A behavioral justification for escalating punishment schemes

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A B S T R A C T

The standard two-period law enforcement model is considered in a setting where individuals usually, but not exclusively, commit crimes only after comparing expected costs and benefits. Where escalating punishment schemes are present, there is an inherent value in keeping a clean criminal record; a person with a record may unintentionally become a repeat offender if he fails to exert self-control, and be punished more severely. If the punishment for repeat offenders is sufficiently high, one may rationally forgo the opportunity of committing a profitable crime today to avoid being sanctioned as a repeat offender in the future. Therefore, partial deterrence can be achieved at a very low cost through the use of escalating penalties, providing a behavioral justification for punishing repeat offenders more severely.

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1. Introduction

The scheme of punishing repeat offenders more severely than first time offenders is still puzzling from a law and economics perspective.[1] Although the law and economics literature on escalating punishment schemes is broad and "escalating"[2] not many articles appear to provide satisfying economic rationales for repeat offender laws.[3] As one scholar very recently pointed out "as

intuitively appealing as [escalating] schemes appear, however, it has proven surprisingly difficult to show that they are consistent with an optimal (cost-minimizing) enforcement policy" Miceli (2012, p. 1).

The main objective of this article is to demonstrate that the strict assumptions in most economic analyses concerning the nature of offenders may be responsible for their inability to provide satisfying justifications for repeat offender laws. Despite many empirical studies, anecdotal evidence, and legal commentary providing support for the contrary,[4] mainstream economic analyses continue to assume that offenders decide rationally, and that they *always* consciously maximize expected net-benefits.[5] Meaningful departures from this assumption, especially in the context of criminal

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[1] *See, e.g.,* Emons (2007, p. 171) stating that "for the well developed law and economics literature on deterrence escalating sanction schemes are still puzzling", and Utset (2007, p. 664), sub-section IV. E. *The Puzzle of Higher Sanctions for Repeat Offenders. See* also Polinsky and Shavell (1998) reviewing the previous law and economics literature, as well as criminal law scholarship, and concluding that "the question of whether sanctions should depend on prior convictions has not been adequately addressed in the standard economic model of deterrence" Polinsky and Shavell (1998, p. 306).

[2] This refers to the title of Miceli (2012): *Escalating Interest in Escalating Penalties.*

[3] *See* Miceli (2012) providing a survey of the existing law enforcement literature on escalating punishment schemes, and concluding that "economic theory has had a hard time rationalizing this practice" Miceli (2012 *at abstract*). One explanation might be that economic analyses are incapable of providing such rationales, because recidivism laws reflect the maximization of non-economic or non-consequentialist

values. The objective of this article is not to investigate whether this is true, but to demonstrate that economic analyses may be capable of providing stronger rationales once they incorporate behavioral assumptions.

[4] *See, e.g.,* Jolls, Sunstein, and Thaler (1998), Robinson and Darley (2004) and McAdams and Ulen (2009) reviewing existing empirical studies. Korobkin and Ulen (2000) is an example of legal commentary arguing for the removal of the rational choice assumption from law and economics.

[5] An exception is Emons (2007) which is briefly reviewed later in this section.

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law – and even more specifically in analyzing repeat offender laws – are likely to increase the explanatory power of law and economics.[6]

More than forty years ago, Stigler noted that "the first-time offender may have committed the offense almost accidentally and (given any punishment) with negligible probability of repetition, so heavy punishments (which have substantial costs to the state) are unnecessary" (Stigler, 1970, pp. 528–529)). Later, in 1991, Cooter observed that "people often commit torts or crimes due to weakness of will" (Cooter, 1991, p. 149) and attempted to incorporate "weakness of will" into the standard economic theory. Since then, many scholars have pointed out and documented that some offenses are committed impulsively rather than as a result of conscious decision making guided by a cost-benefit analysis.[7] Despite these developments, there have not been many attempts to incorporate decision-makers who lack full self-control into the law enforcement literature analyzing repeat offender laws.[8] This is the purpose of this article: to demonstrate how the simplest law enforcement model becomes capable of providing an economic rationale for escalating penalty schemes when *weak-willed* potential offenders are considered.

By *weak-willed*, I mean potential offenders who ordinarily possess self-control, but who may lapse into committing crime.[9] An individual who possesses self-control decides whether or not to commit crime based on a cost-benefit analysis, whereas a person who acts impulsively fails to consider the consequences of his actions. Perhaps paradoxically, this approach allows the formalization of what might be perceived as *over-compliance* in standard law enforcement models; individuals may forgo the opportunity of committing seemingly profitable crimes. In other words, a person may choose to comply with a law, even if breaking that law would lead to a sanction that costs less than the criminal benefits to the potential offender. Though this may seem puzzling, many of us engage in this type of behavior frequently.

