.

135. See Daniel J. Seidmann & Alex Stein, *The Right to Silence Helps the Innocent: A Game-Theoretic Analysis of the Fifth Amendment Privilege*, 114 HARV. L. REV. 430, 467–70 (2000) (showing that the significance of the rule against adverse inference from silence depends on the relative strength of the prosecution's evidence); Alex Stein, *The Right to Silence Helps the Innocent: A Response to Critics*, 30 CARDOZO L. REV. 1115, 1118–22 (2008) (demonstrating the implications of the right to silence under various evidentiary circumstances).

defendants to remain silent at no cost. Second, and more interestingly, the no-negative-inference rule has no bearing on a defendant's decision whether to testify in cases in which the incriminating evidence against her is either *weak* or *strong*.<sup>136</sup> In both of these extreme cases, defendants' behavior at trial will not be affected by the existence (or the absence) of the rule. Only when the prosecution's evidence is of *intermediate* strength will defendants be influenced by the availability of a right to silence.<sup>137</sup> Consider initially the case in which the prosecution's evidence is weak. As legal analysis has emphasized, defendants who are afraid of self-incrimination "can remain silent even in the absence of a privilege against adverse inferences."<sup>138</sup> This is because the combination of "[w]eak inculpatory evidence and [a] silent defendant[]" will usually be insufficient to support a guilty verdict.<sup>139</sup> Fact finders are unlikely to find a silent defendant guilty if the prosecution cannot provide any evidence connecting this defendant to the alleged crime. As such, when the prosecution's case is weak, defendants who desire to avoid testifying will remain silent whether or not a privilege exists.

Legal scholarship has similarly shown that the privilege plays "no significant role in cases in which the evidence inculcating the defendant is overwhelming."<sup>140</sup> When the prosecution has sufficient evidentiary material to prove guilt, the defendant's behavior—testifying or remaining silent—has no bearing on the court's decision. Even if silence is protected such that a negative inference is prohibited, it cannot prevent a guilty verdict, considering the weight of the prosecution's evidence. In the same vein, taking the stand—and thereby corroborating, through self-incrimination, the already convincing inculcating evidence—also has no effect on the trial outcome. Consequently, in strong cases, irrespective of whether the privilege is available, defendants are indifferent whether to testify or remain silent.

While the privilege provides no benefit to defendants wishing to avoid testifying in both weak and strong cases, it turns critical when the probative strength of the inculcating evidence lies somewhere in between.<sup>141</sup> In intermediate cases, the prosecution's evidence alone cannot prove guilt, but becomes sufficiently decisive once corroborated by the defendant's silence. Absent a no-negative-inference rule, defendants in intermediate cases are trapped between a rock and a hard place. Remaining silent will corroborate the prosecution's intermediate evidence and result in conviction; taking the stand will lead to self-incrimination. In contrast to the weak and strong cases, in intermediate cases the Fifth Amendment privilege provides a significant benefit to defendants. By prohibiting fact finders from drawing an

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136. Seidmann & Stein, *supra* note 135, at 467–68.

137. *Id.* at 468.

138. Stein, *supra* note 135, at 1119.

139. *Id.*

140. *Id.* at 1118.

141. Seidmann & Stein, *supra* note 135, at 467–69.

adverse inference, the privilege allows defendants to remain silent and avoid conviction.

With this analysis in mind, consider how rendering silence punishable would affect both defendants and fact finders. Imagine, contrary to the current doctrine, that the legal system imposes an extra penalty on convicted defendants who refuse to testify. Assume also that such a penalty is mandatory, and that fact finders are aware of it.

The imposition of a penalty for silence has two divergent effects. First, it may reduce defendants' incentives to remain silent. If silence is punishable, defendants will be more likely to take the stand in order to avoid the additional sanction (the "sanction effect"). Second, it may encourage defendants to remain silent. Since fact finders adjust the burden of proof in accordance with the size of the punishment, the imposition of an extra penalty will elevate the evidentiary threshold for conviction when defendants do not testify.<sup>142</sup> Because a higher burden of proof is more likely to result in exoneration, imposing a penalty can spur defendants to remain silent (the "evidentiary effect").

Using the above framework, one can see that the manner in which these two competing effects play out depends on the strength of the inculpatory evidence and the size of the penalty imposed for remaining silent. When the case against the defendants is *strong*, the "sanction effect" will dominate defendants' decisions. Assuming the penalty for silence is not excessively high, defendants in strong cases will be convicted even if the burden of proof is shifted upward (i.e., they will be convicted despite the "evidentiary effect"). As such, they will prefer to testify in order to avoid the penalty for remaining silent. In contrast, when the prosecution's evidence alone is insufficient to secure a conviction (*weak* and *intermediate* cases), the "evidentiary effect" will dominate defendants' decisions. Assuming that the penalty for silence is not excessively low, the upward shift in the burden of proof will allow defendants to avoid conviction even in the face of a bias against silent defendants. These defendants will therefore remain silent.

Contrasting these results highlights the advantage of a regime that punishes a defendant's silence. While such a regime induces defendants in strong cases to testify, this does not adversely affect them. Given the prosecution's strong evidence, these defendants will be convicted whether or not they testify. On the other hand, punishing defendants' silence will assist defendants in weak and intermediate cases in exercising their privilege against self-incrimination. The proposed regime thus helps the group of defendants for whom the right to silence is most important (those in intermediate cases), while not harming any other group of defendants (those in weak and strong cases).

An illustration can demonstrate the implications of punishing silence. For ease of exposition, imagine that fact finders adjust the burden of proof in a linear proportion to the level of sanction. Thus, for a sanction of one-

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142. See *supra* Part I (demonstrating the endogenous relation between the size of sanctions and the standard of proof).

year imprisonment, fact finders will convict if the probative strength of the inculcating evidence is at least  $x$ ; for two-year imprisonment, they will convict if the probative strength of the inculcating evidence is at least  $2x$ ; for three-year imprisonment, at least  $3x$ ; and so forth. Suppose that the sanction for theft is ten years, and that three defendants (*A*, *B*, *C*) face charges. The case against *A* is *weak*; the case against *B* is *strong*; the case against *C* is *intermediate*. Specifically, assume that the probative strength of the prosecutor's evidence against the defendants is  $x$ ,  $10x$ , and  $5x$ , respectively. All three defendants do not wish to testify so as to avoid the risk of self-incrimination. Finally, suppose that the magnitude of the fact finders' evidentiary bias against silent defendants is  $5x$ .

The following table summarizes the defendants' expected behavior (remaining silent or testifying) under two possible regimes.<sup>143</sup> The first regime, consistent with the current doctrine, assumes a fixed sanction for theft (ten years). Under the second regime, while the penalty for theft is still ten years, an extra penalty of five years (for a total of fifteen years) is imposed on a convicted defendant who invoked the right to silence during her trial.

