

Texas Law Review

See Also

Response

He Went Back, Jack, and Did It Again: Thoughts on Retributivism, Recidivism as Omission, and Notice

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I. Introduction

It is common practice in U.S. penal systems to punish repeat offenders more severely than first-time offenders.¹ But despite the breadth of this practice, theoretically grounding this extra punishment for recidivists² has proven quite difficult, especially for retributivists.³ Common justifications for the extra punishment given to recidivists, the “recidivist premium,” are that recidivists require greater deterrence, more incapacitation, and more

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1. See BUREAU OF JUSTICE ASSISTANCE, NATIONAL ASSESSMENT OF STRUCTURED SENTENCING 67 (1996) (“[A]ll guideline systems include considerations of criminal history . . .”); Richard S. Frase, *Sentencing Guidelines Are “Alive and Well” in the United States*, in SENTENCING REFORM IN OVERCROWDED TIMES: A COMPARATIVE PERSPECTIVE 12, 16 (Michael Tonry & Kathleen Hatlestad eds., 1997) (“All guidelines states base their recommended sentences primarily on the conviction offense and the offender’s prior conviction record.”); Julian V. Roberts, *The Role of Criminal Record in the Sentencing Process*, 22 CRIME & JUST. 303, 341–51 (1997) (showing the significance of criminal history in determining sentence lengths in several jurisdictions).

2. “Recidivist” and “repeat offender” both refer to one who has committed a crime after being convicted, and not merely one who has repeatedly committed crimes without getting caught.

3. Julian V. Roberts, *Punishing Persistence: Explaining the Enduring Appeal of the Recidivist Sentencing Premium*, 48 BRIT. J. CRIMINOLOGY 468, 469 (2008) (“[A] plausible retributive justification for the recidivist sentencing premium has proved as elusive as the legendary resident of Loch Ness.”).

rehabilitation.⁴ Notice though that these explanations are consequentialist in nature.⁵ That is, these explanations account for punishing recidivists more severely in terms of the good consequences that such punishment will produce, such as a decrease in the crime rate or a better chance of rehabilitating the repeat offender.⁶

But we may still ask whether a recidivist *deserves* to be punished more severely than a first-time offender, even if he commits the very same crime. This is the challenge that beckons the retributivist: Can retributivism account for the increased punishment of recidivists, or is this practice incompatible with retributivism?⁷ To show that the recidivist premium is compatible with retributivism, the retributivist must explain how the recidivist is more culpable than the first-time offender, and therefore deserving of greater punishment.

In his *Texas Law Review* piece *Recidivism as Omission: A Relational Account*,⁸ Youngjae Lee provides us with an innovative retributivist account for the recidivist premium.⁹ His idea aims to capitalize on another interesting issue in criminal law: liability for omissions.¹⁰ Though liability for omissions is controversial,¹¹ Lee claims that it grounds the recidivist premium because recidivists have a duty to rearrange their lives as to minimize the risk that they will commit further crimes. Reoffending shows that they have failed to fulfill their duty.¹² This account is Lee's Recidivism as Omission.

Lee first presents three theories of the recidivist premium in the retributivist literature: the Bad Character account, the Notice account, and the Disobedience account. Lee argues that these accounts, though plausible, are deficient. Instead, Lee presents his new account, Recidivism as Omission, as the best retributivist explanation of the recidivist premium.

4. Richard A. Posner, *An Economic Theory of the Criminal Law*, 85 COLUM. L. REV. 1193, 1216 (1985) (discussing the incapacitation and deterrent interests of the recidivist premium); *see also* JULIAN V. ROBERTS, PUNISHING PERSISTENT OFFENDERS: EXPLORING COMMUNITY AND OFFENDER PERSPECTIVES 35–36 (2008) (stating that recidivist tendencies must be considered when trying to gauge the measures needed for effective rehabilitation).

5. *See* JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW 14 (3d ed. 2001) (providing a basic definition of utilitarianism as a theory of punishment and an explanation of utilitarian goals). Note that Dressler uses the term “utilitarianism” instead of “consequentialism.” The primary consequentialist theory of punishment is called utilitarianism. CYNTHIA LEE & ANGELA HARRIS, CRIMINAL LAW 7 (2005).