One may not report a minor car accident to his insurance company, even if he knows his insurance rate will not go up with the reporting of a single accident. Similarly, a person may prefer not to speed, even if by doing so she would obtain benefits greater than the cost of the speeding ticket. Both examples provide hints as to why the weak-willed potential offender may prefer to comply with the law even if the criminal benefit is higher than the sanction for first time offenders. The person's decision is guided by future considerations in both examples. The insured does not report the minor accident, because he wants to have the ability to report more expensive accidents in the future without having increases in his policy rate. The driver may abstain from speeding, because she wants to be able to accumulate points on her drivers' license in future and more important occasions that will require her to speed. Just like these two individuals, the weak-willed potential offender has a reason to do something that is not in his short-term best interest. He complies with the law today, so that he preserves a clean record when he lapses in the future and commits a crime. This way he avoids the penalty for repeat offenders, which is ordinarily greater than the penalty for first time offenders. I call this over-compliance generating effect of escalating penalties the *temporal spillover effect*.

If punishment is costly, as is clearly the case when imprisonment is used, then one can take advantage of potential offenders' anticipatory behavior. A high sanction for repeat offenders deters individuals who currently possess self-control, even if the punishment for a first time offender is very low. By setting the punishment for first time offenders very low, and the sanction for repeat offenders sufficiently high, one can simultaneously deter individuals with a clean record and minimize the cost of punishing individuals who lapse and commit crime. The possibility of achieving a degree of deterrence while reducing punishment costs makes escalating penalties socially desirable. This justification for escalating punishments relies on the assumption that individuals lack full self-control, and rarely lapse into committing crime; but for this assumption, individuals would not have a reason to forgo profitable criminal opportunities, because once they build up a criminal record, they can simply stop committing crimes.

This rationale does not rely on specific assumptions concerning the efficiency of offenses. Justifications for escalating penalty schemes exist when crimes are inefficient, but also when some are efficient. Similarly, optimal escalating penalties are present when criminal benefits enter the social calculus as well as when they do not. Moreover, it is not necessary to assume that punishment costs more when committed by individuals who lapse. These assumptions are in some regards weaker than those used in other articles analyzing the economics of repeat offender laws that incorporate individuals who are punished without (breaking or) intending to break the law. Examples include Chu, Hu, and Huang (2000), Emons (2007), and Mungan (2013). Emons (2007) incorporates individuals who may accidentally commit crimes, and concludes that if criminal benefits are in a certain parametric range, then escalating punishments are optimal. That article, unlike the instant one, relies on criminals having history-independent strategies (*i.e.* they either always or never intentionally commit crime), punishment being costless, and the existence of a constraint on the total sanctions that can be imposed on criminals. Chu et al. (2000) consider an imperfect legal system which convicts innocent individuals with a certain probability, whereas Mungan (2013) focuses on the possibility of individuals being uninformed of the illegality of various acts. The last two articles assume that there are social costs associated with the punishment of innocent and uninformed individuals, respectively, and conclude that the punishment of repeat offenders can be justified on grounds that they reduce such costs.

I am not claiming that the economic rationale identified in this article is the only – or most important – one that provides a justification for escalating punishment schemes. My primary objective is to demonstrate that simple behavioral assumptions can provide strong economic justifications for repeat offender laws, even under the simplest sets of assumptions. Accordingly, the instant article is complementary to the existing literature, which generally does not rely on behavioral assumptions, and contains at least three broad sub-categories.[10] One line of research asserts that the stigmatization effect of the first criminal penalty may give it greater force than subsequent penalties, which may make escalating punishment schemes optimal (*e.g.* Funk, 2004; Miceli & Bucci, 2005; Rasmusen, 1996). Another strand of literature points out that individuals may have different tendencies to commit crime. In this framework, escalating penalties can be used to distinguish between high-tendency

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[6] McAdams (2011) also highlights the importance of departures from standard assumptions (*e.g.* through the incorporation of "weakness of will, impulsiveness, myopia, or bounded willpower" ((McAdams(2011, p. 1607)) in studying criminal law). Unlike the instant article, McAdams (2011) is mainly concerned with implications concerning general deterrence and addiction. Similarly, Mungan (2012) argues that if economic analyses incorporate behavioral assumptions they can provide satisfying rationales for a variety of prevalent practices in criminal law including punishing repeat offenders more severely. However, that article, unlike the instant one, relies on the information revealing function of criminal law rules and procedures.

[7] *See, e.g.* Robinson and Darley (2004) and the references cited therein. *See also* McAdams (2011) reviewing the existing economics literature studying willpower in the context of criminal law.

[8] For exceptions, *see* Utset (2007) and Baumann and Friehe (2012), which are briefly discussed below.

[9] Section 3.1 discusses how this assumption relates to the literature on present-bias.

[10] *See* Miceli (2012) for another review of the existing literature on escalating punishment schemes.