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Longitudinal Guilt: Repeat Offenders, Plea Bargaining, and the Variable Standard of Proof

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Abstract

This Article introduces a new concept—"longitudinal guilt"—which invites readers to reconsider basic presuppositions about the way our criminal justice system determines guilt in criminal cases. In short, the idea is that a variety of features of criminal procedure, most importantly, plea bargaining, conspire to change the primary "truthfinding mission" of criminal law from one of adjudicating individual historical cases to one of identifying dangerous "offenders." This change of mission is visible in the lower proof standards we apply to repeat criminal offenders.

The first section of this Article explains how plea bargaining and graduated sentencing systems based on criminal history effectively combine to lower the standard of proof for repeat criminals. The second section describes several additional procedural and evidentiary rules that further effectively reduce the standard of proof for recidivists. The third section argues that the net effect is a criminal justice system that is primarily focused on the identification of a class of "dangerous offenders" based upon their repeated interactions with the system over time rather than the accurate resolution of specific allegations of wrongdoing in individual cases, as is conventionally supposed. In a phrase, we have moved toward a system that constructs guilt "longitudinally." This Article concludes with a few brief thoughts on the merits and demerits of longitudinal guilt.

INTRODUCTION

A prominent assumption of criminal law is that there is a uniform, and uniformly demanding, burden of proof that must be met by the prosecution in order to convict a defendant. That burden of proof—beyond a reasonable doubt, or BARD for short—is a matter of both faith and constitutional law; the Supreme Court has long recognized the prosecutor's burden to prove each element of a charged crime to this standard.[1] Most theorists who have written about the standard of proof in criminal cases assume that the BARD standard requires fact-finders to be very certain of the defendant's guilt before returning a guilty verdict. Those prone to think quantitatively have suggested that the BARD standard represents something like a 90%–95% likelihood of guilt.[2]

The BARD standard is conventionally thought to have a fixed, if somewhat imprecise, meaning that does not vary from case to case. As a formal matter, the same reasonable doubt proof standard applies to jaywalking and capital murder trials alike.[3] Opinions differ, however, regarding whether this is really an accurate description of criminal law, and if it is, whether this is normatively desirable. Scholars such as Dean Erik Lillquist have argued that the unwavering BARD label masks a variable substantive standard and that this substantive variability is a good thing.[4] Another school of thought takes the position that BARD in fact represents an unwavering standard but that variability, if we could capture it, would be normatively preferable. Recent work by Professors

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1. *See In re* Winship, 397 U.S. 358, 361 (1970).

2. *See, e.g.*, Craig S. Lerner, *The Reasonableness of Probable Cause*, 81 TEX. L. REV. 951, 996 (2003) ("[P]roof beyond a reasonable doubt is generally defined, insofar as it or any burden of proof can be quantified, as a percentage as high as 85% or 95%."); Christopher Slobogin, *Dangerousness and Expertise Redux*, 56 EMORY L.J. 275, 306 (2006) (describing "the standard quantifications of 'proof beyond a reasonable doubt' as a 90 to 95% degree of certainty"); Lawrence M. Solan, *Refocusing the Burden of Proof in Criminal Cases: Some Doubt About Reasonable Doubt*, 78 TEX. L. REV. 105, 126 (1999) (citing surveys of judges indicating belief that jurors should be roughly 90% certain of guilt before convicting under reasonable doubt standard).

3. *See Winship*, 397 U.S. at 364 (holding that the Due Process Clause requires prosecutors to prove each element of every criminal offense beyond a reasonable doubt).

4. *See generally* Erik Lillquist, *Recasting Reasonable Doubt: Decision Theory and the Virtues of Variability*, 36 U.C. DAVIS L. REV. 85 (2002) (arguing that a variable reasonable doubt standard is preferable to a fixed standard).

Ronald Allen and Larry Laudan,[5] and more explicit work by Laudan in follow-up papers, take this position.[6]

The argument is simple and seemingly compelling. The expected utility theory teaches that rational actors operating under uncertainty will seek to maximize their utility by selecting choices that hold the greatest expected utility understood as "the sum of the utility of the possible outcomes after the decision, weighed by the probability of each possible outcome."[7] In a criminal case, there are four possible outcomes a jury must consider: a true conviction of a guilty person, a true acquittal of an innocent person, a false conviction of an innocent person, and a false acquittal of a guilty person. Thus, as Lillquist explains:

> [T]he expected utility of a decision to convict a defendant is the utility of an accurate conviction—weighted by the probability the defendant is in fact guilty—plus the disutility of an erroneous conviction—weighted by the probability the defendant is in fact not guilty.

Proponents of a high standard of proof point to the presumed non-equivalence in expected (dis)utilities of false acquittals and false convictions. False convictions are commonly thought to be substantially worse—that is, to have a greater expected disutility—than false acquittals.[8] That assumption undergirds the widely embraced cliché—sometimes referred to as the Blackstone Ratio—that it is better to acquit

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5. *See generally* Ronald J. Allen & Larry Laudan, *Deadly Dilemmas*, 41 TEX. TECH. L. REV. 65 (2008); Larry Laudan & Ronald J. Allen, *Deadly Dilemmas II: Bail and Crime*, 85 CHI.-KENT L. REV. 23 (2010). Allen and Laudan argue that rather than looking at the ratio of false acquittals and false convictions to gauge whether the system is performing appropriately, it is far more sensible to compare the (negative) utility of false convictions to the (negative) utility of false acquittals. That ratio, at least, tells us something about how costly it is when the legal system produces an inaccurate result and gives us a sense of which side to err on and by how much. Laudan makes this point more explicitly in a separate paper.

6. *See generally* Larry Laudan, *The Elementary Epistemic Arithmetic of Criminal Justice*, 5 EPISTEME 282 (2008). In subsequent work, Laudan refines this analysis by demonstrating that the desirable standard of proof, more precisely, depends on the relative utilities of both true and false convictions and acquittals and thus can only be calculated by comparing the utilities of all four of the possible trial outcomes. *See* Larry Laudan & Harry Saunders, *Re-Thinking the Criminal Standard of Proof: Seeking Consensus About the Utilities of Trial Outcomes*, 7 INT'L COMMENT. ON EVIDENCE 1, 3 (2009), *available at* http://www.bepress.com/cgi/viewcontent.cgi?article=1099 &context=ice; Larry Laudan, Taking the Ratio of Differences Seriously: The Multiple Offender and the Standard of Proof, or Different Strokes for Serial Folks 1 (July 8, 2009) [hereinafter Laudan, *Ratio*] (unpublished working paper), *available at* http://ssrn.com/abstract=1431616. This refinement does not really matter for purposes of this paper, and therefore, I will ignore it here.

7. Lillquist, *supra* note 4, at 90.

8. *See, e.g.*, Keith A. Findley, *Toward a New Paradigm of Criminal Justice: How the Innocence Movement Merges Crime Control and Due Process*, 41 TEX. TECH L. REV. 133, 133–34 ("Our constitutional system chooses protecting the innocent as a highest-order value, which preferences innocence protection over convicting wrongdoers.").

ten guilty persons than to convict an innocent one.[9] A high standard of proof reflects the intuition that it is better to err on the side of acquitting arguably innocent defendants, even if it is likely they are guilty, given the disproportionate disutility of false convictions.

Even if this proposition is true as a general matter, variability advocates reject the assumption that the disutilities of false convictions and false acquittals are the same in all cases. Certainly, they argue, false acquittals of some especially dangerous criminals—say, terrorists, serial rapists, mass murderers, and the like—are more costly to society if those false acquittals permit the acquittee to engage in future acts of terrorism, rape, and murder than are false acquittals of persons who commit minor crimes or who are less likely to engage in future criminal conduct.

Indeed, as Laudan points out, this logic can be extended to repeat offenders as a class. After all, empirical data demonstrate that repeat offenders commit more crimes after release than first-time offenders.[10] If so, the cost to society of falsely acquitting repeat offenders is necessarily greater than the cost of falsely acquitting first-time offenders.[11] At the same time, false convictions of persons without prior criminal records hurt society—and those persons[12]—more than false convictions of serial criminals, and false acquittals of first-time offenders cost society less, perhaps far less, than false acquittals of serial criminals. Based on these observations, Laudan concludes that the standard of proof should be lower in trials of those with extensive criminal histories than it is for those without a record of wrongdoing.[13] Lillquist reaches the same conclusion.[14]

I do not quibble with the argument's premises, which I think, by-and-large, are probably correct. What I do take issue with is the conclusion that affirmative change in the formal standard of proof is warranted.[15] That conclusion necessarily assumes that the criminal justice system currently assesses the guilt or innocence of repeat offenders no differently than first-time offenders. This is incorrect.

