CROSSING THE LINE: AN ANALYSIS OF PROBLEMS WITH CLASSIFYING RECIDIVIST MISDEMEANOR OFFENSES AS FELONIES

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ABSTRACT

Alaska is in the minority of states that apply felony charges based on a defendant's history of misdemeanor violations. This approach to the challenges of criminal recidivism, however, creates both constitutional and prudential problems. While Alaska enjoys considerable latitude in its sentencing policies, this form of misdemeanor reclassification raises concerns about proportionality under the Eighth Amendment, double jeopardy under the Fifth Amendment, and poses dilemmas for participants in the plea-bargaining process. This Note examines these problems and proposes a graduated approach to sentencing enhancement. By increasing punishment gradually and preventing recidivist misdemeanants from crossing the misdemeanor-felony border as quickly, Alaska could secure the benefits of recidivism statutes while avoiding the constitutional and prudential concerns present in existing law.

INTRODUCTION

Johnny Doe is a citizen of Alaska. He was arrested several years ago for driving under the influence (DUI) a couple miles from home. Johnny served his 72 hours in jail and paid a $1,500 fine while waiting

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for his six-month license suspension to end.[1] Years later, a police officer pulls Johnny's car over and cites him once again for DUI. This time, however, Johnny faces a minimum of twenty days in jail, a fine of at least $3,000, and a one-year suspension of his license.[2] Now that Johnny is a recidivist, his punishment has become much more severe. Not only does the State relabel his offense as a "felony" instead of a "misdemeanor"—meaning that he loses his voting rights and suffers other collateral consequences of a felony conviction—the State also more than sextuples his time in prison. While such reclassifications may be well-intended, they also raise a number of potential issues.

Recidivism—when previous offenders commit additional crimes—is one of the principal problems facing legislatures and criminal justice scholars. Recidivism persists in all jurisdictions.[3] It has long been a primary factor in sentencing,[4] and legislatures have tried many methods to reduce it. In fact, recidivist provisions appear in criminal codes at both the state and federal level.[5]

Legislatures have responded to the recidivist problem in various ways. Statutory enhancements, guideline increases, and separate substantive offenses add to the prosecutorial menu and increase punishments for recidivists.[6] Recidivist adjustments exist for both misdemeanor and felony offenses.[7] Some of the most famous recidivist provisions include the federal criminal history guidelines,[8] and California's three strikes law for felony recidivists.[9] However,

1. ALASKA STAT. § 28.35.030(b)(1)(A) (2013).
2. § 28.35.030(b)(1)(B).
3. Forty-seven percent of prisoners are convicted of a new crime within three years of their release. Prisoner Recidivism Analysis Tool, BUREAU OF JUSTICE STATISTICS, http://www.bjs.gov/index.cfm?ty=datool&surl=/recidivism/index.cfm (click "Analysis" tab; then check all boxes; then click "Generate Results" button). *See also* ALASKA JUDICIAL COUNCIL, CRIMINAL RECIDIVISM IN ALASKA, at EXECUTIVE SUMMARY (2007), *available at* http://www.ajc.state.ak.us/reports/1-07CriminalRecidivism.pdf ("[Sixty-six percent] of all offenders in the sample [all of whom were convicted of at least one felony in 1999] had been re-incarcerated at least once [within three years of release.]").
4. Almendarez-Torres v. United States, 523 U.S. 224, 243 (1998).
5. Jason White, *Once, Twice, Four Times a Felon: North Carolina's Unconstitutional Recidivist Statutes*, 24 CAMPBELL L. REV. 115, 116 (2001).
6. *See* Sarah French Russell, *Rethinking Recidivist Enhancements: The Role of Prior Drug Convictions in Federal Sentencing*, 43 U.C. DAVIS L. REV. 1135, 1144, 1191 n.281 (2010) (noting the existence of all three forms of legislative response).
7. *See, e.g.*, CAL. PENAL CODE § 666 (West 2011) (imposing a recidivist increase on misdemeanor petty theft); § 666.5 (imposing a recidivist increase on felony theft).
8. U.S. SENTENCING GUIDELINES MANUAL § 4A1.1 (2013).
9. CAL. PENAL CODE § 667.

legislatures also craft provisions for misdemeanor recidivists.[10] While some states establish an additional misdemeanor offense for recidivists,[11] Alaska has taken a more aggressive approach. The state has added provisions that reclassify underlying misdemeanor violations as felonies when specific recidivist conditions are satisfied. Alaska has established this recidivist reclassification for assault,[12] theft,[13] vehicle theft,[14] and DUI.[15]

While Alaska amplifies the punishment for repeated misdemeanors with worthy intentions, it may be causing more harm than good. The statutes certainly reflect the long-standing belief that recidivists are more deserving of punishment.[16] These statutes also undoubtedly incapacitate recidivists, both through incarceration[17] and harsher post-conviction consequences.[18] But this Author is aware of no studies performed in Alaska showing that the harsher punishments established by the statutes have contributed to a drop in recidivism rates.[19]

10. *See, e.g.*, § 666 (imposing a recidivist increase on misdemeanor petty theft).

11. *See, e.g.*, N.C. GEN. STAT. § 14-33.2 (2013) (creating a Class H felony violation for a person guilty of two or more previous assault violations).

12. ALASKA STAT. § 11.41.220(a)(5) (2011).

13. § 11.46.130(a)(6).

14. § 11.46.360(a)(4).

15. § 28.35.030(n).

16. Michael Edmund O'Neill et al., *Past as Prologue: Reconciling Recidivism and Culpability*, 73 FORDHAM L. REV. 245, 246 (2004).

17. Recidivists often receive longer prison terms. *See* § 12.55.125(a)(2) (providing a mandatory term of imprisonment of 99 years for repeat murderers); § 12.55.135(g) (providing a minimum term for repeat domestic violence offenders); NORTH CAROLINA SENTENCING AND POLICY ADVISORY COMMISSION, NORTH CAROLINA FELONY PUNISHMENT CHART (2011), *available at* http://www.nccourts.org/Courts/CRS/Councils/spac/Documents /FelonyChart_12_01_11MaxChart.pdf [hereinafter NORTH CAROLINA FELONY PUNISHMENT CHART (2011)] (providing longer presumptive sentencing ranges for repeat offenders).

18. *See infra* notes 49–60.

19. Indeed, the only support for these recidivist statutes appears to be a mix of historical precedent and logical assumption. Parke v. Raley, 506 U.S. 20, 26 (1992) ("Statutes that punish recidivists more severely than first offenders have a long tradition in this country that dates back to colonial times."). The Supreme Court has explained the rationale supporting recidivist statutes generally as follows: "Its primary goals are to deter repeat offenders and . . . to segregate them from the rest of society for an extended period of time . . . based . . . on the propensities that he [or she] has demonstrated over a period of time." Rummel v. Estelle, 445 U.S. 263, 284 (1980). Meanwhile, recidivism rates remain high in Alaska. A 2007 study by the Alaska Judicial Council found that sixty-six percent of offenders come back into the system, with forty-eight percent of these returning within a year of release. ALASKA JUDICIAL COUNCIL, *supra* note 3, at 11. In 2011, a Pew Center study found that Alaska had the sixth-highest recidivism rate in the United States and the highest rate of prisoners returning because of

Furthermore, there is evidence that other states' recidivist provisions have not had a deterrent effect.[20] Given that the statutes increase the incarcerated population as well as the costs related to incarceration and post-sentence supervision,[21] the lack of evidence showing any deterrent effect is concerning.

Perhaps more ominous, these statutes may impose harsh punishments on the wrong populations. By creating such a large gap between a stand-alone misdemeanor violation and its felony recidivist counterpart, the statutes may actually increase acquittals among the most culpable defendants while forcing guilty pleas out of questionable defendants who give up their chance to face a trial's adversarial structure.[22] Prosecutors maintain a heavy bargaining chip, wielding the threat of felony incarceration and its collateral consequences against the defendant.[23] The weight of this bargaining chip gives prosecutors significant leverage in initial plea negotiations; however, prosecutors are left with no middle ground. To compromise, they have to drop the charges from a felony to a stand-alone misdemeanor violation. This cliff creates inefficiencies in the plea bargaining process, pools defendants into three over-inclusive groups, and could coerce innocent defendants into plea bargains out of fear of a possible felony conviction.[24]

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new crimes (rather than technical violations of release conditions). Chris Kling, *Study Finds High Alaska Recidivism Rates*, KTUU (Apr. 13, 2011), http://articles.ktuu.com/2011-04-13/prisoners_29415459.

