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Criminal History Enhancements at Sentencing

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I Introduction

A defendant's prior crimes affect decision-making throughout the criminal process, from decisions taken by the police, prosecutors and investigating magistrates (bail), through to prison and parole authorities considering whether to release prisoners.[1] It is at sentencing however, that criminal history has the greatest impact on decisions and the lives of defendants. Of all the aggravating factors, a criminal record is the most commonly invoked, the most powerful and also the most controversial. In general, people with prior convictions are treated more harshly in all criminal justice systems, civil and common law.[2] This near-universal sentencing policy is variously described as a *Recidivist Sentencing Premium*, a *Prior Record Enhancement*, or *Criminal History Enhancement*; the German term is *Strafschärfung für Rückfalltäter* or, briefer, *Rückfallschärfung*. The penologist Nigel Walker referred to prior convictions as 'the most obvious example of aggravation' and Hessick and Hessick described the recidivist sentencing premium as 'one punishment issue on which everyone seems to agree'.[3] In this chapter, we argue that it is

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[1] For a comprehensive analysis, see Jacobs, *Eternal Criminal Record* (2015).

[2] See discussion in Roberts, *Persistent Offenders* (2008), ch. 8. The only jurisdiction of which we are aware which prohibits courts from considering prior convictions as an aggravation is Western Australia: s. 7(2) of the Sentencing Act 1995 states that 'An offence is not aggravated by the fact that – ... (b) the offender has a previous record.'

[3] Walker, *Sentencing* (1985), 44; Hessick and Hessick, 'Double Jeopardy' (2011), 45–6. The German Federal Court of Justice (*Bundesgerichtshof* (BGH)) stated that such convictions are 'one of the most important factors in sentencing' (BGH, 04.08.1971, 2 StR 13/71, Entscheidungen des Bundesgerichtshofes in Strafsachen (BGHSt) 24, 198–200 at 200; translation by S. H.).

neither as obvious nor as consensual as these quotes suggest. Other authors seem closer to the truth when they describe 'the controversial question of sentencing repeat offenders'.[4]

Despite the apparent consensus regarding the significance of prior crimes for current adjudications, Germany (and other continental jurisdictions) differ from the Anglo-American countries in the ways they use prior convictions, as well as the justifications for considering prior crimes at sentencing. Moreover, there are great differences among the common law countries: repeat offenders are treated with greater severity across the United States compared to England and Wales, Canada and other common law jurisdictions.[5] This variation across and within systems means that the role of prior crimes at sentencing is an ideal subject for greater dialogue between systems that use this factor in different ways.

The importance of prior offending is supported in several ways. First, most offenders appearing for sentencing have previous adjudications of one kind or another. As an aggravating factor, prior convictions therefore affect a large proportion of the caseload of the courts, up to 90 per cent of defendants in England and Wales.[6] Secondly, statutory sentencing provisions in many countries identify prior crimes as an important aggravating circumstance at sentencing, suggesting that legislators ascribe considerable importance to this factor (discussed later in this chapter). Thirdly, empirical research into sentencing practices demonstrates that in many jurisdictions, criminal history is the most powerful predictor of sentencing outcomes (after the seriousness of the current crime).[7] In some US jurisdictions an offender's prior crimes carry more weight at

[4] See Ashworth, *Sentencing and Criminal Justice* (2015), 205; and Hörnle, *Tatproportionale Strafzumessung* (1999), 159–64.

[5] See Frase and Hester, 'Criminal History Enhancements' (2015); and Frase and Roberts, *Paying for the Past* (2019).

[6] Estimates vary, but in England and Wales, 90% of offenders sentenced by the courts in 2013 had at least one prior conviction and approximately half had at least ten prior adjudications: Roberts and Pina-Sánchez, 'Paying for the Past' (2015), Table 9.1. In Minnesota, more than two-thirds of sentenced offenders in 2017 had at least one criminal history point: Minnesota Sentencing Guidelines Commission, *2017 Sentencing Practices* (2018), Table 10. In Anglo-American countries, first offenders therefore seem to be the exception rather than the norm in offenders appearing for sentencing. In Germany, the ratio of offenders with a prior record among those sentenced is lower, but still above 50% (exactly: 52%) in 2016; in the same year, about 23% had five or more previous convictions, see Statistisches Bundesamt, *Strafverfolgung 2016* (2017), Table 7.1.

[7] According to empirical studies conducted in Germany, prior convictions are one of the most important aggravating factors at sentencing, see Harrendorf, 'Sentencing Thresholds' (2017), 527–30.

sentencing than his current crime.[8] Fourthly, an offender's past – whether law abiding or including previous crimes – is perceived by many practitioners to be relevant to culpability and/or the offender's risk of reoffending.[9] If this is true, a criminal record may justify harsher sentencing for recidivists and/or less punitive treatment for first offenders.[10] As this chapter will demonstrate, retributive theories take conflicting positions on whether and to what extent prior crimes should affect current sentencing. Preventive justifications also vary in their approach to prior offending. Finally, intuitive theories of punishment also incorporate an offender's past as a factor: research into public views suggests that most people favour harsher treatment for recidivists and support significantly mitigated punishments for people who have led a law-abiding life up to this point. Opinion surveys of the public in all Western nations have revealed the same result. When the public are asked to identify important aggravating factors, prior convictions are the second most frequent factor, after the extent of the injury to the victim. Similarly, when required to choose a sentence for specific cases, the public favour harsher sentences for repeat offenders.[11]

This chapter compares and contrasts the use of prior convictions at sentencing in selected Anglo-American countries and Germany. The chapter focuses upon the general aggravating effect of prior crimes at sentencing rather than specific recidivist laws such as the '3 Strikes' legislation which proliferated across the United States (and elsewhere) in the 1990s. We do not discuss more limited statutory enhancements such as those which mandate enhanced custodial sentences for offenders convicted of specific offences having been previously convicted of another such serious offence.[12]

[8] See Frase and Hester, 'Criminal History Enhancements' (2015).

[9] See Roberts, *Persistent Offenders* (2008).

[10] With regard to sentencing discounts for first-time offenders, see the first sentencing text published in England over 150 years ago: 'I cannot too earnestly urge leniency in the treatment of [first-time] offenders. A first offence should always be looked upon with pity, as possibly a lapse from virtue, the result more of weakness than of wickedness': Cox, *Principles of Punishment* (1877), 133. For Germany, see e.g. BGH, 26.05.1982, 3 StR 110/82, *Neue Zeitschrift für Strafrecht* (1982), 376; Schäfer, Sander and van Gemmeren, *Praxis der Strafzumessung* (2017), mn. 647.

[11] This research is summarised in Roberts, *Persistent Offenders* (2008); see also Mitchell, 'Public Attitudes' (2017).

[12] E.g. s. 25 of the Criminal Justice Act 2007 in Ireland, discussed in O'Malley, *Sentencing Law and Practice* (2016).

As noted, enhancing sentences to reflect the offender's prior crimes carries great intuitive appeal. Our reactions to transgressions in everyday life usually become more punitive when the transgressor has previously violated a similar social norm. The first 'offence' is often treated as a momentary lapse; external pressures may be blamed, or the wronged party may exercise some tolerance. However, repetition often changes reactions, and people become more punitive when the prior and current acts are the same or similar. This response is mirrored in most sentencing regimes: first offenders are treated more leniently, and this leniency is replaced by a more severe response following repetition. Recidivist punishments also permeate non-penal regulatory schemes, the rules of professional sports[13] and are also found in religious codes,[14] offering further evidence of the appeal of the concept of record-based enhancements. However, the powerful link between informal and formal sanctions should not blind us to the need to justify prior record enhancements. Any source of aggravation at sentencing needs to be justified by the statutory purposes and principles of sentencing, and these in turn need to be founded in a sound philosophy of state punishment.

Legal punishment is imposed for a proscribed act or omission; the sentence is a judgment upon the offender for a specific act. This said, once (s)he has discharged the sentence fully, an ex-offender is entitled to regain full standing in the community, the status enjoyed prior to conviction. Yet upon reconviction, a criminal past triggers additional punishment; (s)he is not sentenced as (s)he would have been prior to the first conviction. The defendant is sentenced as a *repeat offender*. How can this additional punishment, which has a cumulative effect on sentencing over the individual's criminal career, be justified? Lesser sanctions – parking fines, some traffic violations, library fines – often follow a flat-rate approach; the magnitude of the fine tracks the seriousness of the infraction, with no regard to whether the offender has previously committed such acts.[15] Why does the severity of the criminal sanction escalate in response to the offender's prior crimes? The principal

[13] E.g. the yellow and red disciplinary cards brandished by referees in football.

[14] E.g. ancient Jewish law contains a powerful recidivist premium: 'He who was flogged and then flogged again for two transgressions, and then sinned again, is placed by the court in a cell and fed with barley bread, until his stomach bursts' (Sanhedrin, Chapter 9, Mishnah 5; 536 BCE).

[15] See e.g. the sentencing guidelines fixed for minor (non-criminal) traffic offences (*Verkehrsordnungswidrigkeiten*) in Germany in the *Bußgeldkatalog-Verordnung* (Regulation on a Catalogue of Fines).

sentencing philosophies of prevention and retribution supply answers. Additional punishment for recidivists is justified by a need to prevent further (re)offending and by the offender's enhanced blameworthiness.

Section II of this chapter examines the theoretical justifications for prior record enhancements which derive from utilitarian as well as retributive philosophies.[16] Section III discusses the complexities of criminal history as a sentencing factor. Section IV provides examples of relevant statutory provisions and enhancements in sentencing guidelines. As will be seen, although common elements emerge, there is great variability in the ways that different regimes incorporate prior crimes at sentencing. Section V explores three key issues, namely, the age and the seriousness of prior crimes, and the relationship between any prior conviction and the current crime. Section VI considers the importance of prior convictions at sentencing from a comparative perspective.