6. DRESSLER, *supra* note 5, at 14.

7. *See id.* at 16 (providing a basic definition of retributivism as a theory of punishment and an explanation of retributivist goals).

8. Youngjae Lee, *Recidivism as Omission: A Relational Account*, 87 TEXAS L. REV. 571 (2009).

9. *Id.* at 577.

10. *Id.* at 577–78.

11. DRESSLER, *supra* note 5, at 98.

12. Lee, *supra* note 8, at 578.

I will argue that Lee's own account, Recidivism as Omission, does not have any of the advantages over the competing accounts that Lee claims it has. I will argue that there are further detractors to Recidivism as Omission that make it implausible and possibly redundant. Finally, I will argue that, of the competing accounts, the Notice account best explains our intuition that the recidivist deserves more punishment.

As an initial point, I will discuss how retributivism can account for generally punishing recidivists more than first-time offenders. I will not address the justifications of instantiations of the recidivist premium in any particular U.S. jurisdiction. Indeed, given that U.S. penal systems are unabashedly committed to negative retributivism,¹³ it seems like a frustrating endeavor to justify the penal practices in U.S. jurisdictions by retributivist motivations.

II. Brief Explanations of the Different Accounts

A. *Bad Character*

The Bad Character account states that a recidivist is deserving of more punishment than a first-time offender in virtue of his bad character, as evidenced by his reoffending.¹⁴ This account explains the recidivist premium by noting that the state is to some extent ignorant of the nature of the recidivist's character after his first offense, but once he persists in his criminal conduct, the truth becomes clear.¹⁵ Thus, after showing the state his bad character, he merits more punishment.¹⁶

Lee identifies two subspecies of this account. The first subspecies, the first-time-offender-mitigation version, asserts that the first-time offender is given a mitigated punishment, because it may be that his first offense was out of character.¹⁷ We give him the benefit of the doubt, we assume that he acted out of human frailty, and we treat him with mercy.¹⁸ But if the first-time offender becomes a recidivist, then he makes it clear that the offense was not out of character, that his character is truly sordid, and, therefore, that he deserves no such mitigation.¹⁹

13. See Mitchell N. Berman, *On the Moral Structure of White Collar Crime*, 5 OHIO ST. J. CRIM. L. 301, 313 (2007) (characterizing negative retributivism as the "dominant principle" of American law). Negative retributivism is the view that punishment should be motivated by consequentialist reasons, but limited by retributive restraints. That is, our motivation to punish criminals is to engender good consequences, but we are limited because we may only punish those who are deserving of punishment. DRESSLER, *supra* note 5, at 23.

14. Lee, *supra* note 8, at 584–85.

15. *Id.*

16. *Id.*

17. *Id.* at 584–86.

18. *Id.* at 584–85.

19. *Id.*

Lee thinks that this first subspecies has a weakness: it is a theory of mercy and not a theory of desert.²⁰ This is a problem because it does not account for the intuition that the recidivist deserves more punishment; it only explains for what reasons we punish first-time offenders less.²¹ This problem is rectified in Lee's second subspecies, namely the recidivism-marks-bad-character version, which considers subsequent criminal acts of the recidivist as marks of bad character.²² The idea is that we consider two criminals. The first criminal commits one crime and stops. The second criminal is a recidivist. The recidivist shows himself to have a worse character than the first-time-and-only-time offender.²³ This worse character deserves worse punishment. When confronting the first-time criminal, we do not know enough about his character, so we assume that he is a first-time-and-only-time offender.²⁴ The recidivist has rebutted this assumption—he has shown himself to have a worse character—and so we treat him more harshly.²⁵

B. Notice

The Notice account argues that the second criminal act of the recidivist is deserving of more punishment because the recidivist is more cognizant of the wrongness of the criminal conduct, because the recidivist has been convicted and punished for it before.²⁶ To be precise, the Notice account states that a convict²⁷ has a greater awareness of the wrongness of criminal conduct as compared to a first-time offender committing the same conduct. Mirroring a standard mens rea analysis, the greater a person's awareness is that his conduct is wrong, the greater the person's culpability for that conduct.²⁸ Lee points out that a naïve version of this account seems to rely on the implausible assumption that most first-time criminals are unaware of the law.²⁹ Lee himself recognizes that this can be repaired by appealing to a more robust notion of notice.³⁰ That is, it may be true that everyone knows, or is imputed with the knowledge, that certain acts are wrong, but when one is convicted and punished, his knowledge, because it is of a direct nature, is of better quality.³¹ This extra, better knowledge grounds the recidivist premium.