20. *See* Sara J. Lewis, *The Cruel and Unusual Reality of California's Three Strikes Law:* Ewing v. California *and the Narrowing of the Eighth Amendment's Proportionality Principle*, 81 DENV. U. L. REV. 519, 542–43 & n.241 (2003) (noting that California's three strikes statute has not resulted in any significant drop in crime rates).

21. *See, e.g.*, *House Bill 75*, ALASKA H. FIN. COMM. MINUTES, 19th Leg. (Feb. 22, 1996) (statement of Anne Carpeneti, Assistant Attorney General, Department of Law) (estimating that HB 75 would result in additional costs). *See also* Andrew D. Leipold, *Recidivism, Incapacitation, and Criminal Sentencing Policy*, 3 U. SAINT THOMAS L.J. 536, 537 (2006) (calculating the cost of additional incarceration in the federal system).

22. *See* discussion *infra* Part II.A.

23. For example, a stand-alone violation of section 11.41.230 of the Alaska Statutes would be a Class A misdemeanor with a punishment of zero to one year of incarceration. *See* ALASKA STAT. § 11.41.230(b) (2011) (establishing assault in the fourth degree as a class A misdemeanor); § 12.55.135(a) (requiring imprisonment of less than one year for a class A misdemeanor). If the violation is brought under section 11.41.220(a)(5) of the Alaska Statutes, the defendant will be charged with a Class C felony with a punishment of up to five years of incarceration plus felony consequences. *See* § 11.41.220(e) (establishing assault in the third degree as a class C felony); § 12.55.125 (requiring imprisonment of less than five years for a class C felony).

24. *See infra* Part II.A. *See also* Stephanos Bibas, *Plea Bargaining Outside the Shadow of Trial*, 117 HARV. L. REV. 2463, 2507 (2004) ("The decision to go to trial is a gamble . . . . In negotiations, risk-averse people prefer sure settlements . . . .");

Furthermore, the statutes themselves may push up against the Eighth Amendment's proportionality principle[25] and the Fifth Amendment's Double Jeopardy Clause,[26] exposing the statutes to attacks on constitutional grounds.

The first section of this Note will begin by taking a close look at Alaska's novel approach to misdemeanor recidivist sentencing. It will also review the reasoning behind increased penalties for recidivists. Section II will explore the pooling and bargaining problems these statutes create, as well as how they threaten to undermine the criminal burden-of-proof requirements and decrease the efficiency of criminal litigation. This section will also examine the potential constitutional challenges that could be levied against the Alaska statutes. Finally, the last section proposes a solution that will avoid or mitigate these problems, while still fulfilling the purpose of recidivist enhancements.

I. ALASKA'S APPROACH TO MISDEMEANOR RECIDIVISM

Criminal history is one of the primary bases "for a sentencing court[] increasing an offender's sentence."[27] After the court determines a defendant's history, guidelines and statutes apply recidivist increases to augment their sentence.[28]

The primary goals of recidivist provisions are to deter and incapacitate repeat offenders, thereby protecting the public.[29] Criminal laws add a price to unwanted conduct—punishment—in an attempt to prevent actors from performing that conduct. Some scholars have justified recidivist provisions by claiming the original price was not enough to deter the offenders from the undesirable conduct and higher punishments are necessary for those specific individuals.[30] These price increases supposedly provide general deterrence to the public as well.[31]

Robert E. Scott & William J. Stuntz, *A Reply: Imperfect Bargains, Imperfect Trials, and Innocent Defendants*, 101 YALE L.J. 2011, 2012 (1992) ("If . . . innocent defendants as a class are significantly more risk averse than guilty defendants as a class, a prosecutor's failure to internalize a defendant's private information will cost the prosecutor nothing because the defendant, even if innocent, will take the deal anyway.").

25. U.S. CONST. amend. VIII.

26. U.S. CONST. amend. V.

27. Almendarez-Torres v. United States, 523 U.S. 224, 243 (1998).

28. Russell, *supra* note 6, at 1144.

29. White, *supra* note 5 (citing Rummel v. Estelle, 445 U.S. 263, 284 (1980)); *see* Leipold, *supra* note 21, at 542 ("[T]hose in prison don't commit any new crimes except against guards and other inmates.").

30. *E.g.*, O'Neill et al., *supra* note 16.

31. Russell, *supra* note 6, at 1153.

Indeed, as the Alaska Supreme Court has explained:

> Habitual criminal statutes are founded on the general principle that persistent offenders should be subject to greater sanctions than those who have been convicted only once. These statutes serve as a warning to first time offenders and provide them with an opportunity to reform. It is only upon subsequent convictions for repeated criminal conduct that increasingly stiffer sentences are imposed. The reason the sanctions become increasingly severe is not so much that the defendant has sinned more than once, but that he is deemed incorrigible when he persists in violations of the law after conviction of previous infractions.[32]

Recidivists are also considered more culpable offenders because they are on notice and have experience with the justice system.[33] Furthermore, criminal history is one of the strongest predictors of future criminal acts.[34]

In light of these justifications,[35] various states have addressed the misdemeanor recidivist problem by creating felony offenses to augment[36] or replace[37] the original underlying misdemeanors. Alaska courts have explained that their legislature was motivated by at least four different goals in enacting the state's recidivism regime, including improved public safety, reducing repeat offenses, providing clear and easily-understood penalties, and restoring public trust in the criminal

32. State v. Carlson, 560 P.2d 26, 28–29 (Alaska 1977) (citation omitted) (internal quotation marks omitted); *see* Wooley v. State, 221 P.3d 12, 15 (Alaska Ct. App. 2009) (citing and applying *Carlson* in the context of Alaska's misdemeanor upgrade statutes).

33. *See* O'Neill et al., *supra* note 16, at 247 (noting first-time offenders' "lack of familiarity with the criminal justice system"); Aaron J. Rappaport, *Rationalizing the Commission: The Philosophical Premises of the U.S. Sentencing Guidelines*, 52 EMORY L.J. 557, 596–97 (noting that a recidivist criminal "acts with full awareness" of the consequences of his conduct).

34. Rappaport, *supra* note 33, at 590–91 & n.110.

35. *See* Eberhardt v. State, 275 P.3d 560, 566–67 (Alaska Ct. App. 2012) ("The legislature determined that a person who commits three offenses within a ten-year period is a particularly dangerous offender who deserves enhanced punishment.") (Coats, J., dissenting). *See also Wooley*, 221 P.3d at 19 (noting the legislature's goals when enacting the three-strikes law were the traditional goals of (1) improving public safety; (2) reducing the number of serious, repeat offenders; (3) setting proper and simplified sentencing practices; and (4) restoring public trust in our criminal justice system).

36. *See* N.C. GEN. STAT. § 14-33.2 (2013) (augmenting an assault charge with a Class H felony).

37. *See* ALASKA STAT. § 11.41.220(a)(5) (2011) (replacing the original Class A misdemeanor with a Class C felony).

justice system.[38] In Alaska, misdemeanor assault,[39] theft,[40] vehicle theft,[41] and DUI[42] become felonies after the second or third separate conviction in a five- to ten-year period, depending on the offense. In pertinent parts, the Alaska statutes provide that a person who commits the specified misdemeanor, and who has previously been convicted of one of a set of listed crimes, can be punished under a new felony offense. Similarly, in North Carolina, a separate substantive felony offense can be charged against a person who has committed misdemeanor assault or theft and has two or more prior convictions of assault or theft within the preceding fifteen years.[43]

This jump in punishment for non-traffic related offenses is a new and relatively rare method of punishing misdemeanor recidivists.[44] But the stage is set: misdemeanor violations, once only punishable by a maximum of one year in jail,[45] can now trigger felony charges and consequences if the criminal history conditions are satisfied.