II Prior Record Enhancements and Sentencing Theories

Several US guidelines justify their prior record sentencing enhancements by reference to prevention and/or retribution.[17] The US (federal) guidelines provide an explicit justification in terms of culpability when they note that: 'A defendant with a record of prior criminal behaviour is more culpable than a first offender and thus deserving of greater punishment.'[18] Elsewhere sentencing regimes are silent with respect to the justification. In Germany, for example, § 46(2) of the *Strafgesetzbuch* (StGB) simply states that, '[w]hen sentencing the court shall weigh the circumstances in favour of and against the offender. Consideration shall in particular be given to ... the offender's prior history ...'[19] The prior

[16] Throughout this chapter, we simplify the terms 'utilitarian' and 'retributive' to distinguish two general perspectives on sentencing. By the former, we refer to sentencing in order to achieve some demonstrable social benefit. In this context, the benefit is a lower rate of (re) offending due to the enhanced punishment imposed on repeat offenders. Such a utilitarian perspective could also be labelled as 'preventive' (as in the German terms *Spezialprävention* (special prevention) and *Generalprävention* (general prevention), on which we will elaborate later in this text), since it wishes to prevent future crimes. By retributive, we refer to sentencing which reflects exclusively or primarily the crime of conviction and is therefore retrospective rather than prospective.

[17] See Roberts, 'Justifying Criminal History Enhancements' (2015), Table 1.1.

[18] US Sentencing Commission, *Guidelines Manual* (2018), para. 4A1.1.

[19] Translation by Bohlander (www.gesetze-im-internet.de/englisch_stgb/englisch_stgb.html).

history in this provision is only one among a number of different factors that shall, according to the law, particularly be considered at sentencing.

1 *Preventive Sentencing Theories*

All preventive sentencing perspectives seek to reduce the likelihood of future offending, both with respect to the specific offender and the larger pool of potential offenders. Objectives such as deterrence, rehabilitation and incapacitation share this concern with the future. The nature and severity of the sentence reflects the risk of future offending by the convicted person (or by others). Often, a somewhat simple rationale is followed: the higher the risk of reoffending, the harsher the punishment for the current offence. Many US guidelines endorse the deterrent purpose of a recidivist sentencing premium.[20]

(a) Types of Preventive Theories

First, it is necessary to examine differences between utilitarian sentencing theories. These theories can be categorised in respect of the targeted persons: one group aims at the current offender – attempting to prevent his or her recidivism ('special prevention'; German: Spezialprävention). Other utilitarian theories aim not at preventing crimes by the current offender, but rather at the general public ('general prevention'; German: 'Generalprävention'). A second categorisation refers to the way by which the preventive aim is to be achieved in the respective group, by 'negative' effects like deterrence or incapacitation, or by 'positive' effects such as rehabilitation, learning, trust or restoration to the community. Thus, utilitarian theories can be categorised into four groups: positive and negative special prevention, positive and negative general prevention.[21]

(b) Special Prevention

The preventive rationale seems clear, especially with respect to special prevention, the prevention of future offences that would otherwise be

[20] The US federal guidelines manual is particularly clear about this when it affirms that: 'General deterrence of criminal conduct dictates that a clear message be sent to society that repeated criminal behaviour will aggravate the need for punishment with each recurrence.' See US Sentencing Commission, *Guidelines Manual* (2018), para. 4A1.1.

[21] As to these categories in German sentencing theory, see the overviews in Roxin, *Strafrecht Allgemeiner Teil* (2006), § 3 mn. 11–32; Pawlik, *Person, Subjekt, Bürger* (2004), 21–43.

committed by the convicted person him- or herself: the heightened risk represented by a recidivist seems to justify a harsher sentence in the name of prevention. However, the strong appeal of special deterrence masks some troubling questions, some empirical, others normative or constitutional.

According to Franz von Liszt, special prevention can be achieved in three different ways:

a) Rehabilitation of the offenders that can be rehabilitated and need to be rehabilitated;
b) deterrence of the offenders that need not be rehabilitated;
c) incapacitation of the offenders that cannot be rehabilitated.[22]

The question is how prior record enhancements can be legitimated vis-à-vis these offender-related preventive aims. From a *rehabilitative* perspective, a recidivist premium might be justified due to the need for a longer rehabilitation programme (e.g. a specific therapy) necessary to prepare a recidivist for a future life without crime. The rationale of *deterrence* (be it individual or general deterrence) is, more or less,[23] the rationale of the economic theory of crime.[24] According to this theory, the decisions of an offender can be predicted by the model of *homo economicus*: crime is the result of a cost–benefit analysis undertaken by the individual in which the probability and severity of punishment are the main 'cost' variables.[25] From such a perspective, it seems reasonable to increase costs by increasing the punishment for recidivists, as the previous sentence proved an insufficient deterrent. Finally, a connection between a prior record and a longer prison term may be relevant for *incapacitation*: if those with a prior record have a greater risk of recidivism than first-time offenders and this risk increases with the number of previous convictions, there might be an increased need for incapacitation of persons with a long criminal history.

[22] Von Liszt, 'Zweckgedanke im Strafrecht' (1883), 36 (translation by S. H.).

[23] The classical school of criminology follows these lines, see Bentham, *Principles of Morals and Legislation* (1823), 16; von Feuerbach, *Lehrbuch des peinlichen Rechts* (1832), 15–6. As to the psychological assumptions of von Feuerbach detailed Greco, *Feuerbachs Straftheorie* (2009), 87–107.

[24] I.e. rational choice theory. Becker, 'Crime and Punishment' (1968), who saw his theory as an advancement of classical utilitarian ideas (see 209). For details on the economic theory of crime, its most recent developments, and future perspectives, cf. Harrendorf and Geng, 'Der rational kalkulierende Verbrecher?' (2019).

[25] See Becker, 'Crime and Punishment' (1968), 177.

As a category, recidivists are more likely to reoffend than first offenders,[26] and there is a cumulative relationship: the risk of reoffending rises with the number of prior convictions; recidivists with six prior crimes are more likely to reoffend than offenders with only two priors.[27] Yet this simple association alone cannot justify the enhancement on the grounds of incapacitation.[28] The sheer number of prior convictions is insufficient proof of individual dangerousness of an offender: even among those with a long criminal record, many persons are never reconvicted again. The duration of criminal careers depends on many factors.[29] Incapacitation can, however, only be justified for persons who are sufficiently dangerous.[30] Therefore, a prognosis of the individual risk of recidivism, related to the severity of the expected offences, is necessary for any decision to incapacitate a person. Even then, we still face the problem of false positives, the volume of which increases in the case of low base-rate offending such as serious crime.[31]

Individual deterrence is even more problematic: it is necessary to establish empirically that the enhancement (more prison time, or a more severe sanction) actually reduces the likelihood of reoffending. But does it? The clear correlation between the number of prior convictions, particularly prior incarcerations, and the risk of future crime is well-documented.[32] Advocates of a robust recidivist sentencing premium take this as evidence of a causal link between past and future offending.

[26] See Frase and Roberts, *Paying for the Past* (2019) for a recent review of relevant literature.

[27] See e.g. the results of a nationwide German reconviction study: Jehle et al., *Legalbewährung* (2016), 83 (for the reference period 2010–13) and 224 (for 2004–13).

[28] Men are more likely to reoffend than women (see again Jehle et al., *Legalbewährung* (2016), 51), yet this hardly justifies a gender-based sentencing enhancement.

[29] See e.g. Sampson and Laub, *Crime in the Making* (1995); Stelly and Thomas, *Einmal Verbrecher – immer Verbrecher?* (2001); also see. Harrendorf, *Rückfälligkeit und kriminelle Karrieren* (2007).

[30] As to the German preventive detention, which is, however, according to German terminology, not a punishment, but a measure of rehabilitation and incapacitation, see German Federal Constitutional Court (*Bundesverfassungsgericht* (BVerfG)), 04.05.11 – 2 BvR 2365/09, *Entscheidungen des Bundesverfassungs-gerichts* 128, 326–409. According to the European Court of Human Rights (ECtHR), it is, however, usually a penalty: ECtHR, 07.01.2016 – 23279/14 – Bergmann/Deutschland, mn. 181.

[31] As to base rates for violent and sexual crimes, see e.g. Jehle et al., *Legalbewährung* (2016), 108–37; Harrendorf, *Rückfälligkeit und kriminelle Karrieren* (2007); regarding the problem of false positives, see, inter alia, Kinzig, *Legalbewährung gefährlicher Rückfalltäter* (2010); Alex, *Nachträgliche Sicherungsverwahrung* (2013).

[32] This finding emerges from empirical analyses of sentencing practice in many jurisdictions. For a summary and discussion, see Frase and Roberts, *Paying for the Past* (2019); also see Jehle et al., *Legalbewährung* (2016).

However, it is well known that imprisonment has desocialising and stigmatising effects.[33] This assumption is supported by findings from research which demonstrates the criminogenic effects of imprisonment.[34] It is hence equally plausible that higher reoffending rates are caused not only by the offender's prior offending but also by the previous incarceration. The remedy for reoffending (more prison time) may therefore be a cause of, as well as a response to, crime.

A wealth of empirical research has demonstrated two further important findings. First, there is no relationship between the severity of sanctions and subsequent reoffending rates: imprisonment prevents crime no more effectively than community punishments. Secondly, the length of imprisonment is not associated with lower reoffending rates: more prison time does not mean less crime. Several German studies show that different sanctions applied to similar groups of persons result in comparable reconviction rates, leading to an assumption of interchangeability of sanctions with respect to special prevention,[35] a finding which casts doubt on the assumption of deterrent effect of imprisonment. Whether a policy of progressively higher punishments for repeat offenders deters crime is a slightly different question, but the general finding of no link between severity of sanction and reoffending rates calls the recidivist premium into question.[36] Moreover, the limited research specifically addressing the deterrent effect of a recidivist premium is no more encouraging.[37] In addition, different meta-analyses examining the deterrent effect of sanctions like shock incarceration, Scared Straight or boot camps usually show a negative effect of such sanctions – namely an

[33] The prison laws of all federal states in Germany include a *Gegensteuerungsgrundsatz*, a principle which obliges the prison staff to take countermeasures against the detrimental effects of imprisonment. See e.g. § 3(4) *Berliner Strafvollzugsgesetz*. Also see, again, a classic quote by von Liszt, 'Zweckgedanke im Strafrecht' (1883), 40 (translation by S. H.): 'There is nothing more degrading and counterproductive than our short prison terms for the apprentices on the trajectory of crime. Here – if anywhere at all – society bears the lion's share of guilt under which the future career criminal will eventually collapse.'