The mistake, I contend, is that those arguing for a lower formal or informal proof standard at trial pay too much attention to trials and the formal rules applicable to them and fail to take sufficient account of plea bargaining, which is, after all, responsible for producing the vast

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9. *See* Alexander Volokh, n *Guilty Men*, 146 U. PA. L. REV. 173, 174 (1997) ("The ratio 10:1 has become known as the 'Blackstone ratio.'").

10. *See* Laudan, *Ratio*, *supra* note 6, at 5–6.

11. *Id.*

12. *See infra* Part I.C.

13. *See* Laudan, *Ratio*, *supra* note 6, at 2.

14. *See* Lillquist, *supra* note 4, at 195 ("[C]ases involving repeat offenders perhaps should also have a lower standard of proof because the relative benefits of convictions, and the relative costs of acquittals, are higher than in other cases.").

15. *See, e.g.*, Laudan, *Ratio*, *supra* note 6, at 4 ("[W]e should be using a very different standard of proof for trying serial felons than we use for trying first-time offenders.").

majority of criminal convictions in both state and federal courts.[16] When the dynamics of plea bargaining are taken into account, what emerges, I believe, is a *de facto* system of justice that for the vast majority of repeat offenders already downwardly adjusts the effective standard of proof so that typical repeat offenders ultimately are judged by proof standards lower than the beyond-a-reasonable-doubt-standard formally on the books and, perhaps, sometimes little higher than mere probable cause.

In the first section of this Article, I will explain how plea bargaining and graduated sentencing systems based on criminal history combine to effectively lower the standard of proof for repeat offenders. In the second section, I will describe several additional procedural and evidentiary rules that further effectively reduce the standard of proof for alleged recidivists.[17] The net effect, I argue in the Article's third section, is a criminal justice system far more concerned with identifying and incapacitating "dangerous offenders" than with producing accurate results in individual cases. In effect, we have developed a system that constructs guilt longitudinally. The Article concludes with a few brief thoughts on the merits and demerits of longitudinal guilt.

I. Plea Bargaining and the Decreasing Standard of Proof for Repeat Offenders

To understand how plea bargaining effectively reduces the standard of proof for repeat offenders, we must review the incentive structures that induce defendants to plead guilty.[18] Although criminal defendants—like shoppers—do not always get the best bargain possible, plea bargaining—like shopping—can best be understood by looking to the market that sets the relevant prices of the sought-for goods.

A. *The Price of Guilty Pleas*

There are three principal inputs in the standard formula for pricing plea bargains: the probability of conviction (p), the expected sentence if convicted at trial (ets), and the resource costs of litigating the case (r_d for defendant, r_p for prosecutor).[19] The relationship of these inputs can

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16. *See* Russell D. Covey, *Fixed Justice: Reforming Plea Bargaining with Plea-Based Ceilings*, 82 Tul. L. Rev. 1237, 1238 (2008) (reporting that more than 95% of all state and federal felony convictions are obtained by guilty pleas).

17. In using the term "recidivists," I refer to those defendants who have accumulated criminal histories. I do not mean to imply that all such defendants are, in fact, guilty of all the crimes for which they are charged or that they are inherently, and unpreventably, bent on pursuing a life of crime.

18. A rich literature exists discussing the economics of plea bargaining. *See, e.g.*, Frank H. Easterbrook, *Criminal Procedure as a Market System*, 12 J. Legal Stud. 289 (1983); Robert E. Scott & William J. Stuntz, *Plea Bargaining as Contract*, 101 Yale L.J. 1909 (1992).

19. *See* William M. Landes, *An Economic Analysis of the Courts*, 14 J.L. & Econ. 61, 61 (1971); Jennifer F. Reinganum, *Plea Bargaining and Prosecutorial Discretion*, 78 Am. Econ. Rev. 713, 714 (1988); Covey, *supra* note 16, at 1246.

be expressed in a formula, where *rps* is the rational plea sentence:

$$rps = (p)(ets)(r_d / r_p)$$

This formula expresses a simple and relatively obvious fact about plea bargaining: The more likely conviction looks, and the greater the sentence the defendant expects if convicted at trial, the greater the magnitude of the plea sentence that a rational defendant will accept to avoid trial. Similarly, the more expensive it is to litigate the case, the higher the plea sentence a defendant will be willing to accept, and conversely, the lower the sentence a prosecutor will settle for.

For our purposes, I assume the defendant's resource costs are zero. This assumption is not actually true, of course. Defendants do pay a price to contest criminal charges. However, because most criminal defendants are indigent and thus do not absorb the full costs of trial—indeed, the monetary cost of defending indigents is usually borne by the state—I think this assumption is sufficient for our purposes.[20] Dropping resource costs from the defendant's side of the equation, the inputs that remain, which determine whether the plea offer will look attractive, are simply the probability of conviction (p) and the expected trial sentence (ets).[21] If the plea offer is lower than the product of those two inputs, a rational defendant should take the deal.[22] For our purposes, it is important to note the dynamic relationship between p and ets. All things equal, rational defendants should be willing to accept the same plea offer in cases where p is low and ets is high, and where p is high and ets is low, as long as the product of p and ets remains constant.[23]

This plea pricing mechanism causes variation among different types of defendants with respect to the effective standard of proof. Begin with

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20. Net costs of litigation, in other words, are likely to be tilted toward the state, which means that, generally speaking, prosecutors will be willing to discount plea offers downwardly more than defendants are willing to adjust them upwardly.

21. As Professor Oren Gazal-Ayal explains:

> Plea bargaining is rationalized just like any other legal settlement. Whether guilty or innocent, a defendant knows he might be convicted at trial. Taking into account the post-trial sentence and the probability of conviction, he determines his "highest acceptable sentence." A defendant will only be willing to plead guilty in return for a sentence lower than or equal to his highest acceptable sentence.

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

22. If we also consider resource costs in the defendant's calculation, it becomes apparent that defendants sometimes have incentives to accept a plea offer that equals, or even exceeds, expected trial punishment.

23. A defendant's aversion to risk could impact decisionmaking in this context, but the impact could go in either direction. Risk-averse defendants might place greater value on plea offers that eliminate a small risk of a disastrously long sentence. Risk-seeking defendants, on the other hand, might undervalue such plea offers where a plea bargain represents a certain (though small) punishment and the odds of conviction seem small.

the fact of graduated sentencing schemes that increase punishment based on criminal history. Recidivist punishment schemes are manifested in several ways. Sentencing guideline systems predictably increase sentencing exposure. Mandatory minimum sentencing provisions further lock in, with certainty, high sentences upon conviction for certain offenses or for offenders with criminal histories. Career criminal statutes create especially draconian, fixed sentence outcomes for serial offenders. Even absent legislative or administrative sentencing mandates, judges with complete sentencing discretion can be expected to impose harsher sentences on repeat offenders. Accordingly, there is no question that, in general, the more extensive a defendant's criminal history, the greater the defendant's expected trial sentence will be for most crimes. [24]

Next, most prosecutors are not primarily concerned with maximizing jail time for convicted offenders. [25] For most prosecutors in most cases, winning a conviction is more important than maximizing punishment. [26] Where there is a tradeoff between those goals, the typical prosecutor will almost always settle for less punishment in exchange for elimination of the possibility of an acquittal at trial. [27] That prosecutors routinely trade maximum punishment for reduction of uncertainty is

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24. *See* David A. Dana, *Rethinking the Puzzle of Escalating Penalties for Repeat Offenders*, 110 YALE L.J. 733, 735 (2001) (observing that the principle of enhanced punishment for repeat offenders is pervasive at all levels of criminal justice system and "so widely accepted that it strikes most people as simple common sense").

25. *See* Oren Gazal-Ayal & Limor Riza, *Plea-Bargaining and Prosecution*, *in* CRIMINAL LAW AND ECONOMICS 145, 152 (Nuno Garoupa ed., 2009) (noting that plea bargains differ substantially from other legal settlements where litigants seek to maximize expected profits, in that the length of sentences and the resource costs of achieving the sentences are incommensurate, and "as agents of society," prosecutors lack "an interest in maximizing the sentence in each case, since excessive sentences are costly to the public"); Josh Bowers, *Punishing the Innocent*, 156 U. PA. L. REV. 1117, 1141 (2008) ("[Prosecutors] care little, if at all, about maximizing plea prices and ultimate sentence length.").

26. *See* Stephanos Bibas, *Plea Bargaining Outside the Shadow of Trial*, 117 HARV. L. REV. 2463, 2471 (2004) (noting that for prosecutors, the "statistic of conviction . . . matters much more than the sentence"); Daniel S. Medwed, *The Zeal Deal: Prosecutorial Resistance to Post-Conviction Claims of Innocence*, 84 B.U. L. REV. 125, 137 (2004) (reporting practice in prosecutors' offices of publicly tracking prosecutors' win-loss records, or maintaining "batting averages").

