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The Role of Criminal History in Sentencing
Theory and Practice

Master's Thesis

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Introduction

"Once a thief, always a thief"
American proverb

«Кошка мышей ловить не устанет, а вор воровать не перестанет.»[1]
Русская пословица

"Ogni pena che non derivi dall'assoluta necessità, dice il grande Montesquieu, è tirannica"[2]
Cesare Beccaria, Dei delitti e delle penne, Cap. 2: Diritto di punire

Few labels carry the negative connotation that the word recidivist appears to have. The criminal justice system does not desire repeat customers, yet many return to it. When these repeat offenders are to be sentenced again, what awaits them?

There is a sentiment of seemingly righteous wrath to be meted out to those who reoffend. Having had the opportunity to repent and reform, when they appear again for sentencing, they seem to defy the purpose of the penal system as a whole. Yet, if we follow this feeling further, we arrive at a paradox.

As the quoted proverbs suggest, we, in many ways, do not expect desistance. A criminal is always to be a criminal; a recidivist is always to remain a recidivist. However, at the same time, when a criminal does reoffend, we treat it as an insulting aberration rather than as an expected outcome.

This seemingly contradictory state poses the question of how we view criminal history and what we expect from repeat offenders. In sentencing, the intuitive answer is generally straightforward: The greater the criminal history, the harsher the punishment should be. But why should it be harsher? Can such an intuition survive questioning? Those who subscribe to

[1] rus. "Just as a cat will not stop catching mice, so will a thief not stop stealing." Russian proverb.
[2] ita. "Every punishment not derived from absolute necessity, says the great Montesquieu, is tyrannical." Cesare Beccaria, Of Crimes and Punishment, Ch. 2: The Right to Punish

academic rigour are rarely satisfied with mere intuition. For this reason, the current state of affairs deserves closer examination.

There are two levels to the interaction between criminal history and sentencing. The first is normative, which asks *what should be the role of criminal history in sentencing*. The second is empirical, asking *what is the role of criminal history in sentencing*. These two levels represent the two guiding research questions for this thesis.

Both questions were approached from a moderate reductionist position. As the quote attributed by Beccaria to Montesquieu suggests, every punishment ought to be necessary, and any unnecessary punishment is a little tyranny of its own. The belief that any punishment ought to be strongly justified is inherent to any discussion of theory within this work, especially that of the criminal history enhancement, i.e., the additional punishment the recidivist receives solely by virtue of their recidivism.

The first research question was methodologically approached through intensive desk research. The leading literature on the subject was thoroughly analysed, with attention being paid to both foundational classical texts and more recent theoretical developments. The literature was compared, and opposing views were contrasted. The aim was to provide both a coherent synthesis, as well as a critical analysis of the original texts.

The first sub-question asked what the ethical theories of punishment are to establish definitions and a normative framework within which to approach the research question. The second sub-question enquired about what approaches to sentencing can be drawn from these ethical theories. The third sub-question examined what are the current theories and approaches to sentencing repeat offenders. The fourth sub-question delved into what is the current theoretical approach to criminal history in sentencing in Czechia. The final sub-question demanded what kind of role should be ascribed to criminal history during sentencing in Czechia.

The second research question being of an empirical nature necessitated empirical research. Given the limitations on available data, the research question was narrowed down to what the additional punishment is that repeat offenders receive in Czechia. Since the question asked about the magnitude of additional punishment, quantitative methods were appropriate to provide a response. More specifically, descriptive statistics and logistic regression models were

chosen to identify the relationship between criminal history and the decision to incarcerate or not.

The structure of this thesis follows the research questions. In the theoretical part, the theories of punishment were described in Chapter 1, the approaches to sentencing were identified and contrasted in Chapter 2, the theories and approaches to sentencing repeat offenders were analysed and criticised in Chapter 3, and finally, the current Czech legal theory on sentencing repeat offenders was investigated and a new theoretical legal framework was proposed in Chapter 4.

The empirical part of the thesis provided a thorough literature review of past empirical research in Chapter 5, while Chapter 6 described the original research undertaken for this thesis and discussed the findings. Further research directions are discussed at the end of Chapter 6.

1. Theories of Punishment[3]

1.1 Defining Punishment

As has been foreshadowed, this thesis deals with sentencing offenders with respect to their criminal history. An example of a neutral definition of sentencing is that used by Hutton: "*Sentencing is the selection of the appropriate type and amount of punishment for a convicted offender made by a judge*".[4] Therefore, sentencing can therefore be reduced to the determination of a specific individual legal punishment referred to as a sentence. This process is neither mechanic nor value-neutral. For a sentence to be justified, the punishment it consists of must be just. To understand sentencing, we must therefore understand the underlying concept of punishment.

This section cannot claim to resolve the debate regarding what punishment is, but it can offer a working understanding of punishment going forward. A first look at the concept of punishment can be provided through the prism of the definition offered by Hart, which consists of five elements:

> "*(i) It must involve pain or other consequences normally considered unpleasant.*
> *(ii) It must be for an offence against legal rules.*
> *(iii) It must be of an actual or supposed offender for his offence.*
> *(iv) It must be intentionally administered by human beings other than the offender.*
> *(v) It must be imposed and administered by an authority constituted by a legal system against which the offence is committed.*"[5]

Other situations that could qualify as punishment but were omitted include decentralised sanctions, nonlegal punishments, and mob "*justice*".[6] Since these sanctions are not imposed

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[3] Several of the sources cited in this chapter are referenced in HOSKINS, Zachary and Antony DUFF. Legal Punishment. In: ZALTA, Edward N., ed. *The Stanford Encyclopedia of Philosophy* [online]. Metaphysics Research Lab, Stanford University, 2022. Available at: https://plato.stanford.edu/archives/sum2022/entries/legal-punishment/, which provides an outstanding definition of legal punishment and formed an entry point for the following description.
[4] HUTTON, Neil. Sentencing, Rationality, and Computer Technology. *Journal of Law and Society*. 1995, vol. 22, no. 4, p. 549. DOI: 10.2307/1410614
[5] HART, H. L. A. The Presidential Address: I—Prolegomenon to the Principles of Punishment. *Proceedings of the Aristotelian Society*. 1960, vol. 60, no. 1, pp. 1–26. DOI: 10.1093/aristotelian/60.1.1
[6] Ibid.

within a legal framework, they are not *sentences*, and as such they have no relation to sentencing.

This definition of punishment is not the only one and neither it is universally accepted. As McPherson pointed out, Hart's definition presumes that punishment is contingent on the crime being committed in the past, rather than the chance that the offender will commit one in the future.[7] A theory based on incapacitation could theoretically aim to imprison a potential future offender even before they commit any offence. The harm caused by this imprisonment would certainly be considered punishment under such circumstances.[8] Similarly, if one was to agree with Beccaria's assertion that punishment aims to deter others from committing the same offence,[9] then harm done to someone innocent just for the sake of deterring others could also be considered punishment.[10]

Most (if not all) definitions of punishment, therefore, include in themselves certain implicit views about the justifications of punishment and the types of acceptable punishments that may be inflicted. In doing so they can distinguish between legitimate punishment and mere sadism or whim.[11]

In the legal system, punishment is a specific kind of legal sanction, that is the consequence of a breach of legal rules.[12] Punishment expresses stronger disapproval of the offender's actions, as it concerns itself not only with a breach of legal rules but also moral rules.[13] According to expressive theories, this disapproval is communicated through hard treatment.[14] The hardness

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[7] MCPHERSON, Thomas. Punishment: Definition and Justification. *Analysis*. 1967, vol. 28, no. 1, pp. 21–27.
[8] Ibid. This may seem farfetched but given the increased use of advanced algorithms (artificial intelligence) to predict future criminal conduct, it may well be possible to predict with a relatively high degree of confidence, that a given individual will commit a crime in the future.
[9] BECCARIA, Cesare. *An Essay on Crimes and Punishments*. Albany: W. C. LITTLE & CO, 1872, p. 47.
[10] It is important to note that Beccaria considers only punishment inflicted on the offender to be legitimate. Despite this, if deterrence is the singular aim of criminal policy, there is a reasonable case such treatment would be justified.
[11] WALKER, Nigel. *Why punish?*. Oxford: Oxford University Press, 1991.
[12] KNAPP, Viktor. *Teorie Práva*. Nakladatelství C.H. Beck, 1995, p. 155.
[13] FEINBERG, Joel. The Expressive Function of Punishment. *The Monist*. 1965, vol. 49, no. 3, pp. 397–423.
[14] HART, H. L. A. *The Presidential Address*.; FEINBERG, Joel. *The Expressive Function of Punishment*.; VON HIRSCH, Andrew. *Censure and sanctions*. Oxford: Oxford University Press, 1995, p. 12.; HANNA, Nathan. Say What? A Critique of Expressive Retributivism. *Law and Philosophy*. 2008, vol. 27, no. 2, pp. 123–150. DOI: 10.1007/s10982-007-9014-6

of the treatment is intentional, and therefore, suffering is an intended part of the experience.[15] This differentiates punishment from other similar measures, such as psychiatric detention.[16] This has led to various criticisms, most notably to that of Christie, who referred to legal punishment as "*pain delivery*".[17]

1.2 Theories of Punishment

Punishment theories offer a way to justify and understand the institution of legal punishment. They can also be used to create a framework for a principled system according to which a sentence can be determined, generally related to the underlying justification of punishment that the specific theory advances.

Theories of punishment are traditionally divided by the overarching justification of punishment into three broad categories. In the English literature, these categories are most often retributive, utilitarian, and mixed theories. However, the Czech literature has traditionally separated theories of punishment into absolute, relative, and mixed theories of punishment, although these categories largely correspond to each other in the order they are presented, there may be some semantic differences.[18] For the sake of clarity and in line with more recent Czech publications,[19] conventional English terminology will be used when referring to these theories as they are introduced. It is essential to note that it is well beyond the scope of this thesis to encompass the nuances and details of the many theories of punishment that exist. For this reason, the following sections are to be considered a largely simplified introduction.

1.3 Retributive Theories

While definitions of retribution have varied, theories of retribution generally tend to contain several basic elements. The criminal through their actions breaches an established moral or natural order, with this breach necessitating some kind of payment from the criminal to restore the infringed order. Retribution is then this payment from the criminal, which in criminal law

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[15] CHRISTIE, Nils. *Limits to pain*. Oxford: Martin Robertson & Company Ltd., 1982, p. 16.; HANNA, Nathan. *Say What?*.
[16] HANNA, Nathan. *Say What?*.
[17] CHRISTIE, Nils. *Limits to pain*, p. 19.
[18] See: HERANOVÁ, Simona. Ukládání trestů, zánik trestů a dalších právních následků odsouzení. In: JELÍNEK, Jiří et al. *Trestní právo hmotné. Obecná část. Zvláštní část.* Leges, 2019, pp. 444–474.
[19] See: LATA, Jan. *Účel a smysl trestu*. LexisNexis, 2007., GŘIVNA, Tomáš, Miroslav SCHEINOST and Ivana ZOUBKOVÁ. *Kriminologie*. Praha: Wolters Kluwer, 2019.

takes the form of a punishment that the criminal must suffer for their actions. Given that it is assumed that the criminal had at least some control over their actions, the punishment is seen as just, since the criminal *deserves* it.[20] Since this payment is morally indispensable, retribution acts as a justification for punishment.

Some historical justifications for why retribution must be paid have been based on the idea of exact retaliation,[21] which Kant referred to as *ius talionis* (the right of retaliation).[22] An emphasis on the victims of crime has however reintroduced the idea of legal punishment that is at the very least reminiscent of revenge. Retribution is represented by the vindication of the perceived decrease of the victim's moral value,[23] the reparation of the humiliation suffered by the victim,[24] or as a defence of the victim's honour.[25] This right is not acknowledged as a victim's right to revenge *per se* nor as an example of the *ius talionis*,[26] but rather instead as a "*right to punishment*".[27] Nonetheless, it deviates from the traditional separation of revenge and retribution, as articulated by Nozick.[28] However, as others have pointed out, the difference between revenge and retribution need not be so great.[29]

Other than the vindicative understandings of retribution, there have been three main explanations in modern times for why a criminal deserves punishment.[30] The first is based on the relatively intuitive comparison between harms usually resolved by criminal law and those resolved using civil law. The mere fact that a condemnable act has been committed warrants

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[20] STARKWEATHER, David A. The Retributive Theory of "Just Deserts" and Victim Participation in Plea Bargaining. *Indiana Law Journal*. 1992, vol. 67, pp. 853–878.
[21] TUNICK, Mark. *Punishment: Theory and Practice* [online]. Berkeley: University of California Press, 1992, pp. 86–90. Available at: http://ark.cdlib.org/ark:/13030/ft4q2nb3dn/
[22] KANT, Immanuel. *Metaphysical Elements of Justice.* John LADD, tran. Indianapolis: Hackett Publishing Company, Inc., 1999, p. 138.
[23] HAMPTON, Jean. Correcting Harms versus Righting Wrongs: The Goal of Retribution. *UCLA Law Review*. 1992, vol. 39, no. 6, pp. 1659–1702.
[24] SANCHEZ, Jesus-Maria Silva. Doctrines Regarding "The Fight Against Impunity" and "The Victim's Right for the Perpetrator to be Punished." *Pace Law Review*. 2008, vol. 28, no. 4, pp. 865–884.
[25] KAUFMAN, Whitley R. P. Revenge as the Dark Double of Retributive Punishment. *Philosophia*. 2016, vol. 44, no. 2, pp. 317–325. DOI: 10.1007/s11406-015-9675-6
[26] HAMPTON, Jean. *Correcting Harms versus Righting Wrongs: The Goal of Retribution*.
[27] SANCHEZ, Jesus-Maria Silva. *Doctrines Regarding "The Fight Against Impunity" and "The Victim's Right for the Perpetrator to be Punished"*.
[28] NOZICK, Robert. *Philosophical explanations*. Cambridge, Mass: Belknap Press of Harvard Univ. Press, 1981, pp. 366–369.
[29] WALKER, Nigel. *Why punish?*.; KAUFMAN, Whitley R. P. *Revenge as the Dark Double of Retributive Punishment*.
[30] VON HIRSCH, Andrew, Andrew ASHWORTH and Julian V. ROBERTS, eds. Desert. In: VON HIRSCH, Andrew, Andrew ASHWORTH and Julian V. ROBERTS, eds. *Principled sentencing: readings on theory and policy*. Oxford ; Portland, Or: Hart Pub, 2009, pp. 102–109.