20. *Id.* at 585.

21. *Id.*

22. *Id.* at 586.

23. *Id.*

24. *Id.*

25. *Id.*

26. *Id.* at 589.

27. "Convict" here means one who has been convicted of a crime.

28. Lee, *supra* note 8, at 589.

29. *Id.* at 590.

30. *Id.* at 591–92.

31. *Id.*

C. *Disobedience*

There are many variations of the Disobedience account; these various accounts claim that the second criminal act of the recidivist is deserving of more punishment because the second criminal act manifests disobedience,³² defiance,³³ lack of respect for the law,³⁴ or contempt for the state.³⁵ This manifestation of disobedience is in addition to the criminal conduct. As such, the recidivist deserves to be punished for the criminal conduct *and* the manifestation of disobedience; this justifies the recidivist premium.

D. *Recidivism as Omission*

Lee's Recidivism as Omission account argues that a recidivist is deserving of more punishment because the recidivist omits from fulfilling a duty imposed upon him.³⁶ This theory asserts that the state imposes a duty on the recidivist to rectify his life as to minimize the risk of further criminal conduct.³⁷ This is part of the "thick relationship" that develops between the recidivist and the state after the recidivist's conviction.³⁸ The second conviction then shows that the recidivist has, by omission, not fulfilled his duty; it is this omission that makes him deserving of greater punishment.³⁹

Lee claims his account has the following advantages: First, he claims that his account explains and justifies the resentment felt against recidivists.⁴⁰ That is, Recidivism as Omission does not just explain why the recidivist is punished more; Recidivism as Omission properly represents the reason behind the intuition that recidivists deserve *more* punishment than first-time offenders.⁴¹ This is supposed to be an advantage over accounts that base the recidivist premium on first-time-offender mitigations, which explain why we

32. *Id.* at 592; see also STUART P. GREEN, LYING, CHEATING, AND STEALING: A MORAL THEORY OF WHITE-COLLAR CRIME 126 (2006) (finding "plausib[le] the view that what distinguishes the first time and habitual offenders' acts is the amount of disobedience involved").

33. Lee, *supra* note 8, at 592; see also ANDREW VON HIRSCH, PAST OR FUTURE CRIMES: DESERVEDNESS AND DANGEROUSNESS IN THE SENTENCING OF CRIMINALS 79 (1986) ("The repeater, arguably, flouts the law in particularly outrageous fashion and such defiance is an evil in itself").

34. Lee, *supra* note 8, at 592; R.A. Duff, Punishment, Communication, and Community 168 (2001).

35. Lee, *supra* note 8, at 593; see also Markus Dirk Dubber, *Policing Possession: The War on Crime and the End of Criminal Law*, 91 J. CRIM. L. & CRIMINOLOGY 829, 962 (2001) (emphasizing that "[r]ecidivists personify contempt of state authority").

36. Lee, *supra* note 8, at 611–13.

37. *Id.*

38. *Id.* at 614.

39. *Id.* at 613.

40. *Id.* at 617.

41. *Id.*

give extra punishment to recidivists by arguing that we give first-time offenders a discount.⁴²

Second, he claims that his account does not treat the prior convictions of the recidivist as merely evidentiary.⁴³ This is problematic for other accounts because it is not clear why the conviction should have such a privileged role as particularly informative, if it is merely evidentiary.⁴⁴ Instead, by utilizing the conviction to develop obligations for the recidivist, his account explains why the conviction does have such an important role.⁴⁵

Third, he claims that his account better preserves proportionality.⁴⁶ According to Lee, the Disobedience account and the Bad Character account tend to license exaggerated punishments for recidivists, and, further, it is unclear how they can place principled limitations on the recidivist premium.⁴⁷ But because his account describes what the recidivist's wrong consists of, it is better able to place principled limitations on the amount of such punishment.⁴⁸