27. *See* MILTON HEUMANN, PLEA BARGAINING: THE EXPERIENCES OF PROSECUTORS, JUDGES, AND DEFENSE ATTORNEYS 107 (1978) (finding that, "As prosecutors gain experience . . . they tend to stress 'certainty of time' rather than 'amount of time. . . . [In other words], they become less concerned about extracting maximum penalties from defendants and more concerned with insuring that in cases in which they are looking for time, the defendant actually receives some time."); Bowers, *supra* note 25 (arguing that at least in low stakes cases, prosecutors "care little, if at all, about maximizing plea prices and ultimate sentence length"); William J. Stuntz, *Plea Bargaining and Criminal Law's Disappearing Shadow*, 117 HARV. L. REV. 2548, 2553–54 (2004) (stating, "[P]rosecutors do not try to maximize total prison time . . . . [because] legally authorized sentence[s] [are] harsher than the sentence prosecutors want to impose.").

amply evidenced by the massive reliance upon plea bargaining to resolve criminal cases.[28] Even if prosecutors were solely focused on maximizing jail-time for persons charged with crimes, seeking the maximum possible punishment for every criminal defendant would not make sense. Because the resource costs of trial are so high, prosecutors who refused to plea bargain would, in the aggregate, convict and punish far fewer criminals than prosecutors who plea bargain.[29] While there are always a few high-profile cases in which prosecutors aggressively seek to maximize punishment and forgo punishment-reducing deals, those cases are the exception, not the rule.[30]

Now put those two facts together. Recidivist sentencing schemes mean that repeat offenders can expect more severe sentences if they are convicted at trial than first-time offenders. Prosecutors' preference for certain convictions over maximum penalties means that prosecutors will favor plea bargains that ensure, whenever possible, that a criminal defendant pleads guilty and receives at least some punishment rather than risk the possibility of an acquittal at trial. Longer sentences provide more bargaining leverage than short sentences, and thus, assuming the existence of a floor on the charge/sentence that will be deemed adequate by the prosecutor, create comparatively greater flexibility to offer plea discounts.[31] As a result, prosecutors should find it easier to plea bargain with repeat offenders than with first-timers.[32]

For an illustration, imagine the following. Two criminals, Newbie and Old-School, are both caught with cocaine in their possession and are charged with a drug offense. Prosecutors believe both are guilty, but because of some weaknesses in the cases (say, the evidence is based on

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28. Or to use Professor David Bjerk's formulation, "prosecutors are risk-averse with respect to sentence length" due to the diminishing marginal utility of longer sentences. David Bjerk, *On the Role of Plea Bargaining and the Distribution of Sentences in the Absence of Judicial System Frictions*, 28 INT'L REV. L. & ECON. 1, 3 (2008).

29. Easterbrook, *supra* note 18, at 309 (noting that plea prices are set based on a prosecutor's punishment-maximizing strategy, which includes sharing the resource gains obtained by forgoing trial).

30. *See, e.g.*, David Bierie & Kathryn Murphy, *The Influence of Press Coverage on Prosecutorial Discretion: Examining Homicide Prosecutions, 1990–2000*, 41 CRIM. L. BULL. 60, 63 (2005) (finding that, "[M]any prosecutors indicated they would not plea bargain a case if it was receiving media attention.").

31. Professor Bjerk has documented in an empirical study the tendency for prosecutors in states with three-strikes laws to use such laws to increase their bargaining leverage. *See* David Bjerk, *Making the Crime Fit the Penalty: The Role of Prosecutorial Discretion Under Mandatory Minimum Sentencing*, 48 J.L. & ECON. 591, 591 (2005) ("[P]rosecutors become significantly more likely to lower a defendant's prosecution charge to a misdemeanor when conviction for the initial felony arrest charge would lead to sentencing under a three-strikes law.").

32. The existence of a minimum charge or sentence as a floor is critical to the argument that there is a variable standard of proof at work for repeat offenders. If prosecutors have infinite ability to discount plea offers, then higher criminal penalties will not create any more bargaining leverage than lower penalties, only longer sentences. But there is a floor, for reasons I discuss below. *See infra* Part I.C.

easily impeachable witnesses), an objective assessment of the probability of conviction in the two cases is 50%. As this would be Newbie's first felony conviction, if convicted he expects to receive a two-year sentence. Old-School, in contrast, has several prior felony convictions. He expects a four-year sentence if convicted. The prosecutor is authorized to offer both defendants a plea deal carrying a one-year sentence. Now compare the value of the offer from the perspective of the two defendants. For Old-School, the offer is a good one. Because a 50% chance of getting four years is equal to a 100% chance of two years, the prosecutor's offer of just one year cuts Old-School's expected jail-time in half. If he is rational, he should take the deal. Newbie's calculus, however, is different. The one-year offer is merely equal to the expected value of proceeding to trial, making Newbie, at best, rationally indifferent to the offer in terms of jail time. Other considerations, which I will discuss below, would likely push Newbie to reject the deal. Recidivist sentencing provisions thus quite clearly make it easier for prosecutors to obtain guilty pleas from repeat criminals than from first-timers.

Although the operative variable in the example is expected punishment, the outcome—Old School taking a plea offer that Newbie will reject—is functionally identical to one where variation occurred not in expected sentence but in probability of conviction, or p. If Newbie faces a two-year sentence upon conviction and he is offered a one-year deal to resolve the charges, rationally he should take the deal as long as he calculates p as greater than 50%. In contrast, facing a potential punishment twice as severe, Old-School rationally should take the deal as long as he calculates p as greater than 25%. The prosecutor, in other words, should be able to secure a conviction against Old-School in a case that is twice as weak as the case necessary to get Newbie to plead guilty. Moreover, a prosecutor unsatisfied with the prospect of Newbie and Old-School receiving the same sentence has flexibility, given the numbers, to ensure that Old-School receives more punishment than Newbie even though his case remains weaker than the one against Newbie. For example, Old-School should be willing to accept a plea offer of 1.5 years if he calculates p as greater than 38%. Given the existence of the recidivist sentencing penalties, a prosecutor could negotiate a one-year sentence in Newbie's case, while obtaining a 1.5 year sentence in a case against Old-School in which the evidence was only four-fifths as strong.

Of course, the attractiveness of any particular offer will be affected by a defendant's subjective preferences as to time discounting and risk aversion.[33] But while both of those factors complicate the math, they do

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33. *See* Bjerk, *supra* note 28, at 2 ("[T]he plea bargain sentence for each defendant can be greater than, less than, or equal to the expected sentence from going to trial, depending on the relative degree of risk-aversion of prosecutors versus defendants and the relative bargaining power of each party."); Easterbrook, *supra* note 18, at 313 (postulating that defendants in cases where p was equal to 0.75 who had a present-value discount rate of 10% would equate a fifty-

not alter the basic equation. Prosecutors who are not concerned with maximizing jail time can cut progressively more attractive bargains with defendants who have more extensive criminal histories. That means that repeat offenders should be induced to plead guilty in cases in which offenders with lesser criminal histories would not. The net effect of this dynamic, as I discuss below, is to create a lower effective standard of proof for repeat offenders than for first-timers.

B. P *and the Standard of Proof*

P is an *ex ante* prediction made by litigants about how a fact-finder will assess the proof before them. Where the evidence is weak, *p* will be low. Where it is strong, *p* will be high. It is directly proportionate, in other words, to the strength of the admissible evidence of guilt.[34] The standard of proof, in contrast, is an *ex post* rubric used by the fact-finder to evaluate the strength of the evidence. While the standard of proof is expressed qualitatively, it can be thought of in quantitative terms as a probabilistic threshold that the proof must satisfy before the fact-finder will convict. It is often said that BARD equates to something like a 90% certainty of guilt, a preponderance of the evidence standard equates to 50.1%, and clear and convincing something in between.[35] Different standards of proof will produce different *ex ante* probabilities of conviction given equal quanta of proof. While overwhelming evidence of guilt will produce a high *p* under almost any standard of proof, where the evidence is more equivocal, *p* will plainly be higher if the standard of proof is lower, and lower if the standard of proof is higher.

This intuition can be expressed formally as a threshold function, where *p* is the likelihood of conviction, *q* is the quantum of the evidence, and *s* is the standard of proof, so that:

$$p = 1 \text{ where } q \geq s \text{ and}$$

$$p = 0 \text{ otherwise}$$

This characterizes *p* in terms of a single event and with subjective evaluations of *q* and *s* by the fact-finder.