punishment of the actor. Just as an infringement of property requires restitution from the tortfeasor because of the natural rights of the owner without the need for further justification, the same is true for crimes and criminal punishment.[31]

The second explanation relies on the concept of unfair advantage.[32] The offender by their actions gains an unfair advantage when compared to their fellow law-abiding citizens. Punishment is the price of this advantage; it is considered owed to society.[33] This relates to the Hart/Rawls principle of fairness, where those who benefit from certain restraints on freedom (regulations) ought to respect these restraints. Ryberg objected to this view because measuring unfair advantage is not a suitable way to determine proportionality between crime and punishment. In that sense, while it may justify punishment in general, it does not serve as a good basis for a proportional model.[34]

The final explanation is that the punishment is justified because it expresses disapproval of the offence and of the offender. This censure is supported by "hard treatment", which is meant to discourage crime by supporting the weight of the condemnation. It recognises the value of the rights that have been infringed upon and communicates to the offender the wrongfulness of their conduct while treating them as a moral agent capable of making choices.[35] Theories which rely on the last justification are also referred to as expressive or communicative theories, as they rely on an expression of moral condemnation.[36] They are however, teleological in the sense, that they see punishment as having a goal, which in the view of some authors brings them close to utilitarian theories, which explicitly justify punishment as a means to some end.[37] Walker even made the point that these theories that emphasise denunciation or moral education

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[31] MOORE, Micheal S. The Moral Worth of Retribution. In: VON HIRSCH, Andrew, Andrew ASHWORTH and Julian V. ROBERTS, eds. *Principled sentencing: readings on theory and policy*. Oxford ; Portland, Or: Hart Pub, 2009, pp. 110–114.
[32] VON HIRSCH, Andrew, Andrew ASHWORTH and Julian V. ROBERTS, eds. *Desert*.
[33] DAVIS, Micheal. How to Make the Punishment Fit the Crime. *Ethics*. 1983, vol. 93, no. 4, pp. 726–752.
[34] RYBERG, Jesper. *The ethics of proportionate punishment: a critical investigation*. Dordrecht ; Boston: Kluwer Academic Publishers, 2004, p. 43.
[35] VON HIRSCH, Andrew. *Censure and sanctions*, pp. 9–14.; VON HIRSCH, Andrew. Proportionate Sentences: a Desert Perspective. In: VON HIRSCH, Andrew, Andrew ASHWORTH and Julian V. ROBERTS, eds. *Principled sentencing: readings on theory and policy*. Oxford ; Portland, Or: Hart Pub, 2009, pp. 115–134.
[36] HANNA, Nathan. *Say What?*.; HAMPTON, Jean. *Correcting Harms versus Righting Wrongs: The Goal of Retribution*.[36] FEINBERG, Joel. *The Expressive Function of Punishment*.
[37] NOZICK, Robert. *Philosophical explanations*, p. 371.

are very often essentially utilitarian, in that they justify punishment through the achievement of an aim closely related to utility.[38]

1.4 Utilitarian Theories

Utilitarian theories of punishment base their justifications for the practice on an appeal to the principle of utility.[39] This principle was defined by Bentham as a universal rule, under which actions that propagate the utility or pleasure of interested parties are to be held as right, whereas actions that lead to disutility or pain of interested parties are to be held as wrong. This principle is not limited to the actions of an individual but is also supposed to guide actions taken by the state, including its legislation.[40]

Under this principle, punishment is justifiable if its consequence is a total increase in social welfare. The current utilitarian theories are based on any of the mechanisms through which crime can be reduced and, as such, collective well-being can be improved. These mechanisms are deterrence, rehabilitation, incapacitation, and denunciation.[41] While these are introduced in isolation, it is necessary to keep in mind that utilitarian theories often combine some or all of them.

1.4.1 Deterrence

Chronologically, the theory of deterrence is the oldest utilitarian theory of punishment, formulated by the classical school of criminal law in the 18th century.[42] Under the simplest theory of deterrence, punishment aims to increase social welfare by, as the name suggests, eliciting fear and avoidance of punishment.[43] Ellis proposed a more complex theory of deterrence, where punishment is justified as a means of self-defence exercised by society. Violence is inflicted upon the offender to protect society from further offending, while traditional constraints on the amount of violence that can be used in self-defence, such as

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[38] WALKER, Nigel. *Why punish?*.
[39] TUNICK, Mark. *Punishment: Theory and Practice*, p. 69.
[40] BENTHAM, Jeremy. *An Introduction to the Principles of Morals and Legislation*. Kitchener, Ontario: Batoche Books, 2000, pp. 14–18.
[41] WALKER, Nigel. *Why punish?*.
[42] BECCARIA, Cesare. *An Essay on Crimes and Punishments*.
[43] ASHWORTH, Andrew and Julian V ROBERTS. Sentencing: Theory, Principle and Practice. In: MORGAN, Rodney, Robert REINER and Mike MAGUIRE, eds. *The Oxford handbook of criminology*. New York, NY: Oxford University Press, 2012, p. 868.; STAFFORD, Mark C and Mark WARR. A reconceptualization of general and specific deterrence. *Journal of research in crime and delinquency*. 1993, vol. 30, no. 2, pp. 123–135.

proportionality, continue to apply. As such, there are certain restrictions on how punishment can be used to increase social welfare.[44]

Deterrence is commonly subdivided into general and specific deterrence. General deterrence refers to the indirect effect the punishment is understood to have on the public, while specific deterrence relates to the direct effect on the sentenced offender, as the punishment deters them from reoffending.[45]

While Novotný considered deterrence[46] one of the primary aims of punishment, he however warns of the limited deterring effect punishment appears to have in practice.[47] This is a hotly contested topic within the literature. Increasing punishment, whether in statutes or practice (the latter not necessarily following the former), does not appear to have an easily observable deterrent effect, whereas the certainty and the swiftness of the sanction may.[48] A potential explanation lies in the idea that even if severity had some deterrent effect, the procedural complexities associated with imposing the more severe sentence may run contrary to its certainty or swiftness.[49]

This scepticism appears to be well placed, as modern empirical studies cannot convincingly prove the existence of a general deterrent effect related to sentencing. A 2017 meta-analysis on the empirical status of deterrence theory found that traditional mechanisms of deterrence, including certainty of punishment, severity of punishment, and threats of nonlegal sanctions, are very limited in their ability to affect future criminal behaviour. Therefore, the authors of the meta-analysis suggest a more limited role for deterrence theory, as part of other theoretical frameworks.[50]

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[44] ELLIS, Anthony. A Deterrence Theory of Punishment. *The Philosophical Quarterly*. 2003, vol. 53, no. 212, pp. 337–351.
[45] STAFFORD, Mark C and Mark WARR. *A reconceptualization of general and specific deterrence*.
[46] Novotný uses the terms *individual prevention* and *general prevention*, which are typical of Czech literature. In this thesis, the former term is understood to be analogous to specific deterrence, rehabilitation and incapacitation combined, while the latter is analogous to general deterrence.
[47] NOVOTNÝ, Oto. *O trestu a vězeňství*. Praha: Academia, nakladatelství Československé akademie věd, 1969, pp. 25–27.
[48] WALKER, Nigel. *Why punish?*.; WILSON, James Q. *Thinking about crime*. New York: Basic Books, A Member of the Perseus Books Group, 2013, pp. 130–132.
[49] WILSON, James Q. *Thinking about crime*, p. 123.
[50] PRATT, Travis C. et al. The Empirical Status of Deterrence Theory: A Meta-Analysis. In: CULLEN, Francis T., John Paul WRIGHT and Kristie R. BLEVINS, eds. *Taking Stock*. Routledge, 2017, pp. 367–395. DOI: 10.4324/9781315130620-14

1.4.2 Rehabilitation

Within rehabilitation theories, punishment is justified by its ability to increase social welfare by reforming the offender and enabling them to desist from offending.[51] This theory has been advanced historically by the Italian anthropological school of criminology best represented by Lombroso, who concluded that criminal behaviour is akin to an illness, and as such it should be treated.[52]

The caveat of rehabilitation theories lies in the assumption that punishment can (and does) reform the offender. If this assumption is set aside, then punishment can hardly be justified on these grounds. It also can be rather challenging to distinguish whether the desistence was achieved by individual deterrence, that is, the offender has been scared away from further offending, or through the moral improvement rehabilitation desires.[53]

There are methodological issues with testing this assumption, with the empirical evidence being mixed. Overall, there does not appear to be a universally functional intervention – this however does not mean that certain interventions are not successful in specific scenarios.[54]

A more innovative approach to rehabilitation is Braithwaite's reintegrative shaming. Within his theory, shaming communicates to the offender the wrongfulness of their actions (like denunciation), however, the reintegrative part points toward the result of the shaming being forgiveness or some other way of allowing the offender to continue as a member of the community. This allows for the offender to desist from offending, as the social interdependency the offender acquires is a strong protective factor from reoffending.[55] There is some empirical evidence to suggest that shaming through sentencing is certainly possible, although specialized restorative justice tribunals appear to do much better at this task.[56] This points to the fact that

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[51] ASHWORTH, Andrew and Julian V ROBERTS. *Sentencing: Theory, Principle and Practice*, p. 868.
[52] LOMBROSO, Cesare. *Crime: Its Causes and Remedies*. London: William Heinemann, 1911.
[53] WALKER, Nigel. *Why punish?*.
[54] JONES, Iolo Madoc. The impact of corrections on re-offending: A review of "what works." *Probation Journal*. 2005, vol. 52, no. 3, pp. 301–302.; MAGUIRE, Mike et al. 'What Works' and the Correctional Services Accreditation Panel: Taking stock from an inside perspective. *Criminology & Criminal Justice*. 2010, vol. 10, no. 1, pp. 37–58. DOI: 10.1177/1748895809352651; WALKER, Nigel. *Why punish?*.
[55] BRAITHWAITE, John. *Crime, Shame and Reintegration*. Cambridge: Cambridge University Press, 1989.
[56] STRANG, Heather. Crime, shame and reintegration: from theory to empirical evidence. *The International Journal of Restorative Justice*. 2020, vol. 3, no. 1, pp. 23–29. DOI: 10.5553/TIJRJ/258908912020003001003

rehabilitation operates beyond being a mechanism by which to justify punishment. As such, it can reach beyond the criminal justice system and operate independently of formal sentences. Three schemes in the UK that used restorative conferences together with traditional sentencing appeared to have lower reconviction rates; however, the difference was not sufficient to be statistically significant.[57]

1.4.3 Incapacitation

Incapacitation theories justify punishment primarily because punishment prevents further offending and, therefore, increases social welfare. Imprisonment or other forms of privation of liberty illustrate this mechanism most clearly, as an imprisoned convict has their ability to offend significantly impaired. Achieving incapacitation also presents a potential reason why one prefers prison over other forms of punishment. Nonetheless, as Novotný points out, the offender can (and occasionally does) continue offending within the confines of their punishment, meaning that the incapacitative effect is not absolute.[58]

The obvious advantage is that it does not need to rely on considerations of whether human nature can be altered, no matter if through deterrence or rehabilitation. Wilson sets out three conditions for incapacitation to work: i) there must be offenders who would reoffend, ii) the prevented crime is not immediately replaced by other offenders' crimes, and iii) prison should not increase crime committed after release to such a degree that the prevented crime would be nullified.[59]

A key concept in incapacitation theory is the idea of individual offence rates (represented as λ in the literature). The individual offence rate represents the number of crimes an individual offender commits within a certain period. However, there have been significant differences in the estimated individual offence rates.[60]

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[57] SHAPLAND, Joanna et al. *Does restorative justice affect reconviction? The fourth report from the evaluation of three schemes*. London: Ministry of Justice, 2008.
[58] NOVOTNÝ, Oto. *O trestu a vězeňství*, p. 13.; WALKER, Nigel. *Why punish?*.
[59] WILSON, James Q. *Thinking about crime*, p. 133.
[60] Ibid., pp. 135–139.; PIQUERO, Alex R. and Alfred BLUMSTEIN. Does Incapacitation Reduce Crime? *Journal of Quantitative Criminology*. 2007, vol. 23, no. 4, pp. 267–285. DOI: 10.1007/s10940-007-9030-6; OWENS, Emily G. More Time, Less Crime? Estimating the Incapacitative Effect of Sentence Enhancements. *The Journal of Law and Economics*. 2009, vol. 52, no. 3, pp. 551–579. DOI: 10.1086/593141

The downside of incapacitation is its cost.[61] The literature on the elasticity of imprisonment suggests that even large increases in prison population will be met by only a slight decrease in committed offences.[62] However, assuming we can correctly estimate an individual offence rate and the costs of crime, it ought to be possible to perform a cost-benefit analysis for the individual offender. A study of the costs of incapacitating repeat offenders in Maryland suggested that the social costs of their crimes avoided by an additional year of incarceration would be double the costs of their additional imprisonment.[63] This idea of selecting high offence rate offenders and removing them from society through incarceration has been referred to as selective incapacitation.[64]

Nevertheless, recent literature that would examine incapacitation whether selective or not appears to be scarce. Instead, there appears to be a shift after the 1990s from selective incapacitation to the concept of predictive sentencing, where the subject is incapacitated for a period determined by a process of risk assessment.[65]

[61] WALKER, Nigel. *Why punish?*.
[62] PIQUERO, Alex R. and Alfred BLUMSTEIN. *Does Incapacitation Reduce Crime?*.
[63] OWENS, Emily G. *More Time, Less Crime?*.
[64] WILSON, James Q. *Thinking about crime*, p. 139.; AUERHAHN, Kathleen. Selective Incapacitation and the Problem of Prediction. *Criminology*. 1999, vol. 37, no. 4, pp. 703–734. DOI: 10.1111/j.1745-9125.1999.tb00502.x
[65] VAN GINNEKEN, Esther FJC. The Use of Risk Assessment in Sentencing. In: DE KEIJSER, Jan W, Julian V ROBERTS and Jesper RYBERG, eds. *Predictive Sentencing: Normative and Empirical Perspectives*. Hart Publishing, 2019, pp. 9–32. DOI: 10.5040/9781509921447; SLOBOGIN, Christopher. Prevention as the Primary Goal of Sentencing: The Modern Case for Interdeterminate Dispositions. *San Diego Law Review*. 2011, vol. 48, no. 4, pp. 1127–1172.