TABLE I  
DEFENDANTS' BEHAVIOR WITH AND WITHOUT  
A PENALTY FOR SILENCE

	<i>Fixed Sanction</i> (10 YEARS)	<i>Silence Punishable</i> (10 YEARS + 5 YEARS PENALTY)
<b>Defendant A</b> (weak: $1x$ )	Silence (no conviction)	Silence (no conviction)
<b>Defendant B</b> (strong: $10x$ )	Silence/Testimony (conviction—10 years)	Testimony (conviction—10 years)
<b>Defendant C</b> (intermediate: $5x$ )	Silence/Testimony (conviction—10 years)	Silence (no conviction)

Consider initially how punishing silence will affect Defendant *A*'s behavior. Under the first regime, a fixed penalty of ten years is imposed on convicted defendants. Because the fact finders adjust the burden of proof linearly with the applicable sanction, Defendant *A* will be convicted only if the strength of the incriminating evidence is at least  $10x$ . Notwithstanding fact finders' bias against silent defendants, Defendant *A* will remain silent. Since the combination of fact finders' bias and the prosecution's incriminating evidence is insufficient to satisfy the burden of proof ( $5x + 1x < 10x$ ), remaining silent allows Defendant *A* to avoid conviction. This conclusion, however, is true also under the second regime, where an extra penalty of five years is imposed for silence if the defendant is convicted. Once Defendant *A*

143. We assume that defendants can correctly assess the strength of the evidence they face and that jurors account for all of the evidence in the case. We later consider the desirability of our proposal in a less idealized system. For a further discussion of this point, see *infra* notes 202–203 and accompanying text.



chooses to remain silent and expose herself to a sanction of fifteen years, the prosecution must present incriminating evidence with probative strength of  $15x$  rather than  $10x$ . This increase in the burden the proof only reinforces Defendant *A*'s incentive to remain silent. With this higher evidentiary threshold, the prosecution is even further away from proving its case ( $5x + 1x < 15x$ ). Thus, under both regimes, Defendant *A* remains silent and avoids conviction.<sup>144</sup>

Consider now the case of Defendant *B*. Under the first regime (ten-year imprisonment), the strength of the prosecution's evidence ( $10x$ ) is sufficient to prove guilt. Because the prosecution has no problem factually supporting its allegations, Defendant *B* is indifferent as to whether to be silent or testify. As explained earlier, either course of action will only corroborate the already convincing inculcating evidence. Taking the stand will result in self-incrimination; remaining silent will induce fact finders, given their bias, to grant even greater weight to the prosecution's evidence. This indifference between silence and testifying disappears, however, once the legal system punishes silence. Under the second regime, if Defendant *B* remains silent she is subject to a sanction of fifteen, rather than ten, years. Given this higher sanction, fact finders will convict if the strength of the incriminating evidence is at least  $15x$ . In this case, the combination of fact finders' bias and the prosecution's incriminating evidence is sufficient to satisfy this evidentiary threshold ( $5x + 10x = 15x$ ). Consequently, under the second regime, Defendant *B* will testify in order to avoid the extra penalty. Note, however, that the second regime does not disadvantage Defendant *B*. While she chooses to testify, Defendant *B* is not harmed by her testimony. Under the first regime, Defendant *B* is convicted and subjected to ten-year imprisonment whether she testifies or not. Under the second regime, Defendant *B* testifies and is similarly convicted and subjected to ten-year imprisonment.<sup>145</sup> It is also worth emphasizing that Defendant *B*'s testimony plays no role in her conviction. Rather, her conviction is based on the evidence that the prosecution has obtained through its "own independent labors." Defendant *B*'s testimony only serves to prevent the imposition of the penalty for silence.<sup>146</sup>

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144. More generally, this analysis applies to any defendant in a case where the strength of the incriminating evidence against her—even combined with the bias—is insufficient to secure a conviction. In our hypothetical, "Defendant *A*" thus refers to any defendant who faces inculcating evidence of a strength ranging anywhere from  $0x$  to just below  $5x$ .

145. This analysis applies whenever the prosecution can secure a conviction by its own evidence. In our hypothetical, therefore, "Defendant *B*" corresponds to defendants who face inculcating evidence with strength of  $10x$  or more.

146. Legal scholarship has proposed several justifications, other than the "accusatorial system" rationale, for defendants' right to remain silent. A list of these justifications is found in Justice Goldberg's well-known analysis in *Murphy v. Waterfront Commission*, 378 U.S. 52 (1964). According to *Murphy*, the right to silence serves (1) to ensure that individuals are left alone "until good cause is shown for disturbing [them]"; (2) to reflect "our distrust of self-deprecatory statements"; (3) to discourage "inhumane treatment and abuses" of suspects; (4) to allow defendants to avoid the "cruel trilemma" (the choice between self-accusation, perjury, or contempt); and (5) to protect the innocent. *Id.* at 55 (internal quotation marks

Finally, consider Defendant *C*'s case. Under the first regime, Defendant *C* faces a hard choice. Taking the stand will result in self-incrimination. If the defendant chooses to remain silent, though, the combination of the prosecution's intermediate evidence ( $5x$ ) and the fact finders' bias ( $5x$ ) is sufficient to satisfy the burden of proof ( $10x$ ). But this problem is resolved if an extra penalty is imposed for silence. With such an extra penalty the fact finders ratchet up the burden of proof (to  $15x$ ), and Defendant *C* can remain silent and avoid conviction. Although the fact finders will assign probative value to her silence, the strength of the total incriminating evidence will be below the evidentiary threshold ( $5x + 5x < 15x$ ). Therefore, under the second regime, Defendant *C* may remain silent and avoid conviction.<sup>147</sup>

By punishing silence at the appropriate level, the legal system can offset any bias fact finders may have against silent defendants. As the preceding hypothetical shows, the actual level of the penalty for remaining silent should correspond to the size of the bias. If the bias is limited, only a small upward adjustment in the burden of proof will be required to compensate for it, and the imposition of a lenient penalty will be sufficient. If the bias is more substantial, a greater adjustment is necessary, and a more severe penalty will be required. Adjusting the standard of proof in direct proportion to the size of the bias enables the legal system to calibrate the scales for determining guilt. In the above hypothetical, fact finders' bias equaled  $5x$ . By imposing an extra penalty of five years the legal system could adjust the standard of proof at the same rate.

As this analysis shows, rather than undermining the right to silence, punishing silent defendants facilitates the application of the Fifth Amendment privilege. Only defendants against whom sufficient incriminating evidence exists (our hypothetical Defendant *B*) are punished. Furthermore, no defendant is in fact punished for remaining silent. Defendants are either exonerated (Defendants *A* and *C*) or convicted and punished at the lower level without the penalty (Defendant *B*). Such a sanctioning regime therefore helps defendants avoid self-incrimination while not harming any other defendants.

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omitted). While our proposed regime induces Defendant *B* to testify where before she could choose not to, it does not undermine any of the goals set forth in *Murphy*. As our hypothetical shows, Defendant *B*'s testimony provides the prosecution with no advantage in securing conviction. Whether or not silence is punishable, the prosecution must collect evidence with probative strength of at least  $10x$  in order to establish Defendant *B*'s guilt. As such, penalizing silence does not enable the prosecution to "disturb" individuals without sufficient incriminating evidence. Similarly, because the prosecution's evidentiary burden remains intact, punishing silence does not raise the likelihood that a defendant will be convicted based on her false confession (goal 2), nor does it increase the incentives to mistreat suspects (goal 3). In contrast, as our analysis shows, only by raising the sanction for silent defendants can the legal system prevent unsubstantiated convictions of defendants who wish to avoid taking the stand (goals 4 and 5).