Considering *p* probabilistically, that is, capturing the range of expected outcomes viewed from an *ex ante* perspective, *p* can be thought of as a distribution determined by *q* and *s*, where increases in *q* produce increases in *p* and increases in *s* produce decreases in *p*.

Thus, *p* can be written as:

$$p = q\left(\frac{1}{s}\right)$$

year trial sentence with a present-value sentence of 7.43 years).

34. That is, the net quantum of inculpatory evidence minus exculpatory evidence.

35. *See* Lerner, *supra* note 2, at 996. *See generally* Michael S. Pardo, *Second-Order Proof Rules*, 61 FLA. L. REV. 1083 (2009) (discussing various proof standards).

The equation makes clear that in calculating any p_x, the quantum of proof q_x and the standard of proof s_x are directly related. That is, if the standard of proof (s) goes up, the quantum of proof (q) necessary to achieve the same probability of conviction also goes up. If the standard of proof decreases, the quantum of proof necessary to convict also decreases. In simple terms, the prosecutor needs less evidence to convict if the standard of proof is low and more evidence to convict if the standard is high. At the same time, to achieve any lower p_x, either q_x can be decreased or s_x can be increased.

In short, if a prosecutor can induce guilty pleas for equally serious crimes, carrying equally severe sentences, from two defendants, D1 and D2, but can obtain D1's plea to a set charge and punishment with a lower p than necessary to induce D2 to plead guilty to the same charge and punishment, then D1 can be thought of as having negotiated his plea against what is functionally the equivalent of a reduced standard of proof.

The following example might help to illustrate the point. Assume that there are three quanta of proof: $q1$, $q2$, and $q3$. Juries that apply the BARD standard will convict in the three cases at rates of 70%, 80%, and 90%, respectively. *P* thus equals 0.70, 0.80, and 0.90 in the three cases. Juries that apply the lower clear and convincing standard instead, given the same quanta of proof, will convict at rates of 80%, 90%, and 100%. Imagine that prosecutors can choose to file cases in BARD court, where the BARD standard applies, or in C&C court, where the clear and convincing standard applies. Now, imagine that a prosecutor has a case in which the proof is $q1$, and that, given a particular sentence sought by the prosecutor, it is only rational for a defendant to plead guilty if p is equal to or greater than 0.80. On these assumptions, there are two ways the prosecutor can induce the defendant to plead guilty. She can file the case in BARD court and invest enough additional resources in investigating the case to raise $q1$ to $q2$, or she can file the case she has in the C&C court. The point here is that either of these strategies has exactly the same effect on p. Permitting the prosecutor to induce the same plea from defendants with different p's under a given standard of proof is functionally equivalent to applying a lesser standard of proof to some of those defendants and a greater standard of proof to the others.[36]

Given the fungible quality of *ets*, p, q, and s, changes in any one of the variables has the same impact on rational plea price as changes in any of the other variables. Increasing expected punishment for repeat offenders has the same effect—for plea bargaining purposes—as lowering the standard of proof for such defendants.[37] This demonstrates

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36. This logic has been implicitly noted by other commentators. *See, e.g.*, Adam Gershowitz, *Raise the Proof: A Default Rule for Indigent Defense*, 40 CONN. L. REV. 85, 118–20 (2007) (arguing for remedy of increasing standard of proof in jurisdictions that fail to adequately fund indigent defense and noting that one effect of higher standard of proof would be pressure on prosecutors to offer better plea deals to such defendants to entice them to plead guilty).

37. Other scholars have noted that plea bargaining, vis-à-vis trial, seems to lower the

that plea bargaining in a world of recidivist sentencing schemes and relatively unconstrained bargaining discretion produces what is, in effect, a progressively decreasing standard of proof for repeat offenders.

C. *Plea Bargaining and the Special Case of First-Time Offenders*

The simple model we have been relying upon so far unrealistically assumes that the gradient of the slope of the expected plea sentence (*eps)* is perfectly smooth and that the prosecutor is free to offer any plea bargain, in any case, anywhere along that slope. That assumption is unrealistic because the slope available to prosecutors is lumpy, not smooth. That is, prosecutors cannot precisely calibrate their plea bargain offers to perfectly match their quantitative assessments of the value of a guilty plea in particular cases, because they are constrained by the "depth" and "distance" of charging options provided by the legal code.[38] Prosecutors may wish to offer a particular defendant a four-year deal to resolve, say, criminal charges involving the theft of a computer from an occupied residence. However, the criminal code may establish a minimum sentence of five years for robbery and a maximum sentence of three years for burglary. There may be no practical way, given the nature of the criminal conduct and the charge and sentencing distributions provided by the criminal code, to construct a plea deal that allows the defendant to get a four-year sentence.

Because most criminal codes include numerous overlapping offenses carrying a variety of punishments, and/or permit the prosecutor wide discretion to negotiate sentence bargains that reflect just the desired amount of jail time or monetary fines, lumpiness will not create much of an obstacle in most cases.[39] However, lumpiness does prove to be a fairly significant problem at the low end of the scale.[40] Jail time and fines, of course, are not the only elements of punishment accompanying

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standard of proof. *See, e.g.*, Katherine J. Strandburg, *Deterrence and the Conviction of Innocents*, 35 CONN. L. REV. 1321, 1332 (2003) ("However, plea bargaining would appear to have the effect of implicitly lowering the government's burden of proof."); Patricia M. Wald, *Guilty Beyond a Reasonable Doubt: A Norm Gives Way to the Numbers*, 1993 U. CHI. LEGAL F. 101, 108–09. Although I disagree with that characterization because it fails to account for the transfer of risk, the claim is based on logic similar to that presented here.

38. *See* Ronald F. Wright & Rodney L. Engen, *The Effects of Depth and Distance in a Criminal Code on Charging, Sentencing, and Prosecutor Power*, 84 N.C. L. REV. 1935, 1953–55 (2006) (demonstrating that charge reductions frequently made during charge bargaining occur more often where the criminal code provides more alternative charging options for criminal conduct (depth) and where the penal consequences of alternative charges are modest (distance)).

39. *Id.* at 1955 (explaining that where the criminal code provides depth in charging alternatives, prosecutors can "offer a market-clearing price for a guilty plea more often").

40. That is, assuming that the prosecutor is intent on obtaining a felony, rather than a misdemeanor, conviction. Of course, felony charges are often bargained into misdemeanors, and that outcome may in fact be the standard outcome in less serious cases involving offenders without a criminal history. In this Article, "first-offender" means first felony offense, which by definition involves a case in which the prosecutor refuses to permit a misdemeanor plea.

a criminal conviction. The collateral consequences of a felony conviction can be serious and, in many cases, can far overshadow the costs of a jail sentence alone.[41] Depending on circumstances and jurisdictions, those consequences can include deportation, termination of employment, loss of a professional license or ability to continue an accustomed means of making a living, loss of access to government loans or benefits, loss of custody of children, familial impoverishment, and dramatic restrictions on place of residency and freedom of movement, just to name a few.[42] Then there is the stigma of conviction itself. Although the penal consequences of conviction (that is, jail time and fines) might be felt more or less equally and proportionately by all convicts, the collateral consequences and stigma accompanying conviction are heavily front-loaded. First-time offenders almost certainly have more to lose by way of collateral and stigmatic consequences than do repeat offenders who have already absorbed most of these costs.

There are, in other words, some built-in costs that accompany a first-time felony conviction that cannot be discounted away. That means that a prosecutor will be more constrained in plea bargaining a weak case involving a first-time offender than she would in a case involving a repeat offender. Prosecutors cannot offer deals to first-time offenders with the same dramatic discounts as are available in cases involving repeat offenders. Both the expected trial sentence is lower, and the fixed costs of conviction are higher.[43] By limiting how low the expected plea sentence (*eps*) can go in first-time offender cases, these constraints necessarily also establish a floor for *p* in those cases. Where the evidence is relatively weak, first-time offenders will hold out for trial because prosecutors simply cannot make plea offers that are sufficiently discounted to entice first-time offenders to accept them, given the collateral consequences that necessarily follow.[44] And by establishing a

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41. *See* Jenny Roberts, *The Mythical Divide Between Collateral and Direct Consequences of Criminal Convictions: Involuntary Commitment of Sexually Violent Predators*, 93 Minn. L. Rev. 670, 740 (2008).

42. *See generally* Michael Pinard, *An Integrated Perspective on the Collateral Consequences of Criminal Convictions and Reentry Issues Faced by Formerly Incarcerated Individuals*, 86 B.U. L. Rev. 623, 634–36 (2006) (enumerating possible collateral consequences resulting from felony conviction).