2. Sentencing Approaches

2.1 Theories of Punishment and Sentencing Approaches

The reason why the main theories of punishment were introduced is that they are the cornerstones of sentencing approaches. Sentencing approaches connect theories of punishment and actual statutes by attempting to reduce or extend punishment theories into a set of coherent principles that can guide sentencing.

The relationship between a sentencing approach and a theory of punishment is not always obvious. Although Beccaria justified punishment along the lines of deterrence, his sentencing approach consists of five principles which point in a different direction. First, there should be a *fixed proportion* between crimes and punishments. Second, it should follow from this that a scale of crimes, by order of gravity, should be matched with a scale of punishments, ranked by order of severity, with the least serious crimes corresponding to the lightest punishments, etc. Third, the punishment should be determined by the "*injury done to society*", rather than the character of the offender. Fourth, it is sufficient that the harm caused by the punishment to the offender exceeds the benefit expected from the crime, with more severe punishment being superfluous. Fifth, for a punishment to be just it should be only as severe as is necessary to deter others.[66]

Out of these principles, only the fifth one appears to be grounded in utilitarian logic; the other principles instead promote a proportional relationship between crime and punishment, a concept much more closely connected with retributive theories. With this reservation, retributive, utilitarian, and other approaches to sentencing are discussed.

2.2 Retributive Approaches

Retributive approaches are derived from retributive theories in that they pursue retribution for the crime, rather than attempt to increase utility. These approaches, therefore, attempt to provide a framework that makes it possible to determine a punishment that can be considered just retribution.

[66] BECCARIA, Cesare. *An Essay on Crimes and Punishments*, pp. 28–32.

2.2.1 Exact Retribution (*ius talionis*)

Quite possibly, the oldest retributive sentencing approach is one that suggests that retribution for the crime should match the crime exactly. It is known as the law of retaliation (*ius talionis*). It is associated primarily with ancient cultures, with the best-known example of it found in the Old Testament, which states "*But if there is harm, then you shall pay life for life, eye for eye, tooth for tooth, hand for hand, foot for foot…*".[67] Often offered as an example of this approach are also the Babylonian Laws of Hammurabi from the third millennium BC.[68] On a more nuanced look, it becomes apparent that neither of these documents truly embodies the stereotypical *ius talionis* as they only apply the principle between equals, and sometimes provide for monetary compensation, or prescribe a punishment which by far supersedes the harm done by the offender.[69]

In more recent times, the *ius talionis* has been discussed by scholars mainly in terms of the work of Kant. In *Metaphysical Elements of Justice*, Kant stated concerning sentencing: "*Only the Law of retribution (ius talionis) can determine exactly the kind and degree of punishment; it must be well understood, however, that this determination [must be made] in the chambers of a court of justice (and not in your private judgment).*" He went on to argue that every murder must be punished by death, less injustice should prevail. With offences, where direct retaliation may not be possible, he proposes that painful treatment be used instead.[70]

Murphy explored the criterion of proportionality set out by Kant and found that with a broader reading of Kant, it becomes apparent that the philosopher was aware of the impracticality and even impossibility of applying the *ius talionis* to every offence. Murphy therefore argued that while the conversation attached to Kant's work has centred on the application of the *ius talionis* as quoted above, Kant really held a vague theory of proportionality. According to Murphy, when considering the entirety of Kant's work, it appears that he proposed the matching of a crime on a scale ordered by its seriousness with a punishment on a scale ordered by severity. Additionally, Murphy views Kant as not having created a complex theory of punishment or

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[67] Ex. 21:23-24

[68] The Code of Hammurabi. In: *The Avalon Project: The Code of Hammurabi* [online]. 2008 [accessed 02.02.2023]. Available at: https://avalon.law.yale.edu/ancient/hamframe.asp; VINCENT, George E. The Laws of Hammurabi. *American Journal of Sociology*. 1904, vol. 9, no. 6, pp. 737–754. DOI: 10.1086/211268

[69] JACKSON, Bernard S. The Problem of Exod. XXI 22-5 (Ius talionis). *Vetus Testamentum*. 1973, vol. 23, no. 3, pp. 273–304.; VINCENT, George E. *The Laws of Hammurabi*.

[70] KANT, Immanuel. *Metaphysical Elements of Justice*, pp. 138–144.

sentencing approach, but only having made several significant remarks on punishment and by extension criminal law.[71]

Nozick's Non-teleological Approach to Sentencing

A more nuanced take on exact retribution is that of punishment being calculated as the product of the harm[72] of the offence and the degree of responsibility of the offender while subtracting the lowering of the baseline situation of the offender (pre-offence) due to compensating the victim. This leads to the punishment being computed as $(H \times r) - c$.[73] The feasibility of such a calculation and its enactment through the criminal justice system seems however unlikely.[74]

2.2.2 Ordinal Proportionality

Neither of the previous accounts offers more than a very general principle of retaliation. Few authors defend exact retribution, and those who do tend to do so by modifying it to a significantly more symbolic retaliation, than the proverbial *eye for an eye*.[75] It is necessary then to search for a different approach to retributive sentencing.

Expressive theories expect the sentencer to communicate censure to the offender through some amount of "*hard treatment*", which must remain proportionate to the offence.[76] The just deserts sentencing approach is based on an expressive theory of proportionality, where punishment expresses blame commensurate with the blameworthiness of the offence.[77] The blameworthiness is determined by the harm of the offence, the degree of responsibility, and possibly the offender's culpability.

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[71] MURPHY, Jeffrie G. Does Kant Have a Theory of Punishment? In: *Retribution reconsidered: more essays in the philosophy of law*. 54. Dordrecht: Springer Science+Business Media, 1992, pp. 31–60.
[72] Nozick equates harm with wrongfulness, which Jean Hampton explicitly rejects.
[73] NOZICK, Robert. *Philosophical explanations*, p. 363.
[74] SHAFER-LANDAU, Russ. Retributivism and Desert. *Pacific Philosophical Quarterly*. 2000, vol. 81, no. 2, pp. 189–214. DOI: 10.1111/1468-0114.00102
[75] SHAFER-LANDAU, Russ. The Failure of Retributivism. *Philosophical Studies: An International Journal for Philosophy in the Analytic Tradition*. Springer, 1996, vol. 82, no. 3, pp. 289–316.
[76] ASHWORTH, Andrew and Julian V ROBERTS. *Sentencing: Theory, Principle and Practice*, p. 867.; VON HIRSCH, Andrew. *Censure and sanctions*, p. 12.; VON HIRSCH, Andrew. The "Desert" Model for Sentencing: Its Influence, Prospects, and Alternatives. *Social Research*. 2007, vol. 74, no. 2, pp. 413–434.
[77] VON HIRSCH, Andrew and Andrew ASHWORTH. *Proportionate Sentencing: Exploring the Principles*. Oxford University Press, 2005, pp. 135–136. DOI: 10.1093/acprof:oso/9780199272600.003.0009

Ordinal proportionality was defined by von Hirsch as following three tenets. *Parity*, by which crimes of similar seriousness should be punished by a sanction of comparable severity; *rank-ordering*, where both crimes and punishments should be ordered on a scale representing their relative severity and gravity; and *spacing*, meaning that greater differences in crime seriousness should be mirrored by greater differences in punishment severity and *vice versa*.[78] The apparent similarity between the previously introduced scale of Beccaria, the interpretation of Kant's proportionality offered by Murphy, and the current account can be easily noticed.[79]

Rank-ordering is not as simple as it may seem at first glance. Is tax evasion less or more serious than polluting a wood? How do battery and burglary compare? An answer may lie in the idea of criminal harm. For identifiable victims, this harm could be assessed by considering the standard of living lost by the victim. Von Hirsch and Jareborg split it into four levels and analyse the loss within four generic-interest categories. The relative harms can inform the lawmaker or sentencing commission when outlining the minimum and maximum punishments for offences.[80] This may resolve the second question but does little to resolve the first.

The answer to the first question can be found in the harm assessment process. Expanding on the work of von Hirsch and Jareborg,[81] Greenfield and Paoli proposed a framework that can be used to assess the harm of crimes even if they have no identifiable victims. This is done by expanding the categories of generic interest to private sector entities, government entities, and the environment. Following this, the severity of harm is analysed by considering five different levels of loss in standard-of-living or operational capacity, reminiscent once again of the earlier work.[82] This framework could then settle the question of the comparative seriousness of crimes, therefore perhaps finally resolving the question of ordinal proportionality adequately.[83]

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[78] VON HIRSCH, Andrew. *Censure and sanctions*, p. 18.
[79] MURPHY, Jeffrie G. *Does Kant Have a Theory of Punishment?*.
[80] VON HIRSCH, Andrew and Nils JAREBORG. Gauging Criminal Harm: A Living-Standard Analysis. *Oxford Journal of Legal Studies*. 1991, vol. 11, no. 1, pp. 1–38.
[81] Ibid.
[82] GREENFIELD, Victoria A. and Letizia PAOLI. A Framework to Assess the Harms of Crimes. *British Journal of Criminology*. 2013, vol. 53, no. 5, pp. 864–885. DOI: 10.1093/bjc/azt018
[83] GREENFIELD, Victoria A. and Letizia PAOLI. *Assessing the harms of crime: a new framework for criminal policy*. Oxford: Oxford University Press, 2022, pp. 34–37.

2.2.3 Cardinal Proportionality

The scale established by the constraints of ordinal proportionality does not confer information on what *exact* punishment is proportional to a crime, but merely informs us of their relative relationships. A scale that would begin at ten years of hard labour and end with the death sentence could be made as commensurate as the one that starts with a reprimand and ends with a year of house arrest.[84] Kleinig suggested that the scale be anchored at the upper bound by the greatest punishment that can humanely be inflicted, while the lower bound should be the lowest penalty that the sentencer is willing to impose.[85] Once the bounds have been fixed, the rest could be in theory resolved simply by spacing. This is, however, deeply problematic, as it by no means guarantees that punishments will be handed out based on desert, given that both the lower and upper bounds are rather arbitrary.[86]

Fortunately, von Hirsch proposed the principle of cardinal proportionality as a resolution to this issue. The idea is to create a scale of punishments that is neither disproportionately lenient nor severe utilising several guiding considerations. To this end, he proposes that an upper bound of punishment be set by considering the standard of living lost by the victim through the crime and the standard of living lost by the offender through the punishment, making sure the latter does not overly surpass the former.[87]

A balancing concept in modern just deserts sentencing approaches could be parsimony. Under the principle of parsimony, penal suffering should be reduced where appropriate. Although this may be used to justify certain discounts to classes of offenders, a more coherent desert-oriented sentencing approach may be achieved when interpreting parsimony as an imperative to reduce punishment to the lowest amount possible, while maintaining proportionality between crime and punishment.[88]

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[84] SHAFER-LANDAU, Russ. *The Failure of Retributivism*.
[85] KLEINIG, John. *Punishment and desert*. The Hague: Martinus Nijhoff, 1973, p. 124.
[86] SHAFER-LANDAU, Russ. *Retributivism and Desert*.
[87] VON HIRSCH, Andrew. *Censure and sanctions*, pp. 29–33.
[88] TONRY, Michael. Proportionality, parsimony, and interchangeability of punishments. In: DUFF, Antony, ed. *Penal theory and practice: tradition and innovation in criminal justice*. Manchester, UK: Manchester University Press, 1994, pp. 60–83.

There is reasonable criticism to raise at this point. Neither of these answers by itself provides a sufficient basis for a specific penal policy or statute, which sets specific punishments for specific crimes.[89] As Pickard and Lacey pointed out "*there is no agreed mechanism for anchoring the penalty scale according to cardinal proportionality, and actual penalty scales are driven by convention, calculations of consequences, and political dynamics".*[90] A possible answer to this objection could be that, while a general level of severity is a question of convention, the principles to adjust *pro rata* crimes and punishments remain valid and normatively imperative.[91]

Furthermore, it could even be argued that the only option the retributivist could have when determining a proportional sentence is to use their intuition, given the absence of a clear rational mechanism.[92] Harm assessment, however, may just provide this mechanism. Nonetheless, for the time being, while the principles of retributive sentencing certainly play a role in the political world of setting penalty scales, they are not sufficient to determine the penalty scale on their own.

2.3 Utilitarian Approaches

Much of the literature of the past 50 years has focused on the formulation of retributive principles to guide sentencing. However, actual approaches rarely have followed these principles, and a thorough application is fundamentally problematic.[93]

The literature on utilitarian sentencing appears to be more dispersed than that on retributive sentencing with several significant branches. Each approach attempts to achieve an increase in social welfare in some way, generally by using one or more utilitarian mechanisms to guide punishment. Based on the mechanism applied, different features of the offender and their crime

[89] SHAFER-LANDAU, Russ. *Retributivism and Desert*.
[90] LACEY, Nicola and Hanna PICKARD. The Chimera of Proportionality: Institutionalising Limits on Punishment in Contemporary Social and Political Systems: The Chimera of Proportionality. *The Modern Law Review*. 2015, vol. 78, no. 2, pp. 216–240. DOI: 10.1111/1468-2230.12114
[91] VON HIRSCH, Andreas. *Deserved Criminal Sentences: An Overview*. Hart Publishing, 2017, p. 23. DOI: 10.5040/9781509902699
[92] RYBERG, Jesper. Retributivism and the proportionality dilemma. *Ratio*. 2021, vol. 34, no. 2, pp. 158–166. DOI: 10.1111/rati.12297
[93] TONRY, Michael. Punishment and Human Dignity: Sentencing Principles for Twenty-First-Century America. *Crime and Justice*. 2018, vol. 47, no. 1, pp. 119–157. DOI: 10.1086/696948

are relevant when measuring out the sentence. In doing this they act as the "*distributive principle*" in determining punishment.[94]

The approaches that are chosen within this section cannot be expected to encompass all purely utilitarian sentencing approaches, however, they are examples of holistic independent approaches which should offer some insight into the relationship between the justifying mechanisms and the sentencing approach.