147. This analysis applies in cases in which the strength of the prosecution's evidence is sufficient to secure a conviction only if corroborated by the fact finders' bias. Thus, in our hypothetical, "Defendant *C*" refers to defendants who face inculcating evidence of a strength ranging from  $5x$  to just below  $10x$ .

The protection of silent defendants through the imposition of punishment highlights the advantage of using criminal sanctions for their probative function. First, it allows the legal system to protect defendants precisely when the procedural safeguards fail to provide such protection. Rendering silence punishable counterbalances fact finders' failure to respect the rule that they may not infer culpability from silence. Second, harnessing punishment to protect the right to remain silent does not jeopardize other goals of punishment. While the proposed regime allows defendants to invoke the privilege at no cost, it also enables the legal system to continue to subject defendants who are found guilty to the sanction that it deems appropriate.

Our discussion focuses on the Fifth Amendment privilege, yet its core insight can be extended to other procedural rights. To the extent fact finders draw an adverse inference from the use of such rights, defendants might be reluctant to exercise them.<sup>148</sup> Rendering these rights more costly, however, can serve to resolve this problem. Given the probative function of punishment, the imposition of properly designed penalties can offset any bias fact finders may have, and can thus enhance defendants' ability to invoke their rights.

### C. Punishing Recidivists

The preceding analysis has demonstrated the advantage of using criminal sanctions as a means to reduce the likelihood of unsubstantiated convictions. In the criminal attempt context, the risk of a wrongful conviction results from the combination of mitigated sanctions and an *actus reus* element that is both overinclusive and underinclusive. Enhancing the punishment for the offense itself (an attempt to commit a crime) allows the legal system to induce fact finders to convict only when the defendant's guilt is supported by sufficient evidence. In the context of the right to silence, the risk of wrongful conviction stems from the fact finders' bias in response to the defendant's behavior during trial (her decision to avoid the stand). Rendering this behavior punishable can neutralize the bias.

This Section presents a third context—punishment of recidivists—in which the probative function of punishment can be harnessed to prevent convictions based on inadmissible information. Fact finders who are aware or suspicious of the defendant's criminal history often tend to assume her guilt in the case even in the absence of clear evidence. As such, defendants with prior convictions (or those who the fact finders suspect have such a record), like silent defendants, face a risk of biased decisions. Unlike silent defendants, however, recidivists experience a bias that is unrelated to their conduct during trial. Rather, the bias in this context stems from the defendant's conduct *prior* to the case at hand. As this Section shows, increasing the punishment for the alleged offense can help protect defendants with a crim-

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148. It has been suggested, for example, that fact finders may draw a negative inference from legal representation. See *State v. Roberts*, 208 N.W.2d 744, 747 (Minn. 1973) (recognizing that jurors may inappropriately infer guilt from defendant's request for counsel during police interrogation, which may justify rendering such evidence inadmissible).

inal record from unsubstantiated convictions. This insight highlights an overlooked rationale for the widespread, yet controversial, practice of escalating punishments for recidivists.

### 1. Criminal Record and the Risk of Wrongful Conviction

As widely acknowledged by judges, practitioners, and commentators, fact finders tend to infer guilt from the existence of prior convictions. Experiments studying mock jurors' behavior have found that the likelihood of conviction increases significantly once information regarding the defendant's prior record is made available.<sup>149</sup> Studies involving judges have similarly demonstrated that even professional fact finders may fail to disregard the defendant's prior convictions in determining her guilt in the case at hand.<sup>150</sup>

Because of the highly prejudicial nature of evidence regarding defendants' criminal history, the current evidentiary and procedural rules restrict the admissibility and use of such information in two ways. First, according to Federal Rule of Evidence 404, prosecutors are generally prohibited from introducing past convictions to the triers of fact.<sup>151</sup> Second, pursuant to Rule 105, in cases where fact finders become aware of prior convictions, the defendant may demand that they be instructed to avoid making any inference as to her guilt in the present case based on those convictions.<sup>152</sup>

In practice, however, neither of these rules has sufficiently protected defendants with prior records. Notwithstanding Rule 404, there are a number of situations in which fact finders can become aware or suspicious of defendants' criminal histories. First, because prosecutors may use prior convictions to impeach the credibility of defendants who testify, information regarding defendants' criminal histories often becomes admissible. As Rule 609(a) provides, prosecutors can introduce evidence of the defendant's past conviction if her crime involved "dishonesty or false statement" or if "the probative value of admitting the evidence outweighs its prejudicial effect to the accused."<sup>153</sup> While the provisions of Rule 609(a) are rather restrictive, commentators have shown that "[they] are

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149. Eisenberg & Hans, *supra* note 129, at 1358–61 (reviewing the literature on the effects of prior convictions on mock jurors' decisions).

150. *Id.* at 1361–63 (reviewing the literature on the effects of prior convictions on judges' decisions).

151. FED. R. EVID. 404(b) ("Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith.").

152. FED. R. EVID. 105 ("When evidence which is admissible as to one party or for one purpose but not admissible as to another party or for another purpose is admitted, the court, upon request, shall restrict the evidence to its proper scope and instruct the jury accordingly.").

153. FED. R. EVID. 609(a).

honored in the breach.”<sup>154</sup> Impeaching evidence involving prior convictions is thus “routinely” introduced.<sup>155</sup>

Second, even when defendants do not testify, fact finders may become aware of prior convictions from out-of-court sources such as newspaper stories and television reports.<sup>156</sup> As with Rule 609, courts have shown a tendency to downplay the possible adverse impact that such information may have on the defendant’s trial.<sup>157</sup> In this regard, courts examine whether such sources create a “presumption of inherent prejudice” that justifies a change of venue, and whether the trial jurors themselves demonstrated an “actual prejudice” that justifies their removal.<sup>158</sup> With respect to the former, courts have reserved the finding of presumed prejudice to “rare and extreme cases.”<sup>159</sup> As for the latter, courts have emphasized that mere knowledge of prior convictions is not sufficient to remove a juror.<sup>160</sup> Rather, a person may serve on a jury as long as he can “lay aside his impression or opinion and render a verdict based on the evidence presented in court.”<sup>161</sup> Therefore, current doctrine has not managed to exclude such information from jurors.<sup>162</sup>

Finally, in cases in which the defendant does not take the stand, fact finders may suspect that this decision is motivated by the defendant’s desire

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154. *E.g.*, John H. Blume, *The Dilemma of the Criminal Defendant with a Prior Record—Lessons from the Wrongfully Convicted*, 5 J. EMPIRICAL LEGAL STUD. 477, 483 (2008).

155. Mirjan R. Damaška, *Propensity Evidence in Continental Legal Systems*, 70 CHI.-KENT L. REV. 55, 59 (1994). The high correlation between defendants’ testimony and jurors’ knowledge of prior convictions is supported empirically. In Kalven and Zeisel’s classic study, when the defendant took the stand, the jury learned about her criminal history 72 percent of the time. HARRY KALVEN, JR. & HAND ZEISEL, *THE AMERICAN JURY* 147 (1966). More recent studies, while suggesting that jurors learn of prior convictions at a lower rate, still indicate that that rate is substantial. *E.g.*, Eisenberg & Hans, *supra* note 129, at 1375 (reporting that 52 percent of jurors learned of the defendant’s record when the defendant testified).