43. Although there is no direct evidence of which I am aware that repeat offenders accept plea offers in weaker cases than first-time offenders, there is empirical evidence that prosecutors use the enhanced leverage that recidivist sentencing schemes provide in plea bargaining. Professor Bjerk, for example, has documented an increase in misdemeanor pleas entered by defendants in cases in which a felony conviction would result in a third-strike triggering application of a mandatory three-strikes sentencing provision. *See* Bjerk, *supra* note 31, at 593 (presenting "formal empirical evidence documenting that one way in which prosecutors react to mandatory minimum sentencing laws is by systematically becoming more likely to prosecute those arrested for crimes targeted by these laws for lesser crimes not covered by these laws"). Other scholars have made similar findings. *See id.* at 594 n.10.

44. *See* Ronald F. Wright, Response, *Guilty Pleas and Submarkets*, 157 U. Pa. L. Rev.

floor for *p*, these constraints also establish a floor for the effective standard of proof in cases involving first-time offenders, one that prosecutors can't evade through plea bargaining.[45]

In short, the economics of plea bargaining combined with increased penalties for repeat offenders and the variety of collateral and stigmatic consequences that hit first-time offenders with special force ensure that prosecutors can obtain guilty pleas from repeat offenders that the prosecutors could not have obtained from first-time offenders in cases with otherwise similar characteristics. Functionally, this is equivalent to applying a decreased standard of proof to repeat offenders in the system—plea bargaining—that produces the vast bulk of criminal convictions.

II. EVIDENCE RULES AND THE DECREASING STANDARD OF PROOF FOR REPEAT OFFENDERS

The economics of plea bargaining are compounded by a variety of evidentiary and procedural rules that further disadvantage repeat offenders. These rules increase the probability of conviction for repeat offenders, with the same ultimate effect on conviction rates as would result from application of a lower standard of proof at trial.

A. *Repeat Offenders Do Worse at Trial than First-Time Offenders*

Repeat offenders face substantially greater risks than first-time offenders at nearly every stage of the criminal process. During investigation, police are most likely to begin their investigation by identifying the "usual suspects."[46] Offenders with criminal records are more likely to be placed in a line-up or have their picture displayed in a photo array, are more likely to have fingerprint and DNA samples in databases available for comparison with specimens recovered at the crime scene, and are more likely to be questioned by investigators while their exculpatory stories are less likely to be believed.[47]

PENNUMBRA 68, 70 (2008) (stating that because "the fact of conviction should concern [defendants with no prior convictions] more than the amount of punishment, they are more likely to hold out for a dismissal or an acquittal in a weak case").

45. This is not to say that prosecutors cannot induce first-time offenders to plead guilty in weak cases. If the charges are serious and the prosecutor's discretion is relatively unconstrained, then prosecutors should have plenty of bargaining leverage to induce a guilty plea. The point here, however, is that the prosecutor's leverage will always be relatively smaller in cases involving first-time offenders because graduated sentencing schemes limit the maximum punishment that can be expected upon conviction at trial and collateral and stigmatic consequences of felony convictions limit the minimum punishment that may be offered in plea bargaining.

46. *See* Richard Friedman, *Character Impeachment Evidence: Psycho-Bayesian [!?] Analysis and a Proposed Overhaul*, 38 UCLA L. REV. 637, 672 (1991) (noting that investigation of crimes often begins "by focusing on those 'usual suspects' already known to law enforcement officials").

47. *See* Bowers, *supra* note 25, at 1125–26 (explaining that "[r]ecidivists are common

Once charged with a crime, repeat offenders are more likely than first-time offenders to be denied bail or bond or to have a higher bail or bond set.[48] Studies establish that pretrial detention substantially increases the probability of conviction.[49] Indeed, pretrial detention leads to worse results for criminal defendants at every subsequent stage in the process, including sentencing.[50] The likely reasons why pretrial detainees see worse outcomes include the inability of detainees to gather facts, track down witnesses, or otherwise assist overburdened defense lawyers to prepare their defense cases; increased difficulties faced by detainees in communicating with attorneys;[51] and an increased likelihood that detainees will be perceived negatively by jurors who see them handcuffed or otherwise treated as guilty and dangerous by marshals and court officers during trial. Pretrial detention also gives the state new opportunities to gather incriminating evidence. Jailhouse informants may testify at trial about confessions allegedly made while the defendant was in captivity. Conversations, phone calls, and mail are all subject to scrutiny and may turn up incriminating admissions.[52]

At trial itself, repeat offenders confront hazards not faced by first-timers. Most importantly, repeat offenders risk the fact-finder learning of their prior criminal history. Although the rules of evidence nominally disallow such evidence from being used to establish bad character or propensity, critical exceptions exist to this bar. Prior crimes may be admissible, for instance, to show "proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident."[53] At least in federal courts, as well as in some states,

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first targets when crime happens" and that investigations often commence by asking crime victims or witnesses to review "mug-shot books composed exclusively of prior arrestees").

48. *See, e.g.*, Aaron Kupchik, Jeffrey Fagan & Akiva Liberman, *Punishment, Proportionality, and Jurisdictional Transfer of Adolescent Offenders: A Test of the Leniency Gap Hypothesis*, 14 STAN. L. & POL'Y REV. 57, 77 (2003) (presenting data on the effect of pretrial detention on juveniles charged with crimes and finding that prior record was an important predictor of pretrial detention).

49. *See, e.g.*, Douglas L. Colbert, Ray Paternoster & Shawn Bushway, *Do Attorneys Really Matter? The Empirical and Legal Case for the Right of Counsel at Bail*, 23 CARDOZO L. REV. 1719, 1773 ("[P]retrial detention leads to higher conviction rates and longer sentences . . . .").

50. *See* Cassia Spohn, *Race, Sex, and Pretrial Detention in Federal Court: Indirect Effects and Cumulative Disadvantage*, 57 U. KAN. L. REV. 879, 893–94 (2009) (showing, in an empirical study, that pretrial detention is a positive predictor of increased sentence length).

51. Colbert, Paternoster & Bushway, *supra* note 49, at 1720 ("[T]he delay in defense investigations and witness interviews caused by pretrial incarceration, impedes preparation of a defense and is a sure-fire prescription for miscarriages of justice and convicting innocents at trial.").

52. Repeat offenders are also marginally more likely to be falsely targeted by informants because their "general involvement in crime" makes it easier to generate plausible incriminating accusations. *See* Robert P. Mosteller, *The Special Threat of Informants to the Innocent Who Are Not Innocents: Producing "First Drafts," Recording Incentives, and Taking a Fresh Look at the Evidence*, 6 OHIO ST. J. CRIM. L. 519, 555 (2009).

53. FED. R. EVID. 404(b).

evidence of a past sexual assault or child molestation offense is admissible to prove commission of similar crimes as long as such evidence is deemed relevant.[54] In addition, criminal history will almost always be admissible for impeachment purposes.[55] The risk that jurors might learn about a defendant's criminal history if he chooses to testify places an enormous burden on the exercise of the right to testify.[56] A defendant with a relatively minor criminal history may choose to run the risk of such impeachment. A defendant with an extensive criminal history almost certainly will not, given the devastating effect that such information will likely have on the jury's perception of the defendant's guilt.[57] Data show that the impact of a jury learning about the defendant's prior record is greatest in cases where the evidence of guilt is relatively weak, suggesting that in close cases, the threat of disclosure of the criminal record is at its peak.[58]

Although defendants are formally assumed "innocent until proven guilty," and their exercise of the right to silence is not lawfully held against them, as a practical matter, jurors often assume that defendants have some obligation to prove their innocence. A failure to rebut—or at least deny—plausible evidence of guilt put forth by the state will often cement the jury's impression of guilt. In some cases, defendants may in fact have compelling stories to tell. Repeat offenders who cannot risk impeachment thus will be unable to present that exculpatory evidence. Such defendants are often limited to trying to poke holes in the prosecutor's case rather than construct a coherent alternative narrative of innocence, which according to many trial strategists, is a far inferior defense.[59] As a result, the defendant's testimony is often a pivotal trial

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54. FED. R. EVID. 413 (sexual assault); FED. R. EVID. 414 (child molestation). California, Arizona, and the District of Columbia have rules similar to those applicable in federal court. *See* Theodore Eisenberg & Valerie P. Hans, *Taking a Stand on Taking the Stand: The Effect of a Prior Criminal Record on the Decision to Testify and on Trial Outcomes*, 94 CORNELL L. REV. 1353, 1375–77 (2009) (citing CAL. EVID. CODE §§ 1101(a), 1108(a) (West 2007); ARIZ. R. EVID. § 404(c); Johnson v. United States, 610 A.2d 729 (D.C. 1992)).