II. POTENTIAL PROBLEMS WITH ALASKA'S CLASSIFICATION OF RECIDIVIST MISDEMEANOR OFFENSES

This unique reclassification instantly implicates the felony-misdemeanor distinction. This distinction has been described as "[t]he most important classification of crime in general use in the United States."[46] States generally rely on the distinction to scale their laws and

38. *Wooley*, 221 P.3d at 19.
39. § 11.41.220(a)(5).
40. § 11.46.130(a)(6).
41. § 11.46.360(a)(4).
42. § 28.35.030(n).
43. N.C. GEN. STAT. § 14-33.2 (2013).
44. Although all fifty states have adopted some type of recidivist punishment regime, White, *supra* note 5, the most common approach is to enact so-called "three strikes laws" that punish multiple felony convictions. The Alaska approach of upgrading multiple misdemeanor offenses into a felony conviction is uncommon outside of the traffic offense context, though not unheard of. *See, e.g.*, FLA. STAT. § 784.03 (2013) (creating a third-degree felony for a person guilty of two or more batteries, aggravated batteries, or felony batteries). By contrast, most states upgrade misdemeanor traffic offenses, like driving under the influence of alcohol, to felonies after a certain number offenses. *See infra* note 136 and accompanying text (listing states which upgrade misdemeanor traffic offenses to felonies).
45. *See, e.g.*, ALASKA STAT. § 12.55.135 (2011) ("A defendant convicted of a class A misdemeanor may be sentenced to a definite term of imprisonment of not more than one year.").
46. WAYNE R. LAFAVE, CRIMINAL LAW 34 (4th ed. 2003).

punishments.[47] While misdemeanors are seen as minor infractions,[48] felonies are considered serious offenses and can leave a stigma for life.[49] Felony convictions result in longer prison sentences,[50] harsher pre-trial sanctions,[51] and more invasive post-sentence supervision.[52] Felons struggle in the marketplace when hunting for jobs, housing, credit, and relationships.[53] Other consequences include disenfranchisement;[54] prohibition from acquiring professional licenses;[55] exclusion from the purchase and ownership of firearms;[56] ineligibility from sitting on a jury;[57] ineligibility for government assistance, welfare, and federally-funded housing;[58] the establishment of grounds for uncontested divorce;[59] and, for non-citizens, even deportation.[60]

While this article takes no position on the merits of these collateral consequences per se, the punishment must fit the crime.[61] When the

47. Sameer Bajaj, *Policing the Fourth Amendment: The Constitutionality of Warrantless Investigatory Stops for Past Misdemeanors*, 109 COLUM. L. REV. 309, 346 & n.253 (2009).

48. *See* LAFAVE, *supra* note 46, at 34–36 (describing the key differences between felonies and misdemeanors, with the latter carrying less severe penalties).

49. *See* C. William Ralston, *An Act of Criminal "Skullduggery"?: A Critical Analysis of the Circuit Split Resolved in* United States v. Abuelhawa, 112 W. VA. L. REV. 1023, 1042–44 (2010).

50. George C. Thomas III, *A Modest Proposal to Save the Double Jeopardy Clause*, 69 WASH. U. L.Q. 195, 212 (1991).

51. Kirsten Howe, *Criminal Nonsupport and a Proposal for an Effective Felony-Misdemeanor Distinction*, 37 HASTINGS L.J. 1075, 1090 (1986).

52. *Id.*

53. *Id.*

54. *See, e.g.*, ALASKA CONST. art. V, § 2 (disenfranchising some felons); ALASKA STAT. § 15.80.010 (2011) (defining the term used to disenfranchise felons); Christopher R. Murray, *Felon Disenfranchisement in Alaska and the Voting Rights Act of 1965*, 23 ALASKA L. REV. 289, 289–98 (2006) (describing how "Alaska limits the voting rights of felons").

55. *See, e.g.*, § 21.27.410(a)(7) (permitting the denial of insurance licenses to those who have been convicted of a felony).

56. *See, e.g.*, § 11.61.200(a)(1) (criminalizing possession of a firearm capable of concealment after being convicted of a felony).

57. *See, e.g.*, § 09.20.020 ("A person is disqualified from serving as a juror if the person . . . has been convicted of a felony for which the person has not been unconditionally discharged . . . .").

58. *See, e.g.*, 42 U.S.C. § 1437d(*l*)(4)(A)(ii) (2012) (providing a maximum of thirty days before a lease must be terminated after a felony conviction). *See also* Ralston, *supra* note 49, at 1043–44 (noting that food stamps and Social Security benefits can be stripped).

59. *See, e.g.*, ALASKA STAT. § 25.24.050(3) (allowing divorce grounded on a felony conviction).

60. Ralston, *supra* note 49, at 1044.

61. Weems v. United States, 217 U.S. 349, 367 (1910) ("[P]unishment for crime should be graduated and proportioned to offense.").

default punishment is high, and when there is no bridge between possible punishments on the prosecutorial menu, plea bargaining, burden of proof, and proportionality difficulties arise.[62] The Alaska recidivist misdemeanor reclassifications create cliff effects in the prosecutorial landscape, causing over-inclusive defendant pooling, plea bargaining inefficiency, and proportionality concerns.[63] The State's burden of proof and the defendant's presumption of innocence are damaged because the prosecutorial menu provides a heavy initial threat for the prosecutor but leaves him no efficient, smooth slope upon which he can negotiate the sentence. Instead, he is forced to negotiate around the cliff, anchoring his negotiation with a threatened felony and its consequences, but then falling immediately down to the stand-alone misdemeanor violation.[64] Proportionality is implicated when the traditional misdemeanor violations are elevated to felony offenses and carry with them the numerous collateral consequences.[65] Reclassifying a new offense purely out of recidivist elements also creates double jeopardy concerns.[66]

A. Defendant Pooling, Plea Bargaining, and the Burden of Proof

Plea bargaining remains a controversial subject in Alaska and its role in sentencing for the most serious felonies remains in flux.[67]

62. *See infra* Parts II.A–B.

63. *See infra* Part II.A.

64. For example, an Alaska prosecutor can bring charges under section 11.41.230 of the Alaska Statutes, which would be a class A misdemeanor with zero to one year of incarceration, or charge the recidivist upgrade under section 11.41.220(a)(5) of the Alaska Statutes, which would be a class C felony, providing a presumptive sentence of two years' incarceration and as many as five years, depending on prior criminal history, plus felony collateral consequences. There is no in between option. As a parallel example, take the case of *Baker v. Duckworth*, 752 F.2d 302 (7th Cir. 1985), where "[t]he Marion County prosecutor added this habitual offender count to the pending theft charge after plea bargaining attempts with Baker proved unsuccessful . . . ." *Id.* at 303–04. Baker was convicted of theft and the jury found that he was a habitual offender. *Id.* the court therefore enhanced his sentence. *Id.*

65. *See infra* discussion of collateral consequences in Part II.

66. *See* Harold Dubroff, *Recidivist Procedures*, 40 N.Y.U. L. REV. 332, 348 (1965) ("Possible constitutional problems are created by recidivist statutes inasmuch as the defendant has already been punished for his prior crimes.").

67. The Alaska Attorney General's own shifting positions on plea bargaining are emblematic of the ambivalence toward this issue. Prior to 1975, plea bargaining was "fully institutionalized" in Alaska. Michael Rubinstein & Teresa White, *Alaska's Ban on Plea Bargaining*, 13 L. SOC. REV. 367, 367 (1979). According to a report prepared by the Alaska Judicial Council, lawyers believed that "unless it was crystal clear that you had a client who maintained his innocence—you went to the D.A. to see what could be worked out." MICHAEL L.

However, plea bargaining has played an overwhelmingly large role in Alaskan criminal law.[68] According to the 2012 Alaska Court System Annual Report, 4,892 out of the 6,623 felony cases were disposed of via plea bargains.[69] "The principle that there is a presumption of innocence in favor of the accused is the undoubted law, axiomatic and elementary, and its enforcement lies at the foundation of the administration of our criminal law."[70] This foundational principle forms the basis for all criminal trials. To avoid this heavy burden and save on litigation costs and resources, prosecutors offer plea bargains.[71] The bargains typically offer reduced charges in exchange for a guilty plea.[72] Defendants negotiate toward an agreeable settlement in the "shadow" of their impending trial.[73] Both parties work together to find a settlement that is mutually satisfying, given the evidence, charges, and trial costs.[74]

The "shadow of trial" theory purports that litigants "bargain

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RUBINSTEIN ET AL., THE EFFECT OF THE OFFICIAL PROHIBITION OF PLEA BARGAINING ON THE DISPOSITION OF FELONY CASES IN THE ALASKA CRIMINAL COURTS 2 (1978). However, in 1975, Alaska's Attorney General banned plea bargaining by its prosecutors. *Id.* at 1. Attorney General Gross justified the ban on the grounds that it promoted public confidence in the justice system and created a system wherein people could be fairly charged. *Id.* at 15–17. But despite the official ban, "charge bargaining" continued to occur. *Id.* at 19. However, Alaska's current Attorney General, Michael Geraghty, announced a slight change in policy in 2013. Michelle Boots, *State Puts an End to Sentencing Deals in Serious Crimes*, ANCHORAGE DAILY NEWS (July 23, 2013), http://www.adn.com/2013/07/23/2987774/law-department-puts-an-end-to.html. This change does not affect the present analysis because his office merely announced that it would no longer make deals with defendants about the length of jail time they would receive for most serious classes of felonies and cases involving sexual assault. *Id.*

68. In 1974, for example, roughly ninety-four percent of criminal cases were resolved by plea bargaining. *Alaska Plea Bargaining Ban Successful*, THE LEDGER, May 18, 1978, at 8B.