156. Kalven and Zeisel’s study found that when defendants with a prior record chose not to testify, jurors nevertheless learned of their criminal history 13 percent of the time. KALVEN & ZEISEL, *supra* note 155, at 147. Similarly, in Eisenberg and Hans’s study, jurors learned of silent defendants’ criminal histories nearly 9 percent of the time. Eisenberg & Hans, *supra* note 129, at 1375.

157. *See, e.g.*, *United States v. Rodriguez*, 581 F.3d 775, 786–89 (8th Cir. 2009) (holding that jurors’ knowledge of prior convictions does not alone render them prejudiced); *United States v. Blom*, 242 F.3d 799, 804–05 (8th Cir. 2001) (finding jury not prejudiced although pretrial publicity made juror familiar with defendant’s criminal history); *Hale v. Gibson*, 227 F.3d 1298, 1332–33 (10th Cir. 2000) (holding that a jury’s exposure to a defendant’s prior convictions cannot alone demonstrate that the defendant was denied due process).

158. *See Blom*, 242 F.3d at 803.

159. *See id.*

160. *See id.* at 804 & n.2 (discussing the use of cautionary instructions and citing *Shannon v. United States*, 512 U.S. 573, 585 (1994)).

161. *Id.* at 805 (quoting *Irvin v. Dowd*, 366 U.S. 717, 723 (1961)).

162. *See LAFAYE ET AL.*, *supra* note 114, § 23.1(a) (noting that jurors will be “unable to exclude from their consideration facts or allegations that were reported in the news coverage but never presented at trial”).

to hide her past offenses. Given the defendant's reluctance to expose her criminal record, the jury could "infer that the defendant chose to stay silent due to the pressure of prior conviction impeachment."<sup>163</sup> Thus, even when no evidence is presented regarding the defendant's criminal history, the jury may nonetheless suspect that the defendant has been involved in crime and infer her guilt in the present case.<sup>164</sup>

The high likelihood that fact finders will be aware or suspicious of defendants' prior convictions is not mitigated by jury instructions. Studies have shown that such instructions are ineffective because jurors tend to ignore them. Moreover, several researchers have demonstrated that instructing the jury regarding the probative weight of prior convictions may actually raise the significance they assign to this evidence.<sup>165</sup> In a study by Professor Pickel, for example, mock jurors were exposed to testimony that alluded to the defendant's prior conviction.<sup>166</sup> One group of mock jurors was told that this information was inadmissible, and received no further instructions.<sup>167</sup> A second group was told that the information was inadmissible, and also received an explanation regarding the provisions of Rule 609.<sup>168</sup> The results indicated that the explanation of the rule "backfired," and the rate of participants voting in favor of a guilty verdict actually increased. While only 43 percent of the participants in the first group voted to convict the defendant, 55 percent did so in the second group.<sup>169</sup>

In light of the weak protection that the existing rules provide defendants, the current legal regime has been subject to ongoing criticisms. As the following discussion demonstrates, however, properly designed penalties may succeed in protecting innocent defendants where procedural and evidentiary rules fail.

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163. Edward Roslak, Note, *Game Over: A Proposal To Reform Federal Rule of Evidence 609*, 39 SETON HALL L. REV. 695, 701 n.50 (2009). As experimental studies have shown, jurors might be suspicious even in the absence of any evidence regarding the defendant's past involvement in crime. See, e.g., Sally Lloyd-Bostock, *The Effects on Juries of Hearing About the Defendant's Previous Criminal Record: A Simulation Study*, 2000 CRIM. L. REV. 734, 753 (finding that 65.6 percent of mock jurors in a control group—who were given no information about the defendant's record—believed the defendant had one or more prior convictions).

164. This final category reinforces our previous arguments regarding the need to protect silent defendants. Defendants' refusals to testify can increase the risk of wrongful convictions for two separate reasons. First, as the evidence discussed in Section III.A shows, jurors may interpret silence as the defendant's desire to hide incriminating information regarding the present case. Second, the jury may assume that the defendant is avoiding the stand in order to conceal her prior record. To remove the risk of unsubstantiated conviction, therefore, the legal system must account for each type of bias.

165. Lieberman & Arndt, *supra* note 118, at 689–91 (reviewing the evidence on the "backfire" effect caused by limiting instructions).

166. Kerri L. Pickel, *Inducing Jurors To Disregard Inadmissible Evidence: A Legal Explanation Does Not Help*, 19 L. & HUM. BEHAV. 407 (1995).

167. *Id.* at 411–12.

168. *Id.*

169. *Id.* at 414.

## 2. Protecting Defendants with Prior Convictions

A defendant's criminal history is a main factor in determining the size of her punishment.<sup>170</sup> All else being equal, repeat offenders are subject to harsher penalties than criminals who committed the identical crime for the first time. Statutory enhancements of punishment for recidivists are widespread. All of the states' sentencing guidelines adjust the grading of an offense upward in cases in which the offender has a criminal record.<sup>171</sup> Furthermore, several states have adopted specific statutes that provide for mandatory enhanced penalties for habitual criminals.<sup>172</sup>

Despite the prevalence of escalating penalties for recidivists, legal scholarship—both deontological and consequentialist—has struggled to provide a normative theory that justifies this practice. Retributive as well as deterrence concerns, at least on a prima facie level, require that individuals committing the same offense be subjected to the same level of punishment. From the perspective of just desert, “[a] person who robs another of \$20 at gun point is no more blameworthy simply because she had five years earlier been convicted of burglary.”<sup>173</sup> Similarly, under deterrence theories, where “the key factor in assessing the optimal penalty for a given offense is the social harm that will result from the offense,” punishing recidivists more severely is unjustified since “the social harm from a given offense would seem to have nothing to do with the offense history of the offender.”<sup>174</sup>

Current legal theories attempting to justify the imposition of enhanced sanctions on recidivists, both from retributive and deterrence perspectives, have exhibited an offender-centered approach. The most prominent retributive theory offered in support of this practice is the “progressive loss of mitigation theory.”<sup>175</sup> Proposed by Professor von Hirsch, this theory assumes that humans are fallible and thus may “lapse” into committing an offense.<sup>176</sup> As such, the legal system should take into account the nature of

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170. BUREAU OF JUSTICE ASSISTANCE, NATIONAL ASSESSMENT OF STRUCTURED SENTENCING 67 (1996) (“[P]rior record, is the second major consideration in determining guideline sentences.”).

171. MICHAEL H. TONRY, *THE FUTURE OF IMPRISONMENT* 97 (2004) (noting that all state guideline systems account for prior record).

172. These laws are often referred to as “three-strike” laws. For a comparative description, see JOHN CLARK ET AL., “THREE STRIKES AND YOU’RE OUT”: A REVIEW OF STATE LEGISLATION 7, ex. 9 (1997).

173. Markus Dirk Dubber, *Recidivist Statutes as Arational Punishment*, 43 *BUFF. L. REV.* 689, 705 (1995).

174. David A. Dana, *Rethinking the Puzzle of Escalating Penalties for Repeat Offenders*, 110 *YALE L.J.* 733, 736 (2001).

