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# Play Fair with Recidivists

Richard Dagger

*University of Richmond*, rdagger@richmond.edu

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## Chapter 3

# Playing Fair with Recidivists

Richard Dagger\*

### Introduction

Persistent offenders present serious problems for both the theory and practice of criminal justice. As a practical matter, persistent offenders threaten public safety and strain public resources. First-time offenders pose their own challenges for the police and courts, of course, but it is the recidivists—those who have been caught and convicted more than once—who crowd the prisons and other “correctional facilities.”<sup>1</sup>

Where the theory of criminal justice is concerned, the problem is to determine whether there is any justification for “recidivist enhancement” or “the recidivist premium.” The public seems to think that repeat offenders are in some sense guiltier, or deserving of harsher punishment, than those found guilty of a first offense.<sup>2</sup> In some jurisdictions, this sentiment has found expression in laws that require harsher sentences for recidivists, most famously in the “three strikes and you’re out” laws in California and many other parts of the United States. But are legislatures justified in passing such laws? Is public sentiment perhaps out of step with what justice itself demands? These questions are particularly pressing for those of us who take a broadly retributive approach to the punishment of criminals. If the point of punishment is in some sense to pay back the offender for the wrong that he has done, or to mete out punishment according to his just desert, then it is not at all obvious that someone should be punished more severely for his second offense than for his first, and more severely for the third than for the second, and so on. If the offense is virtually the same in every case—say, the theft of a car worth \$10,000.00—then it would seem that retributive justice demands the same punishment in every case.

Retributivists thus face a difficult challenge. Either we must go against the social grain, and perhaps our own intuitions, by insisting that a criminal offense carry the same penalty or punishment no matter how many previous convictions an offender has accrued; or we must find a way to justify the recidivist premium. I shall take the second route here by arguing that recidivism itself is a kind of criminal offense. In developing this argument, I shall rely on Youngjae Lee's insightful analysis of "recidivism as omission."<sup>3</sup> I shall complement his analysis, however, by grounding it in a conception of criminal law as a cooperative practice—a grounding that Lee's defense of the recidivist premium otherwise lacks. In doing so, I shall incorporate Lee's "recidivism as omission" into the familiar theory that justifies punishment as a matter of fair play.<sup>4</sup>

## Recidivism as Omission

Lee is not the first to defend the recidivist premium in retributivist terms, and he takes care to set out and criticize others' attempts before advancing his own theory of "recidivism as omission." He argues, for example, that it is a mistake to base enhanced punishment on the bad character or defiant attitudes of repeat offenders. Instead, he claims, the proper approach is to regard the recidivist as someone who has not only broken the law again but as someone who has omitted to take seriously the lessons of his or her previous punishment. The summary statement of Lee's position is worth quoting at length:

The culpable omission that justifies the recidivist premium is the repeat offender's failure, after conviction, to arrange his life in a way that ensures a life free of further criminality. Although how individuals conduct their lives as a general matter is not properly the business of the state, once offenders are convicted of a crime, they enter into a thick relationship with the state, and that relationship gives rise to an obligation for the offenders to rearrange their lives in order to steer clear of criminal wrongdoing. This Article has also argued that obligations between the state and offenders run in both directions, and that we should recognize the ways in which the state may be a responsible actor that should share the blame for a recidivists' reoffending.<sup>5</sup>

Lee's account is not completely satisfactory, as I shall explain below, but I do believe that it points the way to the justification of the recidivist premium. To begin with, Lee makes a strong case in support of his claim that "recidivism as omission" avoids the problems that beset other retributivist attempts to justify harsher punishment for recidivists. In the case of the "bad character" argument, as he acknowledges, it may well be true that recidivism is an indication of bad character traits. It does not follow, however, that we should punish the recidivist both for the new offense he has committed and for the character flaws that led him to commit it. That is, to return to the example of the car thief, the bad-character argument would have us impose on the repeat offender the same pun-

ishment he received for his previous conviction for car theft *plus* the premium of extra punishment for his bad character. But to do this, as Lee points out, is in effect to punish a person not for breaking the law but for displaying certain character traits. Such punishment might be appropriate if those character traits always and necessarily manifest themselves in criminal behavior, but it is not at all obvious that they do, or even that such traits exist. On the contrary, the character flaws typically associated with criminal conduct—malice, callousness, and insensitivity to others' interests, for example—are often evident in conduct that is unquestionably legal, if not admirable.<sup>6</sup>

The attempt to ground the recidivist premium on the repeat offender's defiant attitude or disrespect for law is also unsatisfactory. As Lee notes, there are well-established legal offenses, such as contempt of court and resisting arrest, that aim at persons whose defiance would obstruct the course of justice or interfere with the rule of law.<sup>7</sup> The question, though, is whether a general proscription of a defiant attitude toward the law is warranted. In liberal societies that encourage people to subject their governing officials to scrutiny, and occasionally celebrate those who engage in civil disobedience, the answer seems to be no. That being the case, it is difficult to see how defiance or disrespect in itself can justify enhanced punishment for the recidivist.

Lee's solution to the problem of the recidivist premium, as previously noted, is to hold persistent offenders accountable not for their bad characters or defiant attitudes but for their failure to conduct their lives, after conviction, "in a way that ensures a life free of further criminality."<sup>8</sup> On his account, in other words, the recidivist is guilty of two new offenses: first, of committing the crime(s) that make him a repeat offender; and second, of omitting to conduct his life in a lawful manner, as his earlier punishment(s) should have taught him to do. For the crime of commission, the recidivist should receive the same punishment she would receive were she a first-time offender; for the omission—that is, the failure to act on the lessons of her earlier punishment(s)—she deserves the extra punishment that we call the recidivist premium.