69. ANNUAL REPORT FY 2012, ALASKA COURT SYSTEM 89 tbls.4.18 & 4.19 (2012), *available at* http://courts.alaska.gov/reports/annualrep-fy12.pdf.

70. Coffin v. United States, 156 U.S. 432, 453 (1895).

71. Gabriel J. Chin & Richard W. Holmes, Jr., *Effective Assistance of Counsel and the Consequences of Guilty Pleas*, 87 CORNELL L. REV. 697, 703 (2002) ("[I]n some cases defendants who might be acquitted after trial plead guilty to relatively minor offenses because the cost of defense exceeds seemingly minimal penalties and consequences."); Russell D. Covey, *Signaling and Plea Bargaining's Innocence Problem*, 66 WASH. & LEE L. REV. 73, 74 (2009) ("The latest data available indicates that approximately 95% of all adjudicated felony criminal charges are disposed with through guilty pleas.").

72. Thomas R. McCoy & Michael J. Mirra, *Plea Bargaining as Due Process in Determining Guilt*, 32 STAN. L. REV. 887, 893 (1980) ("In plea bargaining, the state attempts to induce defendants to plead guilty by threatening to impose a harsher sentence should they be convicted at trial than it would impose if they pleaded guilty.").

73. Bibas, *supra* note 24, at 2464.

74. *Id.*; Covey, *supra* note 71.

toward settlement in the shadow of expected trial outcomes" by "forecast[ing] the expected trial outcome and strik[ing] bargains that leave both sides better off."[75] A perfectly rational defendant facing criminal charges will weigh the punishment awaiting him if convicted at trial against his chance of conviction. If his expected value of punishment[76] in trial is higher than the expected value of punishment through a plea bargain, he will always take the plea, regardless of his culpability.[77] The prosecutor faces his own calculus—he will weigh the time, effort, and value of fully punishing given the chance of conviction in court against the value of a bargained punishment.[78] When the calculus favors a bargain for both parties, the case settles.

Murder cases provide the purest example of this bargaining. Prosecutors generally pursue these cases when feasible,[79] likely in part due to the stirring facts and general public outcry. Because a high percentage of these cases are pursued, a high percentage of them go to trial.[80] Prosecutors in these publicized, grisly cases chase the highest penalties.[81] Thus, the settlement curves are accurately calculated, and plea bargains "fall squarely in the law's shadow" based on the expected trial outcomes.[82]

However, plea bargaining calculus is not an exact science. While pure theory predicts that all charged defendants should agree to some reasonable plea based on their forecasted trial,[83] many factors can distort rational plea bargaining calculations. These factors include the time value of liberty;[84] imperfect heuristics;[85] overconfidence;[86] denial;[87] poor

75. Covey, *supra* note 71, at 74 n.1 (quoting Bibas, *supra* note 24, at 2464).

76. The expected value of punishment is a defendant's presumptive punishment multiplied by the chance of receiving that punishment.

77. *See* Gregory M. Gilchrist, *Plea Bargains, Convictions and Legitimacy*, 48 AM. CRIM. L. REV. 143, 146 (2011) ("The practice of plea bargaining—granting a benefit to the defendant in exchange for the waiver of certain trial and appellate rights—provides an incentive to plead guilty.").

78. *Id*.

79. William J. Stuntz, *Plea Bargaining and Criminal Law's Disappearing Shadow*, 117 HARV. L. REV. 2548, 2563 (2004).

80. *See id*. ("In murder cases, prosecutors generally pursue every case they can, which is why the acquittal rate in such cases is so much higher than for felonies generally.").

81. *See id*. ("Then too, prosecutors probably try to maximize punishment in murder cases—not counting death sentences—partly because the public wants the harshest possible punishment in those cases, and partly because the prosecutors themselves believe it just.").

82. *Id*.

83. *See* Covey, *supra* note 71 (citing Bibas, *supra* note 24, at 2464) (noting that in theory both innocent and guilty defendants "almost always act rationally by pleading guilty rather than contesting guilt at trial").

84. *See* Gilchrist, *supra* note 77, at 154–55 (discussing how defendants value

representation;[88] memory problems surrounding the alleged crime;[89] mental illness;[90] a lack of discovery;[91] attorney workloads and resources;[92] risk and loss aversion;[93] defendant demographics;[94] and most pertinently, the valuation of collateral consequences. These distorting factors may further distance actual guilt from the defendant's willingness to plead guilty.[95]

While these insidious variables warp the plea bargaining calculus, defendants are still eager to plea. The eagerness comes from a desire for finality; while going to trial presents uncertainty and the threat of harsher punishment, plea bargains "barter away [the] chance for acquittal for a lower but more certain sentence."[96] Because many people are loss averse, they prefer a certain smaller loss to the chance of a larger loss.[97] A loss-averse defendant prefers a one hundred percent chance of a one-year punishment over a fifty percent chance of a two-year punishment.[98] Furthermore, innocent defendants are even more loss-averse than guilty defendants.[99] Certain cases are also harder to prove, regardless of the defendant's underlying factual guilt.[100] Given these incentives, the aforementioned confounding variables, and the prevalence of plea bargaining regardless of factual guilt, the prosecutorial menu must be flexibly and smoothly structured to account for plea-bargaining distortions and to match negotiation needs.

On top of these psychological and logistical factors that distort plea-bargaining calculus, the recidivist statutes in Alaska exacerbate plea-bargaining problems. Only smoothly graduated punishment

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their liberty interests).

85. *Id*. (quoting Bibas, *supra* note 24, at 2496).

86. Bibas, *supra* note 24, at 2464.

87. *Id*.

88. Oren Gazal-Ayal, *Partial Ban on Plea Bargains*, 27 CARDOZO L. REV. 2295, 2302–03 (2006).

89. Bibas, *supra* note 24, at 2531.

90. *Id*.

91. *Id*.

92. *See* Stuntz, *supra* note 79, at 2555 (discussing the difficulties faced by underfunded law enforcement agencies).

93. Bibas, *supra* note 24, at 2464.

94. *Id*. at 2511–12.

95. Gilchrist, *supra* note 77, at 146–48 (discussing a situation in which an innocent defendant nonetheless chose to plead guilty).

96. Bibas, *supra* note 24, at 2507.

97. *Id*. at 2508.

98. *See id*. Daniel Kahneman and Amos Tversky have found people are loss adverse and typically "would prefer a certainty of losing $50 to a 50 percent chance of losing $100." *Id.*

99. Scott & Stuntz, *supra* note 24.

100. Covey, *supra* note 71, at 82.

options will allow for smooth, efficient plea negotiations—negotiations that can seamlessly react to the shadows of trial and variations in evidence.[101]

Instead, the Alaska Statutes create massive cliffs with their recidivist sentencing structure. The shadow of trial is formed around the felony conviction for recidivism, its enhanced incarceration period, and its collateral consequences. Any plea-bargaining that takes place will be forced to vacillate between that harsh felony punishment and the lesser misdemeanor sentence. By creating a cliff between the felony recidivist offense and the stand-alone misdemeanor violation, Alaska has caused the prosecutor and defendant have no middle ground on which to meet.

Precisely quantifying the cliff effect is made even more difficult by the imprecise valuation of felony collateral consequences. While most recidivist increases operate within their offense spectrum, where misdemeanors remain misdemeanors and felonies remain felonies,[102] shifting between a misdemeanor and a felony brings about not only increased incarceration, but new felony collateral consequences. Quantifying these consequences, which are not numerical in nature, is difficult for both parties in plea negotiations, and both parties already suffer from several obfuscating effects. This exacerbates the already intimidating cliff effect, adding an extra layer of complication and (potentially mis-)calculation to the plea-bargaining calculus.

Given these distant and obscure posts on which the negotiations must be anchored, defendants will likely pool into three categories. When prosecutors have very strong cases, they will likely not bother with the misdemeanor offer; when they have very weak cases, they would likely bargain at or below the misdemeanor level anyway. The massive cliff between the full charge and any possible bargain creates gross inefficiencies for those mid-level defendants with average cases or inconclusive evidence. The prosecutor is thus likely limited to those two distant landmarks, regardless of the variations in case strength among this enlarged middle class.

This structure causes several problems. The first group, holding the prosecutor's strongest cases, will now be forced to trial more frequently because the stand-alone misdemeanor punishment is too lenient a bargain in the prosecutor's eyes. The raw increase in trials will lead to a natural increase in acquittals as well, even though these defendants are

101. *See* Bibas, *supra* note 24, at 2535 ("While determinate sentencing is less uncertain than indeterminate sentencing, it risks being lumpy. If we wanted plea bargaining to work like a smooth, efficient market, we would have to iron out its rigidity and lumps.").