175. See Andrew von Hirsch, *Criminal Record Rides Again*, 10 *CRIM. JUST. ETHICS* 2, 2 (1991) [hereinafter von Hirsch, *Criminal Record*] (discussing the “progressive loss of mitigation” theory generally); see also Andrew von Hirsch & Martin Wasik, *Section 29 Revised: Previous Convictions in Sentencing*, 1994 *CRIM. L. REV.* 409 (analyzing legislation in light of the theory).

176. See von Hirsch, *Criminal Record*, supra note 175, at 55.

human frailty and give first-time offenders a “second chance.”<sup>177</sup> As an offender continues to engage in criminal activity, however, it is no longer likely that his behavior can be described as a lapse.<sup>178</sup> Thus, after giving an offender an initial “discount,” the legal system should progressively increase the level of punishment.<sup>179</sup>

The dominant deterrence rationale has been articulated by Professors Polinsky and Rubinfeld. In an influential article, they demonstrate that the imposition of enhanced sanctions allows for adjusting the level of punishment in proportion to the propensity of individuals to commit crime.<sup>180</sup> Because harsher sanctions may result in overdeterrence and increase enforcement costs, they should be avoided whenever possible. As Polinsky and Rubinfeld emphasize, escalating penalties enable the legal system to punish harshly only those criminals who have evidenced that lower sanctions do not deter them. Imagine, for example, that a sanction of ten-year imprisonment is sufficient to deter most, but not all, potential thieves. For a small group of criminals, the benefit of stealing is particularly high, and thus only the threat of twenty-year imprisonment will deter them. Under these circumstances, setting the punishment for theft at ten years and increasing it to twenty years if the defendant has a prior record allows adjustment of the sanction in accordance with a defendant’s propensity to engage in theft. By applying such a “price discriminating” system, harsh (and costly) sanctions are reserved only for those offenders who have proved to be undeterred by more lenient (and less costly) sanctions.<sup>181</sup>

The probative theory of punishment, however, suggests that this offender-centered approach provides an incomplete account of the possible justifications for increasing recidivists’ punishments. In light of the weak protection provided by the current evidentiary and procedural rules, enhanced sanctions enable the legal system to reduce the risk of unsubstantiated convictions of defendants with a prior record. Elevating the punishment for such defendants increases the evidentiary standard for conviction. This adjustment in the standard of proof can thus offset the fact finders’ bias, and calibrate the scale for the determination of guilt. Because higher sanctions induce fact finders to demand evidence with greater probative weight, the imposition of enhanced sanctions ensures that defendants with prior records will be convicted only when sufficient evidence is presented.

Furthermore, applying escalating penalties directly addresses one of the primary factors underlying the bias against defendants with criminal histories. Scholars analyzing fact finders’ behavior have suggested that “information of a defendant’s prior record is likely to decrease the regret

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177. *Id.*

178. *Id.*

179. *Id.*

180. A. Mitchell Polinsky & Daniel L. Rubinfeld, *A Model of Optimal Fines for Repeat Offenders*, 46 J. PUB. ECON. 291 (1991).

181. *Id.* at 292–93.



associated with the mistake of convicting a truly innocent person.”<sup>182</sup> Consequently, knowledge of the defendant’s prior record will often “decrease the standard of proof or the amount of evidence required to find him or her guilty.”<sup>183</sup> This theoretical supposition has recently been confirmed by Professors Eisenberg and Hans. Using extensive data from criminal trials, Eisenberg and Hans explored how the introduction of criminal records affects trial outcomes. Based on regression analysis, they concluded that “[t]he conviction threshold appears to differ for defendants with and without criminal records. . . . [J]urors appear willing to convict on less strong other evidence if the defendant has a criminal past.”<sup>184</sup> Rendering the punishment mandatory and of a sufficient size can thus counterbalance this cognitive process, and assure that the evidentiary standard applied to defendants with a prior record corresponds to the standard applied with respect to first-time offenders.

The argument in favor of using enhanced sanctions to protect defendants with criminal records has both practical and descriptive appeal. From a practical perspective, such sanctions enable the legal system to respond to the various circumstances that may trigger the bias. As noted, the current rules that aim to protect defendants with prior convictions focus on precluding information regarding these convictions from reaching the jury or on regulating the way in which the jurors may evaluate the information. As such, these rules are ineffective in cases in which no reference is made to the defendant’s history but jurors are nonetheless suspicious of her prior record. In contrast, enhanced penalties work to remove fact finders’ bias whether they are informed *or* merely suspicious of the defendant’s criminal history. Fact finders who suspect that the defendant has a prior record will also expect her to be punished with an enhanced sanction. The more suspicious they are, the more fact finders will expect the defendant to be subject to an enhanced sanction, and the more they will ratchet up the evidentiary standard. Properly designed punishments can therefore protect defendants from unsubstantiated convictions whether jurors are certain or only suspicious (at any level) of a defendant’s criminal record.

From a descriptive perspective, the proposed approach may also explain the practice of attaching a “recidivist premium” to crimes that are *unrelated* to the offender’s previous crimes. Under the Federal Sentencing Guidelines, for example, the recidivist premium is primarily determined in accordance with the length of the defendant’s prior sentences.<sup>185</sup> Whether the defend-

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182. Roselle L. Wissler & Michael J. Saks, *On the Inefficacy of Limiting Instructions: When Jurors Use Prior Conviction Evidence To Decide on Guilt*, 9 L. & HUM. BEHAV. 37, 45 (1985).

183. *Id.*

184. Eisenberg & Hans, *supra* note 129, at 1386.

185. See U.S. SENTENCING GUIDELINES MANUAL § 4A1.1(a)–(f) (2010) (setting out the Guidelines’ general framework toward repeat offenders). The Guidelines, however, do include some provisions that account for the similarity between present and past behavior. See *id.* § 4A1.3(a)(2)(C) (allowing for upward adjustment of grading because of “[p]rior similar misconduct established by a civil adjudication”); *id.* § 4A1.3(a)(2)(E) (allowing for upward

ant's previous and current offenses are related is mostly insignificant. Consequently, two defendants who previously shoplifted together and were sentenced to one year imprisonment will be assessed the same premium in a later case even if one is accused of shoplifting again, while the other is accused of causing a car accident while intoxicated.

The offender-centered theories, of both von Hirsch and Polinsky and Rubinfeld, fail to explain this practice. As von Hirsch himself acknowledges, the nature of the offender's criminal history is an important factor in determining whether his current offense can be considered a lapse that warrants leniency.<sup>186</sup> In this respect, a distinction should be made between an offender who commits the same offense twice and an offender who commits two unrelated offenses. While the former offender should receive no discount, the latter might be entitled (contrary to current practice) to a reduced punishment. Specifically, the legal system should exhibit leniency when the offender's current offense is more serious than the offense he committed in the past. As von Hirsch explains, "[s]omeone convicted of his first serious crime should be entitled to plead that such gravely reprehensible conduct has been uncharacteristic of him, and hence that he deserves to have his penalty scaled down—even when he has a record of lesser infractions."<sup>187</sup>

Similarly, Polinsky and Rubinfeld's theory, which focuses on the propensity of individuals to commit crimes, is largely inapplicable in the context of unrelated offenses. A defendant's previous shoplifting conviction indicates that he was not deterred by the expected punishment. Subjecting this defendant to a higher penalty for shoplifting is necessary to deter him from repeating this crime. The defendant's history of shoplifting, however, sheds no light on his propensity (or lack thereof) for binge drinking and reckless driving. Imposing an enhanced sanction for reckless driving is justified only once the defendant's criminal record indicates that he had been involved in previous driving or alcohol-related offenses.