As the subtitle of his essay indicates, it is also important to note that Lee's approach to recidivism is "a relational account." The state and the offender, to use his terms, have a "thick relationship" with each other that begins with the offender's first conviction, and the state's right to impose harsher punishment on recidivists than on first-time offenders grows out of this relationship. Moreover, the relationship is in some sense reciprocal. As Lee says, "obligations between the state and offenders run in both directions, and . . . we should recognize the ways in which the state may be a responsible actor that should share the blame for the recidivists' reoffending."<sup>9</sup> Before the agents of the state impose additional punishment on recidivists, they should be sure that they have discharged their responsibility by making it possible for the offender "to arrange his life in a way that ensures a life free of further criminality."<sup>10</sup> If prisons are little more than schools of crime, and if the convict faces legal barriers to employment, housing, and support when he leaves prison, it will be unfair to hold

him accountable for omitting to live a law-abiding life. On Lee's account, then, the recidivist premium is grounded in the relationship between the state and the offender, and the state must take its responsibilities as seriously as the offender must take his.

In my view, Lee's account of the recidivist premium is the most plausible and persuasive to be advanced by a retributivist. Yet it is not without its problems. One problem is his characterization of the omission that makes the recidivist liable to additional punishment, and another involves the "relational" aspect of his argument.

"The key to understanding the recidivist premium," Lee says, "lies in seeing that a self continues over time, and that the self at  $t_1$  can influence what the self does at  $t_2$ . . . . The key to the recidivist premium lies not just in evaluating an individual's act of reoffending or bad character traits. Rather, the focus should be on the ongoing *relationship* between the offender and the state."<sup>11</sup> After his initial conviction, then, the offender is engaged in a "thick relationship" with the state that requires him to conduct himself at  $t_1, t_2, \dots, t_n$  in a way that will keep him from committing another crime. If he fails—if he does commit a new offense—then the state may hold him accountable not only for the offense but for what he failed to do at, say,  $t_2$ , when he renewed his acquaintance with people who had encouraged his earlier crimes, or at  $t_5$ , when he gambled away much of the little money he had. Such activities may not be criminal in themselves, but they do represent the kind of omission for which the state may invoke the recidivist premium at  $t_0$ , when he stands convicted of another offense.

Suppose, however, that we have two first-time offenders, Sally and Sam, who have served their sentences and are now conducting themselves in ways that are likely to lead them back into criminal activity. That is, Sally and Sam both take up with the kinds of people who are likely to land them in trouble, and Sally and Sam both begin to gamble heavily. But Sally does not commit another crime—perhaps because she wins enough while gambling to remove the apparent need for money—while Sam does. Sam is then caught, convicted, and subjected to the recidivist premium, while Sally, who is equally guilty of omitting to arrange her life to stay free of criminality, goes unpunished. It seems, in short, that Sam's *omission* cannot be what justifies the imposition of the premium in his case, since the unpunished Sally is equally guilty of that offense, so it must be his *commission* of the new offense. Either that or the enhanced punishment is simply unjustified (on retributive grounds).<sup>12</sup> In either case, recidivism as *omission* fails to account for the recidivist premium.

The proper response to this objection is not to give up on Lee's recidivism as omission but to recognize that his argument requires elaboration and clarification. One might hold, for example, that Sally is indeed culpable insofar as she has omitted to conduct herself in a way that will keep her free of criminality. Like Sam, she is in a "thick relationship" with the state, and the state has the right to punish or penalize her for her offense of omission. Such a person will not be subject to the recidivist premium, however, because she is not, strictly

speaking, a recidivist. Nevertheless, she will be subject to punishment, penalty, or at least closer supervision on the part of parole or probation officers for her failure to conduct herself in the proper way.

Unfortunately, this attempt at rescuing Lee's account of recidivism as omission leads to the unpalatable conclusion that someone ought to be subject to legal punishment for doing things that are not in themselves illegal. Associating with unsavory characters, drinking too much, and squandering one's money in (legal) gambling are not crimes, however likely they may be to lead to criminal activity. How then can we justify punishing someone like Sally for engaging in them when they do not—or have yet to—lead her to commit actual crimes? One might argue that some conduct that is open to ordinary, law-abiding citizens should be closed to those previously convicted of a criminal offense, but that position would be hard to square with the belief that those who have served their time, or otherwise met the terms of their sentences, have paid their debts to society. The most we can justify in such cases, it seems, is the stricture that parole or probation officers ought to subject someone like Sally to closer supervision and frequent warnings about the dangers of her conduct, but not that they or others may *punish* her for doing what she may legally do.

There is, however, a more promising way to elaborate Lee's analysis of recidivism as a kind of omission. This approach calls for something akin to the "no harm, no foul" reasoning familiar in sporting events. We might hold, in other words, that offenders who keep bad company, gamble (at legal casinos), and drink immoderately are cause for concern, but that they should not be judged guilty of an offense of omission until they show that they cannot live in this way *and* stay free from criminality. If Sally can live in this way without committing another crime, but Sam cannot, then it seems reasonable to say that Sally and Sam are not equally guilty, as we had supposed, of omitting to arrange their lives so that they will remain free from criminality. Sally's conduct may be as misguided as Sam's, but it stops short of recidivism. It is the commission of the new offense, then, that justifies the state in looking backward to Sam's omission to conduct himself as he should have—and thus to the imposition of the recidivist premium.