2.3.1 The Economic Approach to Sentencing

Becker's punishment theory is one of optimal deterrence. Within this approach, the economist (and presumably later the judge) searches for the correct price the offender should pay for their offence.[95] In the seminal 1968 paper, Becker outlined the optimal sentence as one that minimises social costs by deterring offenders through, on one hand, the probability of conviction, and, on the other, the severity of the punishment.[96]

The first tenet when determining an individual's sentence calls back to Bentham, namely that the gain from the offence must not be greater than the punishment, which leads to the following conclusion: The optimal fine equals the harm done to society.[97] The harm to society includes not only the damage the offence caused but also the costs of apprehension and conviction. Where the offender cannot pay the fine, or the crime is so serious that any pecuniary compensation is viewed as insufficient or inappropriate, other punishments are used to close the gap until an equilibrium is reached.[98]

However, where the probability of conviction is not certain ($p < 1$), punishment (f) consists of the harm (H) divided by p i.e., $f = \frac{H}{p}$.[99] This relationship was also foreseen by the second

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[94] ROBINSON, Paul H. A Sentencing System for the 21st Century. *Texas Law Review*. 1987, vol. 66, no. 1, pp. 1–61.
[95] MICELI, Thomas J. Crime as exchange: comparing alternative economic theories of criminal justice. *European Journal of Law and Economics*. 2021, vol. 51, no. 3, pp. 523–539. DOI: 10.1007/s10657-021-09692-8
[96] BECKER, Gary S. Crime and Punishment: An Economic Approach. *Journal of Political Economy*. 1968, vol. 76, no. 2, pp. 169–217.
[97] BENTHAM, J. *Theory of Legislation.* R. HILDRETH, tran.. London: Trübner, 1864, p. 325.; BECKER, Gary S. *Crime and Punishment: An Economic Approach*.
[98] BECKER, Gary S. *Crime and Punishment: An Economic Approach*.
[99] Ibid.; MICELI, Thomas J. On proportionality of punishments and the economic theory of crime. *European Journal of Law and Economics*. 2018, vol. 46, no. 3, pp. 303–314. DOI: 10.1007/s10657-016-9524-5

rule of Bentham, which declares that the lower the certainty of punishment, the greater must be its severity.[100] This is relevant because the potential severity of the punishment can increase sharply, surpassing the crude proportionality of the *ius talionis*. An understanding of the *ius talionis* is advanced as a punishment equal to the sum of the gains of the offender (G) and the material and immaterial losses of the victim(s) (L_V): $f = G + L_V$. In words, the offender is first deprived of any ill gains earned by the crime, and after being brought to his *ex-ante* standing, they are then left to suffer the same loss as the victim. In crimes such as the proverbial maiming, there are no real gains, therefore the offender simply suffers the same loss as the victim.

This understanding, combined with Becker's theory, defines the social harms of crime as $H = L_V + C - G$, where C is the costs of apprehension and conviction. Therefore, punishment that fulfils the following condition is considered to be harsher than the *ius talionis*.

$$\frac{L_V + C - G}{p} > G + L_V$$

Under Becker's theory, sufficiently low values of p or sufficiently high values of C lead to a harsher sentence than the one foreseen by the *ius talionis*, even by several orders of magnitude. In practice, this will be relevant where i) the probability of apprehension and conviction is less than 1 by a notable margin, or ii) the costs of apprehension and conviction are much greater than the gains of the offender. These offenders will receive extremely disproportionate punishment.

In essence, this theory demands that the apprehended offenders be punished for the crimes of the non-apprehended ones.[101] Adelstein calculates how probability scaling extremely distorts the elementary principle of proportionality inherent to most criminal justice systems in the example of Illinois, where following Becker's theory decade to centuries-long imprisonments would have to be imposed for simple burglaries and larcenies.[102] As such, while this theory may be elegant in its mathematical and economic ingenuity, as Adelstein notes, such

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Posner presents a similar equation concerning torts in POSNER, Richard A. An Economic Theory of the Criminal Law. *Columbia Law Review*. 1985, vol. 85, no. 6, pp. 1193–1231. DOI: 10.2307/1122392

[100] BENTHAM, J. *Theory of Legislation*, pp. 325–326.

[101] MICELI, Thomas J. *Crime as exchange*.

[102] ADELSTEIN, Richard P. Institutional Function and Evolution in the Criminal Process. *Northwestern University Law Review*. 1981, vol. 76, no. 1, pp. 1–99.

disproportionate sentencing would be deplored by the actors within the criminal justice system and ultimately nullified.[103]

2.3.2 A Modern Utilitarian Approach[104]

Robinson criticised the idea of any of the aims being used in isolation, stating that purely deterrent sentencing would rely too strongly on the probability of apprehension. Purely rehabilitative sentencing would lead to indeterminate sentencing, such as was popular in the US before the decline of rehabilitation in the 1970s,[105] not to mention the fact that rehabilitation may not always be possible. Purely incapacitative sentencing would easily justify incapacitating potential offenders with no need for an offence to happen, and sentencing could be reduced to risk assessment,[106] which gives rise to concerns over the fairness and reliability of these tools.[107] The answer then seemingly lies in a model that accounts simultaneously for all the justifying aims while paying attention to the state of empirical research.[108]

Deterrence

As far as deterrence is concerned, most of the research over the past 40 years points in the direction that there is limited evidence for the existence of marginal general deterrence, i.e., the idea that through increases in the severity of punishment, crime will be avoided, despite its common-sense appeal.[109] Chalfin and McCrary however identified several studies where marginal deterrence was observed in situations where recidivists would be subject to a serious

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[103] ADELSTEIN, Richard P. *The exchange order: property and liability as an economic system*. New York, NY: Oxford University Press, 2017. As quoted in: MICELI, Thomas J. *Crime as exchange*.

[104] This sections draws heavily on the outline set out by Bagaric, however it does so in its own terms from a critical perspective while considering additional sources and considerations. Compare: BAGARIC, Mirko. The Contours of a Utilitarian Theory of Punishment in Light of Contemporary Empirical Knowledge about the Attainment of Traditional Sentencing Objectives. In: FOCQUAERT, Farah, Elizabeth SHAW and Bruce N. WALLER, eds. *The Routledge Handbook of the Philosophy and Science of Punishment*. New York ; London: Routledge, Taylor & Francis Group, 2021, pp. 62–74.,

[105] O'HEAR, Michael M. Beyond Rehabilitation: A New Theory of Indeterminate Sentencing. *American Criminal Law Review*. 2011, vol. 48, no. 3, pp. 1247–1292.; TONRY, Michael. Sentencing in America, 1975–2025. *Crime and Justice*. 2013, vol. 42, no. 1, pp. 141–198. DOI: 10.1086/671134

[106] ROBINSON, Paul H. Hybrid Principles for the Distribution of Criminal Sanctions. *Northwestern University Law Review*. 1987, vol. 82, no. 1, pp. 19–42.

[107] BERK, Richard et al. Fairness in Criminal Justice Risk Assessments: The State of the Art. *Sociological Methods & Research*. 2021, vol. 50, no. 1, pp. 3–44. DOI: 10.1177/0049124118782533; AUERHAHN, Kathleen. *Selective Incapacitation and the Problem of Prediction*.

[108] BAGARIC, Mirko. *The Contours of a Utilitarian Theory of Punishment in Light of Contemporary Empirical Knowledge about the Attainment of Traditional Sentencing Objectives*.

[109] PRATT, Travis C. et al. *The Empirical Status of Deterrence Theory*.; NAGIN, Daniel S. Deterrence in the Twenty-First Century Evidence Seldom Matters. *Crime and Justice: A Review of Research*. 2013, vol. 42, pp. 199–264.

increase upon reoffending.[110] Despite these findings, given the evidence from Pratt et al.'s meta-analysis, while outright denying the existence of marginal deterrence would be exaggerated, it can be considered ethereal enough to not form a sound basis for sentencing decisions.[111]

The certainty of punishment may have a significant marginal deterrent effect, as suggested in the literature on the reduction of crime through increased police repression.[112] However, this is not a sentencing-related effect, with certainty being only potentially relevant if using probability of apprehension scaling as outlined above.

At this point, absolute general deterrence comes into play. The existence of a system which apprehends and punishes offenders seems to have a deterrent effect on its own, not related to severity levels.[113] For deterrence, it might be enough that we *seem*[114] to sentence to some sufficiently fear-inducing form of punishment such as prison, while the exact extent of the sentence is significantly less important.[115] Nonetheless, there remain questions about whether this reduces crime or merely displaces it.[116]

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[110] CHALFIN, Aaron and Justin MCCRARY. Criminal Deterrence: A Review of the Literature. *Journal of Economic Literature*. 2017, vol. 55, no. 1, pp. 5–48. DOI: 10.1257/jel.20141147; LIN, Ming Jen. More police, less crime: Evidence from US state data. *International Review of Law and Economics*. 2009, vol. 29, no. 2, pp. 73–80. DOI: 10.1016/j.irle.2008.12.003; WEISBURST, Emily K. Safety in police numbers: Evidence of police effectiveness from federal cops grant applications. *American Law and Economics Review*. 2019, vol. 21, no. 1, pp. 81–109. DOI: 10.1093/aler/ahy010; VOLLAARD, Ben and Joseph HAMED. Why the police have an effect on violent crime after all: Evidence from the British Crime Survey. *Journal of Law and Economics*. 2012, vol. 55, no. 4, pp. 901–924. DOI: 10.1086/666614;

[111] PRATT, Travis C. et al. *The Empirical Status of Deterrence Theory*.

[112] CHALFIN, Aaron and Justin MCCRARY. *Criminal Deterrence: A Review of the Literature*.

[113] BAGARIC, Mirko, Theo ALEXANDER and Athula PATHINAYAKE. The Fallacy of General Deterrence and the Futility of Imposing Offenders for Tax Fraud. *Australian Tax Forum*. 2011, vol. 26, no. 3, pp. 511–540.

[114] In the sense that there is a belief that offenders are punished with prison or other similarly harsh treatment, no matter the actual mildness of the system. It remains an interesting question whether projects which give information on actual sentences that are handed out such as *Jak trestáme* (jaktrestame.cz) may influence deterrence.

[115] BAGARIC, Mirko, Theo ALEXANDER and Athula PATHINAYAKE. *The Fallacy of General Deterrence and the Futility of Imposing Offenders for Tax Fraud*. For a discussion on how perception of apprehension affects criminal decision making see: APEL, Robert. Sanctions, Perceptions, and Crime: Implications for Criminal Deterrence. *Journal of Quantitative Criminology*. 2013, vol. 29, no. 1, pp. 67–101. DOI: 10.1007/s10940-012-9170-1

[116] For an experimental study on crime displacement see: BLATTMAN, Christopher et al. Pushing Crime Around the Corner? Estimating Experimental Impacts of Large-Scale Security Interventions. *SSRN Electronic Journal*. 2017. DOI: 10.2139/ssrn.3050823

Could the choice of punishment, if it does not deter the public, deter at least the offender who suffers it? In summary, while the evidence for general deterrence appears at least somewhat mixed, the evidence for specific deterrence seems rather unconvincing, with custodial sanctions having no perceivable deterrent effect when compared to noncustodial sentences.[117] A recent broad meta-analysis stated that it is a criminological fact that "*compared with noncustodial sanctions, custodial sanctions, including imprisonment, have no appreciable effect on reducing reoffending*." As such, it recommends that future policies, and therefore sentencing approaches, should not rely on imprisonment as a tool to reduce reoffending.[118]

Incapacitation

Whether incapacitation can help direct the modern utilitarian approach depends largely on the ability to correctly identify offenders with a high individual offence rate and hold them until this rate sufficiently decreases. Recent empirical evidence appears to be limited. The first example is the earlier-mentioned finding of a cost-effective incapacitative sentence enhancement in Maryland,[119] and the second example is an examination of the Dutch habitual offender law, which allowed for a 2-year sentence enhancement to be imposed on offenders with 10 or more offences. The measure was found to seriously reduce the rate of burglary and theft from cars while being cost-effective.[120] While the general implications are limited, as insight regarding criminal history enhancements these findings are very interesting.