[34] Jolliffe and Hedderman, 'Impact of Custody on Reoffending' (2015); Ministry of Justice, *Re-Offending Statistics* (2011), 16; Mews et al., *Impact on Re-Offending* (2015), 18. See also Lipsey and Cullen, 'Correctional Rehabilitation' (2007), 300–2.

[35] Meier, 'What Works?' (2010), 113–5; also Harrendorf, *Absolute und relative Bagatellen* (forthcoming).

[36] See Kazemian, 'Recidivist Sentencing Premium' (2014).

[37] Canadian researchers who compared the effects of shorter versus longer prison sentences found that longer terms of custody were associated with greater increases in recidivism, a finding which does not support the preventive rationale of prior record enhancements. See Smith, Goggin and Gendreau, *Recidivism* (2002).

increase in reconviction rates.[38] Research on the effectiveness of individual deterrence provides little support for the concept.

It is also worth examining studies on *general* deterrence: meta-analyses have shown that it is principally the perceived risk of detection and conviction that deters, while there are no or only weak effects associated with the *severity* of punishment.[39] It is likely that this will be the same for persons who have previously been convicted. The existence of previous convictions shows that the prospect of punishment was insufficient to deter.[40] Why should 'more of the same treatment' prove effective?

Comparisons of reoffending rates across jurisdictions are also instructive. Prior convictions play a more powerful role in the United States than in England and Wales, yet recidivism rates in the two countries are similar.[41] Jehle compares reconviction statistics for Germany, Austria and Switzerland and similarly concludes that 'despite strongly different sentencing practices', reconviction rates are comparable.[42] One explanation for this finding is that the factors generating reoffending (e.g. substance abuse, lack of employment, poor self-control, absence of moral guardians) are unaffected by the magnitude of a reoffending enhancement.[43] In addition, 'reoffenders' (if it is appropriate to use this term for people who simply have been convicted of more than a single crime) are generally less sensitive to future consequences, including the likely impact of a reconviction.[44] Taken together, if prior record enhancements are founded on the rationale of individual deterrence, it is unclear that they can be justified – at least when they carry as much weight as they do in some jurisdictions.[45]

[38] Lipsey and Cullen, 'Correctional Rehabilitation' (2007).

[39] Dölling et al., 'Is Deterrence Effective?' (2009); von Hirsch et al., *Criminal Deterrence* (1999). Becker, 'Crime and Punishment' (1968), at 178, already foresaw this and attributed it to the fact that most criminals 'are risk preferrers, at least in the relevant region of punishments'.

[40] Kaspar, *Präventionsstrafrecht* (2014), 705.

[41] Frase and Roberts, *Paying for the Past* (2019).

[42] See Jehle, 'German Reconviction Study' (2014), 41.

[43] Repeat offenders' propensity to reoffend may be unaffected by additional time in prison arising from the prior record enhancement, but there will be significant impacts on their employment prospects.

[44] See Becker, 'Crime and Punishment' (1968), 178.

[45] Elsewhere, Frase and Roberts identify other assumptions which should be met before an enhancement can be justified. For example, even if increments in severity do reduce risk, is it the case that they are more effective than other, non-punitive responses? And further, if they are effective, and more effective than other responses, are there any countervailing costs? Much of the racial disproportionality in prison populations in Minnesota is caused

Finally, most of the literature has focused on the preventive benefits of the recidivist premium without fully considering the unanticipated adverse consequences of this sentencing policy. For example, the use of prior records at sentencing increases the disproportionate numbers of racial minority prisoners (since racial minority defendants tend to have longer criminal histories).[46] It is well known that in the US, African-American citizens account for a disproportionate number of prison places and admissions and much of this racial disproportionality is a result of the prior record enhancements; an apparently neutral sentencing variable (criminal history) exacerbates racial disparities. The literature on the effectiveness of recidivist sentencing enhancements has also overlooked the adverse impacts of this policy on undermining other preventive approaches. Offenders with multiple priors may be incarcerated as a result of their criminal record, and this incarceration may undermine their efforts towards desistance.

But what about prior record enhancements for the purpose of rehabilitation? Imagine a therapy capable of reducing the recidivism rate by 20 percentage points, but which takes two years to be completed in a prison environment. Aside from the general effect of imprisonment alone, it is well known that rehabilitative programmes can be effective in reducing recidivism, especially if they follow the 'risk, needs and responsivity' approach.[47] This is also true for programmes provided in prison. Can this justify increasing the punishment for an offender to the time necessary to complete a therapeutic treatment? Since a prior record indicates increased risk of recidivism, the offender's risk of recidivism may be high enough to justify such a therapeutic approach focused on his or her criminogenic needs. It may also justify an increase in punishment in order to ensure that (s)he will not be released before the programme is successfully completed.

Increasing punishment for the purpose of rehabilitation should, however, be ruled out for normative reasons: notwithstanding a possible right to rehabilitation and the obligation of the state to assist,[48] from the

by prior record enhancements and such costs need to be included in any consideration of the merits of prior record enhancements: see Frase and Roberts, *Paying for the Past* (2019).

[46] See Frase, 'Sentencing Enhancements' (2014), 132–3; Frase and Roberts, *Paying for the Past* (2019).

[47] Lipsey and Cullen, 'Correctional Rehabilitation' (2007), 302–13.

[48] In Germany, such a right to rehabilitation and a corresponding obligation of the state can be derived from the constitution, see BVerfG, 01.07.1998 – 2 BvR 441/90 and others, BVerfGE 98, 169–218, at 200.

perspective of the offender, rehabilitation is a *voluntary* act: coercive treatment of adults who are capable of making informed decisions on their own violates the individual's human dignity and/or personal autonomy.[49] Therefore, while rehabilitation is a legitimate goal, it cannot *justify* punishment, which is by nature coercive.[50] An offender should not be forced to participate in a specific therapeutic intervention and it is unethical to increase punishment simply to facilitate such participation.

Rehabilitation might constitute a mitigating factor, particularly for first-time offenders: while positive special prevention cannot justify punishment, it may justify choosing the mildest (i.e. the least desocialising and least stigmatising) sanction among those that can legally be justified.[51] The danger of social exclusion and stigma is greatest for first-time offenders, since they may be fully integrated in their community. Imprisonment severs the offender's ties with his or her family and the community more generally; this rupture often increases his or her risk of reoffending. Offenders with an extensive record, on the other hand, have already experienced some exclusion and stigma; another punishment will therefore not necessarily have the same negative effect on their social standing. Therefore, sentence reductions for first-timers can be justified with regard to positive special prevention, but not an ever-increasing sentence severity for recidivists.[52]

(c) General Prevention

In addition to the special preventive aims of sentence enhancements, there may also be general preventive aims. Might these justify prior record enhancements more easily? First there is general deterrence, which in Germany is also labelled 'negative' general prevention.[53] The assumptions of the theory are, as mentioned above,[54] derived from rational choice theory,[55] but they are also connected to classical

[49] Greco, *Feuerbachs Straftheorie* (2009), 436–41; Stratenwerth, *Lehre von den Strafzwecken* (1995), 11; Roxin, *Strafrecht Allgemeiner Teil* (2006), § 3 mn. 39.

[50] Greco *Feuerbachs Straftheorie* (2009), 436–7; Kaspar, *Präventionsstrafrecht* (2014), 682–4.

[51] See also Kaspar, *Präventionsstrafrecht* (2014), 682–3.

[52] Harrendorf, *Absolute und relative Bagatellen* (forthcoming); Frase and Roberts, *Paying for the Past* (2019), ch. 10.

[53] See above at Section II.1.(a).

[54] See Section II.1.(b).

[55] Becker, 'Crime and Punishment' (1968); also Harrendorf and Geng, 'Der rational kalkulierende Verbrecher?' (2019).

utilitarian thought.[56] Yet, as already noted, earlier research on the deterrent effects of punishment shows that it is mainly the expected risk of detection and punishment that deters potential offenders; there is no clear evidence to support a deterrent effect of increased sentence severity.[57]

Sentence enhancements might aim at deterring others with a criminal record similar to that of the offender who is currently being punished. For this group, however, sentence severity does not seem to have a relevant deterrent effect. Apart from the results of the meta-analyses noted earlier, it can also be said that these offenders have directly experienced the effects of punishment after their first offence. It is implausible that the perception of others being sentenced in a specific (e.g. harsh) way will have an effect comparable to the direct and individual experience of being punished.[58]

In Germany, 'positive Generalprävention' is another important justification for punishment. Usually, there are three different effects associated with positive general prevention:[59]

- *Learning*: people learn through penal law and punishment which rules are most important and ought to be followed.
- *Trust*: if the penal law is enforced, this increases trust in the validity of legal rules and thus encourages compliance.
- *Restoration to the community*: punishment resolves the conflict between society and the offender and satisfies the general public. This may lead to increased willingness to comply with the law.

Some of these possible effects are close to functions that are attributed to law and punishment in Anglo-American countries as well, namely the 'expressive function of law'[60] and the 'expressive function of punishment'.[61] 'Positive' general prevention can, to some extent, also be

[56] See e.g. Bentham, *Principles of Morals and Legislation* (1823), 16: 'The value of the punishment must not be less in any case than what is sufficient to outweigh that of the profit of the offence.' Also von Feuerbach, *Lehrbuch des peinlichen Rechts* (1832), 15–6.

[57] Dölling et al., 'Is Deterrence Effective?' (2009); von Hirsch et al., *Criminal Deterrence* (1999); also see again Becker, 'Crime and Punishment' (1968), 178: 'offenders are risk preferrers, at least in the relevant region of punishments'.

[58] Kaspar, *Präventionsstrafrecht* (2014), 805–6.

[59] Roxin, *Strafrecht Allgemeiner Teil* (2006), § 3 mn. 27.

[60] Sunstein, 'Expressive Function of Law' (1996); Cooter, 'Expressive Law and Economics' (1998).