This approach, however, seems to have the unfortunate implication of turning Lee's "recidivism as omission" into a straightforward account of recidivism as commission. That is, if we follow the "no harm, no foul" rule, all that really matters is the foul—the criminal offense—and not the harmful misconduct that puts one on the path to criminality. This becomes clear when we consider what would happen, on this approach, if Sam makes a genuine effort to stay free from criminality, but fails, while Sally makes no such effort but somehow stops short of breaking the law. Suppose, for example, that Sam, despite his earnest intentions, simply cannot resist breaking the law when he notices one day that someone has left the keys in the ignition of an unlocked car. Sally, meanwhile, intends to steal a car, but is too weak or distracted to make the effort. Sam is guilty of car theft and Sally is not; but is Sam also guilty of omitting to live in a

way that will keep him free from criminality? Is Sally not guilty, as the “no harm, no foul” approach suggests?

My view is that the answer to both of these questions is yes. Sam did try to live in a law-abiding manner, but he failed; at the crucial juncture he omitted to act as his prior conviction and punishment should have led him to act. Sally has not learned her lesson, evidently, but she has somehow stayed within the law. Sam therefore deserves punishment, including the recidivist premium, but Sally does not. Nevertheless, this reasoning seems to strain the claim that recidivism is a kind of omission. To reduce the strain, and to strengthen Lee’s case for recidivism as omission, we shall need to address the second problem with his analysis.

This second problem is a matter of incompleteness, specifically the incompleteness of the “relational account” Lee offers. Lee is right, I think, to direct our attention to “the ongoing *relationship* between the offender and the state”; and he is also right to hold that “[w]hen a person is convicted and punished for a crime, one thing we can say with confidence is that the relationship between that person and the state has changed in a way that makes that person different from others who have not had that kind of encounter with the state.”<sup>13</sup> How this relationship develops, however, and what its nature is, are matters that he does not explain. He offers an occasional hint in this direction, but nothing that can satisfy someone who doubts that there is any significant relationship, thick or thin, that connects the recidivist to the state.

Lee’s “recidivism as omission,” as a result, is a promising but incomplete account of the recidivist premium—promising enough, in my view, to give us reason to look for ways of completing it. That is the task I take up in the remainder of this essay. To carry out this task, we shall need to ground Lee’s argument for the recidivist premium in a broader theory of retributive punishment; and such a theory must itself be grounded in a conception of the political or legal order that makes sense of Lee’s “relational account.” Such a conception will fill out his account of the relationship between offenders and the state, and it will do so in large part by turning our attention from *the state*—a term that connotes a remote, bureaucratic agency—and toward *the polity*—that is, toward the political or legal order understood as a cooperative practice in which legal punishment is a matter of fair play.

## **Law, Punishment, and Fair Play<sup>14</sup>**

Although intimations may be found in earlier writers, the first clear formulations of this conception of the political or legal order appeared in the works of two of the most influential legal and political philosophers of the twentieth century, H. L. A. Hart and John Rawls. According to Hart, “when a number of persons conduct any joint enterprise according to rules and thus restrict their liberty, those who have submitted to these restrictions when required have a right to a similar

submission from those who have benefited by their submission.”<sup>15</sup> What Hart called “mutuality of restrictions,” Rawls a few years later designated the principle of fair play. “Suppose,” he said,

there is a mutually beneficial and just scheme of social cooperation, and that the advantages it yields can only be obtained if everyone, or nearly everyone, cooperates. Suppose further that cooperation requires a certain sacrifice from each person, or at least involves a certain restriction of his liberty. Suppose finally that the benefits produced by cooperation are, up to a certain point, free: that is, the scheme of cooperation is unstable in the sense that if any one person knows that all (or nearly all) of the others will continue to do their part, he will still be able to share a gain from the scheme even if he does not do his part. Under these conditions a person who has accepted the benefits of the scheme is bound by a duty of fair play to do his part and not to take advantage of the free benefits by not cooperating.<sup>16</sup>

In these early formulations, Hart and Rawls spoke of rights, duties, and justice, but not of punishment. Their primary concern was with the principle of fair play as a grounding for political obligation, understood as the general obligation to obey the law. By a somewhat different route, however, Herbert Morris drew a connection between the fair distribution of benefits and burdens, on the one hand, and the justification of legal punishment, on the other. As he argued in his influential essay, “Persons and Punishment,” “A person who violates the rules has something others have—the benefits of the system—but by renouncing what others have assumed, the burdens of self-restraint, he has acquired an unfair advantage. Matters are not even until this advantage is in some way erased. . . . [H]e owes something to others, for he has something that does not rightfully belong to him. Justice—that is, punishing such individuals—restores the equilibrium of benefits and burdens by taking from the individual what he owes, that is, exacting the debt.”<sup>17</sup>

Underpinning all three of these statements—Hart’s, Rawls’s, and Morris’s—is the idea that society, or the political or legal order, is a cooperative endeavor. That is, the principle of fair play only applies to those who are engaged in what Hart called a “joint enterprise” and Rawls a “scheme of cooperation.” Worries about fairness and unfairness may arise in other contexts, as they do when someone complains that it is not fair for some people to enjoy natural advantages, such as keen eyesight and a healthy constitution, while others are born with crippling disabilities. But fair *play* is a consideration that grows out of cooperative ventures, enterprises, or practices, in which the participants rely on one another and must make some sacrifice or bear some burden if the cooperation is to prove beneficial. In other words, cooperative enterprises produce public goods, and complaints of *unfair play* are likely to be heard when some people try to be free riders who enjoy the benefits of the cooperative efforts of others without bearing their share of the sacrifice or burden.