Once the focus shifts to innocent defendants, however, the probative theory provides support for the imposition of enhanced sanctions for unrelated offenses. Studies suggest that even when prior convictions are unrelated to the current indictment, fact finders may infer the defendant's guilt from her criminal history. In a study conducted by Professors Wissler and Saks, four groups of mock jurors were given evidence regarding the defendant's possible involvement in an auto theft.<sup>188</sup> Participants in the control group received no information regarding the defendant's prior convictions.<sup>189</sup> In the remaining three groups, participants were informed that the defendant had been previously convicted of one the following three

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adjustment of grading because of "[p]rior similar adult criminal conduct not resulting in a criminal conviction").

186. See ANDREW VON HIRSCH & ANDREW ASHWORTH, *PROPORTIONATE SENTENCING* 148–49 (2005).

187. *Id.* at 154–55.

188. Wissler & Saks, *supra* note 182, at 39–40.

189. *Id.*

offenses: auto theft, murder, or perjury.<sup>190</sup> Results showed that compared to the control group, participants in the experimental groups were more likely to find the defendant guilty.<sup>191</sup> Furthermore, this increased likelihood was observed across all the three experimental groups, highlighting how both related and unrelated prior offenses increase the likelihood of a biased decision. Specifically, whereas only 35% of participants in the control group were willing to convict, in both the murder and perjury conditions the conviction rate was increased to 70% (compared with 80% in the auto theft group).<sup>192</sup> These findings suggest that repeat offenders, whether accused of committing the same crime or an unrelated crime, are exposed to the risk of unsubstantiated convictions and should therefore be subject to an augmented sanction.

While enhanced penalties enable the legal system to protect defendants when fact finders have different levels of certainty (informed or merely suspicious) regarding their prior records and for different types of offenses (related and unrelated), this protection may come at a cost. Our preceding analysis of criminal attempts and the right to silence has demonstrated that the imposition of mandatory enhanced sanctions as a means to avoid unsubstantiated convictions does not compromise the other goals of punishment. In the context of criminal attempts, raising the sanction for incomplete offenses reduces the risk of wrongful conviction and thus enables punishment of the guilty at an appropriate level.<sup>193</sup> In the context of the right to silence, the imposition of an additional penalty for avoiding the stand benefits silent defendants without adversely affecting other defendants.<sup>194</sup> In the case of recidivists, however, adopting a regime of mandatory enhanced sanctions may result in the imposition of harsh sanctions even when criminal-centered or victim-centered approaches may support a more lenient sanction. Raising the sanction for theft can help prevent the conviction (due to fact finders' bias) of innocent defendants with a prior record, accused of a theft they did not commit. However, it will also increase the punishment for defendants with a prior conviction who indeed engaged in theft, where sufficient evidence can be found to prove their guilt. If the "recidivist premium" necessary to protect innocent defendants is significant, the sanction imposed on convicted thieves with a prior record might exceed the level justified by just-desert or efficient-deterrence principles. Thus, in designing punishments for defendants with a criminal history, the legal system may face a tradeoff between protecting innocent defendants and appropriately punishing guilty offenders.

To be sure, the existence of such a tradeoff and its scope depends on the fact finders' behavior and the characteristics of both potential offenders and

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190. *Id.*

191. *Id.* at 41.

192. *Id.* at 43. *But see* Lloyd-Bostock, *supra* note 163, at 744–45 (reporting that dissimilar past convictions *lower* the probability of convictions among mock jurors).

193. *See supra* Section III.A.2.

194. *See supra* Section III.B.2.

defendants. If fact finders' reactions to enhanced sanctions is such that only a small recidivist premium is sufficient in order to overcome their bias, then the level of punishment proposed by the probative approach might not differ much from that proposed by other theories. In addition, if the population of guilty defendants is composed of a relatively small group of recidivists and a large group of first-time offenders, the application of enhanced sanctions serves to protect innocent defendants with prior records without affecting the punishment of most guilty offenders. However, even if a small premium is unlikely to be effective or the population of criminals is more diverse, the case for enhanced sanctions might still be compelling for both deterrence and retributivist approaches.

For theorists endorsing efficient deterrence, determining whether the probative theory can justify the application of enhanced sanctions for recidivists requires balancing two competing factors. On the one hand, setting a punishment beyond the level necessary to deter potential criminals may create overdeterrence.<sup>195</sup> On the other hand, punishing innocent defendants dilutes the deterrent effect of criminal sanctions and may result in underdeterrence.<sup>196</sup> If the latter factor dominates the former, deterrence-oriented theorists will favor a legal system that imposes a recidivist premium. To this extent, the probative theory highlights the potential to use criminal sanctions to enhance deterrence not only by raising the costs of illicit behavior but also by reducing the likelihood of false convictions.

For retributivists, the probative theory introduces a new consideration in the design of criminal punishments. When evidentiary and procedural rules cannot ensure the integrity of the fact-finding process, criminals' behavior creates two types of detrimental results. First, criminals' engagement in illicit behavior inflicts harm on their victims. Second, in the case of erroneous convictions, criminals' conduct also inflicts harm on innocent defendants. The existence of this latter type of harm supports the imposition of penalties like the recidivist premium. It is precisely the goal of just desert—the desire to punish criminals according to their culpability and the harm they inflict—that may justify the imposition of enhanced penalties. Because criminals' behavior increases the risk of unsubstantiated convictions, offenders should bear the costs of eliminating this risk.

The intensive debate surrounding the imposition of enhanced sanctions for recidivists reflects the complexity of the legal questions that such a penal regime raises. Scholars and policymakers addressing the issue have restricted their analysis to the effects of enhanced sanctions on potential and actual offenders. The preceding discussion, however, highlights that this debate should also explore how changes in sanction size may affect innocent defendants with prior records. More generally, our analysis suggests the advantage of mandatory punishments of sufficient size in contexts in which biases against defendants may lead to unsubstantiated convictions. Irrespective of whether

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195. SHAVELL, *supra* note 7, at 475–76 (analyzing the problem of discouraging desirable acts with excessive sanctions).

196. See *supra* note 65 and accompanying text.

one supports or criticizes such penalties, understanding their effect on the risk of erroneous convictions allows both consequentialists and deontologists to appreciate the actual costs of their choice.

#### IV. OBJECTIONS

Thus far, our analysis has highlighted the advantages of incentivizing fact finders through the design of criminal sanctions. We have demonstrated that such sanctions can reduce the risk of unsubstantiated decisions, often without jeopardizing the other goals of punishment. In this Part, we turn to discuss possible objections regarding the legal system's ability to properly design and apply such a penal regime.