The contemporary paradigm of predictive sentencing allows the measure of incapacitation to be determined based on a risk assessment instrument. Currently structured professional risk assessments are preferred, which combine actuarial (algorithmic) risk assessment with clinical judgment.[121] The validity of such assessments depends on the predictive accuracy of the instrument itself and the threshold risk level at which an intervention is mandated.[122] Imprecise information, user error, and base rates of recidivism provide additional threats to the accuracy

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[117] NAGIN, Daniel S., Francis T. CULLEN and Cheryl Lero JONSON. Imprisonment and Reoffending. *Crime and Justice*. 2009, vol. 38, no. 1, pp. 115–200. DOI: 10.1086/599202; ROZUM, Jan et al. Recidiva jako měřítko účinnosti trestní politiky. *Trestněprávní revue*. 2016, no. 9, p. 209.
[118] PETRICH, Damon M. et al. Custodial Sanctions and Reoffending: A Meta-Analytic Review. *Crime and Justice*. 2021, vol. 50, no. 1, pp. 353–424. DOI: 10.1086/715100
[119] OWENS, Emily G. *More Time, Less Crime?*.
[120] VOLLAARD, Ben. Preventing Crime Through Selective Incapacitation. *The Economic Journal*. 2013, vol. 123, no. 567, pp. 262–284. DOI: 10.1111/j.1468-0297.2012.02522.x
[121] VAN GINNEKEN, Esther FJC. *The Use of Risk Assessment in Sentencing*.; BROWN, Jerrod and Jay P SINGH. Forensic risk assessment: A beginner's guide. *Archives of Forensic Psychology*. 2014, vol. 1, no. 1, pp. 49–59.
[122] VAN GINNEKEN, Esther FJC. *The Use of Risk Assessment in Sentencing*.

of the risk assessment instrument.[123] Machine learning algorithms could provide very sophisticated risk assessments with significant predictive values – however, machine learning algorithms reflect the incomplete or biased data they are given, with great concerns over specifically racial bias.[124] For this reason, Desmarais and Zottola cautioned against their use, preferring structured professional risk assessment.[125] Fazel went as far as to state "*current widely used tools should probably not be used for prediction*", but at the same time promoted OxRec[126] as a risk-assessment tool with significant external validation that should prove useful going forward.[127]

On the normative side, Slobogin defended risk-based sentencing from a purely utilitarian view, as well as a seemingly limiting retributivist view, as the best form of preventing recidivism. According to him, desert-based concerns about the unreliability of risk assessment instruments are in many ways out of place, given the unreliability of establishing the blameworthiness based on which just deserts are meted out.[128] This is reminiscent of Kant's assertion "*The real morality of actions, their merit or guilt, even that of our own conduct, thus remains entirely hidden from us.*"[129] If human judgments of moral responsibility are always imperfect, then imperfect risk assessment instruments need not be so different. It is beyond the scope of this

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[123] DESMARAIS, Sarah L. and Samantha A. ZOTTOLA. Violence Risk Assessment: Current Status and Contemporary Issues Symposium: Responding to the Threat of Violent Recidivism: Alternatives to Long-Term Confinement. *Marquette Law Review*. 2019, vol. 103, no. 3, pp. 793–818.

[124] HANNAH-MOFFAT, Kelly and Kelly STRUTHERS MONTFORD. Unpacking Sentencing Algorithms: Risk, Racial Accountability and Data Harms. In: DE KEIJSER, Jan W, Julian V ROBERTS and Jesper RYBERG, eds. *Predictive Sentencing: Normative and Empirical Perspectives*. Hart Publishing, 2019, pp. 175–196. DOI: 10.5040/9781509921447 A shortcoming of the literature is that it is grounded within the North American cultural context, and as such is concerned about differences particularly between White and Black North Americans. To what extent this can be extended to the Central and Eastern European context remains for now unanswered.

[125] DESMARAIS, Sarah L. and Samantha A. ZOTTOLA. *Violence Risk Assessment: Current Status and Contemporary Issues Symposium: Responding to the Threat of Violent Recidivism: Alternatives to Long-Term Confinement*.

[126] Freely available at: https://oxrisk.com/oxrec-8/

[127] FAZEL, Seena. The Scientific Validity of Current Approaches to Violence and Criminal Risk Assessment. In: DE KEIJSER, Jan W, Julian V ROBERTS and Jesper RYBERG, eds. *Predictive Sentencing: Normative and Empirical Perspectives*. Hart Publishing, 2019, pp. 197–212. DOI: 10.5040/9781509921447

[128] SLOBOGIN, Christopher. *Prevention as the Primary Goal of Sentencing: The Modern Case for Interdeterminate Dispositions*.; SLOBOGIN, Christopher. A Defence of Modern Risk-Based Sentencing. In: DE KEIJSER, Jan W, Julian V ROBERTS and Jesper RYBERG, eds. *Predictive Sentencing: Normative and Empirical Perspectives*. Hart Publishing, 2019, pp. 107–126. DOI: 10.5040/9781509921447

[129] KANT, Immanuel, Paul GUYER and Allen William WOOD. *Critique of pure reason*. Cambridge: Cambridge university press, 2000. Also quoted in: BROOKS, Thom. Retribution. In: FOCQUAERT, Farah, Elizabeth SHAW and Bruce N. WALLER, eds. *The Routledge Handbook of the Philosophy and Science of Punishment*. New York ; London: Routledge, Taylor & Francis Group, 2021, pp. 18–25.

work to consider in depth all the arguments about normative permissibility, and Slobogin's defence is found satisfactory in the context of a utilitarian sentencing approach.[130]

Rehabilitation

The final utilitarian mechanism that remains to be considered is rehabilitation. Since the 1970s, there has been a serious change of course in the United States from the rehabilitative ideal that had governed sentencing from the 1930s onwards. This was at least partially due to the disillusionment with the apparent lack of success of rehabilitation programs.[131] In Scandinavia, where the disillusionment was not so massive, rehabilitation was still remitted to a secondary goal, one that may be achieved in addition to other aims of punishment, but that is not a distributive principle of punishment.[132]

A modern review found that many interventions that have shown positive effects are related to minimising the harms of crime in the context of crime prevention and rehabilitation.[133] In the context of correctional interventions, based on a systematic review of meta-analyses of different forms of intervention, the following programmes appear most promising:

"*(1) group-based cognitive-behavioural programs for general offenders, (2) group-based cognitive-behavioral programs for sex offenders, (3) hormonal medication treatment for sex offenders, and (4) prison-based therapeutic communities for substance abusing offenders.*"[134]

It is further proposed that interventions be grounded within an RNR paradigm.[135] The risk principle states that high-risk offenders should be prioritised over low-risk offenders. The need

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[130] For a normative critique see: HOSKINS, Zachary. Against Incapacitative Punishment. In: DE KEIJSER, Jan W, Julian V ROBERTS and Jesper RYBERG, eds. *Predictive Sentencing: Normative and Empirical Perspectives*. Hart Publishing, 2019, pp. 89–106. DOI: 10.5040/9781509921447

[131] TONRY, Michael. *Sentencing in America, 1975–2025.*; ANDREWS, D. A. and James BONTA. Rehabilitating criminal justice policy and practice. *Psychology, Public Policy, and Law*. 2010, vol. 16, no. 1, pp. 39–55. DOI: 10.1037/a0018362

[132] HINKKENEN, Ville and Tapio LAPPI-SEPPALA. Sentencing Theory, Policy, and Research in the Nordic Countries. *Crime and Justice: Review of Research*. 2011, vol. 40, pp. 349–404.

[133] WEISBURD, David, David P. FARRINGTON and Charlotte GILL. What Works in Crime Prevention and Rehabilitation: An Assessment of Systematic Reviews. *Criminology & Public Policy*. 2017, vol. 16, no. 2, pp. 415–449. DOI: 10.1111/1745-9133.12298

[134] WILSON, David B. Correctional Programs. In: WEISBURD, David, David P. FARRINGTON and Charlotte GILL, eds. *What works in crime prevention and rehabilitation: lessons from systematic reviews*. New York: Springer, 2016, pp. 193–217. DOI: 10.1007/978-1-4939-3477-5

[135] Ibid.

principle relates to targeting the specific criminogenic needs of the offender. Finally, the responsivity principle relates to the correct choice of intervention and adequate individualisation.[136] With these considerations, the resurgent importance of rehabilitation within a modern utilitarian sentencing approach becomes apparent.

Proposed Modern Utilitarian Sentencing Approach

Bagaric concluded within his contour of a modern utilitarian sentencing approach,[137] that the modern utilitarian sentencing approach is one of bifurcation. He arrived at this conclusion by referring to the principle of proportionality. Within this approach, imprisonment is reserved for serious sexual and violent offences.[138] However, Bagaric is not isolated in prescribing this sentencing approach,[139] and in fact, the Belgian criminal policy has been described as one of bifurcation.[140]

The idea that this is a modern utilitarian sentencing approach grounded in empirical evidence seems implausible. There is no apparent or obvious utilitarian reason to imprison specifically serious sexual and violent offenders, lest it be empirically proven that they are substantially more dangerous and must be incapacitated. However, this was not Bagaric's reasoning behind proposing bifurcation; instead, he justified it on the ground that this kind of crime is fundamentally more harmful, given the impact on victims.[141]

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[136] ANDREWS, D. A. and James BONTA. *Rehabilitating criminal justice policy and practice*.

[137] Bagaric presented an understanding of proportionality much like the concept of ordinal proportionality described earlier. In the present understanding of the retributivist/utilitarian split, this does not feel consistent with the idea of a strictly utilitarian approach. While harm assessment (GREENFIELD, Victoria A. and Letizia PAOLI. *Assessing the harms of crime*.; VON HIRSCH, Andrew and Nils JAREBORG. *Gauging Criminal Harm: A Living-Standard Analysis*.) specifically as a tool to order crimes by severity has some utilitarian connotations, when used as a solution for ordinal proportionality, it betted considered part of this retributivist approach. In the context of Paoli's framework, which she considers to be part of a "*side-constrained utilitarian approach*" (PAOLI, Letizia. What is a "good" criminal policy? Criminal policy aims, criteria of evaluation, and evaluation efforts so far. Lecture at KU Leuven. 11. 10. 2022), this seems to be part of the side constraint.

[138] BAGARIC, Mirko. *The Contours of a Utilitarian Theory of Punishment in Light of Contemporary Empirical Knowledge about the Attainment of Traditional Sentencing Objectives*.

[139] PATHINAYAKE, Athula. The Effectiveness of the Objective of Incapacitation: Is It a Myth. *Journal of Gender, Race, and Justice*. 2017, vol. 21, no. 2, pp. 333–366.

[140] SNACKEN, Sonja. Penal Policy and Practice in Belgium. *Crime and Justice*. 2007, vol. 36, no. 1, pp. 127–215. DOI: 10.1086/592805; VANHOUCHE, An-Sofie. Penal Policies in Belgium. In: VANHOUCHE, An-Sofie. *Prison Food*. Cham: Springer International Publishing, 2022, pp. 35–59. DOI: 10.1007/978-3-030-96125-1_3

[141] BAGARIC, Mirko. *The Contours of a Utilitarian Theory of Punishment in Light of Contemporary Empirical Knowledge about the Attainment of Traditional Sentencing Objectives*.

Such reasoning does not appear to be truly utilitarian, and if harms would be central to a utilitarian sentencing approach, then it would be better to asses them with an understanding of harms in line with the work of Greenfield and Paoli described in the preceding chapter.[142] Under this broader understanding, should the utilitarian approach to sentencing be based on relative harms, it is questioned whether it would still be only serious sexual and violent crimes that would merit the harshest treatment.

For a sentencing approach to be considered truly utilitarian, it is maintained that it must attempt to maximise social utility by efficiently reducing the harms of crime, which bifurcation does not appear to do. Sentencing reduces the harms of crime if it leads to sentences that prevent other harmful crimes from happening *in the future*. Given the summary of empirical evidence described above, instead an approach of forward-looking risk management is proposed.

Within this approach, sentences would be decided through predictive sentencing. In statutes, the sentence would be indeterminate or have a sufficiently broad range, so that the length could be precisely determined based on the results of a state-of-the-art risk assessment. This risk assessment would take the form of a structured professional judgment or a complex machine learning model, as long as it has the best predictive validity. High-risk offenders would be segregated from society by imprisonment, to maintain an absolute general deterrent effect, and would be imprisoned until they are reclassed as medium or low-risk, or the statutory maximum obliges the state to release them. While imprisoned, they would receive treatment based on the RNR model to accelerate this process as much as possible and reduce the harms of incarceration, especially group cognitive behavioural therapy.

As a disclaimer, this approach is not necessarily considered the optimal approach to sentencing. Nonetheless, it is viewed as the best empirically supported purely utilitarian sentencing approach.

2.4 Limiting Retributivism

Although retributive principles appear to have great normative appeal, they are limited in their ability to provide a workable set of principles that a sentencing system could wholly adopt.

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[142] GREENFIELD, Victoria A. and Letizia PAOLI. *A Framework to Assess the Harms of Crimes*.

Utilitarian principles could lead to greater specificity by relying on repeated risk assessments to determine the amounts and kinds of punishment with greater precision, but they could just as easily end up vague and indeterminate. Not to mention the normative setback, as there is no clear reason why only duly convicted offenders should be submitted to this process, as opposed to all "*dangerous*" individuals.

The traditional example of creating a hybrid or mixed approach that combines both utilitarian and retributive aims is Morris' limiting retributivism. Through the principle of proportionality, a range of acceptable sentences is established based on desert considerations, while the principle of parsimony as well as the satisfaction of utilitarian aims guides the judge in setting the exact sentence.[143] Furthermore, the theory is sceptical of predictions of dangerousness, as well as indeterminate "rehabilitative-ideal" sentencing.[144] Many of these ideas are particularly appealing within a continental system, where one can imagine the Penal Code as setting out these ranges to comply with the idea *nulla poena sine lege (certa)*[145] while allowing for a broad range of aims to be taken into account.[146]

For how this might look in practice, look to the 2007 amendment of the American Model Penal Code, which codified the approach in § 1.02(2)(a)(i).[147] The amended text requires that the punishment be "*within a range of severity proportionate to the gravity of offenses, the harms done to crime victims, and the blameworthiness of the offender*".[148] In the 2017 Model Penal Code: Sentencing was approved, amending § 1.02(2)(a)(ii) MPC, which states that punishment should aim "*when reasonably feasible, to achieve offender rehabilitation, general deterrence, incapacitation of dangerous offenders, restitution to crime victims, preservation of families,*

[143] FRASE, Richard S. Limiting Retributivism. In: TONRY, Michael H., ed. *The future of imprisonment*. New York: Oxford University Press, 2004, pp. 83–119.
[144] FRASE, Richard S. *Just sentencing: principles and procedures for a workable system*. New York: Oxford University Press, 2013, pp. 82–84.
[145] No penalty without a (well-defined) law.
[146] BÍLKOVÁ, Veronika. Princip nulla poena sine lege z pohledu evropského systému ochrany lidských práv. *Jurisprudence*. 2014, no. 2, p. 3.
[147] While the Model Penal Code is not binding legislation, it presents a useful codification of leading ideas in American criminal law and is widely used in teaching at law schools. In addition, its structure is reminiscent of European penal codes and as such it is useful for comparisons of how similar provisions could be used in a continental context. For more information see: ROBINSON, Paul H. and Markus D. DUBBER. The American Model Penal Code: A Brief Overview. *New Criminal Law Review*. 2007, vol. 10, no. 3, pp. 319–341. DOI: 10.1525/nclr.2007.10.3.319
[148] ROBINSON, Paul H., Joshua Samuel BARTON and Matthew LISTER. Empirical Desert, Individual Prevention, and Limiting Retributivism: A Reply. *New Criminal Law Review*. 2014, vol. 17, no. 2, pp. 312–375.

and reintegration of offenders into the law-abiding community, provided these goals are pursued within the boundaries of proportionality in Subsection (a)(i)".[149] Here we can see that while retributive proportionality sets out the initial range, utilitarian principles are used to specify where in the range the sentence falls.