That is why the attempt to ground political obligation or punishment on the principle of fair play begins by conceiving of society—or the political or legal order—as a cooperative endeavor secured by coercion. When it approaches the ideal of a cooperative endeavor, the political order enables us to work together for common purposes and to pursue in peace our private interests; but we can do these things only when others, through their cooperation, help to maintain this order. We must have rules, therefore, or conventions of some sort, for we need to know what the required acts of cooperation are; and we must see to it that the participants generally do what the rules require—that is, that they do their cooperative part. Indeed, in any but the smallest and most closely knit societies, simply having known procedures for making, enforcing, and interpreting the rules will be perhaps the most valuable of all public goods. For it is the political order, understood to include the rule of law, that makes it possible for people to go about their lives with a measure of security, pursuing various other goods, private as well as public, within its cooperative framework. As Jeffrie Murphy once made the point, “in order to enjoy the benefits that a legal system makes possible, each man must be prepared to make an important sacrifice—namely, the sacrifice of obeying the law even when he does not desire to do so. Each man calls on others to do this, and it is only just or fair that he bear a comparable burden when his turn comes.”<sup>18</sup>

If a society is truly fortunate, little effort will be required to ensure widespread compliance with its laws, for the members will act out of a desire to do their fair share of the cooperative work. Such good fortune is not to be relied upon, however. Fairness often demands that we do things for the sake of cooperation that we find unpleasant or burdensome, such as paying taxes, obeying traffic laws, and respecting the property of others. The temptation to be a free rider is often strong, and measures are necessary to secure the cooperative order against this temptation. Enforcing the laws is one of these measures, and punishment of those who break the laws is another. In Hart’s words, “Sanctions’ are therefore required not as the normal motive for obedience, but as a *guarantee* that those who would voluntarily obey shall not be sacrificed to those who would not. . . . [W]hat reason demands is *voluntary* cooperation in a *coercive* system.”<sup>19</sup>

Punishment is justified, then, when the political order may be reasonably regarded as a cooperative enterprise. When it can be so regarded, and when other things are equal, the persons who disobey the law fail to meet their obligations to the cooperating members of society. Punishment under law serves as a means of assuring the law-abiding members of the enterprise that those who would take advantage of their cooperation by breaking the law will be subject to sanctions if they do. Those who do not play fair, in short, open themselves to punishment. In this way, the fair-play theory incorporates both forward-looking elements and the backward-looking point of view characteristic of retributivism. That is, the threat of punishment provides a measure of assurance to those who are willing to obey the law that others will not take unfair advantage of them;

otherwise obeying the law would have little point. But this assurance is secured only by punishing those who have taken unfair advantage of others by breaking the law.

To put the point another way, every crime is a crime of unfairness, whatever else it may be.<sup>20</sup> Criminals act unfairly when they take advantage of the opportunities the legal order affords them without contributing to the preservation of that order. In doing so, they upset the balance between benefits and burdens that a cooperative practice requires, and they make themselves liable to punishment. In the terms of Lee's "relational account," the relationship between offenders and the state is better understood as a relationship between citizens, or members of a cooperative practice, who owe it to one another to bear their fair share of the burdens of maintaining that practice.

## Contracts, Communities, and Cooperative Practices

To develop and clarify this account, it may be helpful to distinguish it from two other ways of conceiving of the political and legal order. On the first conception, political societies are essentially voluntary in nature, and their members stand in the same relation to one another as the parties joined by a contract. That is, the parties form or enter into the society in order to advance their interests, and they acquire obligations to one another when they do so. The political society thus rests on the consent of its members as the classical social-contract theorists held, even if their consent must be understood to be given tacitly or hypothetically.

The second conception of the political and legal order differs from the first in holding that political societies resemble families or traditional communities much more than they do voluntary associations. On this communitarian view, membership in and identification with the society is what counts, even when membership is not altogether voluntary. We do not choose the families into which we are born, the argument goes, yet we are members of families nevertheless, and that membership entails obligations to our families. In much the same way, we are born into communities or societies, and we have obligations to their members, whether we *choose* to undertake them or not. Nor is this to say that those obligations are forced or imposed on us in the way that unfortunate British (and other) subjects of earlier times were sometimes *impressed* into military service. As Michael Hardimon argues,

the metaphor of impressments is particularly ill-suited to the roles associated with the non-contractual role obligations we are inclined to take seriously. It would simply be wrong to say that we are impressed into the roles of sons or daughters, wrong to say that we are impressed into the roles of brothers and sisters, and wrong to say that we are impressed into the role of citizen. We do not,

it is true, choose these roles, but we are not impressed into them either. They are roles into which we are born.<sup>21</sup>