55. *See* FED. R. EVID. 608–09 (permitting impeachment with prior bad acts and convictions relevant to truthfulness of witness); Eisenberg & Hans, *supra* note 54, at 1355 ("All U.S. jurisdictions allow the use of some criminal convictions to impeach the credibility of a witness.").

56. The Eisenberg and Hans study confirms that the existence of a prior record is a strong indicator that the defendant will decline to testify at trial. In the sample studied by Professors Theodore Eisenberg and Valerie Hans, 62% of defendants without a prior record testified while only 45% of defendants with a record testified. The study also disclosed greater disparities depending on case type, with 93% of defendants without prior records testifying in assault cases compared with 57% of defendants with prior records. Similar disparities were also reported in first-degree murder cases. *See* Eisenberg & Hans, *supra* note 54, at 1371–74.

57. *See id.* at 1360–61 (summarizing studies of mock jurors as demonstrating that jurors who learn about a defendant's prior record will be more likely to convict because "[t]he evidence against a defendant with a prior record appears stronger").

58. *Id.* at 1381–83.

59. *See, e.g.*, Brian J. Foley, *Applied Legal Storytelling, Politics, and Factual Realism*, 14 LEGAL WRITING: J. LEGAL WRITING INST. 17, 22 (2008) (summarizing presentation by Professor

event,[60] and the defendant's failure to testify in his own defense can be outcome determinative.[61]

Defendants with no substantial criminal history will not be constrained by these concerns. Such defendants will be better positioned to directly rebut the state's charges, explain incriminating evidence, and present a credible alternative narrative of events. Of course, those repeat offenders who choose to testify notwithstanding the collateral damage will likely be perceived as less credible witnesses.[62] For all these reasons, *ceteris paribus*, repeat offenders will do worse at trial than first-timers.[63]

Finally, repeat offenders do worse at sentencing than first-time offenders as well and not only because of recidivist sentencing schemes, mandatory minimums, and career criminal statutes. Even absent any statutory or guideline mandate, judges are far more likely to impose harsher sentences on repeat criminals than on first-timers.[64] In death penalty cases, jurors are more likely to impose a death sentence on those with criminal histories than those without.[65]

Kevin Jon Heller explaining that "in general the best defense is a good alternative narrative"); *see also* Sunwolf, *Talking Story in Trial: The Power of Narrative Persuasion*, 24 THE CHAMPION 26, 27–28 (2000) (explaining tendency of jurors to understand trial as competition between competing stories).

60. *See* Eisenberg & Hans, *supra* note 54, at 1369–70 (describing data gathered in survey of judges showing that defendant testimony was considered more important than that of police, eyewitnesses, co-defendants, and expert witnesses).

61. Friedman, *supra* note 46, at 666 (observing that in some cases where defendants decline to testify for fear of character impeachment, their "failure to take the stand is utterly disastrous, spelling the difference between conviction and acquittal").

62. This would intuitively seem to be the case. Indeed, the very purpose of permitting prior convictions to be introduced during impeachment is that they are relevant to credibility. However, Professors Eisenberg and Hans' data did not verify that intuition; nor has other experimental research demonstrated that perceptions of credibility are affected by knowledge of prior records. *See* Eisenberg & Hans, *supra* note 54, at 1387.

63. That outcome has been confirmed in at least one empirical study. *See* Martha Myers, *Rule Departures and Making Law: Juries and Their Verdicts*, 13 LAW & SOC'Y REV. 781, 786–88, 792–93 (1979) (finding, based on study of 201 Indiana jury trials, that juries are more likely to convict defendants with numerous prior convictions).

64. For example, the federal sentencing guidelines permit judges to downwardly adjust a sentence where the court finds the offender was a minor participant in the offense. *See* U.S. SENTENCING COMM'N GUIDELINES MANUAL § 3B1.2 (2010). Data shows that this mitigating provision was applied twice as often to defendants without criminal history compared with those with criminal history. *See* Michael Edmund O'Neill, Linda Drazga Maxfield & Miles D. Harer, *Past as Prologue: Reconciling Recidivism and Culpability*, 73 FORDHAM L. REV. 245, 263–64 (2004). Congress has instructed the Sentencing Commission to be more lenient with regard to first-time offenders. *See* 28 U.S.C. § 994(j) (2006) (directing the Sentencing Commission to ensure that "guidelines reflect the general appropriateness of imposing a sentence other than imprisonment in cases in which the defendant is a first offender").

65. Not only does a prior criminal record often count as aggravating circumstances and/or increase the perceived dangerousness of defendants, but some statutes expressly make the death penalty available only for repeat offenders. For example, South Carolina passed a law in 2006 that allowed the death penalty for repeat offenders of criminal sexual conduct with a minor, but

B. *Comparative Ease of Conviction as a Lower Standard of Proof*

The numerous disabilities faced by repeat offenders ensure that if they choose to fight charges at trial, they will lose more often than do those who have no prior criminal records. They face what might be called a "repeat offender tax." The tax works in a variety of ways. Some of the disabilities have the effect of increasing the quantum of net evidence of guilt. Where a defendant is unable to gather exculpatory evidence that he otherwise might have found because he has been detained pretrial, and the state's case remains the same, the net evidence of guilt increases. The net evidence of guilt also increases when the defendant's testimony is made less credible as a result of impeachment, or when jurors find the prior crime evidence probative of intent, motive, or modus operandi. In such cases, there is simply more evidence of guilt—a larger q—and thus a greater likelihood of conviction.

Prior crimes evidence may also directly lower the de facto standard of proof.[66] Once the fact-finder learns of the defendant's criminal past, the fact-finder may require less proof of guilt to convict.[67] A mere preponderance of the evidence may well, as a practical matter, satisfy many jurors (and judges) who know the defendant is a convicted felon. Professors Theodore Eisenberg and Valerie Hans calculated that, in cases in which the evidence was relatively weak, disclosure of a criminal record to the jury alone increased the defendant's probability of conviction from an average of one in five to more than 50%.[68] And as we have seen, risk of disclosure of a criminal record is only one of many ways that criminal procedure disadvantages repeat offenders. Either way, the disabilities faced by repeat offenders increase the probability of conviction—by raising q or lowering s—in ways that are functionally equivalent to a reduced standard of proof.

C. *Magnifying the Disparity*

As demonstrated above, the increased penalties imposed on repeat offenders permit prosecutors to negotiate guilty pleas from those offenders more easily and, because of the pricing realities of the plea bargaining system, have the functional effect of easing the standard of proof. Those disparities are further magnified by the various disabilities that repeat offenders confront should they choose to contest charges at

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not for first-time offenders. *See* S.B. 1138, 2005 Leg., 116th Sess. (S.C. 2005). Although that law is now unconstitutional in light of *Kennedy v. Louisiana*, it illustrates the point. *See* Kennedy v. Louisiana, 128 S. Ct. 2641, 2642, 2650–51 (2008) (holding the Eighth Amendment prohibits the death penalty for raping a child without the intent to kill).

    66. *See* Lillquist, *supra* note 4, at 160–61 (observing that use of character evidence at trial likely affects standard of proof applied by decisionmakers at trial and leads to lower standard of proof for repeat offenders).

    67. *See* Friedman, *supra* note 46, at 657 (noting the possibility that evidence of prior crimes may cause jury to "decide that the defendant is a bad person, and thus effectively lower the prosecution's burden of persuasion").

    68. *See* Eisenberg & Hans, *supra* note 54, at 1385.

trial. In calculating whether to accept a plea offer, rational repeat offenders (and their counsel) must discount their chances of winning to reflect these disabilities. In other words, given any quantum of proof of guilt, repeat offenders will calculate a higher p than first-time offenders. Raising p has the same effect, vis-à-vis plea bargaining, as raising the expected trial sentence. It makes plea offers attractive that would not otherwise be so. Repeat offenders thus confront a compounded calculus at plea bargaining: they face potentially longer sentences and have a higher likelihood of conviction. These factors combine to substantially increase the relative attractiveness of any particular plea offer, and function identically to substantially decreasing the standard of proof for repeat offenders.