Morris' original theory of limiting retributivism assumed that these ranges would be rather broad, to allow sufficient judicial discretion.[150] Whereas it might be conceivable to rely on the ideas of proportionality as advanced by von Hirsch to find these ranges, Tonry and Morris advance that strong ideas of proportionality are antithetical to a more parsimonious system of intermediate punishment, as by relying less on the idea of equal punishment among similar offenders it may be possible to utilise a broader range of lesser punishment. They hold this system to be more just on the grounds that it allows for the disadvantaged to be treated with greater lenience.[151] This challenges the idea of an ordinal scale of punishments and makes in turn cardinal proportionality significantly less viable unless serious modifications were to be done to it. Nevertheless, this assumes that allowing judges to look away from desert in favour of personal characteristics will lead them to mitigate and aggravate based on the *correct* set of characteristics,[152] rather than the reverse.[153]

In the more recent limiting retributivism model authored by Frase, more narrow ranges for lengths of imprisonment are proposed.[154] This is referred to as definite, but asymmetric desert limits, i.e., relatively specific punishment, with the option to mitigate below desert, but not aggravate above it.[155] In the model, reference is made to the Minnesota sentencing guidelines, which provide relatively narrow sentencing ranges in a two-dimensional matrix based on

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[149] THE AMERICAN LAW INSTITUTE. *Model Penal Code: Sentencing*. 2017.
[150] VON HIRSCH, Andreas. Punishment Futures: The Desert-model Debate and the Importance of the Criminal Law Context. In: TONRY, Michael, ed. *Retributivism Has a Past: Has It a Future?* Oxford University Press, 2011, pp. 256–274. DOI: 10.1093/acprof:oso/9780199798278.003.0013
[151] TONRY, Michael. *Proportionality, parsimony, and interchangeability of punishments*.; MORRIS, Norval and Michael H. TONRY. *Between prison and probation: intermediate punishments in a rational sentencing system*. New York: Oxford Univ. Press, 1991, pp. 104–108.
[152] Consider the traditional argument whether a disordered social background is grounds for mitigation or aggravation.
[153] BROWNLEE, Ian. Hanging judges and wayward mechanics: reply to Michael Tonry. In: DUFF, Antony, ed. *Penal theory and practice: tradition and innovation in criminal justice*. Manchester, UK: Manchester University Press, 1994, pp. 84–92.
[154] VON HIRSCH, Andreas. *Punishment Futures: The Desert-model Debate and the Importance of the Criminal Law Context*.; FRASE, Richard S. *Limiting Retributivism*.
[155] FRASE, Richard S. *Just sentencing*, pp. 25–26.

criminal record and offence severity, as a good example of a more delimited formulation of limiting retributivism. In addition to the principles of the Minnesota sentencing guidelines, Frase proposes that only upper presumptive limits be placed on noncustodial sentences, to prevent overly harsh noncustodial punishment, while allowing for greater discretion when measuring it out. As for anchoring the ranges, it is implied that ordinal and cardinal proportionality would be used.[156]

A potential alternative lies in the concept of empirical desert. Given the issues involved in ordinal and cardinal proportionality, what if instead opinions of the lay public could be used to determine appropriate ranges? This is practical in the sense that it both allows for more precise anchoring, and it also makes sentencing have greater moral credibility.[157] Nevertheless, there is no obvious way how to incorporate the opinions of the lay public into sentencing, and public opinion tends to conflict with sentencing practices by generally demanding harsher sentences.[158] This does not mean that public opinion should have no place, but it can hardly be expected to create normatively optimal sentencing ranges.

Frase's extended model also assumes a greater role for the moral-educational, expressive, and communicative roles of punishment. In addition, he adds an economic aspect to the theory, with the ends-benefits proportionality. Both economic and non-economic costs and burdens ought to be minimalized under this principle. Another principle is that of social equality, as according to Frase sentencing should consider the offender's disadvantages, especially those related to race or ethnicity.[159] While the last principle is, without a doubt, well-intended, it is questionable whether a system that allows discrimination based on race or ethnicity (including positive discrimination) does not open a Pandora's box of traits that are better left untouched during sentencing.

The model's flexibility is certainly part of its appeal while however making it slightly ambiguous. The literature is generally silent on the relationship of the utilitarian aims used to

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[156] FRASE, Richard S. *Limiting Retributivism*.
[157] ROBINSON, Paul H., Joshua Samuel BARTON and Matthew LISTER. *Empirical Desert, Individual Prevention, and Limiting Retributivism: A Reply*.
[158] ROBERTS, Julian V. The Future of State Punishment: The Role of Public Opinion in Sentencing. In: TONRY, Michael, ed. *Retributivism Has a Past: Has It a Future?* Oxford University Press, 2011, pp. 101–129. DOI: 10.1093/acprof:oso/9780199798278.003.0006
[159] FRASE, Richard S. *Just sentencing*, pp. 31–35.

determine the specific sentence. Still, at the very least the strong limits should lead to the sentence not being undeserved, no matter the final measure that is based on the utilitarian aims. Limiting retributivism could also be easily compatible with Czech law. After all, Novotný's insistence on delivering sentences that are proportional, that is, neither too harsh nor too lenient, while adjusting the specific measure for crime prevention reasons, is not overly far from Morris' or Frase's limiting retributivism.[160]

2.5 Intuitive Synthesis

The approaches established so far stemmed from theories of punishment and attempted to create a normatively coherent model that sentencers could adhere to. In this final section, a further approach is discussed, which unlike the previous ones is not defined by its principles but rather by the lack of them. Under an intuitive synthesis approach, judges have wide discretion to consider any potential aims of punishment, without being bound by principles set out in statutes or guidelines. In the Anglo-Saxon world, this approach has been upheld by courts in Australia and in England, with the courts explicitly embracing sentencing as a subjective, intuitive judgment that should not be restricted by statutes or guidelines.[161]

In the Australian context, Bagaric wrote about "*instinctive synthesis"*, which he defined as "*a mechanism whereby sentencers make a decision regarding all of the considerations that are relevant to sentencing, and then give due weight to each of them* […] *and then set a precise penalty*".[162] This definition is largely equivalent to Tonry's intuitive synthesis;[163] therefore, these ideas are assessed together. While the advocates of intuitive synthesis are keen to point out that the approach allows for punishment to be duly individualised, critics point out that such decisions are opaque and inconsistent.[164]

This section does not aim at and cannot settle the debate over discretion within the judicial system. However, the phenomenon of intuitive synthesis is particularly important, given it is according to Drápal, the sentencing approach implicitly chosen by omission in the Czech

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[160] NOVOTNÝ, Oto. *O trestu a vězeňství*, pp. 61–85.
[161] TONRY, Michael. *Sentencing Matters*. New York: Oxford University Press, 1996, pp. 177–179.
[162] BAGARIC, Mirko. Sentencing: From Vagueness to Arbitrariness: The Need to Abolish the Stain That Is the Instinctive Synthesis. *University of New South Wales Law Journal*. 2015, vol. 38, no. 1, pp. 76–113.
[163] TONRY, Michael. *Sentencing Matters*, pp. 177–179.
[164] BAGARIC, Mirko. *Sentencing: From Vagueness to Arbitrariness: The Need to Abolish the Stain That Is the Instinctive Synthesis*.

Republic.[165] This thought is necessary to keep in mind as we progress toward an empirical assessment of the role of criminal history in Czech sentencing, as outcomes may derive from the opaque intuitive decisions of judges just as easily if not more than from statutory provisions.

This chapter explored a variety of sentencing approaches that have helped bridge the gap between ethical theories and actual sentencing practices. The next question to be answered as we develop the theoretical background of criminal history enhancements is in what ways should sentencing practices (if at all) reflect the criminal past of the offender.

[165] DRÁPAL, Jakub. Základní přístupy k ukládání trestů. *Státní zastupitelství*. 2020, no. 5, p. 8.

3. Sentencing Repeat Offenders in Theory

Hessick and Hessick have notably called the idea that repeat offenders deserve harsher sentences than first offenders the one punishment issue virtually everyone seems to agree on.[166] Others have been quick to point out that this is not necessarily the case, as there is significant theoretical opposition to harsher sentences for repeat offenders. Nevertheless, it remains the case that many countries apply more severe penalties to repeat offenders.[167] This practice has been referred to by several terms, notably as *recidivist sentencing premium*, *prior record enhancement*, or *criminal history enhancement*.[168] In the Czech language, there appears to be no equivalent term.[169] Given the title and central issue of this thesis, the term *criminal history enhancement* is used exclusively when referring to this practice.

In this chapter, apart from a discussion of criminal history as a phenomenon, theoretical perspectives chosen by their presence and popularity in the literature concerning the practice of enhancements will be presented. This list cannot be exhaustive; however, it should provide a complex and in-depth look at the present state of criminological theory.

3.1 Criminal History and Repeat Offending

The following account of criminal history is deeply grounded within a Czech understanding. Although reference is made to foreign literature and principles of understanding criminal history, it is done so for comparative reasons or to fill in the gaps rather than to assume an imported perspective on criminal history.

Criminal history is perceived primarily from the angle of recidivism, that is, repeat offending. Conventionally, recidivism has been divided on the basis of three perspectives: i) juristic, ii) criminological, and iii) statistical. Juristic recidivism is defined as an offence committed after the offender has been definitively convicted of a prior offence. Criminological recidivism is

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[166] HESSICK, Carissa Byrne and F. Andrew HESSICK. Double Jeopardy as a Limit on Punishment. *Cornell Law Review*. 2011, vol. 97, pp. 45–86.
[167] ROBERTS, Julian and Stefan HARRENDORF. Criminal History Enhancements at Sentencing. In: HEINZE, Alexander et al., eds. *Core Concepts in Criminal Law and Criminal Justice: Volume I*. 1. Cambridge: Cambridge University Press, 2020, pp. 261–303. DOI: 10.1017/9781108649742.008; ROBERTS, Julian V. *Punishing Persistent Offenders: Exploring Community and Offender Perspectives*. Oxford University Press, 2008, pp. 93–117. DOI: 10.1093/acprof:oso/9780199283897.001.0001
[168] ROBERTS, Julian and Stefan HARRENDORF. *Criminal History Enhancements at Sentencing*.
[169] The term „*přídatek za trestní minulost*" is suggested, and it is used in the Czech abstract.

simply related to the repeated commission of crimes (or other criminologically relevant harmful acts) regardless of whether a legal intervention occurs. Finally, statistical recidivism refers to repeated arrests, prosecutions, or convictions that appear in official statistics.[170]

Generally, when we talk about criminal history in the context of sentencing, it is about a mixture of legal and statistical recidivism. While courts would potentially be interested in the full criminal history of an offender from a criminological perspective, in reality, they can rely only on that offending that has been duly recorded. In addition, there may be some legal rules that determine what kind of previous offending is the court allowed to consider while making its decision. To compare how criminal history can be defined differently for sentencing, consider the following examples:

In a precisely outlined system, such as the one offered by Minnesota's guidelines, a criminal history score is computed primarily from the severity of the previous offences, taking into account offences committed within a guideline-determined period before the offence. Expungements from the public record have no effect, nor does the kind of previous criminality and its (dis)similarity to the currently sentenced offence.[171]

In the penal codes of the Netherlands, Italy, and Turkey, there are provisions allowing for an enhancement if the offender has reoffended within a certain period from the previous conviction. However, while in the Netherlands, this can only be done while sentencing for a serious offence, in Italy and Turkey the enhancement is possible for reoffending of any kind, with a further enhancement if the previous offence was of the same category as the current one.[172]

These examples point towards a conceptualisation of criminal history where multiple dimensions must be considered: i) the recency of the previous offences, ii) the relative

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[170] MAREŠOVÁ, Alena. Pachatel trestného činu. In: GŘIVNA, Tomáš, Miroslav SCHEINOST and Ivana ZOUBKOVÁ. *Kriminologie*. Praha: Wolters Kluwer, 2019, pp. 95–119.; ROZUM, Jan et al. *Efektivita trestní politiky z pohledu recidivy*. Praha: Institut pro kriminologii a sociální prevenci, 2016, p. 31.
[171] *Minessota Sentencing Guidelines and Commentary* [online]. Minessota Sentencing Guidelines Commission, 2022, pp. 10–34. Available at: https://mn.gov/sentencing-guidelines/assets/1August2022MinnSentencingGuidelinesCommentary_tcm30-536102.pdf
[172] ROBERTS, Julian V. *Punishing Persistent Offenders: Exploring Community and Offender Perspectives*, pp. 114–116.

seriousness of the previous offences compared to the current one, iii) whether the previous offences are similar or not to the current one, iv) the multitude of the previous offences, and v) what punishment has the offender been submitted to because of them.[173] This paints a much more complex picture of sentence-relevant criminal history and provides a challenge for the theories exploring criminal history enhancements. Even beyond these dimensions, there remains room for interpretation, in particular stories of mitigation which can hardly be told based on raw numbers alone.[174]

Another issue to explore is the temporal relationship of previous offences. Czech legal theory and practice have traditionally distinguished three types of temporal patterns: concurrent offences, quasirecidivism, and "true" recidivism.[175] These patterns are distinguished based on when the offender committed an offence relative to the moment of conviction (when the court announced the guilty verdict). If both offences occurred before conviction, they will be treated as concurrent with the sentence based on the range for the most severe one.[176]