The fair-play theory rests on a conception of the political order that falls between the contractarian and communitarian conceptions. This claim may surprise some readers, for critics sometimes take the fair-play theorists' appeal to the mutual benefits of a cooperative practice to indicate that practices of this kind are essentially contractual. Matt Matravers, for example, holds that "fair play theory combines a contract-based understanding of social co-operation and a retributive account of punishment."<sup>22</sup> In discussing Rawls's duty of fair play, Phillip Montague states that political obligations "are requirements of fair play that arise when people *voluntarily enter into agreements* to establish mutually beneficial and just schemes of social cooperation."<sup>23</sup> These assessments, however, are mistaken. Fair-play theorists do not rely on a conception of the political order as a voluntary agreement; nor do they believe that occasions for acting unfairly arise only when a person has agreed or consented to enter into a mutually beneficial scheme of social cooperation. On the contrary, such obligations are more likely to arise when people simply find themselves participating in a cooperative practice, never having thought of whether they should or should not enter into it. In this respect, the fair-play view is closer to the membership or communitarian account in holding that the obligations of membership are neither fully voluntary, as in a contract, nor wholly involuntary, as in the case of the impressed sailor. But neither are they exactly like the obligations that flow from membership in a family or traditional community. To conceive of the political order as a cooperative practice is, again, to take a stand between the contractarian and communitarian views. Ronald Dworkin indicates as much in his own defense of the communitarian position. According to Dworkin,

the best defense of political legitimacy—the right of a political community to treat its members as having obligations in virtue of collective community decisions—is to be found not in the hard terrain of contracts or duties of justice or *obligations of fair play that might hold among strangers . . .* but in the more fertile ground of fraternity, community, and their attendant obligations.<sup>24</sup>

In short, the fair-play conception of the political order as a cooperative practice stands between the contractarian and communitarian positions because it does not rest on strictly voluntary agreement, on the one hand, and because it requires more than mere membership, on the other. It will no doubt be easier to secure obedience to the law and other forms of cooperation when the people engaged in a joint enterprise perceive themselves as members of an extended family or community, and fair-play theorists may well want to foster such a sense of membership or identity. But it is not necessary to their theory that they do so. What is necessary is that the people engaged in social cooperation under law or—at least a good many of them—understand that the benefits that they and others derive from this cooperation require them, as a matter of fairness, to do

their part, even when it is unpleasant to do so, and even when those to whom they owe their obligations of fair play are for the most part strangers.

To be sure, communitarians may not be willing to concede that the fair-play conception of the political order is as different from their conception as I have claimed. To them it may appear that the appeal to fair play will have force or “bite” only when it rests on some pre-existing sense of community; for without that sense, how are we to see others as *fellow* participants in a cooperative practice?<sup>25</sup> Fair play presupposes community, in other words, but once we recognize this point, we must also recognize that community or fellow feeling does the real work of justifying obedience to the law and punishment of those who do not obey. The appeal to fair play is simply a way of expressing this underlying reliance on the bonds of community.

We may concede the strengthening force of community, however, without conceding that the fair-play conception of the political order simply reduces to a form of communitarianism. I say this for two reasons. First, there is something distinctive about fair play that the appeal to community does not capture. This distinctive element becomes evident when we consider that appeals to fair play will be pointless in an ideal community—that is, one in which a truly powerful sense of fellowship or solidarity permeates all relationships among its members—for in such a community everyone will cheerfully try to promote the common good. That such an ideal is seldom if ever attained is no doubt owing to the tug of self-interest. Even strong communities have to worry about cheaters and free riders, and the force of the appeal to fair play owes as much to that worry as it does to the sense of fellowship or community.

The second reason for distinguishing the fair-play account from the communitarian is that fair play continues to hold even as the sense of community weakens. Again, it is important to note that the sense of community may help people to perceive that they are involved in a cooperative practice of some sort, and that perception in turn will almost certainly reinforce their commitment to the practice. Nevertheless, that is not to reduce fair play to the sense of community—not unless we simply define “community” as involvement in a cooperative practice. If we take community to entail direct or many-sided relationships among people, however, so that you and I are not members of the same community unless, say, we live in the same town, know some of the same people, and are subject to the same laws, then it becomes clear that we can have duties of fair play to those who do not share membership in a community with us.<sup>26</sup> That is why I say that fair play continues to hold even as the sense of community weakens, as it surely has weakened in the modern state. The millions or hundreds of millions of culturally diverse people scattered across hundreds or thousands of miles in such a state may feel little sense of community with one another, but they may still owe one another a duty of fair play to obey the law.

This is to say that the conception of the political order as a cooperative practice differs from the communitarian conception in its emphasis on the rule of law. Families and traditional communities have their customs, rules, and norms,

of course, but their members typically do not regard themselves as participants in rule-governed enterprises. What counts most for them are the ties of affection and solidarity. Cooperative practices, however, are by their nature rule-governed—joint enterprises according to rules, in Hart's terms. When the practices involve a small number of people, the rules are likely to be simple and tacit—perhaps nothing more than the rule that “you do your part, I'll do mine, and no shirking.” As cooperative enterprises expand, however, the rules will need to be more explicit and elaborate, so that we know what counts as your part of the cooperative effort and what counts as mine. When the cooperative practice is a political order, moreover, it will be necessary to have ways not only of stating and enforcing the rules, but also of making and unmaking them to adapt to the needs of the practice. The rules will now be laws, in other words, and this rule-governed enterprise will be a political order (or polity) under the rule of law.