III. Longitudinal Guilt

Thus far, I have tried to demonstrate that, in practice, repeat offenders are convicted subject to a standard of proof below—and perhaps well below—that applicable to first-time offenders. Arguments for a variable formal proof standard, such as Professor Laudan's suggestion that we should formally adopt lower proof standards for repeat offenders, seem less compelling once this larger picture of the criminal process is developed, even if one accepts the assumption that disparate treatment of repeat offenders is justified by the greater risks of future criminality they present. As the arguments in this Article show, formally lowering the standard of proof at trial for repeat offenders would only further magnify the disabilities such repeat offenders already face, and those disabilities have their greatest impact not on the small handful of cases that actually go to trial but on the much larger pool of cases that are resolved through guilty pleas. If a formal rule directed jurors to apply a lower standard of proof in cases involving repeat offenders at trial, it would only make it that much harder for repeat offenders to successfully contest criminal charges. As a result, prosecutors would obtain even greater leverage to plea bargain, resulting in yet harsher sentences and guilty pleas in cases involving more equivocal evidence of guilt. The risk that innocent persons will be induced to plead guilty would, of course, also increase. If prosecutors lacked leverage in plea bargaining, these might be consequences worth tolerating. There is no reason, however, to believe that prosecutors lack bargaining leverage or face difficulties inducing defendants to plead guilty. There is no mob clamoring at the courthouse gates for a trial; just the opposite: guilty pleas as a percentage of criminal convictions have been trending upward for decades.[69]

In this final section, I suggest that, over the course of the past century and a half or so, our criminal justice system has undergone a substantial, evolutionary transformation—one largely driven, or at least

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69. Ronald F. Wright, *Trial Distortion and the End of Innocence in Federal Criminal Justice*, 154 U. PA. L. REV. 79, 90–91 (2005) (describing the steady increase in plea bargaining rate since 1981).

made possible, by plea bargaining.[70] Whether we acknowledge it or not, the system as it has developed has in the mine-run of cases abandoned the goal of making an accurate determination of historical facts at a high level of certainty (such as BARD embodies) or attempting to apportion blame and punishment based on that determination. Rather than solve "crimes," the system's primary goal is the identification of "criminals." The criminal process as a whole (there are of course exceptions) is no longer constructed (if it ever was) to determine beyond a reasonable doubt whether *X* committed a particular crime on a particular occasion. Its goal is to make a determination, with as much accuracy as is possible to muster, that *X* is "a criminal."[71] That determination occurs over time, which is why I refer to it as "longitudinal."

Longitudinal guilt is the system's implicit rejoinder to criticisms of a plea bargaining system that permits—indeed induces—defendants to plead guilty even in cases in which proof is weak or equivocal. Plea bargaining occurs relatively early in the investigative process, before all leads have been thoroughly pursued and all potential defenses explored. Often, defense lawyers and prosecutors negotiate plea deals with little more in hand than a police report.[72] This is not a process likely to reveal factual nuance. When plea offers represent substantial discounts over expected trial sentences, as they usually do, rational defendants take the deals. When the deal is good enough, it is rational to refuse to roll the dice, regardless of whether one believes the evidence establishes guilt beyond a reasonable doubt, and regardless of whether one is factually innocent.[73] The risk of inaccurate results in the plea bargaining system thus seems substantial.

The system of longitudinal guilt has safeguards built in to check its excesses. These safeguards begin with the substantial sentence discounts themselves inherent to plea bargains in weak cases. The more uncertainty there is regarding the defendant's guilt in a particular case, the more likely the defendant can trade a guilty plea for a nominal punishment. First-time offenders usually are treated leniently because of their status as first-timers. They often receive probation rather than a

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70. *See generally* GEORGE FISHER, PLEA BARGAINING'S TRIUMPH: A HISTORY OF PLEA BARGAINING IN AMERICA (2003) (establishing the birth of widespread plea bargaining around the mid-to-late 19th Century).

71. To use Professor Bernard Harcourt's language, the criminal system has increasingly adopted actuarial methods based primarily on prior criminal history and deployed them in order "to know the criminal and to predict his criminality." Bernard E. Harcourt, *From the Ne'er-Do-Well to the Criminal History Category: The Refinement of the Actuarial Model in Criminal Law*, 66 LAW & CONTEMP. PROBS. 99, 135 (2003).

72. One study found that defense lawyers almost never visited the crime scene, even in murder cases, and interviewed witnesses in only 4% of felony cases. *See* Michael McConville & Chester L. Mirsky, *Criminal Defense of the Poor in New York City*, 15 N.Y.U. REV. L. & SOC. CHANGE 581, 762–64 (1987).

73. The coercive force of the system is, in fact, at its peak where repeat offenders and relatively minor crimes are involved. *See* Bowers, *supra* note 25, at 1119–22.

prison sentence.[74] First-time felony offenders can frequently get felony charges reduced to misdemeanors, preserving their status as non-felons. The process by which convictions are obtained may not provide absolute certainty, or even remove all reasonable doubt, as to the defendant's guilt. But the penalties are usually light. Under the logic of longitudinal guilt, the proof of accuracy of the conviction is not necessarily the product of the criminal process, or the evidence, that led to it; it is the test of time. If the offender stays clean post-conviction, the dust-up with the courts and police will eventually be forgotten. It is a minor stain on an otherwise more or less productive life. No harm, no foul.[75]

If the offender subsequently finds him or herself again accused of criminal conduct, however, then suspicions about the offender's criminal character are "confirmed." Given the offender's criminal record, potential trial sentences start to increase, and a second accusation will likely lead to a less generous plea offer than was available for the first offense. Although the enhanced penalties that attach to recidivist crimes can be justified with the traditional retributivist defense of recidivist penalties—that in offending again the offender demonstrated greater disregard for morality or law[76]—they are just as well understood as a kind of ex post facto amendment of the lighter penalty imposed previously. After all, subsequent incriminating conduct "lessens" the uncertainty accompanying the earlier conviction by strengthening the suspicion that the defendant possesses a "criminal" character.[77]

In weak cases involving repeat offenders, prosecutors may settle for a guilty plea and another nominal punishment even though the proof of guilt in the new case is somewhat shakier than it was in prior cases.

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74. In the federal system, according to one study, first-time offenders with no prior contact with the criminal justice system received sentences carrying no prison time in approximately 53% of cases, compared with only 9.6% of cases involving defendants with a criminal history. *See* O'Neill, Maxfield & Harer, *supra* note 64, at 264.

75. This is meant somewhat tongue-in-cheek. Of course, for the first-time felony offender, it is not really no harm, no foul. The collateral and stigmatic consequences of conviction impose a substantial cost. But the system accounts for that increased cost, to some extent, by providing more robust protections for such defendants. Because it is harder for prosecutors to plea bargain a first felony offense, prosecutors have incentives to ensure that the evidence is stronger in cases involving first-time offenders, and guilty pleas negotiated in such cases will more likely be induced in strong cases. This, in turn, provides more assurance that the conviction is reliable.

76. *See, e.g.*, *id.* at 246 (noting the "long-standing idea . . . that repeat offenders are deserving of greater punishment because they are already familiar with the criminal justice system and 'should have known better'").

77. At least one scholar has explained this phenomenon as an optimal feature of a punishment system in which the risk of error is high. *See* Eric Rasmusen, *Judicial Legitimacy as a Repeated Game*, 10 J.L. ECON. & ORG. 63, 77 n.31 (1994) (citing Ariel Rubinstein, *An Optimal Conviction Expectation Regime for Offenses that May Have Been Committed by Accident*, *in* APPLIED GAME THEORY (Steven John Brams, Andrew Schotter & Gerhard Schwödiauer eds., 1979)).

Prosecutors may feel comfortable prosecuting the defendant notwithstanding the evidentiary weakness of the new case because, given the prior record, less new evidence is necessary to confirm the repeat offender's type as "criminal."[78] And so it goes. Repeat offenders confronting new allegations of wrongdoing face a spiraling set of consequences. Their prior convictions mean ever-longer expected sentences, which in turn further encourages them to cut their losses when they can through plea bargaining, which adds another entry to their criminal records and makes it even easier for prosecutors to obtain a guilty plea against them the next time. In this way, an individual might go from being a first-time offender to a career criminal without ever having a jury conclude that the evidence proved guilt beyond a reasonable doubt.

At the end of day, however, the system purports to have established to most everyone's satisfaction what the criminal record shows: the defendant's criminal character, i.e., his "recidivism risk."[79] What one plea deal didn't reveal, a career record of criminal convictions proves: the defendant is a criminal "beyond a reasonable doubt." Any harsh penalties reserved for hardened criminals can be imposed without much worry about investigative or trial error given the increased risk of recidivism the defendant poses. Even if this conviction has problems, the defendant has proved his criminality over time. He is longitudinally guilty.

Of course, this characterization of the criminal process does not accurately describe the handling of every criminal case. Some cases receive an enormous amount of attention and resources. Think O.J. Simpson. In those cases, the system rolls out the whole panoply of bells and whistles. It really does seem focused on uncovering historical truth, even when it doesn't succeed at it very well. Indeed, the concept of longitudinal guilt may not capture what happens in most very serious criminal cases, the kind that provoke widespread community attention and close coverage of the investigation and trial. But it does capture, I suspect, the far more typical and mundane doings of the assembly-line criminal justice process that is characterized by overworked prosecutors and underfunded defense attorneys, and in which even serious criminal cases go largely uninvestigated, especially by defense counsel.[80]

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78. There is a baseline below which proof of guilt should not drop, provided by the probable cause requirement. The prosecutor must convince a judge, or a grand jury, that there is at least that much evidence to initiate charges in the first place. Theoretically, probable cause equates, more or less, with a more probable than not standard; this suggests that criminal cases do not lead to convictions, even by guilty plea, unless there is somewhere near a 50.1% likelihood that the defendant was, in fact, guilty. For a discussion of the relationship between probable cause and the more probable than not standard, see, for example, Max Minzner, *Putting Probability Back into Probable Cause*, 87 TEX. L. REV. 913, 927 n.62 (2009).