[61] Feinberg, 'Expressive Function of Punishment' (1970), 98–101; also see Dubber, 'Positive Generalprävention' (2005), 493–9.

understood to be a necessary counterpart of general deterrence – and vice versa: 'The "messages" sent by law and the legal processes contain information about the costs of lawbreaking, but they also affirm that it is wrong to disobey.'[62] The operationalisation of positive general preventive effects is, however, complex,[63] and it is not always clear that this is a utilitarian theory at all: a theory of positive general prevention necessarily relies on the expressive function of law or punishment, yet a retributive theory is also expressive.[64] For a more retributive version of positive general prevention, it would be sufficient that the *meaning* of punishment is to express the binding character of legal norms, reinstate trust and protect legal order.[65] Yet, if positive general prevention is a truly preventive theory, the damage an offender inflicts upon the legal validity of a legal norm (*Normgeltungsschaden*)[66] is an *empirical* parameter and the extent of punishment necessary to 'heal' this damage should also be empirically founded.[67] In this section, we focus on the utilitarian version of the theory of positive general prevention.

Although the effects of positive general prevention are complex,[68] results of empirical studies seem to confirm some effects. First, consider the important experiments of Fehr, Gächter and Gintis on the concept of reciprocal fairness as a precondition for norm adherence.[69] Other studies show that even sanctions which are so mild that they cannot act as a deterrent (as they would not outweigh the benefits of a deviant act) foster norm adherence.[70] Finally, Tyler was able to show that a perception of

[62] Andenaes, 'General Preventive Effects' (1966), 950.

[63] As to the problems of operationalisation, also see Baurmann, 'Theorie der Generalprävention' (1998).

[64] See, explicitly, Nozick, *Philosophical Explanations* (1981), 374–80.

[65] Based on this differentiation, Jakobs's version of the theory of positive general prevention started off as a preventive theory (in Jakobs, *Schuld und Prävention* (1976)), was modified into a retributive theory (e.g. in Jakobs, 'Funktionalismus und Prinzipiendenken'(1995)) and then modified back into a preventive theory (cf. Jakobs, *Staatliche Strafe* (2004)).

[66] Also cf. the classical 'Lehre vom intellektuellen Verbrechensschaden' (theory on intellectual damages of crime): Welcker, *Recht, Staat und Strafe* (1813), at 265–6.

[67] See Jakobs, *Staatliche Strafe* (2004), 32; Holz, *Justizgewähranspruch* (2007), 176–8.

[68] Baurmann, 'Theorie der Generalprävention' (1998).

[69] See Fehr and Gächter, 'Cooperation and Punishment' (2000); Fehr and Gintis, 'Human Motivation and Social Cooperation' (2007); detailed on these experiments Harrendorf and Geng, 'Der rational kalkulierende Verbrecher?' (2019).

[70] Feldman, 'Expressive Function of Law' (2009); Funk, 'Expressive Function of Law' (2007); Killias, 'Rechtsgefühl und Sanktionen' (1985); but also see Schumann, *Positive Generalprävention* (1989), at 35–8; detailed Harrendorf, *Absolute und relative Bagatellen* (forthcoming).

the legitimacy of a legal norm may in itself (i.e. regardless of the individual moral values) increase legal compliance.[71]

Therefore, while the empirical support for positive general prevention is weaker than for general deterrence, we can assume that positive general prevention is effective in some circumstances. Indeed, some scholars believe that prior record sentence enhancements are best justified by positive general prevention.[72]

These scholars assume that the *Normgeltungsschaden* caused by a crime is greater if it is committed by a recidivist. The demand of the public for punishment might be increased here, hence a harsher sanction might be necessary to fulfil the restorative function of sentencing for the community. There is, however, an important normative question that needs to be answered: can the increased Normgeltungsschaden in such cases actually be attributed to the criminal act, or is it something related, but not part of it?

German scholars who favour a justification of prior record enhancements via the *Normgeltungsschaden* are often also in favour of an extended definition of the criminal act when it comes to sentencing: according to this view, the sentence does not only refer to the criminal act itself, but to everything connected to the conflict society has with the offender which can influence the demand for punishment.[73] Prior record enhancements are then justified as they are seen to be necessary to resolve the conflict. Yet this approach is not feasible, as it would eradicate the difference between *Tatstrafrecht*, a criminal law punishing a person for the criminal act, and *Täterstrafrecht*, a criminal law punishing a person for their general 'criminal lifestyle'.[74] It also does not sit easily with the principle of guilt and with proportionality of sentencing: even a preventive justification of punishment should rely on culpability as a limiting factor for punishment:[75] the punishment must not exceed the blameworthiness of the offender.

There is an additional twist to this issue: scholars who endorse an expanded definition of the criminal act sometimes subscribe to a functional interpretation of guilt. According to them, guilt is externally

[71] Tyler, *Why People Obey the Law* (1990), 62.
[72] E.g. Streng, '§ 46 StGB' (2017), at mn. 66.
[73] See e.g. Streng, 'Schuld ohne Freiheit?' (1989), 310–12.
[74] See Hirsch 'Tatstrafrecht' (2002), 266.
[75] In Germany, the guilt principle is guaranteed by the constitution, see BVerfG, 30.06.2009 – 2 BvE 2/08 and others, BVerfGE 123, 267–437, at 413.

attributed by society, regardless of the mental state of the offender.[76] Such an approach, however, devalues the concept of blameworthiness and comes close to violating human dignity (since guilt is externally attributed to serve a social function and without regard to the offender as an individual).[77]

Finally, it can be questioned whether the spontaneous and emotional reaction of people when they hear of a crime by a recidivist is really relevant for sentencing: 'Criminality is an area for which awareness and knowledge is typically weak, whilst attitudes and opinions are strong.'[78] The public demand for increased punishment is often based on emotions and insufficient information (e.g. on the effects and possible aims and justifications of punishment). Hence, all one usually receives when asking the public about punishment for a certain crime is raw public opinion.[79] But if the public has something to say about punishment (which is more than plausible in a democracy), it is public *judgment* that should count – namely, an informed and considered decision based on the information available. Studies show that such an informed decision (e.g. via so-called 'deliberative polls') is significantly less punitive.[80] This is one of the most well-documented findings in the field of public opinion.[81]

2 *Retributive Perspectives*[82]

Proportionality lies at the heart of the retributive perspective: the severity of the sentence should reflect the seriousness of the crime and the offender's level of culpability – *for the offence*. At first glance, and for some scholars, even after repeated glances, this leaves little room for prior convictions. After all, prior offending cannot affect the seriousness of the current crime or the offender's culpability for this latest offence, particularly when the prior and current crimes were committed years apart. And, indeed, this position was advocated by George Fletcher and others

[76] Again, see Streng, 'Schuld ohne Freiheit?' (1989).
[77] Roxin, *Strafrecht Allgemeiner Teil* (2006), § 19 mn. 35.
[78] Aromaa as cited in Tomášek, 'The Public and Crime' (2011), 221.
[79] See Green, *When Children Kill Children* (2008), 241–69.
[80] Luskin, Fishkin and Jowell, 'Considered Opinions' (2002); also see Cochran and Chamlin, 'Public Opinion' (2005); Indermaur et al., 'A Matter of Judgement' (2012); and for a review of research, Roberts and Hough *Public Attitudes* (2005).
[81] See Roberts and Stalans, *Public Opinion* (2000).
[82] Essays regarding the retributive perspective can be found in Roberts and von Hirsch, *Previous Convictions* (2014), and Tamburrini and Ryberg, *Recidivist Punishments* (2012).

over forty years ago.[83] Fletcher argued that an offender is fully culpable for the offence when he has no claim for diminished culpability as a result of provocation by the victim, intoxication, social adversity or other such grounds. If one or more of these mitigating circumstances are present, they may sustain a diminished culpability claim. Yet the offender cannot be considered 'hyper-culpable' as a result of prior crimes, and therefore sentence severity cannot escalate indefinitely in the way that the 'cumulative' sentencing approach implies. A glass may be only partially filled, with the wine reaching different levels, but once the brim is reached, no additional capacity exists. In Germany, this view remains a minority position, but under the influence of Anglo-American and Scandinavian concepts of sentencing proportionality (*Tatproportionalität*) it has grown stronger in recent decades.[84]

'Mainstream' German sentencing theory, in contrast, does subscribe to the concept of 'hyper-culpability', as it applies an extended definition of 'personal guilt', one which is wider than the Anglo-American notion of 'culpability'. This concept of personal guilt also encompasses the attitude of the offender at the time (s)he committed the offence, thus blameworthy motives, attitudes etc. (so-called *Gesinnungsunwerte*) are seen to increase guilt even if they are not part of the offence definition.[85] With respect to criminal record enhancements, the courts subscribe to a 'warning theory': the previous conviction is considered a warning which should raise the inhibition threshold against further offences (especially of the same kind). Hence, disregarding this inhibition – and offending – reflects increased guilt.[86] This is a very implausible assumption. Psychologically, it would be more convincing to understand previous *offences*

[83] Other theorists such as Duff also exclude the use of previous convictions: 'The mere fact that an offender is now convicted of a crime has a prior criminal record can make no justified difference to his sentence'; and 'The fact that this is the offender's twentieth burglary does not justify a harsher punishment than was imposed for the tenth burglary'; in Duff, *Punishment, Communication, and Community* (2001), 167 and 169.

[84] Hörnle, *Tatproportionale Strafzumessung* (1999), 164; von Hirsch, 'Begründung und Bestimmung tatproportionaler Strafen' (2003), 72; Schünemann, 'Akzeptanz von Normen und Sanktionen' (2003), 195.

[85] See e.g. Gallas, 'Lehre vom Verbrechen' (1955), 45–6; Jescheck and Weigend, *Lehrbuch des Strafrechts* (1996), § 39 II. 1; Schmidhäuser, *Strafrecht Allgemeiner Teil* (1975), 6/23. Dissenting: Greco, *Feuerbachs Straftheorie* (2009), 497; Hörnle, *Tatproportionale Strafzumessung* (1999), 151; Roxin, *Strafrecht Allgemeiner Teil* (2006), at § 19 Rn. 23–6.