102. *E.g.*, CAL. PENAL CODE §§ 666, 666.5, 667, 1170 (West 2011).

often the most culpable. This will also reduce the number of cases that plead out. The increase in tried cases will increase the costs of litigation imposed on the state and stretch the resources of prosecutor and defender offices beyond their current level.[103]

The second group, holding middling levels of evidence, will increase in size but decrease in negotiation efficiency. The most risk-averse defendants will take the stand-alone misdemeanor plea because it is the only offer they can get. They can easily be coerced into accepting misdemeanor charges, given the risks and costs of felony punishment and collateral consequences. To avoid a potentially massive loss, even innocent defendants could take pleas.[104] Their natural loss aversion encourages taking the plea to lock down an acceptable and certain sentence instead of rolling the dice at trial.[105] Many more defendants will present cases that may deserve harsher punishment than the stand-alone misdemeanor provides, but are not worth taking to trial because the evidence is not strong enough for the prosecutor. These defendants will quickly accept the stand-alone misdemeanor bargain, as they are getting a great deal given the potential punishment at trial. In essence, the sentencing differentials leave many of these mid-level defendants with no choice but to plea, despite their case strength (or lack thereof).[106]

The final group, holding the prosecutor's weakest cases, will be mostly unaffected because they will almost always be bargaining at or below the stand-alone offense, given their low chance of conviction at trial.

In summary, heavy top-end penalties without smooth surrounding gradations will not allow prosecutors to efficiently negotiate bargains. Defendants will be stuck with lumpy offers, and they will pool together regardless of the variations in their groups. Not only does this stretch the resources of the litigants, acquit a larger number of strong cases, and expose weak and innocent defendants to harsh penalties and plea deals, but it also degrades the burden of proof for the large class of middling defendants.[107]

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103. Stuntz, *supra* note 79, at 2554–56.

104. *See* Scott W. Howe, *The Value of Plea Bargaining*, 58 OKLA. L. REV. 599, 630 (2005) ("[B]argaining promotes false guilty pleas[.]"); Covey, *supra* note 71, at 82 ("Cases that turn on a confident witness's identification, for example, may look quite strong to a jury but include a large proportion of actually innocent defendants.").

105. Bibas, *supra* note 24, at 2507.

106. *See* Maximo Langer, *Rethinking Plea Bargaining: The Practice and Reform of Prosecutorial Adjudication in American Criminal Procedure*, 33 AM. J. CRIM. L. 223, 224–25 (2006) (discussing the problems with the current state of plea bargains in the American justice system).

107. *See id*. at 230–31 (telling the tale of an eighty-eight dollar forgery earning

The mid-level defendants averse to the intimidating felony charges will plea to lesser offenses at extremely high rates. The mid-level defendants with damning cases who nonetheless get a bargain offer will take it with haste. Thus, the predominant burden of proof becomes probable cause.[108] Probable cause is the standard that most prosecutors must meet when leveling formal criminal charges.[109] It is not necessary for a prosecutor to be convinced beyond a reasonable doubt to issue formal charges, offer a plea bargain, and secure a guilty plea.[110] When the prosecutor's only options are to initiate stand-alone misdemeanor offenses or felony recidivist charges, the disparate penalties drive bargains in a large number of the middle class of defendants. Given the increased incentive to plead (increased from an already high rate), the standard of proof so revered in our constitutional system is reduced to mere probable cause.[111] This erosion away from the reasonable doubt standard is of great harm to the criminal justice system:

> The reasonable-doubt standard plays a vital role in the American scheme of criminal procedure. It is a prime instrument for reducing the risk of convictions resting on factual error . . . . Accordingly, a society that values the good name and freedom of every individual should not condemn a man for commission of a crime when there is reasonable doubt about his guilt . . . . [T]he reasonable-doubt standard is indispensable to command the respect and confidence of the community in applications of the criminal law. It is critical that the moral force of the criminal law not be diluted by a standard of proof that leaves people in doubt whether innocent men are being condemned. It is also important in our free society that every individual going about his ordinary affairs have confidence that his government cannot adjudge him guilty of a criminal offense without convincing a proper factfinder of his guilt with utmost certainty.[112]

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a recalcitrant defendant life in prison). *See also* Stuntz, *supra* note 79 ("[P]rosecutors [may] threaten the death penalty in cases in which they have no desire to impose it, as a means of getting better plea bargains.").

108. Gilchrist, *supra* note 77, at 153 ("Where the government has: (a) probable cause to bring a series of charges with significantly disparate penalties, and (b) discretion to select among those charges, then the effective burden of proof to secure a conviction can be reduced to as little as probable cause.").

109. Langer, *supra* note 106, at 261 n.146 (2006).

110. *Id.* at 260–61.

111. Gilchrist, *supra* note 77, at 153.

112. *In re* Winship, 397 U.S. 358, 363–64 (1970) (internal citations omitted).

B. Proportionality

The Eighth Amendment doctrine of proportionality[113] has long been the subject of academic analysis, but it has been infrequently used to decide cases.[114] The Supreme Court first invalidated a sentence on proportionality grounds in 1910.[115] Since then, use of the proportionality principle to invalidate non-capital sentences has been exceedingly rare and quite muddled—the primary cases[116] have provided more uncertainty than clarity.[117]

Proportionality challenges ask when an otherwise constitutional punishment is "so 'excessive' or 'disproportionate' in relation to the crime for which they are imposed that [it becomes] unconstitutional."[118] *Weems v. United States* held that the "punishment for crime should be graduated and proportioned to offense" and struck down a non-capital sentence.[119] Many years after *Weems*, *Solem v. Helm*[120] enunciated a proportionality test. First, the Court required a comparison of "the gravity of the offense and the harshness of the penalty . . . in light of the harm caused or threatened to the victim or society, and the culpability of

113. U.S. CONST. amend. VIII; *see* Robinson v. California, 370 U.S. 660, 667 (1962) (holding that the the Eighth Amendment applies to the states through the Fourteenth Amendment).

114. *See* Youngjae Lee, *The Constitutional Right Against Excessive Punishment*, 91 VA. L. REV. 677, 688 (2005) ("Between 1910, when *Weems* was decided, and 1972, when the Court decided *Furman v. Georgia*, the *Weems* principle of proportionality—that the Eighth Amendment barred disproportionate sentences—was rarely cited by the Court.").

115. Weems v. United States, 217 U.S. 349 (1910).

116. Ewing v. California, 538 U.S. 11 (2003); United States v. Bajakajian, 524 U.S. 321 (1998); Harmelin v. Michigan, 501 U.S. 957 (1991); Solem v. Helm, 463 U.S. 277 (1983); Rummel v. Estelle, 445 U.S. 263 (1980).

117. See Joshua R. Pater, *Struck Out Looking: Continued Confusion in Eighth Amendment Proportionality Review After* Ewing v. California, *123 S. Ct. 1179 (2003)*, 27 HARV. J.L. & PUB. POL'Y 399, 407–10 (2003) for an overview of the continuing problems in fairly applying the Eighth Amendment. Alaska has seen only a small number of cases that raise this issue. However, the courts have interpreted the Alaska Constitution in a similar manner to the U.S. Constitution, finding that it prevents punishments that are "so disproportionate to the offense committed as to be completely arbitrary and shocking to the sense of justice." Thomas v. State, 566 P.2d 630, 635 (Alaska 1977) (quoting Green v. State, 390 P.2d 433, 435 (Alaska 1964)). *See also* McNabb v. State, 860 P.2d 1294, 1298 (Alaska Ct. App. 1993) (discussing whether or not fines imposed on a fisherman were excessive). Since the U.S. Constitution establishes the baseline for rights in this context and the Alaska courts have interpreted the U.S. and Alaska Constitutions similarly, the following analysis focuses on the federal constitutional right.

118. Lee, *supra* note 114, at 679.

119. *Id.* at 687–88 (quoting *Weems*, 217 U.S. at 367).