III. Assessing Lee's Recidivism as Omission Account

A. *Explanation of Deserving More*

Lee's first claimed advantage, namely that his account better explains and justifies the resentment felt against recidivists, is not too compelling. In terms of the competing accounts, this provides Lee's theory with a leg up over the first-time-offender-mitigation subspecies of the Bad Character account. But even Lee noted that the first-time-offender-mitigation version had problems that could be repaired to form a stronger subspecies of the Bad Character account, the recidivism-marks-bad-character version.⁴⁹ The recidivism-marks-bad-character version also attempts to explain the intuition that recidivists deserve more punishment—it is not merely a theory of mercy.⁵⁰

42. *Id.*

43. *Id.*

44. *Id.*

45. *Id.*

46. *Id.*

47. *Id.* at 617–18.

48. *Id.*

49. *Id.* at 586; *see also supra* notes 22–25 and accompanying text.

50. *See supra* subpart II(A). With all this in mind, we still may question whether being a “theory of mercy” is all that objectionable. The initial project was to explain how retributivists can justify the recidivist premium. The first-time-offender mitigation does this, but it does so by arguing that recidivists do not deserve more; rather, under this version, first-time offenders are treated with mercy. Lee insists that it would be better to explain why recidivists actually deserve more, because it explains our intuitions. But in response, we could simply say that our intuitions are in error.

B. Evidentiary Problem

Lee's second claimed advantage, namely, that his account does not treat the prior convictions of the recidivist as merely evidentiary, is also unconvincing. First, the fact that the conviction is merely evidentiary is not problematic for any of the accounts. The prior conviction seems to be good evidence for each of the theories' respective purposes.⁵¹

But note that Lee's theory itself has an evidentiary worry of its own. It is true that in Lee's account, the first conviction is not merely evidentiary; the conviction creates a thick relationship between the state and the criminal that entails certain duties.⁵² But note that the second conviction *is* merely evidentiary. It is supposed to signal to us that the convict has not repaired his life in accordance with the duty levied upon him. Yet it does not seem like very good evidence.

Consider the following example: It could be that a convict gets out of jail and completely rectifies his life. He stops hanging out with his sordid friends, he moves out of the bad neighborhood, he gets a job, he stops using, and so forth. Nevertheless, in a moment of weakness he reoffends. Suppose somebody starts a fight with him while he is minding his own business; he tries to avoid the fight, but the instigator persists. At a point in the fight, the instigator is losing and tries to surrender peacefully. The convict does not allow him to and kills him or grievously injures him. The convict may be convicted of manslaughter or aggravated assault. Yet it does not seem that he has shirked his duty to repair his life.⁵³

Lee recognizes this problem, but has little to say about it.⁵⁴ One possible response to this hypothetical is that the second conviction always shows that the duty was unfulfilled; the convict could have repaired his life better. I find this to be an unsatisfactory answer. Note that in prototypical examples of omissions to fulfill a duty, we recognize people's limitations. Consider the Bad Samaritan laws: if someone tries with all his ability to save a person, but does not, we do not say that he has failed to fulfill his duty.⁵⁵ In failing to conform to our intuitions, this kind of answer turns the Recidivism

51. To be brief, the prior conviction is good evidence of the criminal's bad character, his being on notice, and his disobedience. And if, as a matter of empirical fact, there were other good evidence, then that would provide us with suggestions of how to reform those theories—suggestions that these theories could consistently accommodate.

52. Lee, *supra* note 8, at 611–14.

53. Even if this hypothetical is not convincing to some, it is possible to imagine an individual who did everything he could to rectify his life, but still became ensnared in crime. So it seems that the second conviction acts in an evidentiary way, and that perhaps it is not evidence of the highest quality.

54. Lee, *supra* note 8, at 615–16.

55. See, e.g., VT. STAT. ANN. tit. 12, § 519(a) (1973) (creating a duty to “give reasonable assistance” to a fellow human being “exposed to grave physical harm”).

as Omission account into more of a pretext for punishing recidivists than an explanation for why we can justifiably punish them more.