Another way to make this point is to say that the political order is a kind of *super-* or *meta-*cooperative practice. That is, the political order provides a collective good—cooperation under the rule of law—that makes it possible for people to pursue with some degree of peace and security other goods, including other, narrower public or collective goods. The members of a car pool, for example, are engaged in a cooperative practice that provides them with benefits that they produce for themselves by taking in turns the burdens of picking up and driving those who are sharing the ride. But in order to produce those benefits for themselves, they must also be able to take advantage of benefits provided by the legal order, such as the traffic laws that make it possible for them to drive in relative safety to the workplace, school, play group, or other destination. Unless they live in a libertarian utopia, wherein every inch of their journey takes place on privately owned roads governed by the owners' regulations, they must rely on the meta-practice of the law if their car pool is to be the joint venture for mutual benefit that they want it to be.

One implication of this way of thinking about a system of laws is that such a system is necessarily *political*. As a meta-practice, the legal system must establish laws that make it possible for people to engage in other cooperative practices and to go about their individual lives. Laws by themselves are not sufficient, however. The members of the car pool need traffic laws, but they also need traffic signals and roads on which to drive, and these require the collection and expenditure of funds. They also require that decisions be made as to where roads are to be built, what kinds of roads they should be, and where the signals should be placed, among other things. What is necessary, in short, is a political order operating under the rule of law.

In a polity of this kind, the political order itself is a cooperative practice—or, more properly, a meta-cooperative practice. The laws in such an order will be the terms of fair cooperation, or of what the members take to be the terms of fair cooperation. Laws will need to be promulgated, and cooperation will need to be encouraged, but the laws themselves will become matters of debate and products of public decisions. “What laws do we need?” thus becomes a vital ques-

tion, as do the related questions of who should make these laws, who should enforce them, and who should apply and interpret them. There is also, finally, the question of how to hold those who make, enforce, and apply the laws accountable to the public—that is, to those who have not only duties but rights as cooperating participants in the political order.

Conceiving of the legal order as a cooperative practice thus has a number of significant implications. Perhaps the most important of these, for present purposes, is that conceiving of the legal *cum* political order as a cooperative practice helps to clarify the *communicative* aspect of the criminal law. According to a widely held view, legal punishment is, among other things, an attempt to communicate the wrongness of their actions to those who break the law, with the aim of bringing them into the fold or restoring them to the community or society whose standards they have violated. In *Punishment, Communication, and Community*, for example, R. A. Duff develops a “communicative theory” of punishment, “according to which punishment should be understood as a species of secular penance that aims not just to communicate censure but thereby to persuade offenders to repentance, self-reform, and reconciliation.”<sup>27</sup> Similarly, Herbert Morris’s paternalistic theory of punishment “relies essentially on the idea of punishment as a complex communicative act . . .”; moreover, Morris takes a “communicative component” to be “a defining characteristic of punishment” that “in part distinguishes it from mere retaliation or acting out of revenge. . . .”<sup>28</sup> Especially interesting for the purposes of this paper is the fact that Youngjae Lee endorses this view in “Recidivism as Omission”: “The institution of punishment,” he states, “has a communicative, expressive dimension. When the state punishes, it condemns what the offender has done as blameworthy and it communicates to the offender that what he has done is wrong. Implicit in that message . . . is that the offender is being punished for what he has done, and after his punishment is complete, he shall not offend again.”<sup>29</sup>

But what, we may ask, gives some of us the right or authority to communicate our standards in this way? We may grant that punishment of lawbreakers is a way of communicating the community’s, society’s, or polity’s displeasure with them, but punishment is typically an especially harsh and unpleasant form of communication. As such, it requires more justification than a remonstrance or mere expression of disapproval does. Such a justification may be found, however, in the offender’s violation of the laws comprising the meta-practice that, *ceteris paribus*, supplies him or her with benefits through the cooperative restraint of others. As part of that practice, we give some of our members the authority to arrest and punish those who do not respect the persons and property of the other members of the practice—that is, the other members of the polity. Insofar as the offender enjoys the benefits of the meta-cooperative practice without fully contributing to their provision by bearing his or her share of the burdens of obeying the law, then the offender in effect justifies the rest of us in punishing him or her. That is why the polity is justified in communicating its censure to the offender by means of punishment.

To put the point in terms of Lee's "relational account," the polity is justified in punishing an offender because he or she is engaged in a relationship with the other members of the polity—a relationship in which he or she failed to bear a fair share of the burdens of the cooperative practice. This justification of legal punishment supplies, in turn, the underpinnings for "recidivism as omission" that Lee's presentation of his theory lacks. Or so I shall now try to show.

## Relations, Recidivism, and Punishment

For any retributive theory of the recidivist premium to succeed, the theory must explain how recidivists deserve harsher treatment than first-time offenders. In Lee's case, his "relational account" provides this explanation. As he says,

the crucial difference between first-time offenders and repeat offenders is that the repeat offender has gone through *a process* with the state that has created *a relationship* with the state, and the point of that relationship was to ensure that whatever led the offender to the status of being a convict should be avoided in the future. It is *that history* of having had *that relationship* that first-time offenders lack. And once a person enters into a thick relationship with the state through the process of conviction and punishment, it is appropriate for the state to attribute blame to how a person has increased the risks of criminal wrongdoing over time.<sup>30</sup>