[86] See BVerfG, 16.01.1979 – 2 BvL 4/77, BVerfGE 50, 125–41 at 136; BGH, 03.06.1997 – 1 StR 183/97, BGHSt 43, 106–9 at 108; Horstkotte, 'Reform des Strafrechts' (1970), 153; Kunz, 'Vorleben und Nachtatverhalten' (2011), 142.

(not previous *convictions*) as a marker for a lower inhibition threshold and hence for reduced guilt.[87] Somewhat paradoxically, some proponents of mainstream theory accept this, too.[88] According to this view, prior convictions usually increase guilt, but may sometimes also diminish it.

There are other reasons why prior crimes might affect an offender's level of culpability. Lee, for example, suggests that repeat offenders are guilty of a 'culpable omission', namely, of omitting to address the causes of their offending. Additional punishment is justified to reflect this culpable omission.[89] Such a position can also be found in the German literature, most prominently in the works of Köhler and Kaufmann. Kaufmann argues that reoffending violates a second duty beyond the one the penal norm includes, which is a culpable omission of 'value-oriented character development'.[90] Similarly, Köhler ascribes an increased culpability due to 'energetic and permanent reoffending' and a 'delinquent habitus'.[91] In our opinion, however, there are no convincing ways to derive such an additional duty for repeat offenders from their previous convictions. The only duty the law actually places on first time and repeat offenders alike is to refrain from offending.[92]

The approach that has had most influence on judicial practice in Anglo-American countries represents a middle ground between the cumulative and exclusionary schools. Several scholars have argued that the absence of priors should mitigate the sentence, but that once this first offender mitigation is lost, prior convictions should trigger no further enhancement. Known as the 'Progressive Loss of Mitigation', this principle finds its origins in English sentencing law.[93] Opinions differ as to why a first offender deserves mitigation. Von Hirsch argues that

[87] Kaspar, *Präventionsstrafrecht* (2014), 705–6; Hörnle, *Tatproportionale Strafzumessung* (1999), 161.

[88] BGH, 12.09.2006 – 4 StR 279/06, *Strafverteidiger* (2006), 689; Kunz, 'Vorleben und Nachtatverhalten' (2011), 141.

[89] See Lee, 'Repeat Offenders' (2014). Von Hirsch echoes this in an older article where he observes that 'repetition after confrontation with censure also suggests a failure to make the extra effort at self-restraint': von Hirsch, 'Criminal Record Rides Again' (1991), 55. See also the recent discussion in Alexander and Ferzan, *Crime and Culpability* (2018).

[90] Kaufmann, *Bindings Normentheorie* (1954), 212.

[91] Köhler, *Strafrecht Allgemeiner Teil* (1997), 604.

[92] Hörnle, *Tatproportionale Strafzumessung* (1999), 162.

[93] E.g. Thomas noted that the 'progressive loss of credit until the offender has exhausted all the mitigating effect of good character and arrived at the point that he is exposed to the full length of the sentence appropriate to his offence'. See Thomas, *Principles of Sentencing* (1970), 197.

first offenders (and, indeed, offenders with modest records) should receive a more lenient sentence simply because to err is human; he describes this as tolerance for a lapse from a law-abiding lifestyle. Duff's theory is also consistent with the principle of the progressive loss of mitigation. Duff reasons that the mitigation extended to first offenders is appropriate because it 'makes sense of the intuitively plausible thought that, in the criminal law as in other contexts, the fact that this is the offender's first offence should be a modestly mitigating factor'.[94]

The 'tolerance for a lapse' model has been criticised.[95] First because it is unrelated to culpability – the mitigation derives not from the first offender's diminished culpability, but from some fuzzy conception of state magnanimity. This surely raises questions about its retributive significance. Secondly, scholars have questioned the logic of an iterative model which prescribes multiple, albeit diminishing degrees of mitigation.[96] Why should the state repeatedly extend mitigation to successive lapses by the offender, particularly when the offences of reconvictions are the same? Thirdly, the mitigation extends without consideration of the nature of the crime. A lapse seems plausible when the wrongfulness of the conduct is unclear, where the offence is very common, or where the crime occurred spontaneously without the offender having ample time to exercise self-restraint. But what about serious personal injury offences, or crimes that require extensive and meticulous planning? Can they reasonably be described as the product of 'a momentary lapse'?

Despite its theoretical shortcomings, the progressive loss of mitigation guides sentencers in many common law countries.[97] Even in England and Wales, where the statutory provisions regulating the use of prior convictions moved away from the progressive loss of mitigation over a decade ago, empirical research suggests that sentence severity

[94] Duff, *Punishment, Communication, and Community* (2001), 169.

[95] See e.g. Ryberg, who argues that the retributive principles that justify the use of prior convictions 'are – if not defective – theoretically under-determined'. See Ryberg, *Proportionate Punishment* (2004), 79–81.

[96] Von Hirsch and other scholars advocating this approach suggest that the first offender mitigation is not exhausted until the offender has committed up to five crimes. Mitigating the sentence on up to five successive sentencing hearings may strike many as excessive tolerance on the part of the state.

[97] And also see BGH, 26.05.1982, 3 StR 110/82, *Neue Zeitschrift für Strafrecht* (1982), 376; Schäfer, Sander and van Gemmeren, *Praxis der Strafzumessung* (2017), mn. 647 for Germany, accepting the absence of previous convictions as a mitigating factor.

rises and then levels off after a few convictions in a way that is consistent with this approach.[98]

The recidivist sentencing premium thus creates tension between competing sentencing philosophies. With respect to enhanced sentences – aggravation rather than simply mitigation for first offenders – the most convincing rationale is preventive, yet this also rests on some problematic empirical assumptions. For many repeat offenders, the offence of conviction will carry less weight: risk reduction trumps retribution. The effect can be observed for the persistent petty offender. Highly repetitive property offenders are often imprisoned to interrupt their repeat offending. When this occurs, they have been incarcerated for reasons of prior rather than present offending. US scholars refer to this as 'push in' – the offender convicted of an offence insufficiently serious to warrant imprisonment is nevertheless incarcerated for their criminal past. In Germany, persistent petty offenders are also 'pushed into prison' by virtue of their record, even where the crime involved only a few euros.[99] This is usually justified by a mixture of guilt-based ('warning theory', see above), and preventive arguments (preventive need to influence the offender by means of a prison sentence, see § 47(1) StGB),[100] all of which are questionable.

Taken together, the twin justifications of prevention and retribution offer, at best, an incomplete rationale for record-based sentencing enhancements. Mitigation for first offenders appears justified on the basis of both risk and retribution. Once the mitigation is lost, however, the grounds for progressive increases in severity – except for high risk offenders where incapacitation may be justified – remain problematic. In addition, a robust prior record enhancement would be inconsistent with the principle of proportionality, which underpins all common law sentencing regimes, and the guilt principle, which is a constitutional principle in Germany and encompasses the concept of *Schuldangemessenheit*,[101] – the

[98] See data summarised in Roberts and Pina-Sánchez, 'Previous Convictions' (2014).

[99] See e.g. Higher Regional Court (*Oberlandesgericht* (OLG)) Braunschweig, *Neue Zeitschrift für Strafrecht: Rechtsprechungs-Report* (2002), at 75 (shoplifting regarding a box of cigarettes; value: 5 Deutsche Mark; one month's imprisonment); OLG Stuttgart, *Neue Juristische Wochenschrift* (2006), 1222 (three cases of fare dodging; price per ticket: 1.65 euros; per offence one month's imprisonment); OLG Hamburg, *Neue Zeitschrift für Strafrecht: Rechtsprechungs-Report* (2004), at 72 (shoplifting regarding sweets; value: 4.44 euros; one month's imprisonment).

[100] See Harrendorf, 'Sentencing Thresholds' (2017).

[101] See e.g. BVerfG, 24.10.1996 – 2 BvR 1851/94, BVerfGE 95, 96–142 at 140.

need for an adequate relationship between the guilt and punishment. In practice, this principle is less focused on the severity of the offence alone and therefore also reflects the personality of the offender to a greater extent than the Anglo-American proportionality principle.[102] However, it also rules out any sentence enhancements which are justified only by preventive reasons.

III The Need for Guidance: The Complexity of a Criminal Record

In most jurisdictions, courts are provided with relatively little guidance regarding the consideration of a criminal record at sentencing. This paucity of detailed guidance is regrettable and reflects a failure to recognise the complexities of a criminal record. Several features set criminal history apart as an aggravating circumstance unlike any other. First, it affects most cases appearing for sentencing.[103] Secondly, it is a multidimensional[104] factor, unlike most other sentencing factors. For example, the aggravating effect of premeditation reflects the degree of planning and the amount of time and effort the offender spent planning the offence. Judicial reflection is necessary to establish the extent to which this factor should aggravate, but this determination is relatively straightforward.

Criminal history, in contrast has multiple dimensions which must be considered. These include: the age of the prior(s); the number of previous convictions; their seriousness; the relationship among the prior crimes, as well as the relationship between the previous and current offence(s); whether there has been a gap in offending (if the priors are spaced over a lengthy period); and whether there has been an escalation – or de-escalation – in the trajectory of offending seriousness, to name a few.[105] Most other aggravating factors exercise their effect uniformly across cases: remorse mitigates and premeditation aggravates, regardless of whether the offender is a young adult or in his sixties, or is convicted of burglary or buggery. The effects of prior record, however, will vary depending upon a number of characteristics relating to the offender and the offence.

[102] E.g. mainstream sentencing theory in Germany also considers Gesinnungsunwerte, see text above.

[103] See the figures provided in n. 6 above.

[104] Wasik lists eight dimensions of a criminal record: Wasik, 'Criminal Record' (1987). See also Wasik, 'Criminal History' (2010).

[105] Most of these are well established in the case law: see e.g. Thomas, *Principles of Sentencing* (1970), ch. 4.

Many aggravating factors are binomial in nature: the offender either was or was not on parole at the time of the current crime. Committing a fresh crime while still serving a sentence for a previous crime enhances the offender's level of culpability. Once the parole status is established, usually little further judicial interpretation is necessary. An offender who commits a crime while on parole will receive a higher penalty for the later offence. Criminal record is a very different proposition. The existence of prior convictions alone does not trigger an automatic enhancement; after all, these have resulted in sentences which the offender has discharged. The significance of a prior crime springs from its relationship to the current crime. For example, a prior conviction for theft should not carry aggravating force for a sentence for assault,[106] but it might for a fresh theft.