120. 463 U.S. 277 (1983).

the offender."[121] Second, the Court stated that "it may be helpful to compare the sentences imposed on other criminals in the same jurisdiction" to see whether "more serious crimes are subject to the same penalty, or to less serious penalties."[122] Third, the Court suggested that "courts may find it useful to compare the sentences imposed for commission of the same crime in other jurisdictions."[123]

The Court softened *Solem*'s full test in *Harmelin v. Michigan*.[124] In *Harmelin*, the first weighing step remained, but the jurisdictional comparisons that composed the second and third steps became wholly discretionary.[125] Finally, in *Ewing v. California*,[126] the court declared that a "sentence can have a variety of justifications, such as incapacitation, deterrence, retribution, or rehabilitation"[127] and that it is "enough" that the state has a "reasonable basis for believing" that its punishment "advance[s] the goals of [its] criminal justice system in any substantial way."[128]

In essence, what started as an inter- and intra-jurisdictional test that examined the gravity of crimes and punishments was neutered, now calling for almost complete deference to the legislature when weighing the gravity of the punishment to the offense.[129] There are reasons for this: differences in non-capital punishments can arise from judicial discretion, sentencing preferences, and penological ideals.[130] Administering a robust non-capital proportionality doctrine could also prove unwieldy given the sheer number of non-capital cases courts encounter.[131] Finally, deference to the state legislature honors federalism ideals.[132]

Alaska's provisions must be put to the "gravity" test. By itself, the original misdemeanor charges would result in up to a one-year

121. *Id*. at 290–92.
122. *Id*. at 291.
123. *Id*.
124. 501 U.S. 957 (1991).
125. *Id*. at 1005; Lee, *supra* note 114, at 731–32 (recounting the *Harmelin* decision).
126. 538 U.S. 11 (2003).
127. *Id*. at 25.
128. *Id*. at 28.
129. *See* Lee, *supra* note 114, at 681–82, 693–96 (providing an overview of the historical development of Eighth Amendment jurisprudence).
130. Julia Fong Sheketoff, *State Innovations in Noncapital Proportionality Doctrine*, 85 N.Y.U. L. REV. 2209, 2215–16 (2010).
131. *Id*. at 2216–17.
132. *Id*. at 2217 ("[T]he [Supreme] Court has asserted that a weak noncapital doctrine is necessary to ensure an appropriate level of deference to state legislative policymaking.").

sentence.[133] With the upgraded felony offense, a presumptive sentence of up to two years is applied, in addition to felony consequences.[134] This creates a one hundred percent increase in incarceration and tacks on collateral consequences long after the sentence has been served. In misdemeanors related to driving under the influence, many other states apply a felony reclassification to an inherent misdemeanor violation.[135]

133. ALASKA STAT. § 12.55.135 (2011).

134. § 12.55.125. The sentence can rise up to five years of incarceration, depending on criminal history. *Id.*

135. *See* ALA. CODE §§ 32-5A-191(e)–(h) (1983) (DUI misdemeanor aggravated to felony at fourth offense in five year window); ARIZ. REV. STAT. ANN. §§ 28-1382–1383 (2012) (DUI misdemeanor aggravated to felony at third offense); ARK. CODE ANN. §§ 5-65-111–112 (West 2013) (fourth DUI offense is a felony, fewer offenses not classified); CONN. GEN. STAT. §§ 14-227a, 53a-25–26 (West 2013) (DUI misdemeanor aggravated to felony at fourth offense in five-year window); DEL. CODE ANN. tit. 21, §§ 4177(d), 4177B(e)(2) (West 2013) (DUI misdemeanor aggravated to felony at third offense); FLA. STAT. § 316.193 (West 2013) (DUI misdemeanor aggravated to felony at third offense in ten-year window); HAW. REV. STAT. §§ 291E-61, 291E-61.5 (West 2013) (DUI misdemeanor aggravated to felony at fourth offense); IDAHO CODE ANN. §§ 18-8004C–80005 (West 2013) (Blood Alcohol Content greater than .2 aggravated from misdemeanor to felony at third offense); 625 ILL. COMP. STAT. 5/11-501 (West 2013) (DUI misdemeanors aggravated to a felony at third offense); IOWA CODE § 321J.2 (West 2011) (DUI misdemeanor aggravated to felony at third offense); KAN. STAT. ANN. § 8-1567 (West 2013) (DUI nonperson misdemeanor aggravated to nonperson felony at third offense); KY. REV. STAT. ANN. § 189A.020(5) (West 2010) (BAC greater than .18 misdemeanor aggravated to felony at third offense); LA. REV. STAT. ANN. § 14:98 (2013) (uncategorized first and second offenses for DUI, third offense either a misdemeanor or felony, a felony at the fourth offense); MASS. GEN. LAWS ch. 274 § 1, ch. 90 § 24 (West 2014) (third DUI offense is a felony, prior offenses unclassified); MICH. COMP. LAWS § 257.625 (West 2013) (DUI misdemeanor aggravated to felony at third offense in ten year window); MISS. CODE ANN. § 63-11-30 (West 2014) (DUI misdemeanor aggravated to felony at third offense); MO. REV. STAT. § 302.321 (West 2011) (misdemeanor of driving on canceled, revoked, or suspended license aggravated to a felony at fourth offense); MONT. CODE ANN. §§ 61-8-714, 61-8-731 (West 2013) (DUI misdemeanor aggravated to a felony at fourth offense); NEB. REV. STAT. §60-6,196(1) (West 2013) (fourth DUI offense within twelve years aggravates misdemeanor to felony); NEV. REV. STAT. § 484C.400 (West 2009) (DUI misdemeanor aggravated to a felony at third offense); N.H. REV. STAT. ANN. § 265-A:18 (2013) (non-injury driving while intoxicated misdemeanor aggravated to felony at fourth offense); N.M. STAT. ANN. § 66-8-102 (West 2010) (fourth DUI offense classified as a felony, prior offenses not classified); N.Y. V. & T. LAW § 1193 (McKinney 2013) (driving while impaired misdemeanor aggravated to felony at second offense within ten years); N.C. GEN. STAT. ANN. § 20-138.5 (West 2006) (impaired driving fourth offense is a felony, prior offenses are level 1–5 offenses); OR. REV. STAT. ANN. § 813.010 (West 2013) (DUI misdemeanors aggravated to a felony at fourth offense); S.D. CODIFIED LAWS §§ 32-23-2–4 (2013) (DUI misdemeanor aggravated to felony at third offense); TEX. PENAL CODE ANN. §§ 49.04, 49.09 (DUI misdemeanor aggravated to felony at third offense in ten years); UTAH CODE ANN. § 41-6a-503 (West 2013) (first two offenses within six years are class B misdemeanors, third and subsequent offenses within ten years are third degree felonies); WYO. STAT.

This certainly weighs against the inter-jurisdictional prong of the test outlined in *Solem v. Helm*.[136] In addition, North Carolina's felony charge only gives the defendant a presumptive sentence of four to six months, not two years.[137] Within Alaska, the felony reclassification is limited to assault, vehicle theft, and DUI.[138] No other Class A misdemeanors are subject to the same recidivist reclassifications.

Given the current state of non-capital proportionality doctrine, however, any proportionality challenges to the Alaskan recidivist provisions are likely to fall on deaf ears. Although the felony consequences and incarceration periods are certainly heavy,[139] the broad deference given to state legislatures will likely defeat any claims against the punishment. Many penological theories satisfied the *Ewing* Court,[140] and Alaska's legislature spent considerable time discussing the need for deterrence and incapacitation.[141] Comparative jurisdictional analysis weighs against the provisions—Alaska, Florida, and North Carolina are the only states this Author is aware of to broadly apply felony charges based on misdemeanor recidivism alone, and even North Carolina's application is significantly more lenient than Alaska's.[142] However, this prong of the test is wholly discretionary after *Harmelin*.[143] Although Alaska only applies the felony reclassification to a few misdemeanors, this will most likely be chalked up to state needs and legislative deference.[144]

ANN. § 31-5-233 (West 2013) (non-injury DUI offenses are misdemeanors, fourth or subsequent offenses within five years are felonies).

136. 463 U.S. 277 (1983).

137. *See* NORTH CAROLINA FELONY PUNISHMENT CHART (2011), *supra* note 17 (recommending a presumptive range of four to six months).

138. *See supra* notes 11–15 and accompanying text.

139. *See supra* notes 49–60 and accompanying text. *See also* Julia L. Torti, *Accounting for Punishment in Proportionality Review*, 88 N.Y.U. L. REV. 1909, 1909–10 (2013) ("Though courts have interpreted the Eighth Amendment to offer more expansive protection in specific contexts, such as for certain offenders facing the death penalty, individuals serving term-of-years sentences very rarely get relief under the Eighth Amendment."); Rachel E. Barkow, *The Court of Life and Death: The Two Tracks of Constitutional Sentencing Law and the Case for Uniformity*, 107 MICH. L. REV. 1145, 1146 (2009) ("In noncapital cases . . . the Court has done virtually nothing to ensure that the sentence is appropriate.").

140. *See* Lee, *supra* note 114, at 681–82 (discussing the *Ewing* decision).

141. *House Bill 30*, ALASKA H. FIN. COMM. MINUTES, 25th Leg. (Feb. 8, 2008) (statement of Anna Fairclough, Alaska House of Representatives). Other representatives, including Gerald Luckhaupt and Peggy Brown, also discussed recidivism and deterrence. *Id.*

142. *Compare* NORTH CAROLINA FELONY PUNISHMENT CHART (2011), *supra* note 17 (giving a sentence with a presumptive range of four to six months), *with* ALASKA STAT. § 12.55.125 (2011) (giving a sentence of up to five years).