A first objection to the theory of punishment presented in this Article is that it might bring about an undue increase in the level of punishment. The severity of criminal punishments in the United States has risen dramatically over the past three decades.<sup>197</sup> Opponents of this trend have expressed serious concerns that these punishments are excessively harsh.<sup>198</sup> To the extent that punishments are indeed already too harsh, raising them further in order to protect defendants will exacerbate an existing problem.

Our proposal, however, does not advocate increasing the penalties imposed on criminals. First, properly designed sanctions can often protect defendants from unsubstantiated convictions without raising the penalty for convicted defendants. As demonstrated in the context of the Fifth Amendment privilege, when silence is punishable, defendants are either exonerated or subject to the regular (rather than the enhanced) sanction. Second, even when our theory affects the penalty of convicted defendants, it does not support harsher punishments. Our analysis presents an ordinal rather than a cardinal theory of punishment: it highlights the advantage of punishing certain behaviors more severely than others, but does not address the absolute size of the punishment in question.<sup>199</sup> For example, it may well be that the current sanctions for both complete and inchoate crimes are too high. What we show, however, is the advantage of punishing both behaviors equally.

A second concern that might be raised relates to the availability of the information required to determine sanctions' optimal size. To address the

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197. The key figure exemplifying this trend is the incarceration rate. According to the Bureau of Justice Statistics, the number of incarcerated inmates grew from 139 per population of 100,000 in 1980 to 502 per 100,000 in 2009. See BUREAU OF JUSTICE STATISTICS, KEY FACTS AT A GLANCE: INCARCERATION RATE, 1980–2009 (2009), available at <http://bjs.ojp.usdoj.gov/content/glance/tables/incrttab.cfm> (last updated Sept. 18, 2011).

198. See, e.g., Joseph E. Kennedy, *The Jena Six, Mass Incarceration, and the Remoralization of Civil Rights*, 44 HARV. C.R.-C.L. L. REV. 477 (2009) (studying the effect of incarceration and civil rights on racial relations); Paul H. Robinson & John M. Darley, *The Role of Deterrence in the Formulation of Criminal Rules: At Its Worst When Doing Its Best*, 91 GEO. L.J. 949, 994–99 (2003) (presenting a utilitarian argument against extended incarceration).

199. On the distinction between ordinal and cardinal theories of punishment, see Andrew von Hirsch, *Equality, "Anisonomy," and Justice: A Review of Madness and the Criminal Law*, 82 MICH. L. REV. 1093, 1095–98 (1984) (book review).

risk of unsubstantiated decisions, fact finders should be induced to adjust the standard of proof at the appropriate level. For instance, in the numeric example discussing the right to silence, a five-year penalty was required to overcome the bias against silent defendants.<sup>200</sup> With a penalty of a different size, fact finders would over- or underadjust the standard in such a way that might ultimately exacerbate the problem rather than solve it.

This concern suggests that more empirical research needs to be conducted. The current experimental literature, while exposing the interdependence of the severity of sanctions and evidentiary thresholds, provides only a partial account of this phenomenon. Additional studies will enable us to draw a more complete picture of fact finders' behavior. More particularly, these studies should attempt to shed more light on the proportion by which fact finders adjust the standard of proof in relation to the increase in the size of the sanction. Arguably, this proportion might be affected by factors such as the type of sanction (fines compared to incarceration), the crime involved (property crimes compared to bodily injury crimes) and the identity of the fact finders (judges compared to juries).

The informational hurdle, however, should not prevent policymakers from using sanctions as means to incentivize fact finders. Legal systems often use criminal sanctions to deter crime. Setting sanctions at the right level from the perspective of deterrence requires information regarding many relevant factors, such as the benefit that the perpetrator derives from her illicit conduct, the social harm caused by the crime, and individuals' attitude toward risk—information that is not always easy to obtain. Nevertheless, legal systems have been successful in designing criminal penalties that properly deter crime. Absent reasons to suppose otherwise, one may assume they will also be able to obtain the necessary information to properly incentivize fact finders.

A third concern involves the risk of error. Even if the legal system can obtain the necessary information to properly set the size of sanctions, it cannot entirely prevent mistaken judgments. The implication in our case is that innocent defendants who are wrongfully convicted will be subject to aggravated penalties. In the right to silence example, if fact finders fail to acquit an innocent defendant who invoked the right, this defendant will be subjected not only to the basic punishment but also to the extra penalty for remaining silent.

This objection, however, disregards the many contexts in which the legal system applies enhanced sanctions despite the risk of possible mistakes. Consider, for example, the rule endorsed by many jurisdictions that increases the punishment for crimes committed with a weapon.<sup>201</sup> While this rule may be consistent with the principle of just desert (bearing arms makes

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200. See *supra* Section III.B.2.

201. See Jon S. Vernick & Lisa M. Hepburn, *State and Federal Gun Laws: Trends for 1970–99*, in *EVALUATING GUN POLICY: EFFECTS ON CRIME AND VIOLENCE* 345, 392–95 (Jens Ludwig & Philip J. Cook eds., 2003) (reporting that between 1970 and 1996 thirty states adopted such laws).

crimes more morally reprehensible) or deterrence (the higher sanction discourages violent crimes), it increases the costs of mistaken judgments. In a system that applies such a rule, an innocent defendant who is convicted of armed robbery is subject to an aggravated punishment. Nevertheless, the benefits that such a rule provides have been regarded as sufficient to outweigh this concern. Similarly, to the extent that policymakers wish to address the risk of unsubstantiated decisions, they may determine that the advantages of using mandatory sanctions to incentivize fact finders are sufficient to offset the costs that such sanctions inflict on defendants who are wrongfully convicted.

A fourth possible objection might be doctrinal. As mentioned earlier, the general rule is that fact finders should not be aware of the specific punishment that the defendant faces.<sup>202</sup> If fact finders are completely ignorant of the applicable punishment, the imposition of aggravated sanctions will not cause them to increase the burden of proof. To induce fact finders to raise the evidentiary threshold for conviction, they must be knowledgeable about the mandatory nature of the sanction and its size.

This valid doctrinal point, however, does not undermine the preceding analysis. To begin with, the point is relevant only in settings in which there is a distinction between the body responsible for the determination of guilt and the body charged with sentencing. Thus, in bench trials—where both of these decisions are made by the judge—the trier of fact is fully aware of the applicable sanction.<sup>203</sup> Furthermore, our analysis does not advocate informing jurors of the specific punishment to which the defendant is exposed. To induce jurors to properly adjust the burden of proof, knowledge about general sentencing rules is sufficient. For example, with respect to criminal attempts, jurors are not required to be aware of the concrete punishment at stake. They need only be aware of the rule regarding the equal treatment of complete and incomplete crimes.

Finally, one may argue that the high rate of plea bargains renders our discussion incomplete. Once plea bargaining is incorporated into the analytical framework, concerns might arise regarding the use of mandatory enhanced sanctions. The imposition of such penalties may disproportionately increase the prosecution's bargaining power and thus unfairly disadvantage defendants.<sup>204</sup>

The prosecution's bargaining power, however, depends on two factors. First, as the level of the applicable sanction rises, prosecutors have greater leverage over defendants. Thus, adopting enhanced mandatory sanctions may provide prosecutors more bargaining power when negotiating a plea.