In short, without explicit direction from a statute, appellate court or sentencing guidelines individual sentencers will resort to judicial intuitions about issues relating to the relevant components of a criminal record. The prevalence, complexity and potential to affect the sentence are all powerful arguments for the provision of guidance for trial courts.

IV Representative Statutory and Guidelines Approaches to Structuring Discretion Regarding Previous Convictions

All jurisdictions adopt one of three distinct approaches to prior record enhancements: (1) formal guidelines in which prior convictions constitute a primary dimension; (2) statutory enhancement provisions; (3) appellate guidance.

1 Presumptive Sentencing Guidelines

The most visible way of structuring judicial discretion is found in the US guidelines.[107] In many states, courts apply a sentencing grid with two dimensions: the seriousness of the crime and the offender's criminal history. The architecture of a grid ensures that prior convictions exercise

[106] Unless the enhanced blameworthiness springs from the offender violating *any* law, this would appear to be an overbroad ascription of enhanced culpability; an example of punishing a defiant attitude towards legal authority.

[107] For a comprehensive survey and analysis of the role of prior convictions in the federal and state guidelines, see Frase et al., *Sourcebook* (2015); Frase and Roberts, *Paying for the Past* (2019).

a powerful impact on sentencing outcomes. In Minnesota, for example, offenders are assigned criminal history points for each prior crime which falls within a broad window of inclusion. In addition, the criminal history score reflects other components such as whether the offender was on parole, probation or bail at the time of the current offence. Once the total points have been summed, the offender is placed in one of seven criminal history categories. For offenders falling into the custodial zone of the main grid, sentence length increases by the same quantum across each criminal history category.[108]

An example illustrates: an offender convicted of a crime of seriousness level 8 with no prior convictions faces a presumptive sentence of forty-eight months. One criminal history point raises the sentence length to fifty-eight months, two criminal history points to sixty-eight months and so on. Cases falling in the highest criminal history category (six or more points) carry a presumptive sentence of 108 months. The US guidelines approach, which involves the steady accumulation of criminal history points, has been criticised, but making the components of a criminal history transparent at least promotes greater consistency of application.[109] The weakness of the US approach is the rather mechanical way in which prior crimes increase the severity of sentence, and the excessive influence of prior convictions in terms of sentence outcomes. The advantage, if it is in fact one, is that the magnitude of these enhancements is clear to all parties. It may also be argued that such a simplistic approach leads to greater consistency.

Courts in England and Wales must also follow definitive sentencing guidelines which, unlike the US grid-based approaches, are offence-specific in nature. These guidelines specify two levels of aggravating factors, and previous convictions have been placed at Step Two of the guidelines methodology, which means that they carry less weight than other factors (such as premeditation) which are located at Step One.[110] In Germany, no sentencing guidelines exist in criminal law and the ones existing for non-criminal traffic offences[111] do not include prior offences as an aggravating circumstance.

[108] Minnesota Sentencing Guidelines Commission, *Guidelines and Commentary* (2018).

[109] Parent notes that: 'The pivotal concern for the [Minnesota Sentencing] Commission was operational simplicity.' See Parent, *Structuring Criminal Sentences* (1988), 71.

[110] See Sentencing Council for England and Wales at www.sentencingcouncil.org.uk; Ashworth and Roberts, *Sentencing Guidelines* (2013).

[111] See n. 15 above

2 *Statutory Provisions Relating to Prior Convictions*

The second approach is the most common and consists of statutory directions to courts at sentencing. Most sentencing codes contain some direction to courts regarding the presence of prior convictions. This guidance is sometimes explicit, sometimes more nebulous. The guidance is usually skeletal, presumably in the expectation that appellate courts will flesh out the statutory provisions. It may also be the case that the minimal direction reflects recognition that interpreting a criminal record for the purposes of sentencing is best left to the discretion of trial courts. Without the exercise of discretion, individualisation of the sentence is greatly impaired.

England and Wales is a good example of a jurisdiction which has a statutory provision which addresses the aggravating effect of prior convictions. Section 143 of the Criminal Justice Act 2003 specifies key dimensions for courts to consider (the age and nature of the prior crime and the relationship between previous and current offences) and allows judicial discretion to ignore prior convictions if it would be unreasonable to consider them in aggravation. A provision of this kind clarifies the role of previous convictions but does not provide any guidance as to their weight in the sentencing equation.

Elsewhere, the statutory provision is vague, leaving many issues for judicial discretion to resolve. § 46 of the German StGB, which articulates the principles of sentencing, states in subsection (2):

> When sentencing the court shall weigh the circumstances in favour of and against the offender. Consideration shall in particular be given to ... the offender's prior history ...[112]

The prior history in this provision is, as noted above, only one among a number of different factors that should be considered at sentencing. As regards prior convictions, the law is quite vague: first, a 'prior history' in the meaning of the law includes not only prior convictions (or the absence thereof), but also other aspects of the offender's past.[113] Secondly, it is not clear that prior convictions need to be an aggravating factor, they may also serve as a source of mitigation (if the prior convictions indicate a reduced inhibition threshold). This ambivalence is indeed

[112] Translation by Bohlander (www.gesetze-im-internet.de/englisch_stgb/englisch_stgb.html).

[113] Although prior convictions are the most important factor. For details, see Eschelbach, '§ 46 StGB' (2018), mn. 107–16.

also reflected in the practice of the courts (although in the vast majority of cases German courts resort to warning theory and see prior convictions as an aggravating circumstance).[114] In addition, German courts also accept the *absence* of previous convictions as a mitigating factor.[115] The exact effect of prior convictions or their absence on sentence severity depends on a holistic assessment of the case.[116]

Section 21A(2) of the Crimes (Sentencing Procedure) Act 1999 in New South Wales is similarly brief, but refers to the criminal record only as an aggravating factor:

> The aggravating factors to be taken into account in determining the appropriate sentence for an offence are as follows:
>
> ...
>
> (d) the offender has a record of previous convictions.

Some sentencing statutes explicitly identify previous convictions as a potential aggravation, and their absence as a mitigation. For example, section 40k of the Israeli Penal Law (1977, as amended in 2012) specifies a number of circumstances which a court may consider at sentencing. These are described as 'unrelated to the ... offense' (in contrast to the English statutory provision which embeds priors within the determination of seriousness) and one of these (s. 40k (11)) is 'the offender's previous criminal convictions or lack thereof'. Legislative directions such as these examples leave much to judicial discretion to resolve. The result is likely to be a somewhat inconsistent policy with regard to enhancements for prior crimes.

Finally, a few jurisdictions provide limited guidance regarding the *quantum* of aggravation that is appropriate to reflect previous wrongdoing. The 2014 judicial guidelines in China are a good example. Section 6 of the guidelines prescribes specific ranges of aggravation expressed as a percentage of the base sentence. Thus, for repeat offenders, the base sentence should be increased by between 10 per cent and 40 per cent, with the exact percentage reflecting a number of

[114] See BVerfG, 16.01.1979 – 2 BvL 4/77, BVerfGE 50, 125–41 at 136; BGH, 03.06.1997 – 1 StR 183/97, BGHSt 43, 106–9 at 108; Horstkotte, 'Reform des Strafrechts' (1970), 153; Kunz, 'Vorleben und Nachtatverhalten' (2011), 142, for an aggravating use of prior convictions. See BGH, 12.09.2006 – 4 StR 279/06, *Strafverteidiger* (2006), 689; Kunz, 'Vorleben und Nachtatverhalten' (2011), 141, for a mitigating use.

[115] BGH, 26.05.1982, 3 StR 110/82, *Neue Zeitschrift für Strafrecht* (1982), 376; also see Schäfer, Sander and van Gemmeren, *Praxis der Strafzumessung* (2017), mn. 647.

[116] See Schäfer, Sander and van Gemmeren, *Praxis der Strafzumessung* (2017), mn. 650–60.

dimensions including the relationship between the current and prior crime, the seriousness of the prior crime and the length of time that has passed since the previous sentence elapsed.[117] In Germany, a recent expert opinion for the 72nd *Deutscher Juristentag* in 2018 proposes a new restrictive regulation in criminal law according to which prior convictions should not aggravate the sentence by more than one-third of the punishment a first-time offender would have received under same circumstances.[118]

3 *Judicially Derived Guidance*

In a number of other countries such as Ireland,[119] there is no explicit statutory provision stipulating prior convictions as an aggravator.[120] Instead, prior convictions only constitute a judicially recognised aggravating factor. Courts of first instance in such countries rely upon guidance from the appellate level. In jurisdictions such as these it is much harder to determine the magnitude of the repeat offender premium or to uncover the various dimensions considered by a court when sentencing an offender with a lengthy criminal history. Germany in effect also belongs to this category, as the legal provision (see above, under IV.2) only vaguely refers to the consideration of the offender's prior history when deciding on the sentence length.

V Three Key Issues

As noted, a criminal record is a complex combination of different dimensions and sentencers must interpret a record to see how the prior crimes, in light of their relationship to the current offence, should affect the sentence. This creates the challenge, for courts and commissions alike, to 'read' a record with a view to determining the degree to which a sentence should be enhanced. To promote consistency of application, Sentencing Commissions in the United States usually prescribe specific counting rules for courts to apply. Three key dimensions are the age, seriousness and similarity of prior crimes. Yet there are many other aspects of a defendant's criminal past which must be considered.

[117] For discussion and translation see Roberts and Pei, 'Judicial Discretion in China' (2016).
[118] Kaspar, *Sentencing Guidelines* (2018).
[119] See O'Malley, *Sentencing Law and Practice* (2016).
[120] There is a provision relating to one specific form of offending.

Commissions and courts[121] alike must also decide whether to set a threshold for considering a prior – for example, by disregarding low seriousness crimes such as misdemeanours in the United States, by excluding crimes committed and punished when the offender was a juvenile or by ignoring older previous convictions.[122] For the sake of brevity, this chapter discusses only three principal components.