This is an important, but ambiguous, passage. On the one hand, Lee seems to be saying that the relationship between the repeat offender and the state is the product or creation of the process that the offender went through upon his or her initial conviction and punishment. If so, the implication is that there was no relationship between the offender and the state prior to that first offense. If there were no relationship, however, then difficult questions arise as to the state's authority to punish the offender in the first place. But perhaps Lee means, on the other hand, that every citizen or subject of a state is engaged in a relationship with that state, but it is only a *thin* relationship until or unless an individual "enters into a *thick* relationship with the state through the process of conviction and punishment. . . ." <sup>31</sup> That thin relationship may be sufficient to justify the state's punitive authority in the first place, with the thick relationship then providing the warrant for the recidivist premium. Whether it is or is not what Lee intended, this second reading of the passage above seems to be the sounder of the two. Even so, it leaves two questions unanswered: What is the nature of that thin relationship? And what is it about the first-offender's punishment that transforms it into a thick relationship?

To answer these questions we must complement Lee's "relational account" with the fair-play justification for legal punishment that I have sketched in the preceding sections of this essay. Setting aside the "thin" and "thick" terminology, the justification for the recidivist premium thus takes the following form.

Everyone who is a member of a polity—that is, of a political *cum* legal order reasonably regarded as a cooperative practice under the rule of law—is involved in a reciprocal relationship with the other members of that polity. The relationship is reciprocal because all have an obligation of fair play to the others to bear their share of the burdens of maintaining the practice by obeying, *ceteris paribus*, the law. Those who break the law make themselves liable to penalty or punishment, which is to say that their relationship to the law-abiding members of the polity undergoes a significant change. The offenders continue to be members of the polity, but they are not, so to speak, members in good standing; they are, instead, free riders of a more or less vicious kind. If they are sentenced to punishment, their sentence will communicate to them the law-abiding members' disapproval and condemnation of their criminal deeds; but it should also convey the expectation that the offenders will have the chance to restore themselves to full membership. If they fail to take advantage of this opportunity—if they become repeat offenders—they will in effect be offending doubly against the cooperating members of the polity: first by committing another crime; and second, by omitting to live in a way that will keep them free of criminal trespasses against the other members.

Lee's "recidivism as omission" makes sense, then, but only as part of a theory of punishment grounded in the principle of fair play. The recidivist is in effect guilty of a multiple failure to play fair—once for the first offense, again for the second, and so on for each new offense. After the first offense, however, each succeeding offense represents a double failure to play fair. That is, each new offense is a *crime* of unfairness, but it also is a failure to play by the rules that apply to the offender as someone who has been previously convicted of a crime. To return to the examples of Sam and Sally from §1, Sally is not playing fair with the law-abiding members of the polity when, following her punishment as a first-time offender, she does not act so as to keep herself free of criminality. Fair play requires more of her than that—or it will, at least, when the legal and penal systems give her a fair chance of living such a life. She has not committed another crime, however, and that is what makes her situation different from Sam's, who has. Sam is guilty of a double offense against fair play in that he has omitted to conduct himself in a way that will keep him free of criminality, and he has committed another crime. This crime may have occurred despite his sincere intention to stay within the law, as in the case of his happening upon an unlocked car with its keys in the ignition, but he is nevertheless guilty of the criminal act and of failing to maintain the fair-play relationship with the other members of the polity. For the criminal act, he deserves the same punishment he would deserve as a first-time offender committing the same crime. He has been given a second chance, however, and his failure to take advantage of that chance to play fair is what justifies, as Lee says, the recidivist premium. Should he fail a third or a fourth time, or more, the polity will be justified in increasing the premium for his new and persistent offenses. Whether increasingly severe punishment will be efficacious is a question for criminologists to try to settle; but

there is certainly justification for reacting more strongly to someone who persistently refuses to play fair.

## Conclusion

At the beginning of this essay I noted that recidivism presents both practical and theoretical challenges to criminal justice. In the essay itself I have concentrated on the theoretical challenge of providing a justification of the recidivist premium on retributivist grounds. That challenge can be met, I have argued, by following Youngjae Lee in conceiving of recidivism as a kind of omission, but with the further step of complementing or supporting Lee's theory with an appeal to the fair-play model of the political or legal order as a cooperative practice. If I am right, however, then it is also fair to say that meeting the theoretical challenge also has practical implications.

These practical implications take two principal forms. First, there is the implication that a proper justification for the recidivist premium may well serve to reduce the practical problems that recidivism presents. To put the point crudely, if we can get the theory right, then we should be able to take steps that will reduce the number of persistent offenders. The second implication is that getting the theory right means, in this case, that the theory must recognize, as Lee argues, that offenders and the state are engaged in a relationship that imposes responsibilities on both parties. On the offender's part, this is a responsibility to "ensure that whatever led [him or her] to the status of being a convict should be avoided in the future"<sup>32</sup>; on the state's part, it is a responsibility not to make it virtually impossible for the offender to live within the law. Getting the theory right means, in other words, that offenders and law-abiding members of the polity have duties of fair play to one another. Failure to carry out these duties on the part of the offenders gives the polity the right to impose extra punishment on recidivists. The polity, however, also has a duty to play fair with the recidivists, and that duty is to arrange their punishment in a way that not only discourages them from becoming repeat offenders but also encourages them to become cooperating, law-abiding members of the polity once again. Playing fair with recidivists in this way offers some hope of reducing recidivism, thereby meeting—or at least addressing—the practical as well as the theoretical challenge of recidivism.