Given all this, we can ask why it is acceptable to use the second conviction in an evidentiary way but not the first. Lee can bite the bullet and say that it is not, in which case he would have to give up his second claimed advantage. He might also suggest that there is something different about the first conviction that makes using it as merely evidence unacceptable. I cannot fathom what this would be.

C. Proportionality

Lee's third claimed advantage, namely that his account better preserves proportionality, is without any justification. All of these accounts explain specifically what the recidivist is being punished for.⁵⁶ Further, the theories can be limited in as principled a way as Lee's Recidivism as Omission account. How much extra punishment we levy on the recidivist will all depend on the valuation of the conditions for extra punishment. If we punish for bad character, we could limit the extra punishment to a fraction of the punishment associated with the underlying crime, because we do not think the extra bad character is as bad as the bad character associated with the underlying criminal conduct. If we punish for disobedience, we could limit the extra punishment to a fraction of the punishment associated with the underlying crime, because we do not think disobedience is as bad as the underlying criminal conduct. This requires us to make value judgments—perhaps difficult value judgments about bad character and disobedience, respectively. But this does not mean that the theories are unprincipled in their limitations of punishment, for it is possible for us to make reasoned, principled value judgments about bad character and disobedience.⁵⁷

D. Further Detractions

We have seen that Lee's theory does not truly achieve the benefits he claims. But, indeed, there are further detractions to his theory. First, Lee's theory is seemingly indistinct from the Disobedience account. Lee's theory capitalizes on the failure of the recidivist to do something, namely his failure to rearrange his life so that he avoids criminal conduct. The Disobedience

56. The Bad Character account states that the recidivist premium is given in light of the bad character traits that accompany subsequent criminal acts. The Disobedience account punishes the recidivist for his additional disobedience, whether this is grounded in a special command or an additional awareness.

57. Lee does not mention the Notice account in this objection. But, for good measure, the Notice account punishes the recidivist more because the recidivist knew better of the consequences that arise from criminal conduct. If we punish for extra notice, we could limit the extra punishment to a fraction of the punishment associated with the underlying crime, because we do not think the extra notice is as bad as the underlying criminal conduct.

account can take advantage of this as well: the recidivist disobeys a directive to rearrange his life so that he does not commit further crimes.

Lee says that his theory is not advocating such a command. Lee says, “[I]t is not likely that such a command is actually part of the meaning of the process of conviction and punishment, whereas it seems incontrovertible that the process of conviction and punishment carries the message that the offender should not reoffend.”⁵⁸ It is unclear how the command and the duty truly differ. If the state is imposing a duty on an individual such that the state can punish the individual for not fulfilling this duty, then it seems that the state is commanding the individual to fulfill that duty.

Lee proffers another argument: If there were implicit commands to convicts to rearrange their lives, they would be displaced by the explicit commands that already exist—in the form of probation, parole, and supervised release. This would mean that the implicit commands are redundant. If they are redundant, they cannot license the extra punishment that is the recidivist premium.⁵⁹

In response, we might ask why this explicit regime of commands does not displace the duty to rearrange one’s life. If the state is commanding a convict to rearrange his life through probation or parole, would that not also make a duty to rearrange one’s life redundant? That would make the recidivist premium, even on Lee’s account, a redundant punishment for parole or probation violations.⁶⁰

Thus, I do not think that Lee’s account differs from the Disobedience account. Moreover, given that the Disobedience account is firmly established in the literature,⁶¹ it is unclear how revolutionary Lee’s account is. Lee may have explicated what the disobedience consists of by filling in the directive that is being disobeyed, but this does not seem to have been all too plaguing for the Disobedience account.

Second, I think Lee’s account is inferior when it comes to explaining our intuitions supporting the recidivist premium. When we reflect on the resentment we feel for the convict who commits subsequent crimes, the locus

58. Lee, *supra* note 8, at 615.

59. Lee writes, “[A] regime of . . . commands [to fix one’s life] already exists in the form of probation, parole, and supervised release. A command-centered account would then have two sets of parallel commands—explicit commands and implicit commands—and it is unclear why the explicit commands would not simply ‘occupy the field’ . . .” *Id.* at 615.