1 *Age of Prior Offences: The Long-Playing Criminal Record*

There are powerful arguments for placing temporal limits on the consideration of previous offending, for recognising significant gaps in episodes of offending and for discounting older prior crimes. The double punishment argument becomes more compelling for older convictions. Counting all priors endlessly across an offender's criminal career means that each prior offence will trigger further severity enhancements across every subsequent sentencing decision. The consequence is a snowballing effect over the duration of the individual's criminal career. In addition, both utilitarian and retributive perspectives should respect temporal limits on prior convictions, and also declining weights for crimes which are included. From a risk-based perspective, the risk associated with prior crimes declines over time as a result of changes in the offender's life. As the interval between the prior and current crime increases, the former's significance declines; this finding emerges from criminal career research.[123] Similarly, if, say, ten years have elapsed since the last conviction, the individual can reasonably claim to have regained his or her standing as a person without a criminal past.

It is unsurprising, therefore, that courts in many countries generally disregard or discount previous convictions when they are old ('stale') or separated from the latest conviction by a significant period. The US guidelines, in contrast, are much less forgiving. In many states, there is

[121] Although they are not the focus of this chapter, parole boards in Anglo-American countries or courts deciding on conditional release of prisoners in Germany must also grapple with the complexities of the prisoner's criminal history to determine what implications it may have for his or her release on parole or licence. The problems of interpreting and weighing an offender's record are therefore not restricted to the stage of sentencing.

[122] Almost all US guidelines also include custody status as a component of the criminal history score. If the offender was on bail, parole or serving a community sentence at the time of the latest crime, his criminal history score is raised. We regard custody status as a separate aggravating factor, and do not discuss it in this chapter.

[123] See Mitchell, 'Decay and Gap Policies' (2015).

no 'look-back' limit; all prior crimes count against an individual no matter how old. States that operate limits of inclusion generally include felonies occurring as long as fifteen years previously. Trends in Minnesota demonstrate the point. Over half the convictions recorded in 2014 will be counted against the offender for at least twenty years. Such lengthy windows of inclusion are hard to justify from the perspective of risk or retribution, and are further evidence of the excessive influence of prior crimes across the United States.

The US guidelines also fail to distinguish between prior crimes of very different longevities: there is no 'discounting' of older priors. In Minnesota, for example, a one-year-old prior felony carries the same weight as a fourteen-year-old felony. This indifference to the age of the prior conviction reflects a preference for a system which is easy to apply, yet it has a clear Procrustean effect. The fourteen-year-old and the one-year-old prior crimes would reflect very different levels of risk or blameworthiness yet trigger the same increase in severity. This tendency to aggregate priors which may be very different is characteristic of the point-based enhancements. Two offenders can attract the same criminal history scores with very different prior crime profiles.[124] The US approach promotes simplicity, but at a substantial cost in terms of calibrating the level of enhancement to an offender's actual level of risk or blameworthiness. The US guidelines do not provide any means by which a court may disregard (or even discount) a prior crime on the basis that it has no probative value in terms of risk or retribution.[125] In its guidance for jurisdictions across the United States, the American Law Institute's Model Penal Code project recognises the importance of temporal limits:

> § 6B.07. Use of Criminal History. (TD No. 1) (approved 2007). (3) The commission shall fix limitation periods after which offenders' prior convictions and juvenile adjudications should not be taken into account to enhance sentence.

[124] E.g. an offender with three prior crimes at the lowest levels of seriousness (1 to 2) would attract a similar criminal history score to an offender with a prior crime at a much higher level of seriousness (6 to 8). See Minnesota Sentencing Guidelines Commission, *Guidelines and Commentary* (2018), 12.

[125] E.g. courts in Minnesota may decline to impose the presumptive sentence provided in the guidelines, and sentence outside the grid. This is classified as a 'departure' sentence, and courts must first find 'identifiable, substantial, and compelling circumstances' for departing, see Minnesota Sentencing Guidelines Commission, *Guidelines and Commentary* (2018), 38. The grounds for departure upheld by the Minnesota Court of Appeals do not extend to departing because the prior conviction was too old or too different from the current crime to be considered relevant.

A second problem with the US approach is that it treats a prior conviction as an automatic sentencing enhancement, similar to others such as 'use of a weapon where this was not the subject of a separate charge'. Criminal history should not aggravate sentencing in this way. First, unlike use of a weapon, this factor will not always and uniformly justify an enhanced sentence. Many priors are of little or no relevance to the latest sentencing decision. Secondly, the conduct giving rise to the prior record enhancement has already resulted in prosecution and punishment; the use of a weapon or other such offence-related factors creates an unpunished liability for which punishment is appropriate.

Other jurisdictions have a clear advantage over the US guidelines in this respect. Statutory directions often require sentencers to consider various dimensions of a criminal record in a way that may lead to significant discounting of the prior crime, or even a total disregard. Courts in England and Wales, for example, often exercise their discretion to ignore prior convictions when they seem too old or insufficiently related to the current crime.[126] It is relatively straightforward to provide guidance on the effect of time on the weight assigned to a prior conviction. Under a points-based scheme where each prior crime results in a number of criminal history points, the number of points can be reduced to reflect the age of the prior. In more discretionary regimes, courts can be directed to discount or disregard prior crimes once they have passed a certain age.

In Germany, criminal records held at the Federal Central Register are deleted after certain periods of time without reconviction. The time limits depend on the seriousness of the offence and range from five years to fifteen years in most cases, but reach twenty years for sexual felonies (see § 46 of the Law on a Federal Central Register (*Bundeszentralregistergesetz* (BZRG)). In most cases, the time limit is additionally extended by the length of the prison sentence (§ 46(3) BZRG). Life sentences (which in practice are almost exclusively imposed for murder),[127] psychiatric hospital orders and preventive detention orders are, however, never deleted (§ 45 BZRG). There is also an 'all or nothing' rule applied. The registration of an offender is only deleted if all offences included therein have

[126] See discussion and Table 1 in Roberts and Pina-Sánchez, 'Previous Convictions' (2014).

[127] Just see Statistisches Bundesamt, *Strafverfolgung 2016* (2017), Table 6.1: Of the eighty-nine life sentences imposed in 2016 in Germany, eighty were for completed and nine for attempted murder, but none for the few other offences for which a life sentence could theoretically be imposed.

reached the time thresholds according to the above rules (§ 47(3), cl. 1 BZRG); otherwise, everything (even petty offences) will stay in the register.

Consider a person that has received a life sentence for murder. Even if released on parole, the person's criminal record will never be deleted. The life sentence will remain forever, and since the life sentence stays, all other sentences stay in as well, even a conviction for fare evasion on public transport. However, there is a special regulation for juvenile offenders, for whom all but the most serious convictions are completely discarded at the age of 24 (§ 63(1) BZRG).

For those who are registered on a regular basis, these rules set down in the BZRG ensure that even very old convictions are still visible in the record and can, in principle, be considered at sentencing. On the other hand, as soon as the register is cleared, a person is entitled by law to state that (s)he has no prior convictions (§ 51(1) BZRG). The courts have to disregard such convictions even if they receive evidence on them from other sources.[128] Apart from these legal provisions, the courts can and will of course also consider the age of convictions that are still visible in the criminal record. Usually, a reconviction shortly after the last conviction will lead to a more severe aggravation of sentence than a reconviction a long time after the last conviction.[129] Old previous convictions for offences of minor or medium severity can only be considered as an aggravator if the special circumstances of the case require the court to do so (e.g. if it can be proved that the offender has meanwhile returned to his or her former criminal lifestyle).[130]

However, a short length of time between release from prison and a reconviction is not necessarily a sign of increased dangerousness or culpability, but might also suggest problems with regard to the person's reintegration into society. The time period shortly after release is in this respect a critical phase,[131] which may explain why most people who are

[128] BGH, 25.01.2017, 1 StR 570/16, *Strafverteidiger* 2018, 219. On the few possible exceptions, cf. § 52 BZRG.

[129] See Schäfer, Sander and van Gemmeren, *Praxis der Strafzumessung* (2017), mn. 657–8; BGH, 26.11.2014, 2 StR 132/14, *Beck online*, BeckRS 2015, 01163.

[130] BGH, 16.10.1991, 5 StR 444/91, *Beck online*, BeckRS 1991, 31084024 (regarding a previous conviction for theft and fraud fifteen years ago and one for assault ten years ago).

[131] See Pruin, 'Entlassung aus dem Strafvollzug' (2015).

reconvicted after a prison sentence commit their next offence within the first months of freedom.[132]

2 *The Seriousness of Prior Convictions*

Guidance on the impact of the seriousness of the prior crimes is more challenging. As noted, many US guidelines operate a points-based criminal history enhancement regime. Each prior conviction carries criminal history points and the degree of enhancement reflects the total number of points. This approach does not always distinguish between felonies of different levels of seriousness.[133] Should they?

There is no clear answer to the question of whether the seriousness of the prior crime should affect the degree of enhancement. If risk reduction is the rationale, a very serious prior felony should carry more weight than a less serious prior crime only if the prior crime predicts the nature of any reoffending. Yet the best evidence suggests that the nature of the previous crime is an unreliable predictor of the nature of the offence of reconviction.[134] Most offenders do not specialise and the most likely subsequent crime is a non-violent offence, regardless of the nature of the previous crimes.[135] But perhaps a more severe prior offence is relevant the other way round: if the prior crime is very serious (e.g. armed robbery) and the new offence is minor (e.g. fare evasion on public transport, which is an offence in Germany), this might signal a positive development: the offender is reducing the seriousness of his or her offending, although (s)he has yet to succeed in fully refraining. This might indicate that a sentence enhancement is inappropriate. This assumption is confirmed by results from criminal career research, which show that even offenders who have decided to desist face a difficult path, as they need to change their lifestyle and habits, while lacking the necessary human and social re-integrative structures.[136] Hence, another offence might be little more than a momentary lapse on the path to desistance, and it is important that the courts have sufficient information to assess this question in each

[132] For an overview based on the nationwide German reconviction database, see Harrendorf, 'Neues zur Gefährlichkeit von Gewalttätern' (2014), 189–91.