If an offence is committed after a guilty verdict, the offence is a recidivist offence and is sentenced separately, and if the sentences overlap, they are served consecutively.[177] In theory, it is distinguished whether the guilty verdict was final,[178] but if not, it is a case of quasirecidivism, as opposed to "true" recidivism. However, the impact of this theoretical distinction of recidivism on sentencing is doubtful, as either can be considered an aggravating circumstance under § 42 PC.[179]

This distinction between recidivism and concurrence is key, as while in both cases the offender has a criminal history with multiple offences, they are treated fundamentally differently. In the case of concurrence, the offender receives a single sentence that is limited by the upper bound

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[173] A very similar list is advanced in WASIK, Martin. Dimensions of Criminal History: Reflections on Theory and Practice. In: *Previous Convictions at Sentencing: Theoretical and Applied Perspectives*. London: Hart Publishing, 2010, pp. 161–184. DOI: 10.5040/9781472565150. Some of these dimensions are repeated in ROBERTS, Julian and Stefan HARRENDORF. *Criminal History Enhancements at Sentencing*.
[174] WASIK, Martin. *Dimensions of Criminal History: Reflections on Theory and Practice*.
[175] *souběh; nepravá recidiva; recidiva* respectively.
[176] § 43(1-2) PC. § 43 (1) provides the option of asperation of up 1/3 of the upper range in cases where concurrence happens through a greater number of offences committed in different instances (*skutek*).
[177] HERANOVÁ, Simona. *Ukládání trestů, zánik trestů a dalších právních následků odsouzení*.
[178] § 139 CPP.
[179] KALVODOVÁ, Věra and Filip ŠČERBA. § 42 [Přitěžující okolnosti]. In: ŠČERBA, Filip et al. *Trestní zákoník. 1. vydání (2. aktualizace)*. Praha: C. H. Beck, 2022.

of the range for the most severe offence, while in the case of recidivism, the offender receives two separate sentences served consecutively. Thus, there is a fundamental difference in penal bite, since as Jareborg pointed out, multiple offenders (concurrence) generally receive a bulk discount, while repeat offenders (recidivism) receive a harsher punishment.[180]

This sharp distinction leads to a phenomenon, which Drápal referred to as cumulation[181], where a second sentence is handed out before the first (generally a suspended prison sentence) has been executed. This is problematic because while the offender is being punished with consecutive sentences as a recidivist, they have not been censured yet with hard treatment. Therefore, he suggests that under Czech law, cumulation be considered an additional category of criminal history, where sentences would be determined either similarly as they are during concurrence, or at least nonexecuted punishments would be considered when determining the new sentence.[182] The latter approach had been hinted at by the Constitutional Court[183] and was codified into law in 2020 in § 39 (4) PC.[184] In a broader context, it is suggested that a holistic approach be adopted when approaching offenders in situations of cumulation, with appropriate guidance given when such cases should be treated more closely to concurrence.[185]

This thesis cannot aim to describe and assess all theories related to these multitudes of possible criminal histories. Therefore, it is focused specifically on the effects on sentencing related to recidivism records, as described above. Therefore, the next sections describe theories related to sentencing repeat offenders, specifically those who have been previously convicted. Although the bulk discounts afforded to offenders during concurrence certainly merit discussion, this is unfortunately outside of the scope of this work.[186]

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[180] JAREBORG, Nils. Why Bulk Discounts in Multiple Offence Sentencing? In: ASHWORTH, Andrew and Martin WASIK, eds. *Fundamentals of Sentencing Theory - Essays in Honour of Andrew von Hirsch*. Oxford: Oxford University Press, 1998, pp. 129–140.

[181] In a more recent article Drápal uses the term "*multiple conviction offenders*" instead. Given that this discussion is oriented specifically towards the Czech context, the term cumulation (*kumulace*) is considered preferrable. Compare: DRÁPAL, Jakub. Sentencing multiple conviction offenders. *European Journal of Criminology*. 2023, vol. 20, no. 1, pp. 142–160. DOI: 10.1177/1477370821996903

[182] DRÁPAL, Jakub. Ukládání trestů v případě jejich kumulace: Jak trestat pachatele, kteří spáchali další trestný čin předtím, než vykonali dříve uložené tresty. *Jurisprudence*. 2020, no. 2, p. 1.

[183] Judgment of the Constitutional Court, 30 July 2019, II. ÚS 4022/18

[184] Act No. 333/2020 Coll., amending the Penal Code, Code of Penal Procedure, and other acts.

[185] DRÁPAL, Jakub. *Sentencing multiple conviction offenders*.

[186] For a recent discussion on sentencing offenders during concurrence see: DE KEIJSER, Jan, Julian V. ROBERTS and Jesper RYBERG, eds. *Sentencing for Multiple Crimes*. Oxford University Press, 2017. DOI: 10.1093/oso/9780190607609.001.0001

3.2 Retributive Theories

3.2.1 Flat-rate sentencing

Some retributivists argue that previous convictions should not play a role in sentencing, as two identical crimes deserve the same punishment, no matter the criminal history of their perpetrators. This approach has been referred to as flat-rate sentencing, given it leads to a single sentence being delivered no matter the amount or intensity of previous convictions.[187]

Historically, this idea was defended on the grounds that the liberal state has no standing to increase punishment because of the defiance of the offender. On desert grounds, it is appropriate to only look at the wrongful act and its immediate context, rather than the character of the offender (including their criminal history).[188] This is in line with a strong retributive theory that presumes that there is a specific proportionate punishment for a crime of a specific degree of wrongfulness and responsibility, rather than a range of possibilities. Such an understanding does not allow for a deviation from proportionality within which a criminal history enhancement is present.[189] It is also hard to square within a retributive theory the idea of bulk discounts for offenders during concurrence while maintaining criminal history enhancements for repeat offenders.[190]

Davis argues the impermissibility of criminal history enhancements in the context of the unfair advantage justification for retributive punishment. The criminal history enhancement can be conceptualised as the price for the ability to pay once again the price to obtain an unfair advantage. This metaprice is predicated on the idea that not only there is a fair distribution of advantages that crime violates, but also further that there is a fair distribution of unfair advantages gained through criminal offences that repeated offending violates. Only through this recursive argument does one arrive at a justification why additional retribution ought to be paid by the repeat offender. Davis rejects the idea of a fair distribution of unfair advantages. From this follows that the idea that a further unfair advantage is gained through repeat

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[187] ROBERTS, Julian V. *Punishing Persistent Offenders: Exploring Community and Offender Perspectives*, p. 51.
[188] FLETCHER, George P. *Rethinking criminal law*. New York: Oxford University Press, 2000, pp. 460–466.
[189] CORLETT, J. Angelo. Retributivism and Recidivism. In: TAMBURRINI, Claudio Marcello and Jesper RYBERG, eds. *Recidivist Punishments: The Philosopher's View*. Lanham: Lexington Books, 2012, pp. 13–22.
[190] REITZ, Kevin R. The Illusion of Proportionality: Desert and Repeat Offenders. In: *Previous Convictions at Sentencing: Theoretical and Applied Perspectives*. London: Hart Publishing, 2010, pp. 137–160. DOI: 10.5040/9781472565150

offending is theoretically wrong. Under such circumstances, there is no justification for criminal history enhancements, and therefore a flat rate should be used.[191]

An alternative rationale for flat-rate sentencing lies in the prohibition of double jeopardy as articulated by the 5th Amendment of the US Constitution.[192] In the European context, it is useful to look at this argument through the prism of the *ne bis in idem* principle, which the ECHR states as: "*No one shall be liable to be tried or punished again in criminal proceedings under the jurisdiction of the same State for an offence for which he has already been finally acquitted or convicted in accordance with the law and penal procedure of that State*."[193] The logic here is that an offender who receives a criminal history enhancement for a subsequent offence is being punished multiple times for the prior one.[194] A normatively safer alternative could be to insist on strictly proportionate just deserts for either offence, refraining from mitigation or aggravation.

The US Supreme Court has largely rejected such an interpretation.[195] In Europe, as far as it appears from HUDOC,[196] the closest the ECtHR has come was while considering a French recidivist statute doubling punishment in Achour v. France, however, it did so from a retroactivity standpoint, rather than one considering double punishment. The relevant part for this work is that the court stated that rules on recidivism are left solely to the High Contracting Parties.[197] Given the absence of further case law, especially related to Art. 4 (1) of Prot. No. 7 ECHR, it can be presumed that this margin of appreciation applies to sentencing repeat offenders as well. In Czech national law, while Art. 40 (5) of the Charter forbids double prosecution, it does not explicitly forbid double punishment.[198] It is therefore dubious whether a claim against criminal history enhancements on *ne bis in idem* grounds could succeed. As far as EU law is concerned, it appears the CJ EU has not ruled on the question of whether the *ne bis in idem* principle laid down in Art. 50 of the EU Charter might apply to criminal history enhancements, it is, however, clear from Council Framework Decision 2008/675/JHA, that

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[191] DAVIS, Micheal. Recidivist Penalties Revisited. In: TAMBURRINI, Claudio Marcello and Jesper RYBERG, eds. *Recidivist Punishments: The Philosopher's View*. Lanham: Lexington Books, 2012, pp. 23–40.
[192] HESSICK, Carissa Byrne and F. Andrew HESSICK. *Double Jeopardy as a Limit on Punishment.*
[193] Art. 4 (1) Protocol No. 7 to the ECHR.
[194] HESSICK, Carissa Byrne and F. Andrew HESSICK. *Double Jeopardy as a Limit on Punishment.*
[195] Ibid.
[196] https://hudoc.echr.coe.int/
[197] Achour v. France, Judgment of the Grand Chamber, 29. March 2006, application no. 67335/01, par. 44.
[198] GŘIVNA, Tomáš. Zásada "ne bis in idem" v evropském právu. *Trestněprávní revue*. 2006, no. 5, p. 133.

current EU law anticipates that member states consider previous convictions when determining a sentence[199] and binds them to consider previous convictions in other member states as equal to previous convictions in the sentencing state during sentencing.[200]

For the above reasons, Hessick and Hessick's legal argument against criminal history enhancement on double jeopardy/*ne bis in idem* grounds is rejected with the current legal framework under the ECHR, EU law and Czech national law. While there is a normative argument for flat-rate sentencing on strong retributivist grounds, a legal argument against criminal history enhancements appears unpersuasive.

3.2.2 Progressive Loss of Mitigation

Even for scholars who in general terms believe that there is no normative argument which would support aggravation based on criminal history, the idea of mitigation for the first offence, or the first few offences because of human fallibility, is difficult to discard.[201] This idea has been referred to as *progressive loss of mitigation*.[202]

The idea of progressive loss of mitigation is closely linked to that of *lapse theory*, where the deserved punishment of a first offender is mitigated as an expression of the tolerance for human frailty or fallibility expressed by the sentencer.[203] An important assumption inherent to this retributive theory is that the initial (pre-mitigation) punishment has been calculated based on proportionality to the seriousness of the offence.[204] In this sense it is not a standalone approach, but rather one that expands just deserts proportionality. The traditional progressive loss of mitigation account expounds on the idea of a lapse. A first offender receives a modest *discount*, and as they commit further crimes, this discount keeps diminishing, until it is withdrawn completely.[205] The justification follows the same structure; there is a limited tolerance for

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[199] Rec. 2, Council Framework Decision 2008/675/JHA of 24 July 2008 on taking account of convictions in the Member States of the European Union in the course of new criminal proceedings.
[200] Art. 3 (1) Council Framework Decision 2008/675/JHA.
[201] DUFF, Antony. *Punishment, communication, and community*. Oxford: Oxford University Press, 2003, pp. 167–170.
[202] VON HIRSCH, Andrew. Criminal Record Rides Again. *Criminal justice ethics*. New York: Institute for Criminal Justice Ethics, 1991, vol. 10, no. 2, pp. 2, 55–57. DOI: 10.1080/0731129X.1991.9991898
[203] Ibid.
[204] VON HIRSCH, Andrew. Proportionality and Progressive Loss of Mitigation: Further Reflections. In: *Previous Convictions at Sentencing: Theoretical and Applied Perspectives*. London: Hart Publishing, 2010, pp. 1–16. DOI: 10.5040/9781472565150
[205] VON HIRSCH, Andrew and Andrew ASHWORTH. *Proportionate Sentencing: Exploring the Principles*, p. 149.

human weakness that leads a human being to offend. The reason why tolerance is limited is related to the expectation that a censured offender should make an extra effort at containing themselves from offending.[206]

However, there are issues with defining what is a first offence, or what constitutes a lapse given the difficulty of interpreting mixed criminal records as described earlier.[207] While this was acknowledged in part by von Hirsch and Ashworth, it is done so rather vaguely with consideration to be given whether the offence was characteristic of the offender.[208] This answer is problematic, as it opens up the idea of extensively assessing the character of the offender. This notion is hardly compatible with the traditional retributive insistence on punishing based on the offender's actions, rather than their character.