## Notes

\*I am grateful to Geoffrey Goddu, David Lefkowitz, and an anonymous reader for valuable comments on an earlier draft of this essay. Special thanks are due to Youngjae Lee for sharing his insights with me.

1. For supporting evidence, see Julian V. Roberts, *Punishing Persistent Offenders: Exploring Community and Offender Perspectives* (Oxford: Oxford University Press, 2008), 95–96.

2. See Roberts, *Punishing Persistent Offenders*, chapter 8, which concludes: “Public support for the recidivist sentencing premium rests principally on three branches: first, repeat offenders are perceived as being more culpable; second, crime by recidivists is perceived as being more serious than the same offending by novice offenders; and third, repeat offenders are seen as being more likely to reoffend” (183).

3. Youngjae Lee, “Recidivism as Omission: A Relational Account,” *Texas Law Review* 87, 3 (2009): 571–622. For a more concise statement of the position, see Lee’s “Repeat Offenders and the Question of Desert,” in *The Role of Previous Convictions at Sentencing: Theoretical and Applied Perspectives*, ed. Julian Roberts and Andrew von Hirsch (forthcoming).

4. The version of fair-play theory I develop in this essay resembles that of Michael Davis in some respects, but it does not rely on his distinctive idea of a “crime auction.” See Davis, “Just Deserts for Recidivists,” *Criminal Justice Ethics* 4 (1985): 29–50, reprinted in his *To Make the Punishment Fit the Crime: Essays in the Theory of Criminal Justice* (Boulder, CO: Westview Press), and his contribution to the present volume, “Recidivist Penalties Reconsidered.”

5. Lee, “Recidivism as Omission,” 621.

6. Lee lists the following as “some possibilities” for character traits that would warrant extra punishment according to the bad-character argument: “cruelty, malice, abusiveness, arrogance (manifesting in the belief that rules of the society do not apply to them [the recidivists]), callousness, dishonesty (if the crimes involve fraud), greed, hatred (if the crimes are motivated by hateful feelings), indifference (to human suffering), lack of discipline (if the crimes result from an inability to stick to a law-abiding path), weakness of will (if the crimes result from an inability to resist temptations), insensitivity, irresponsibility, or ruthlessness” (586).

7. *Ibid.*, 599–600.

8. *Ibid.*, 621.

9. *Ibid.*, 621.

10. *Ibid.*, 621.

11. *Ibid.*, 608; emphasis in original.

12. I owe this objection to Geoffrey Goddu.

13. *Ibid.*, 608, 611–612.

14. In this and the following section I draw on my “Playing Fair with Punishment,” *Ethics* 103, no. 3 (April 1993): 473–88, and “Punishment as Fair Play,” *Res Publica* 14, no. 4 (2008): 259–275.

15. Hart, “Are There Any Natural Rights?,” as reprinted in *Human Rights*, ed. A. I. Melden (Belmont, CA: Wadsworth, 1970), 70; originally printed in *Philosophical Review* 64 (1955).

16. Rawls, “Legal Obligation and the Duty of Fair Play?” in *Law and Philosophy*, ed. Sidney Hook (New York: New York University Press, 1964), 9–10.

17. Morris, “Persons and Punishment,” *The Monist* 52 (October 1968), 478.

18. Murphy, “Three Mistakes about Retributivism,” *Analysis* 31 (1971), 166. For Murphy’s subsequent doubts about the adequacy of the fair-play argument, see his “Retributivism, Moral Education, and the Liberal State,” *Criminal Justice Ethics* 4 (1985),

6–7, and “Legal Moralism and Retribution,” *Criminal Law and Philosophy* 1 (2007), 11–14. Rawls also came to have doubts about fair play as a general basis for political obligation, for which see his *A Theory of Justice* (Cambridge, MA: Harvard University Press, 1971), §18.

19. Hart, *The Concept of Law* (Oxford: Clarendon Press, 1961), 193; emphasis in original.

20. Critics of fair-play theory object that it is implausible to think of many crimes, including robbery, rape, and murder, as crimes of unfairness. I respond to this objection in “Playing Fair with Punishment,” 480–482, and in “Punishment as Fair Play,” esp. 262–263.

21. Hardimon, “Role Obligations,” *The Journal of Philosophy* 91 (1994), 347.

22. Matravers, *Justice and Punishment: The Rationale of Coercion* (Oxford: Oxford University Press, 2000), 55.

23. Montague, *Punishment as Societal Defense* (Lanham, MD: Rowman & Littlefield, 1995), 85; emphasis added.

24. Dworkin, *Law’s Empire* (Cambridge, MA: Harvard University Press, 1986), 206; emphasis added.

25. I owe this point to Antony Duff.

26. Michael Taylor develops such a conception of community in his *Community, Anarchy, and Liberty* (Cambridge: Cambridge University Press, 1982).

27. R. A. Duff, *Punishment, Communication, and Community* (Oxford: Oxford University Press, 2001), xviii–xix.

28. Both passages quoted from Morris, “A Paternalist Theory of Punishment,” in *A Reader on Punishment*, ed. R. A. Duff and David Garland (Oxford: Oxford University Press, 1994), 97; originally published in *American Philosophical Quarterly* 18 (1981): 263–271.

29. Lee, “Recidivism as Omission,” 613.

30. *Ibid.*, 614; emphasis in original.

31. *Ibid.*, 614; emphasis added.

32. *Ibid.*, 614.

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