[133] But see e.g. Minnesota Sentencing Guidelines Commission, *Guidelines and Commentary* (2018), 12, providing such a differentiation.

[134] See Roberts, 'Severity Premium' (2015).

[135] See Harrendorf, *Rückfälligkeit und kriminelle Karrieren* (2007), 318–31 for results from the German reconviction database and further references.

[136] Shapland and Bottoms, 'Young Adult Recidivists' (2011).

individual case. In any event, the individual preventive rationale would always require an individual assessment of the individual's risk of reoffending. For general prevention, the argument might be similar.

On a retributive rationale,[137] it is hard to see how the seriousness of the prior crime is a significant factor in determining the level of any enhancement. As noted, many retributivists do not see a role for prior convictions at sentencing. Those who argue the opposite do not usually discuss the nature or seriousness dimensions in relevant theoretical detail. Once again, it might, however, be argued that a decreasing level of seriousness is better than an increasing trajectory: the offender might have understood the principal message (i.e. not to commit *these specific* offences anymore). It might also be seen as a form of positive character development if someone at least manages to refrain from severe offences. From a retributive perspective, it might also be necessary to assess whether a new offence is committed because a person does not accept the legal and moral rule behind it, or merely out of personal weakness. Especially for petty offences like shoplifting, the latter is usually the case; this should justify a mild and non-increasing punishment even in cases with multiple previous convictions for such offences.[138]

3 *The Similarity of Prior Convictions*

Generally, the US guidelines also do not differentiate between similar and dissimilar prior felonies.[139] This is, however, also an important issue for both preventive and retributive approaches. For preventive approaches, similarity will be relevant for the prediction of future crimes, for retributive approaches, a conviction for a similar offence might carry more weight as a warning or with respect to an omission of value-oriented character development,[140] if one subscribes to these views.

VI Drawing Conclusions

Previous convictions appear to play a greater role in common law systems than in civil law systems. Support for this conclusion can be

[137] We omit character-based retributivism which might include a much wider examination of the offender's character; on this construct, just see Schmidt 'Probleme in der deutschen Strafrechtsreform' (1957), 386; Herzberg, 'Setzt Schuld Vermeidenkönnen voraus?' (2012), 63.

[138] See Köhler, *Strafrecht Allgemeiner Teil* (1997), 612–3.

[139] Frase et al., *Sourcebook* (2015).

[140] Schäfer, Sander and van Gemmeren, *Praxis der Strafzumessung* (2017), mn. 655.

found in the absence of explicit prior conviction sentencing provisions in many civil law statutes.[141] It is also supported by the limited empirical comparisons of sentencing statistics: the sentencing differential between first and repeat offenders appears greater in the United States than in European jurisdictions. Yet, even in a civil law country like Germany, previous convictions remain one of the most important aggravating factors in sentencing.[142] The German sentencing regime is however much less punitive than, for example, sentencing regimes in the United States or even England and Wales.[143] The absolute level of enhancement imposed for a prior conviction is also smaller. Still, there are some instances where a prior record has a very strong effect on sentence severity. In Germany, this effect is most pronounced for minor offences. Persons without a criminal record will often not even be formally punished for such offences, but the proceedings will be dropped due to public interest reasons. For the next offence, a person will receive a conditional disposal or a fine, but after a certain number of repetitions, reconvicted offenders will even be sent to prison for stealing a chocolate bar or for fare evasion on public transport.[144]

Previous convictions play an even greater role in common law countries. The first reason may be that recidivist sentencing statutes, in general, appear to be more frequent in Anglo-American jurisdictions, and this may reflect a greater interest in repeat offending in these countries.[145] Recidivist provisions for a range of offences including firearm offences, impaired driving, drug crimes and knife offences have proved a popular option with legislatures in most Western common law jurisdictions. Statutory sentencing regimes in common law jurisdictions highlight criminal history to a greater extent. Deterrence – at first

[141] However, such provisions are known in civil law systems as well. Germany, for example had a general aggravation rule for reconvicted offenders in § 48 StGB up to 1986, which in principle led to a minimum prison sentence of six months for the third conviction, regardless of the severity of the new offence.

[142] See Harrendorf, 'Sentencing Thresholds' (2017), 527–30 with further references.

[143] See e.g. Cavadino and Dignan, 'Penal Policy' (2006); also see Harrendorf, 'Sentencing Thresholds' (2017), regarding the custody threshold in Germany.

[144] See the references in n. 99 above; and, again, Harrendorf, 'Sentencing Thresholds' (2017).

[145] See Tonry, 'Sentencing in America' (2013). Even a jurisdiction like Canada, which has pursued a much more moderate approach to sentencing than the United States, has passed a steady stream of mandatory sentences in recent years: see Malik, 'Mandatory Minimum Sentences' (2007); and Roberts, *Mandatory Sentences* (2006).

glance[146] the most plausible justifying rationale for prior record enhancements – plays a greater role in the Anglo-American countries. All common law jurisdictions which have placed the objectives of sentencing on a statutory footing have included deterrence as one such objective.[147]

In contrast, in a number of civil law countries, deterrence assumes a lower profile as a sentencing purpose. For example, Weigend notes that 'deterrence is conspicuously absent from the general principles of sentencing under German law'.[148] This in itself does not completely exclude a sentencing premium based on grounds of general deterrence, but such a premium would only be possible within the limits of culpability – that is, it does not justify sentences that are disproportionate to the offender's guilt.[149] According to the Federal Court of Justice, such premiums are also only justified under certain circumstances:

- to deter 'copycat' crimes that would otherwise be expected, and/or
- if a certain type of offence, similar to the one the offender committed, has recently increased in a way that is dangerous to the community.[150]

Secondly, the Anglo-American countries have been particularly affected by media-driven penal populism. Populist criminal justice reforms have often targeted repeat offenders, most notoriously in the 'three strikes' statutes which originated in the United States and then proliferated around the Western nations.[151] Other countries, most prominently in Scandinavia,[152] but also others, like Slovenia,[153] and, in most respects, also Germany,[154] have more strongly withstood the temptation of penal populism.

Thirdly, risk-based sentencing instruments are far more prominent in the Anglo-Saxon jurisdictions. Courts across the United States, Canada and England and Wales routinely employ risk prediction instruments

[146] The deterrent effect of harsher punishments for recidivists is questionable; see above, at Section II.1.(b) and (c).

[147] See e.g. s. 142 of the Criminal Justice Act 2003 in England and Wales or s. 718 of the Criminal Code of Canada.

[148] Weigend, 'No News is Good News' (2016), 89.

[149] See BVerfG, 21.06.1977, 1 BvL 14/76, BVerfGE 45, 187, 260.

[150] BGH, 11.04.2013, 5 StR 113/13, *Neue Zeitschrift für Strafrecht: Rechtsprechungs-Report* (2013), 240; BGH BGH, 23.11.2010, 3 STR 393/10, *Beck online*, BeckRS 2011, 00428.

[151] See Pratt, *Penal Populism* (2007); Roberts et al., *Penal Populism* (2003).

[152] Pratt, 'Scandinavian Exceptionalism' (2008).

[153] Flander and Meško, 'Slovenian Exceptionalism' (2016).

[154] Heinz, 'Neue Straflust' (2011); Kury, Brandenstein and Obergfell-Fuchs, 'Punitiveness in Germany' (2009); more critical Klimke, Sack and Schlepper, 'Punitive Turn' (2011).

such as the Level of Service Inventory Revised (LSI-R). These scales capture a wide range of variables related to risk of reoffending, and the offender's score on the scale is then used by a sentencing court to help determine the sentence. For example, these instruments contain questions on factors related to the risk of reoffending including drug or alcohol abuse and the offender's responses to these questions result in a risk score which is then used to classify the offender as high, medium or low risk to reoffend. Courts and in some cases parole authorities then consider this risk-scale score in determining whether the offender is suitable for a community penalty, or whether (s)he can be safely released from prison on supervised parole. Because previous convictions predict subsequent reoffending, they figure prominently in risk assessment scales, and this further enhances the impact of prior crimes on sentence severity. This is especially problematic if one considers that the predictive strength of such systems still seems to be weak.[155]

As risk-based enhancements increase in strength, they come increasingly in conflict with offence-based proportionality. Sentencing regimes thus face a choice: allow sentence severity to rise indefinitely (subject only to constitutional limits) for preventive purposes, or introduce retributive limits. The challenge to sentencing regimes around the world is to ensure that prior crimes do not carry excessive weight at sentencing, thus overwhelming the offence of conviction. Offence-based proportionality is undermined when an offender's prior crimes are more important determinants of the sentence imposed. As noted, in many US schemes, prior crimes can eclipse the current offence, at least for offenders with serious criminal records. Moreover, this can occur even in states such as Minnesota which ostensibly sentence according to a principally desert-based rationale.

To conclude, prior record enhancements play a greater role at sentencing than can reasonably be justified by preventive or retributive rationales. This is particularly true in the United States, where the guidelines mandate more punitive enhancements than in other jurisdictions. One explanation for the strength, persistence and universality of prior record enhancements is that there are additional, intuitive motivations at work. Many people regard repeat offenders as less worthy of sympathy and

[155] For the COMPAS risk assessment tool, see Dressel and Farid, 'Predicting Recidivism' (2018), who showed that this programme, although including data from 137 different variables, was unable to make better predictions of recidivism than persons who had little or no criminal justice expertise.

deserving of more punishment in a way that is independent of theoretical models of desert. There is also a naïve assumption that reoffending reflects wilful recalcitrance (rather than the influence of environmental factors and lack of self-control), for which the offender is to be blamed and hence punished. Finally, there is an expectation that the offender's reaction to state censure should be desistance; when persistence is the response this triggers punitiveness. If politicians, policy-makers and judges[156] share these intuitions about offenders and offending, this may explain the enduring appeal of the recidivist sentencing premium.

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[156] Many judges certainly subscribe to some of these expectations. Walker noted that: 'The ordinary sentence regards earlier convictions and failures to respond to sentences as good reasons for sentencing more severely.' See Walker, *Aggravation, Mitigation and Mercy* (1999), 40.

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