60. We should also recognize again that we are not limited to the way U.S. jurisdictions do things, as we are trying to provide an explanation of how retributivists can justify punishing recidivists more. If there were no such regime of explicit commands, this objection would fall flat—we would not have to worry about the implicit commands, and implicit duties, being trumped by the explicit commands. Thus, it is clear that a retributivist could explain why we would want to punish more by appealing to the implicit command in a conviction to rearrange one’s life. It may not be the way we do things, but we could do it that way and this would ground the recidivist premium.

61. *See supra* notes 32–35 and accompanying text.

of our attention is not the prior self of the convict who failed to rectify his life. This is evidenced by the fact that when we think of a convict who has not taken any steps to rectify his life, but also has not reoffended, we feel resentment toward him. So in focusing on the omission, it seems that Lee's account focuses on a feature that does not strongly relate to our resentment. Furthermore, when we think of a convict who has taken substantial steps to rectify his life but reoffends, we do feel resentment against him. It is great that he changed his life to minimize his chance of committing further crimes, and perhaps that is worthy of acknowledgment. But when it came to crunch time, he failed to learn his lesson.

The other accounts accommodate this intuition. The focus on the actor at the time of the criminal act is what enables these accounts to vindicate our intuition that the act of reoffending is itself more blameworthy. Lee thinks that this is one of the mistakes of these accounts.⁶² But given that his account has no clear advantages over the other accounts, Recidivism as Omission's focus on the prior self of the recidivist is problematic.

IV. The Notice Account and Our Intuitions

Very little scholarly work has been written on the Notice account,⁶³ and indeed Lee himself thinks that it merits little attention.⁶⁴ That being said, I find myself enamored with this account, for it best reflects our intuitions regarding imposition of the recidivist premium.

The Notice account depends on the recognition that, with regard to crime, normally people are susceptible to different kinds of cognitive failures. They do not recognize that the law is really directed at them. They do not recognize what the content of the law really means, because of a lack of first-hand experience. For example, they may think that law is defeasible in ways that it is not—they may think that “Thou shall not steal” has an exception for when they are hungry. They may not realize fully the harm and seriousness of the criminal conduct. Some of these thoughts blend together, but insofar as they are distinct, it is this last kind of cognitive failure that I think best grounds our intuitions behind the recidivist premium.

We can imagine an adolescent. His parents advise him to be careful not to hurt others. He hears the advice, but he has not internalized it. One day, after a heated discussion, he punches his brother and his brother is hurt. His parents punish him and scold him as to how bad it is to hurt someone. A few weeks later, he gets in another heated argument—this time with his uncle—

62. Lee, *supra* note 8, at 608.

63. See ANDREW VON HIRSCH, *DOING JUSTICE: THE CHOICE OF PUNISHMENT* 85 (1976) (presenting the Notice view very briefly); VON HIRSCH, *supra* note 33, at 81–91 (retracting the Notice view based on the evidentiary objection).

64. Lee, *supra* note 8, at 589 (“The ‘notice’ argument need not detain us long . . .”).

and deliberately says something to hurt his uncle's feelings. And he succeeds.⁶⁵

This second time, our intuition is that the adolescent deserves more punishment, and it seems that the main reason is that he now really understands what it is to hurt someone. It is not that he has defied his parents' orders to stop hurting people—although that is not good.⁶⁶ It is not that he has not tried to rectify his mannerisms so that he is likely to avoid hurting people—although that might be nice.⁶⁷ These might be reasons that he deserves more punishment, but I assert that, by our intuition, they are not the main reasons why we want to punish him more severely. Our intuition is that the adolescent deserves more punishment because, after the first time, he knew how bad an act it was. That is among the things that the scolding and the punishment were supposed to instill in him. So, his valuation of the wrongness of the second act was higher than it would have been if he had not committed the first act—as a repeat hurter, he took himself to be doing a worse act than if he was not a repeat hurter. Therefore, he is more blameworthy than an adolescent who just cursed his uncle, because he took himself to be committing a worse act. As he is more blameworthy, he deserves more punishment. Indeed, we can imagine ourselves saying to him, “Come on, kid. You knew how bad it was to hurt someone, and you still did it?”

