

**Is repeating a mistake worse:
The Theoretical Basis and Impact of Prior Convictions as a
Sentencing Factor from a Retributive Perspective**

*Keng-Wei Fan **

Abstract

This paper focuses on the relationship between prior convictions and sentencing, setting the “theoretical basis” and “impact” of prior convictions on sentencing as the main discussion topics. This article adopts a broad understanding of prior convictions as previous criminal records and establishes a discussion of two key topics from the perspective of retributivism, based on the principles of proportionality between crime and punishment, as well as the theory of criminal responsibility. The central theoretical question is: “How does the existence of prior convictions influence the blameworthiness of subsequent recidivist behavior?” To explore the theoretical basis and impact of prior convictions on sentencing, the paper initially analyzes theories categorized under the “recidivist premium model,” which highlight prior convictions as an aggravating factor in sentencing. The analysis indicates that part of these theories essentially argues the impact of prior convictions on sentencing based on the criminal’s character and habits, potentially leading to a diminished functionality of criminal responsibility. Another part fails to adequately justify why previous crimes and their guilty verdicts could lead to an obligation not to reoffend or imply a higher motivation against committing crimes, thus failing to sufficiently explain why recidivists with prior records might possess a greater degree of unlawfulness or culpability, indicating an ineffectiveness of prior convictions as an aggravating factor. The paper then

* Associate Professor, Department of Law, National Dong Hwa University.
Email: fanfangarcon@gms.ndhu.edu.tw

reviews the “Progressive loss of mitigation model,” noting that although this theory is enlightening, it simplifies the concept of a lapse too much and overlooks its diversity. Moreover, the theoretical inference that the mitigating effect diminishes as recidivism decreases lacks a clear theoretical foundation and criteria for determining its applicability and effects. Finally, based on a review of contemporary theories, the paper concludes with two assertions regarding the main discussion topics: first, that prior convictions should not, in principle, serve as an aggravating factor in sentencing; second, that prior convictions could potentially serve as a mitigating factor in sentencing.

Keywords: punishment philosophy, sentencing theory, proportionality principle, prior convictions, retribution, warnmodell, fair play theory, communicative retributivism