79. O'Neill, Maxfield & Harer, *supra* note 64, at 278 (stating that the Federal Sentencing "Guidelines' criminal history measures serve in significant part as a recidivism risk prediction instrument").

80. *See* McConville & Mirsky, *supra* note 72, at 762–64.

What can be said in favor of longitudinal guilt? Well, first, it is a relatively inexpensive system to operate. Longitudinal guilt uses the cheapest dispute resolution tactic—plea bargaining—to obtain most criminal convictions. By making guilty pleas cheap, plea bargaining reduces the investigative and prosecutorial resources needed to build adequate cases against defendants. That means that investigators and prosecutors can better ration their resources across cases and increase the deterrent effect of law enforcement.[81] Second, the drop in accuracy in individual cases is compensated for by an increase in accuracy over time. Longitudinal guilt may well produce "accurate" results, in terms of identifying persons who have found themselves consistently on the wrong side of the law, as long as we accept a definition of accuracy based on the proposition that where there is smoke, at least most of the time, there is fire too. More importantly, perhaps, it has proven effective in identifying those who are most likely to find themselves on the wrong side of the law in the future. If the accumulation of a criminal record makes relatively clear who the bad guys are, it also, in turn, facilitates their management and control. Longitudinal guilt, in other words, is the predicate for the "new penology" built upon actuarial forms of risk management applied to crime control.[82]

Longitudinal guilt necessarily places more emphasis on the initial stages of the criminal process. Where the resolution of criminal charges is heavily front-loaded, the content and type of the initial accusations and their alleged factual predicates are more likely to go unchallenged. Indeed, there is a movement afoot to incorporate prior arrests as well as prior convictions into criminal history sentencing calculations because prior arrests have been shown to be almost equally predictive of future criminality.[83] This means that initial decisions about arrests and charges made by law enforcement officers will tend to have relatively greater importance and thus increase police power to make credible threats of legal penalties. This marginal increase in police power may assist them in maintaining order on the streets by magnifying their power to shape legal outcomes through arrest and offense characterization decisions.

What are the costs of a system constructed around the concept of longitudinal guilt? There is, of course, the risk of error. There will be cases, for sure, where a trial conviction would be sufficiently disastrous that the collateral and stigmatic consequences will seem a small price to pay to avoid the risk. In those cases, potentially innocent defendants may well agree to falsely plead guilty to a serious charge. It is even

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81. *See* Easterbrook, *supra* note 18, at 309 (explaining that prosecutors prefer plea bargaining because it permits redeployment of "released resources" for "use in other cases, thus increasing deterrence").

82. Albert W. Alschuler, *The Changing Purposes of Criminal Punishment: A Retrospective on the Past Century and Some Thoughts About the Next*, 70 U. CHI. L. REV. 1, 11–12 (2003). *See generally* JONATHAN SIMON, POOR DISCIPLINE: PAROLE AND THE SOCIAL CONTROL OF THE UNDERCLASS, 1890–1990 (1993).

83. *See* O'Neill, Maxfield & Harer, *supra* note 64, at 248.

conceivable that such an individual, through a chain of unfortunate calamities, could be repeatedly dragooned into the system and, by way of aggressive loss-cutting, accumulate a criminal record notwithstanding innocence. But the likelihood of that happening seems remote. As noted above, the system of longitudinal guilt imposes the strongest de facto protections on first-time offenders, making wrongful convictions of such offenders relatively unlikely.[84] Although its protections diminish for repeat offenders, it increasingly relies on statistical (im)probabilities to reduce the risk of systemic error. Even if justice provided no more accuracy than a coin toss, the odds that the coin will keep coming up heads becomes, at some point, statistically implausible. Moreover, even the severest critics of the system would probably concede that the probability of guilt in most cases exceeds a mere 50.1%, which is, in theory, its absolute floor.[85] So accuracy seems a relatively minor concern.

A greater concern, however, is the possibility that longitudinal guilt is a self-reinforcing system.[86] Individuals who get caught up in the criminal justice system early in life get "tagged" as criminals. The stigma and collateral consequences that follow that early labeling affect the choice-set available to them. If individuals with criminal records cannot get jobs, social services, or student loans, criminal activity might well present an attractive, and perhaps the only, alternative source of income. If "decent" society shuns convicted criminals, then the "street" may be the only society open to them.[87]

Longitudinal guilt is predicated on the essentialist premise that "true" criminals will reveal themselves through repeated criminal conduct, a claim that has won a fair measure of statistical backing. Perhaps the strongest criticism of longitudinal guilt is its tendency to disregard the possibility that criminals are made and not born, and that *the system* is the maker. In other words, longitudinal guilt may well confuse the problem with the solution; it fails to acknowledge that criminality might not be inherent in the character, genes, or psychological profile of offenders but rather could be a "problem with

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84. *See* Bowers, *supra* note 25, at 1121–22 (arguing that risk of wrongful conviction is greatest for repeat offenders who commit relatively minor crimes).

85. *See* discussion *supra* note 78. Whatever theoretical floor is established by the requirement that criminal charges survive the scrutiny of a probable cause determination, I think it is additionally safe to assume that most prosecutors would not prosecute if they did not believe the defendant was, at the least, more probably guilty than innocent.

86. Professor Harcourt refers to this problem as the "ratchet effect," by which he means that statistically targeted populations in the criminal justice system will not only be subject to disproportionately more policing and punishment but will also be perceived by society as especially prone to criminality, thereby limiting their reentry options. *See* Bernard E. Harcourt, *Henry Louis Gates and Racial Profiling: What's the Problem?* 17–20 (John M. Olin Law & Econ. Working Paper No. 482 (2d Series), 2009), *available at* http://ssrn.com/abstract=1474809.

87. Professor Elijah Anderson uses these terms in his classic qualitative study of street life in inner city communities. *See* ELIJAH ANDERSON, CODE OF THE STREET: DECENCY, VIOLENCE, AND THE MORAL LIFE OF THE INNER CITY 35 (1999).

prisons, punishment, or the lack of reentry programs."[88] The next criminal conviction may, in short, not prove that the defendant's essential nature is "criminal" but reflect only the economic and social pressures of life as a convicted criminal, or indeed, nothing more than the increased difficulty of defending a criminal case as a repeat offender.

IV. CONCLUSION

The plight of convicted criminals in our society, unforgiving as it is, is not the primary point of this Article. What I set out to show is simply that, by and large, repeat offenders do not receive the same benefit of the doubt as first-time offenders. The plea bargaining system accounts for upwards of 90% of all criminal convictions.[89] As some commentators have observed, plea bargaining is not merely an aspect of our system of justice; it is our system of justice.[90] In that system, prosecutors have enormous discretion to bargain with defendants and thereby determine the outcomes of prosecutions. Defendants, of course, have the ultimate power to decide whether to take the deal. Assuming that defendants bargain rationally, however, the two primary determinants of whether a deal is worth taking (setting aside the costs of litigation) are the sentences they expect to receive if they lose at trial and the probability that they will lose. Those two factors determine the economic value of a plea offer. Because expected sentences and the probability of losing at trial increase for repeat offenders, first-time offenders and repeat offenders are not on a level playing field. Prosecutors can induce repeat offenders to take plea offers that first-timers should rationally refuse. That is the equivalent of reducing the standard of proof for repeat offenders at trial. Without a stronger showing of a crisis of dismissals or acquittals of repeat offenders, it seems to me that the burden of proof for lowering the burden of proof, so to speak, rests with those who believe the current disadvantages that repeat offenders face do not already account for the greater actuarial risks presented by them.

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88. Harcourt, *supra* note 71, at 151.

89. *See* BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS 2000 at 457 (Kathleen Maquire & Ann L. Pastore eds., 2001) (reporting that 91% of all state court felony convictions in 1996 were obtained by guilty plea).

90. *Cf.* Rudolf J. Gerber, *On Dispensing Injustice*, 43 ARIZ. L. REV. 135, 145 (2001) ("Plea bargaining is not just a part of Arizona's justice system; today it *is* the system. More than ninety-five percent of defendants enter guilty pleas.").