143. Harmelin v. Michigan, 501 U.S. 957, 1005 (1991).

144. *See* Lee, *supra* note 114, at 694–95 (outlining the role of state's interests in

Without clear guidance on non-capital proportionality, any proportionality claims will likely be denied. There have been calls for an improvement in non-capital proportionality jurisprudence.[145] Some have also voiced dissatisfaction with the state of the proportionality doctrine[146] and calls for its use as a limit on state power.[147] A proportionality challenge to recidivist sentencing may give the courts an opportunity to hash out the non-capital proportionality doctrine. However, the current jurisprudence's deferential, muddled state suggests that a challenge to recidivist sentencing on proportionality grounds will likely fail.

C. Double Jeopardy

The Double Jeopardy Clause of the Fifth Amendment protects persons from being put in legal jeopardy twice for the same offense.[148] The Double Jeopardy Clause is founded on the constitutionally embedded ideal that "the State with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity."[149] Alaskan courts have consistently enforced this federal right.[150]

Increased penalties for recidivists have always existed in sentencing.[151] However, the Double Jeopardy Clause must be consulted when recidivist increases appear because recidivists have already been punished once for their crimes; to base a defendant's new punishment on those past crimes may punish him twice for the past offenses.[152] "If

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the *Ewing* decision).

145. *See id*. at 679–81 (critiquing non-capital proportionality jurisprudence).

146. *See generally* Lee, *supra* note 114 (providing an overview of the problems facing proportionality jurisprudence).

147. Alice Ristroph, *Proportionality as a Principle of Limited Government*, 55 DUKE L.J. 263, 265–66, 268–69 (2005).

148. U.S. CONST. amend. V. *See also* Benton v. Maryland, 395 U.S. 784 (1969) (incorporating the Fifth Amendment against the States).

149. Green v. United States, 355 U.S. 184, 187–88 (1957).

150. *See, e.g.*, Whitton v. State, 479 P.2d 302, 310 (Alaska 1970) (holding that Alaska's constitutional prohibition against double jeopardy prevents one from receiving multiple prison sentences for the same offenses"); Rofkar v. State, 305 P.3d 356, 358–59 (Alaska Ct. App. 2013) (applying a double jeopardy analysis in an Alaska court).

151. *See, e.g.*, Almendarez-Torres v. United States, 523 U.S. 224, 243–44 (1998) (discussing the rationale and history underlying increased sentences for recidivists).

152. *See also* Russell, *supra* note 6, at 1151 (2010) ("One can argue, however, that a defendant's status as a recidivist should not affect a measure of the

problems of double jeopardy are to be avoided in the very concept of increased punishment for recidivists, the notion that recidivism is a distinct crime must be rejected."[153] To avoid this predicament, courts have held that recidivist enhancements are not separate substantive punishments but aggravating factors prompting increased punishments.[154] Categorizing recidivist provisions as sentence enhancements rather than separate substantive offenses has allowed courts to deny double jeopardy challenges to recidivist statutes.[155] These recidivist aggravations exist in all states and the federal criminal system,[156] and they have survived numerous attacks.[157]

Recently however, some states have adopted separate substantive recidivist offenses.[158] The misdemeanor recidivist statutes in these states do not merely enhance sentences as the distinction requires; rather, they are separate, unique offenses, whose only and essential elements are the previous convictions themselves.[159] North Carolina courts have resisted this conclusion by misconstruing these separate offenses as mere enhancements, falling in line with previous categorization, and claiming that the enhancement status disposes of double jeopardy inquiries.[160]

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seriousness of the crime committed or what the appropriate punishment for that offense should be. Regardless of whether an offender committed previous offenses, the seriousness of an offense should depend only on the seriousness of the illicit act.").

153. Dubroff, *supra* note 66, at 340.

154. *See* White, *supra* note 5, at 122 ("Courts have developed a fictional distinction between actual punishment and enhancement of punishment in order to rationalize the constitutionality of recidivist statutes. Courts apply this distinction to conclude that increased punishment authorized by recidivist statutes does not punish a defendant for crimes previously committed."). *See also* Dubroff, *supra* note 66, at 332 ("The statutes have been sustained on the theory that a recidivist is not punished for having committed the earlier crimes; rather, he is punished more severely for the present offense because his prior convictions have imparted a status to him which aggravates his guilt for any subsequent crimes he may commit.").

155. *See, e.g.*, Spencer v. Texas, 385 U.S. 554, 560–61 (1967) (listing numerous cases that were tried and failed on these grounds).

156. White, *supra* note 5.

157. *See Spencer*, 385 U.S. at 560–61 (listing cases in multiple jurisdictions where the use of recidivist aggravations were challenged but upheld).

158. *See supra* note 135 (listing states with aggravating factor statutes).

159. *See* N.C. GEN. STAT. § 14-33.2 (2010) ("A person guilty of violating this section is guilty of a Class H felony.").

160. *See* State v. Vardiman, 552 S.E.2d 697, 700–01 (2001) ("Relying on *Priddy,* this Court in *Smith* also held North Carolina General Statutes section 14-33.2, the habitual misdemeanor assault statute, to be a substantive offense and not 'merely a status.' . . . However, in determining whether the habitual misdemeanor assault statute withstood constitutional scrutiny in regard to the prohibition against *ex post facto* laws, the fact that the statute was a sentence enhancement statute, not the fact that it was a substantive offense, was

Because mere enhancements have been declared consistent with the Double Jeopardy Clause—they only increase punishment by aggravating guilt—misconstruing the statutes in this way has so far shielded them from Double Jeopardy attacks.[161] However, predicating the offenses purely on the past convictions may violate the Double Jeopardy Clause because these are not mere enhancements—they are separate substantive offenses that stand alone as independent and unique charges and can be brought against the defendant like any other offense.[162] The only and essential elements in these statutes are the existence of the prior convictions.[163] Such specific, stand-alone offenses are inherently different from the mere sentence enhancements and twice put a defendant in jeopardy.[164]

Alaska's misdemeanor recidivist enhancements are framed slightly differently. Initially, the statutes seem to operate as simple enhancements, upgrading inherent misdemeanor offenses to felonies.[165] However, the recidivist statutes break through the felony/misdemeanor distinction based on recidivism alone, morphing the original offense from a misdemeanor infraction to a newly minted felony. The previous convictions are the only and essential elements that transform the original misdemeanor violation into a new felony offense; those prior convictions subject the defendant to an offense that would otherwise not exist. Although not as clear-cut as the separate offenses in other states,[166] the analogy can be drawn: Alaska's recidivist provisions could be framed as new, separate offenses whose essential elements include the past convictions.

The Supreme Court has been clear that "our cases have recognized three separate guarantees embodied in the Double Jeopardy Clause: It protects against a second prosecution for the same offense after acquittal, against a second prosecution for the same offense after

dispositive."); White, *supra* note 5, at 122 (downplaying double jeopardy challenges by treating prior crimes as sentence enhancements rather than as independent or new punishment for old crimes).

161. *See* State v. Carpenter, 573 S.E.2d 668, 676 (N.C. Ct. App. 2002), *cert. denied,* 577 S.E.2d 896 (N.C. 2003) (defending recidivist aggravators as sentence enhancements and not ex post punishment of previously tried crimes); State v. Smith, 533 S.E.2d 518, 520–21 (N.C. Ct. App. 2000) (dismissing challenge that aggravators are ex post facto punishment for prior conduct but rather punishment for current conduct to a greater degree).

162. White, *supra* note 5, at 122.

163. *See, e.g.*, N.C. GEN. STAT. § 14-33.2 (2010) (defining the crime as "a person guilty of violating this section is guilty of a Class H felony").

164. White, *supra* note 5, at 122.

165. *See supra* notes 11–15 (upgrading assault, theft, vehicle theft, and DUI).

166. *Compare supra* notes 11–15 (listing aggravating factor statutes in Alaska), *with supra* note 135 (listing aggravating factor statutes in other states).

conviction, and against multiple punishments for the same offense."[167] Without the past offenses, the defendant has been convicted of conduct that is only a misdemeanor violation; the past convictions alone allow prosecutors to charge defendants with a new felony offense.[168] Thus, the recidivist increases available in Alaska are not mere sentence enhancements that only apply at sentencing.[169] Rather, they are new substantive offenses that cannot be afforded the protections that Double Jeopardy jurisprudence makes available to mere sentence enhancements.[170] The new felony offenses in Alaska bring a second punishment for a previous offense in a separate, substantive way, and violate Double Jeopardy protections.