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202. See *supra* notes 44–49 and accompanying text.

203. See Adam M. Gershowitz, *12 Unnecessary Men: The Case for Eliminating Jury Trials in Drunk Driving Cases*, 2011 U. ILL. L. REV. 961, 984–87 (comparing jury trials to bench trials and noting that judges have “full knowledge of the sentencing range and typical punishments”).

204. See Jeffrey Standen, *Plea Bargaining in the Shadow of the Guidelines*, 81 CALIF. L. REV. 1471, 1505–17 (1993) (modeling the way in which guidelines transfer power to prosecutors).

Second, as the likelihood of conviction falls, prosecutors have less leverage over defendants. Because enhanced mandatory sanctions cause fact finders to increase the standard of proof, they also reduce the bargaining power that prosecutors possess. Consequently, imposing the sanctions that we recommend does not necessarily disfavor defendants who engage in plea bargaining. More generally, this insight suggests that criticisms leveled against the shift toward mandatory punishments in the federal sentencing guidelines and against this shift's effect on defendants' bargaining power have not offered a complete account of the potential implications of such a regime.<sup>205</sup>

In sum, reforming the penal system in light of the theory presented in this Article certainly raises several concerns. These concerns, nonetheless, do not represent an insurmountable obstacle. Cautious application of the theory, coupled with careful examination of its effects in the real world, can allow policymakers to harness criminal sanctions in order to decrease the risk of unsubstantiated decisions.

#### CONCLUSION

This Article presents a new approach regarding the role of criminal punishment. Building on the literature documenting the connection between the sanction severity and fact finders' willingness to convict, it shows that punishment can be structured to protect defendants from wrongful convictions. Because higher punishments induce fact finders to ratchet up the standard of proof, mandatory sanctions of sufficient size can lower the probability of error in situations where evidentiary and procedural rules have proved to be ineffective. Our analysis further demonstrates that designing criminal sanctions to protect the innocent often does not require compromising the other goals of punishment.

We illustrate the advantage of using sanctions to incentivize fact finders in three contexts in which defendants face a particularly high risk of erroneous convictions: inchoate crimes, the right to silence, and evidence of defendants' existing criminal records. Fact finders in these contexts might rely on insufficient or inadmissible evidence. By imposing mandatory sanctions of sufficient size, the legal system can induce these fact finders to convict only when sufficient admissible evidence proves the defendant's guilt.

The insight that fact finders apply flexible evidentiary standards has potential implications beyond the criminal context. Scholars have suggested that the evidentiary standards in civil lawsuits might be influenced by the dollar amount at stake.<sup>206</sup> The greater the amount of damages a plaintiff

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205. See, e.g., *id.* at 1532–37 (arguing that the guidelines should be discretionary rather than mandatory).

206. See Mark C. Dickinson, Note, *Damages for Insider Trading Violations in an Impersonal Market Context*, 7 J. CORP. L. 97, 112 (1981) (“[T]he measure of damages may have an actual influence on the standard of proof employed by the court.”); see also Richard Craswell, *Instrumental Theories of Compensation: A Survey*, 40 SAN DIEGO L. REV. 1135,



seeks to collect, the higher the evidentiary standards that fact finders will apply.

To the extent that this interdependence exists, rules regarding compensation have greater significance than conventionally perceived. These rules not only provide the monetary value of the litigation but may also affect its outcome. In the tort context, for example, the observed behavior provides a new prism through which the ramifications (and desirability) of punitive damages can be explored. Furthermore, in contrast to criminal sanctions that are determined by the legal system, the stakes of civil litigation can be designed *ex ante* by the parties themselves. Parties to a contract, for example, often predetermine the amount to be paid in case of breach.<sup>207</sup> Courts have traditionally struck down such liquidated damages provisions when the agreed amount appears unduly skewed against the breaching party.<sup>208</sup> This approach, however, disregards the advantage that promisors may derive from harsh liquidated damages provisions. High damages can protect promisors who may be concerned that fact finders will be inclined to erroneously find them liable. A high compensation amount can serve to induce fact finders to increase the evidentiary standard, and thus it can reduce the risk of an unsubstantiated decision.

The existence of flexible standards of proof may also affect the enduring debate regarding the comparative advantages of “all-or-nothing” and “proportional” liability regimes.<sup>209</sup> Under the former type of liability, plaintiffs receive full compensation if they satisfy a certain legal threshold, but receive nothing if they fail to meet this threshold. Under the latter type, no threshold is applied, and plaintiffs collect damages in proportion to the relative strength of their claim. In the context of uncertain causation, for example, the rule that provides for full compensation once causation is proved beyond a 50 percent threshold of likelihood represents an “all or nothing” regime, whereas the rule in which the amount of damages is adjusted continuously to the probability of causation represents a “proportional” regime.

Legal scholarship has often compared all-or-nothing and proportional liability regimes in terms of their ability to maximize social welfare or to comply with corrective-justice principles.<sup>210</sup> The preceding analysis, however, suggests that the choice between these regimes will also affect the applicable evidentiary standard. Under an all-or-nothing regime, fact finders must determine whether to award the plaintiff *full* compensation. In contrast, under a proportional regime, they may award *partial* compensation.

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1170 (2003) (analyzing the implications of a potential connection between the size of damages and the burden of proof).

207. See U.C.C. § 2-718 (2005) (specifying the legal framework that is applied to liquidated damages).

208. For a review of the case law, see Larry A. DiMatteo, *A Theory of Efficient Penalty: Eliminating the Law of Liquidated Damages*, 38 AM. BUS. L.J. 633, 655–75 (2001).

209. For a recent review of the literature, see Shmuel Leshem & Geoffrey Miller, *All-or-Nothing Versus Proportionate Damages*, 38 J. LEGAL STUD. 345, 350–51 (2009).

210. E.g., ARIEL PORAT & ALEX STEIN, LIABILITY UNDER UNCERTAINTY 42–43 (2001) (discussing the justifications for both regimes).

This difference suggests that courts awarding compensation under the second regime will often apply a lower standard of proof than courts determining cases under the first regime.<sup>211</sup> Incorporating this insight into the existing analysis regarding all-or-nothing and proportional liability regimes will provide greater understanding of their actual effects.

In conclusion, the framework put forward in this Article lays the groundwork for a large body of future research. Further empirical studies regarding the interdependence of evidentiary standards and the stakes of litigation can enhance our understanding of the intricate characteristics of fact finders' behavior. In addition, more theoretical studies can explore the potential applications of the framework to other areas of law. Coupled together, these studies will enable legal scholarship to develop a comprehensive account of the probative function of sanctions and remedies.

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211. For example, suppose that in a negligence case the evidence shows that the probability that the defendant's behavior caused the harm (the element of causation) is 60 percent. Under a proportional causation regime, the plaintiff may collect 60 percent of her loss, whereas under an all-or-nothing regime she can collect the entire amount of her injury. To win the case, the plaintiff must also prove the unreasonableness of the defendant's conduct (the element of fault). The standard of proof that fact finders will apply in determining whether the defendant's behavior was unreasonable, however, is likely to be different under each regime. Given the potential interdependency between the amount of damages and the evidentiary threshold, the evidentiary standard will be lower under the proportional regime.