But does this analogy carry on to the all-grown-up criminal? I contend that it does. When we think of our resentment for the recidivist, I do not think that we care that he defies us or that he has failed to fix his life. Those might be annoying features of the recidivist, but it seems that we judge his act as worse because it is more informed. Indeed, I can see my resentment embodied in the statement, “Let me get this straight: You know how badly crimes affect society because we have made sure you understand that. Yet you still keep doing it?”

Regarding our intuitions and the Bad Character account, things get murkier. I am not sure whether our intuition is that the adolescent is more blameworthy because we know his character is worse than a first-time-offender adolescent. At first glance, I am inclined to say that we have no opinion about the adolescent's character. That is not the focus of our judgment; the focus of our judgment is his act. But it might be that we are hesitant to make firm judgments about the characters of malleable adolescents, but when we are dealing with an adult recidivist, part of our increased resentment relates to the adult's character.

65. Note that the adolescent is not committing the same type of act, yet the Notice account still proceeds.

66. This is a characterization of the Disobedience account.

67. This is a characterization of Lee's Recidivism as Omission account.

Indeed, I think we intuitively do judge the adult recidivist as deserving more punishment in light of his character, but I think this judgment works *with* the idea of notice. It seems that our intuition that the recidivist has a worse character than the first-time offender is based on the fact that the recidivist committed the second criminal act *even though* he knew better. So our intuition that the recidivist's character is worse is based on his act done with the extra knowledge of the wrongness of his conduct, the act done with greater notice. Thus, it is still the Notice account which grounds our intuition that the recidivist deserves extra punishment.

One may object that we are not led to the conclusion that the Notice account grounds our intuition, because the Notice account claims that we are punishing the bad act, instead of the bad character. But note the tenuousness of the distinction between Punishing Character and Punishing Bad Acts. As noted, Lee himself asserts that this distinction may collapse into one.⁶⁸ I do not know if Lee is right about this, but we need not address that difficult question. The point is that whether the object of our resentment is the recidivist's bad character or the recidivist's bad act (or both), we resent the recidivist because he committed the second act with greater notice. So, it may be better to conceive of the Notice account in a more generalized way: a recidivist deserves more punishment because the recidivist is more cognizant of the wrongness of the criminal conduct, as the recidivist has been convicted and punished for it before. Under this generalized version, we are not specifying whether the recidivist deserves the recidivist premium in light of his bad character or his bad act (or both), but either way it is still because he committed a second criminal act with greater notice.

V. Conclusion

In summation, I have argued that Lee's Recidivism as Omission is not a great solution to the problem of providing a retributivist explanation to the recidivist premium. Lee's own account, Recidivism as Omission, does not have any of the advantages over the competing accounts that Lee claims it has. Indeed, we have exposed certain weaknesses in his account that make it less plausible than its competitors and possibly redundant. This seemingly

68. *See supra* notes 18–21 and accompanying text. I think there may be a genus–species mistake in Lee's typology. Lee has two broad categories, Punishing Bad Character and Punishing Bad Acts. In Punishing Bad Character, he lists what I call the Bad Character account (and what Lee calls the Recidivism and “Bad People” account). Lee, *supra* note 8, at 584. In Punishing Bad Acts, he lists the Notice and Disobedience account. *Id.* at 589, 592. Notice that in the Punishing Bad Acts category we ask, “What makes us judge the recidivist's act as bad?” We get two answers: notice and disobedience. This generates the Notice and Disobedience account.

But it seems like we could ask the same question of Punishing Bad Character: What makes us judge the recidivist's character as bad? Indeed, having committed a crime with greater notice and being disobedient may be indications of bad character. So it seems that the Bad Character account is rightly conceived of as a genus of bad character accounts: Bad Character because of notice, Bad Character because of disobedience, etc.

left us at square one—we have some competing accounts, and none of them are the clear favorite.

Finally, we identified one particular, and previously unmentioned, laurel of the Notice account. Essentially, the Notice account best describes the intuition behind our resentment for the recidivist, the reason why we feel that the recidivist deserves more punishment. It simply asserts that we punish the recidivist more because he committed the second act with greater notice. Certainly, there is more work to be done to truly solve the difficult problem of providing a plausible retributivist explanation of the recidivist premium. I will have accomplished my humble goal if I have convinced even some that the Notice account deserves more theoretical attention and that it has great promise in providing an answer to this difficult puzzle.