However, courts have been loath to invalidate any recidivist statutes on double jeopardy grounds.[171] While the enhancement/separate-offense distinction may be a workable legal test, courts have performed judicial gymnastics to avoid it.[172] Given the overly broad classification of all recidivist provisions as sentence enhancements (despite the stand-alone statutes and their analogies that exist in some states),[173] successful constitutional challenges on double jeopardy grounds seem unlikely. However, if courts begin to acknowledge the distinction, stand-alone recidivist provisions will face

167. Justices of Bos. Mun. Court v. Lydon, 466 U.S. 294, 306–07 (1984). *See also Ex parte* Lange, 85 U.S. 163, 168 (1873) ("If there is anything settled in the jurisprudence of England and America, it is that no man can be twice lawfully punished for the same offence. And though there have been nice questions in the application of this rule to cases in which the act charged was such as to come within the definition of more than one statutory offence, or to bring the party within the jurisdiction of more than one court, there has never been any doubt of its entire and complete protection of the party when a second punishment is proposed.").

168. *See, e.g.*, ALASKA STAT. § 11.46.130(a)(6) (2011) (aggravating a charge of theft to theft in the second degree where convict has history of recidivism).

169. § 11.41.220(a)(5); *supra* note 12. *See also* Monge v. California, 524 U.S. 721, 728 (1998) (finding that double jeopardy protections may not apply at sentencing).

170. *See Monge*, 524 U.S. at 728 ("Nor have sentence enhancements been construed as additional punishment for the previous offense[.]"); Witte v. United States, 515 U.S. 389, 398–99 (1995) (holding the use of evidence of a related crime to enhance the sentence of a separate crime within the statute does not trigger the Double Jeopardy Clause).

171. *See supra* Section II.C; Nathan H. Seltzer, *When the Tail Wags the Dog: The Collision Course Between Recidivism Statutes and the Double Jeopardy Clause*, 83 B.U. L. REV. 921, 931–32 (2003) ("[T]he Court has repeatedly upheld recidivism statutes 'against contentions that they violate constitutional strictures dealing with double jeopardy . . . .'").

172. *See* Carissa Byrne Hessick & F. Andrew Hessick, *Double Jeopardy As A Limit on Punishment*, 97 CORNELL L. REV. 45, 66–69 (2011) (rejecting both classifications of recidivist enhancements).

173. *E.g.*, N.C. GEN. STAT. § 14-33.2 (2013).

constitutional attacks.

III. SMOOTHING THE PUNISHMENT LANDSCAPE: A SOLUTION

Constitutional challenges are notoriously difficult. Given the state of affairs in proportionality and double jeopardy jurisprudence, challenges on these grounds are unlikely to succeed. However, a much easier path is available: legislative reform. The legislatures have the opportunity to improve the prosecutorial menu and their recidivist provisions to greater serve the needs of their criminal justice systems while honoring the foundational rights established in the Constitution.

To correct the concerns outlined in this article, the Alaska legislature should modify the recidivist provisions to parallel the federal guidelines and their criminal history adjustments.[174] To smooth out the prosecutorial menu, recidivist provisions should offer increasing enhancements as the number of previous convictions increases, starting with the second conviction. These increases should start small and grow with each additional offense. The felony upgrade should be entirely removed, or at least postponed for several enhancements. The prosecutor should have the discretion to apply or ignore the enhancements when bringing the charges and negotiating plea agreements.

Structuring the prosecutorial menu in this way will reduce the plea-bargaining problems associated with lumpy sentencing options; assuage any proportionality concerns by keeping misdemeanors classified as misdemeanors for the majority, if not all, of the offenders; securely establish the statutes under the enhancement category of double jeopardy analysis; and reduce overall costs on the state budgets.

Creating a smooth punishment curve will facilitate smooth settlement curves. Instead of creating cliffs between the felony recidivist charge and the stand-alone misdemeanor infraction, the series of graduated enhancements can provide for a wide range of sentencing options during plea negotiations and at trial. Such a statute could provide for increasing recidivist enhancements that add to the punishment through step-by-step increases in incarceration. This wide range, split over many steps, would be tacked onto the stand-alone misdemeanor offense, allowing the parties to tailor a plea bargain in smaller increments to fit varying evidence levels and trial shadows. If the offender's criminal history reaches the felony offense levels, the

174. *See* U.S. SENTENCING GUIDELINES MANUAL § 4A1.1 (2013) (listing adjustments to sentences based on criminal history).

incarceration could be kept the same as the previous maximum misdemeanor level, while introducing the felony collateral consequences. This would mitigate the imprecision of quantifying the collateral consequences and keep the punishment curves smooth. This can lead to more efficient negotiation, more appropriate sentencing, and dispose of the problems of lumpiness and rigidity in the prosecutorial menu. Furthermore, this allows for cases brought to trial to experience the same tailoring by the court if a conviction arises.

In response to Alaska's relatively high recidivism rates, there have been calls to make more sentencing options available to prosecutors.[175] Most prominently, Senate Bill 64 proposes the creation of an Alaska Sentencing Commission.[176] The Commission's major goal would be to propose penal changes that would both save the state money and reduce recidivism rates.[177] While primarily economically motivated, the measure shows that giving prosecutors more flexibility is a desired result in the Alaskan justice system.[178] Studies support the idea and call for more sentencing options because of the increased effectiveness that programs other than longer sentences, such as electronic monitoring, and substance abuse treatment during incarceration periods, have at reducing recidivism rates.[179] Offering prosecutors these alternatives would be less expensive, more effective, and more constitutionally sound than the recidivist penalty scheme currently in place.

By keeping the first few increases at the misdemeanor level, it certainly side-steps any proportionality challenge, especially given the reluctance of any court to apply non-capital proportionality review to punishments. Following *Ewing v. California*,[180] recidivist sentences in

175. *See, e.g.*, Matt Buxton, *Recidivism Down, Treatment Up for Alaska Convicts, Officials Say*, FAIRBANKS DAILY NEWS-MINER (Nov. 6, 2013, 12:01 AM), http://www.newsminer.com/news/local_news/recidivism-down-treatment-up-for-alaska-convicts-officials-say/article_00a29ee4-46c2-11e3-bba0-0019bb30f31a.html (detailing options other than increased incarceration to deal with Alaska's recidivism problem). *See also* Editorial, *Prison Problems: Reduced Recidivism Would Fight Against Rising Costs*, JUNEAU EMPIRE (Mar. 27, 2013, 12:15 AM), http://juneauempire.com/opinion/2013-03-28/alaska-editorial-prison-problems-reduced-recidivism-would-fight-against-rising (calling for alternatives to reduce prison population, including reclassifying drug offenses as misdemeanors rather than felonies).

176. S.B. 64, 28th Leg. (Alaska 2013).

177. *Id.*

178. As of January 27, 2014, the Bill has been referred to the Senate Judiciary Committee and has yet to return to the Senate Floor for discussion or debate.

179. ALASKA JUSTICE FORUM, JUSTICE CENTER – UNIVERSITY OF ALASKA ANCHORAGE, FIVE YEAR PRISONER REENTRY STRATEGIC PLAN, 2011–2016 (2011), *available at* http://justice.uaa.alaska.edu/forum/28/2-3summerfall2011/d_reentry.html.

180. Ewing v. California, 538 U.S. 11, 12 (2003) ("In weighing the offense's

such a mold will almost certainly withstand any proportionality challenge. By incorporating the recidivist provision strictly as a sentence enhancement, it will fall squarely under the enhancement distinction approved by the courts in double jeopardy jurisprudence. The elimination of the felony collateral consequences and the felony incarceration levels will reduce incarceration and post-incarceration supervision costs. Efficient plea negotiation will reduce trial costs and preserve litigant resources.

CONCLUSION

Recidivism is a major problem facing all jurisdictions, including Alaska. Increasing punishment based on criminal history is a popular attempt at controlling recidivism. However, when these increases are extreme or sudden, inefficiency arises in the plea bargaining and trial process and proportionality problems may arise. To avoid these problems, Alaska's recidivist increases should be implemented immediately yet gradually, starting with the second repeated offense. This structure smoothes the prosecutorial landscape and assuages proportionality concerns. Recidivist increases must also be wary of the Double Jeopardy Clause. So long as they are framed as sentence enhancements and not separate statutes, however, they will be upheld as constitutional. If Alaska molds a statute with these concerns in mind, it can achieve the goals of legislatures cheaply, efficiently, and proportionally while avoiding the constitutional and logistic difficulties currently present.

gravity, both his current felony and his long history of felony recidivism must be placed on the scales. Any other approach would not accord proper deference to the policy judgments that find expression in the legislature's choice of sanctions.").