A slightly different account relies on the idea that the discount offered to the offender is a token of recognition of their moral agency, and in turn of their ability to desist from offending. It is, however, conceptualised as an opportunity rather than as an obligation. The realities of criminal careers, and the fact that desistance is a gradual process speak in favour of offering a discount over multiple offences, rather than just one.[209]

An angle of criticism towards progressive loss of mitigation is that it is in some ways vague. The magnitude of the discount, as well as the number of offences by which it is exhausted, is not established in any meaningful way.[210] Ryberg contended that the idea of a lapse as presented by progressive loss of mitigation theorists is flawed, as the model does not specify the pattern of behaviour which leads to an action being considered a lapse and *vice versa*. Assuming that every first-recorded offence is a lapse appears to stretch the idea immensely. Additionally, to properly establish whether the decision to offend was truly a lapse of judgment,

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[206] Ibid., pp. 151–153.
[207] WASIK, Martin. *Dimensions of Criminal History: Reflections on Theory and Practice*.
[208] VON HIRSCH, Andrew and Andrew ASHWORTH. *Proportionate Sentencing: Exploring the Principles*, p. 154.
[209] VON HIRSCH, Andrew. *Proportionality and Progressive Loss of Mitigation: Further Reflections*.
[210] RYBERG, Jesper. Recidivism, Retributivism and the Lapse Model of Previous Convictions. In: *Previous Convictions at Sentencing: Theoretical and Applied Perspectives*. London: Hart Publishing, 2010, pp. 37–48. DOI: 10.5040/9781472565150; ROBERTS, Julian V. and Richard S. FRASE. *Paying for the Past*. Oxford University Press, 2019, pp. 31–33. DOI: 10.1093/oso/9780190254001.001.0001

one would have to consider the strength of temptation felt by the offender, something which the progressive loss of mitigation theory seems to skip over.[211]

In his criticism of progressive loss of mitigation, Bagaric rejected the idea that offenders are owed any forgiveness or tolerance, or that there is any imperative to extend these towards them. He argues that if an interest is important enough to be protected by criminal law, then its breach should be viewed as generally undeserving of any tolerance. This connects to the idea that offenders who commit serious crimes are not entitled to any mitigation, even if this was their first crime.[212] This is similar to the objection raised by Roberts and Frase that offenders who commit particularly serious crimes (even if spontaneously) cannot be offered a mitigated punishment simply because it was the result of a sudden lapse.[213] While the idea that carefully planned serious crimes can hardly be seen as the product of a lapse seems plausible, certainly serious crimes can be, and in practice often are mitigated because of happening during a sudden lapse.

Under Czech law, the impulsive killer is held liable for simple murder (§ 140 (1) PC), whereas the deliberate killer is held liable for premeditated murder (§ 140 (2) PC), which carries a greater penalty (12-20 years of imprisonment as opposed to 10-18 years). Further mitigation is available in cases of manslaughter (*zabití* - § 141 PC), which reduces the punishment for intentional homicide to a maximum of 10 years, given significant partially excusing circumstances. The distinction between degrees of murder is not specific to Czech law, therefore the idea that mitigation in cases of serious crimes committed during sudden or excusable lapses "*could only bring the sentencing process into disrepute*", as Roberts and Frase state, seems exaggerated.[214] Bagaric's reliance on criminalisation as an answer to what conduct does not deserve any degree of tolerance or forgiveness appears much weaker when considering that the legislator accounts for ideas of sudden lapses even where criminalising the most serious of crimes.[215]

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[211] RYBERG, Jesper. *Recidivism, Retributivism and the Lapse Model of Previous Convictions*.
[212] BAGARIC, Mirko. The Punishment Should Fit the Crime - Not the Prior Convictions of the Person That Committed the Crime: An Argument for less Impact Being Accorded to Previous Convictions in Sentencing. *San Diego Law Review*. 2014, vol. 51, no. 2, pp. 343–418.
[213] ROBERTS, Julian V. and Richard S. FRASE. *Paying for the Past*, p. 31.
[214] Ibid.
[215] BAGARIC, Mirko. *The Punishment Should Fit the Crime - Not the Prior Convictions of the Person That Committed the Crime: An Argument for less Impact Being Accorded to Previous Convictions in Sentencing*. Consider § 140 (3) h) PC which carries the maximum penalty range available in Czech law for the murderer who

There are apparent issues with the progressive loss of mitigation theory, regarding the definition of a lapse and its presumption upon an early offence (and denial upon a later offence). Despite this, the appeal to recognise the offender as a moral agent capable of change and the tolerance extended to the lapsing offender strike as particularly humane in the sense that they insist on treating the offenders as an end in themselves and with the respect every human being is owed. If a repressive system of hard treatment can be redeemed, a parsimonious and tolerant approach may just distinguish it from mere pain deliverance.

3.2.3 Omission Theories

Lee offers an innovative account of a retributive justification for a criminal history enhancement. Unlike the previous retributive theorists who shy away from an enhancement and formulate the escalating punishment in terms of reduced mitigation, Lee holds that repeat offenders deserve enhanced punishment.[216]

The basis of Lee's theory is that the first punishment that the offender receives entails an obligation to make such changes in their life so that they do not commit further crimes. When the offender commits another crime, they have broken this obligation, i.e., committed a crime by omission, given they had this specific duty.[217] The recidivist punishment has then two components – the fair sentence for the second crime, and a premium, which plays the role of a punishment for the breach of the offender's duty to *do better*. The expectation is that punishment obliges the offender to desist not only while it is executed, but also beyond, as an inherent part of the state-offender relationship.[218]

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murders repeatedly. While the first-time murderer may be extended quite a bit of lenience, the repeated murderer is barred from this discount, even if their actions were impulsive and not premeditated.

[216] LEE, Youngjae. Recidivism as Omission: A Relational Account. *Texas Law Review*. 2009, vol. 87, no. 3, pp. 571–622.; LEE, Youngjae. Repeat Offenders and the Question of Desert. In: *Previous Convictions at Sentencing: Theoretical and Applied Perspectives*. London: Hart Publishing, 2010, pp. 49–71. ISBN 978-1-84946-042-2. DOI: 10.5040/9781472565150

[217] To the Czech lawyer this structure of an offence is familiar, as it follows a similar logic to the quasi-omissive offences described by § 112 PC. This does not mitigate however the paradoxical nature of the argument. Committing *some crime* is not an offence, only committing *a certain crime*. So, the question is, what crime is committed through omission, if any? See: TONRY, Michael. The Questionable Relevance of Previous Convictions to Punishments for Later Crimes. In: *Previous Convictions at Sentencing: Theoretical and Applied Perspectives*. London: Hart Publishing, 2010, pp. 91–116. DOI: 10.5040/9781472565150

[218] LEE, Youngjae. *Recidivism as Omission: A Relational Account*.; LEE, Youngjae. *Repeat Offenders and the Question of Desert*.

The first line of questioning arises from scepticism about the origins of the obligation of the convicted offender to avoid behaviours that may lead to them committing further offences, as there is no obvious source.[219] Lee responds, that it is an associative obligation, that is, an "*obligation that one has by virtue of one's membership of some group*". In this case, presumably, the cause is the status of having had a substantive criminal law relationship with the state.[220]

This seems rather unpersuasive, as it adds an important aspect to the substantive criminal law relationship between the offender and the state. The dangerous notion behind Lee's theory is the existence of a further obligation, separate from the general obligation to obey the criminal law, that applies only to those who have offended. The legal counterargument lies in the foundations of public and criminal law. First, the continental emphasis on written law does not allow the creation of an obligation towards the state on convention alone but demands it to be stated in the positive law, otherwise, rendering it both illegal and unconstitutional.[221] Second, not only is this obligation introduced without positive law, but it is one punishable by criminal law, making it akin to a crime and infringing on the demands of *nullum crimen sine lege*. Breach of this principle is illegal and unconstitutional,[222] and prohibited under the ECHR and EU law.[223] Perhaps this account of the criminal history enhancement can prevail in a common law jurisdiction, but within the traditions of continental law, it seems incompatible unless such an obligation would be expressly formulated in the written law.[224]

Dagger attempts to redeem Lee's theory by appealing to fairness. In his opinion, members of a polity owe each other "*fair play*" which the offender disregards. By committing a new offence, the repeat offender commits two offences, the second being a dereliction of a special duty of fair play. The offender is then punished for both. Unlike Lee's theory, Dagger's explicitly

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[219] TONRY, Michael. *The Questionable Relevance of Previous Convictions to Punishments for Later Crimes*.; BAGARIC, Mirko. *The Punishment Should Fit the Crime - Not the Prior Convictions of the Person That Committed the Crime: An Argument for less Impact Being Accorded to Previous Convictions in Sentencing*.; VON HIRSCH, Andrew. *Proportionality and Progressive Loss of Mitigation: Further Reflections*.; RYBERG, Jesper and Thomas J. PETERSEN. Punishment, Criminal Record, and the Recidivist Premium. In: TAMBURRINI, Claudio Marcello and Jesper RYBERG, eds. *Recidivist Punishments: The Philosopher's View*. Lanham: Lexington Books, 2012, pp. 157–170.
[220] LEE, Youngjae. *Repeat Offenders and the Question of Desert*.
[221] Art. 2 (2) and Art. 4 (1) of the Charter.
[222] Art. 39 of the Charter.
[223] Art. 7 ECHR, Art. 49 (1) EU Charter.
[224] § 205 (2) PC comes to mind as a special obligation not to reoffend for repeat thieves.

embraces the idea that the repeat offender will commit an additional implicit offence, making it far worse from the point of view of the principle that crimes must be defined by law in advance. Therefore, this attempt seems to be damning rather than redeeming for the recidivism as an omission theory.[225]

A slightly different, but similar account of why the repeat offender has more to answer for than the first-time offender lies in Bennett's theory of apologies. Bennett assumes that by condemning the offender through punishment, we communicate how sorry we expect them to be. Therefore, the convicted offender carries an obligation to reform and through that to factually apologise to the state. The repeat offender should feel sorry not only for the second offence but also for the failure to reform. According to the theory, this makes the second offence more serious, rather than adding to it an additional offence of failing to reform, making it much more compatible with positive law.[226] Tonry, however, completely dismisses the apology account, which he considers to be fiction from the perspective of the state, and if an apology were owed, it would be to the victim, not the state.[227]

Another gap in the explanations is the difficulty in assessing to what extent the repeat offender has violated an obligation to reform. Consider the thief who, after being convicted for the first time, gets a legal job and lives the next two years as a model citizen. Suddenly, during a period of dramatic economic downfall, the former thief is laid off, and after several weeks of fruitless job-hunting, threatened with eviction which would leave them homeless, the thief steals razors from a department store to be able to pay for rent. Unfortunately, for the thief, they are caught and sentenced.

To say that the thief had flaunted their obligation to reform seems disingenuous and cruel in some ways. The answer, therefore, is that a just court could hardly be satisfied with an irrefutable presumption of a breach of an obligation to reform. It follows then that the court

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[225] DAGGER, Richard. Playing Fair with Recidivists. In: TAMBURRINI, Claudio Marcello and Jesper RYBERG, eds. *Recidivist Punishments: The Philosopher's View*. Lanham: Lexington Books, 2012, pp. 41–62.
[226] BENNETT, Christopher. 'More to Apologise For': Can a Basis for the Recidivist Premium Be Found within a Communicative Theory of Punishment? In: *Previous Convictions at Sentencing: Theoretical and Applied Perspectives*. London: Hart Publishing, 2010, pp. 73–89. DOI: 10.5040/9781472565150; BENNETT, Christopher. Do Multiple and Repeat Offenders Pose a Problem for Retributive Sentencing Theory? In: TAMBURRINI, Claudio Marcello and Jesper RYBERG, eds. *Recidivist Punishments: The Philosopher's View*. Lanham: Lexington Books, 2012, pp. 137–156.
[227] TONRY, Michael. *The Questionable Relevance of Previous Convictions to Punishments for Later Crimes*.

would have to consider in every case the effort (or lack thereof) on the part of the offender when determining the criminal history enhancement. As such, this theory no longer appears to be a solid justification for a general criminal history enhancement practice, despite claiming to do so.[228] Finally, any of the presented theories of recidivism creating an additional obligation tell us very little about how great or small the punishment enhancement should be.[229]

3.3 Utilitarian Theories

In the context of criminal history enhancements, the common utilitarian ratio is one of crime prevention. According to Frase, a criminal history enhancement would be justified on utilitarian grounds if i) an increase in relevant criminal history predicts an increase in severity or rate of offending, and ii) the net effects of more severe sentences for repeat offenders are crime-reducing.[230] In addition, he looks to whether the costs of this policy are distributed equitably among offenders and other citizens, satisfy public attitudes and are consistent with generally shared values.[231]

In this section, a slightly different set of deciding criteria is followed, that is, whether the criminal history enhancement reduces crime in a cost-efficient manner. As such, the two main distributive mechanisms of deterrence and incapacitation are discussed from this perspective. Rehabilitation is intentionally omitted as it does not tend to play a distributive role in modern sentencing as outlined in Section 2.3.2.

3.3.1 Deterrence

The idea that by increasing punishment for repeat offenders, others will be deterred from reoffending seems intuitively appealing. However, as established in Section 2.3.2 marginal general deterrence is not well supported by the evidence. We might instead look to specific deterrence as earlier it was mentioned that Chalfin and McCrary[232] found two successful

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[228] ROBERTS, Julian V. and Richard S. FRASE. *Paying for the Past*, p. 36.; RYBERG, Jesper and Thomas J. PETERSEN. *Punishment, Criminal Record, and the Recidivist Premium*.; BAGARIC, Mirko. *The Punishment Should Fit the Crime - Not the Prior Convictions of the Person That Committed the Crime: An Argument for less Impact Being Accorded to Previous Convictions in Sentencing*.
[229] RYBERG, Jesper and Thomas J. PETERSEN. *Punishment, Criminal Record, and the Recidivist Premium*.
[230] FRASE, Richard S. *Just sentencing*, p. 188.
[231] Ibid.
[232] CHALFIN, Aaron and Justin MCCRARY. *Criminal Deterrence: A Review of the Literature*.

examples of deterring repeat offenders in their literature review: California's three strikes laws[233] and an Italian conditional pardon.[234]

The opening question is whether increasing the punishment for subsequent offences can deter offenders from further offending. To investigate this, one must consider whether the enhancements lower the rate of reoffending. The following questions, therefore, arise: i) do jurisdictions with limited or no enhancements have a greater rate of reoffending *ceteris paribus*, ii) do custodial (harsher) punishments lead to a lesser rate of reoffending than noncustodial (more lenient) punishments, and iii) do longer custodial sentences lead to a lesser rate of reoffending.[235] Assuming any of the former questions could be answered in the affirmative, one might consider an appreciable specific deterrent effect of criminal history enhancements.

Before answering these questions, it might be useful to consider the mechanism by which specific deterrence of repeat offenders is supposed to occur. Do we imagine the court explaining to the offender that if they reoffend, they will suffer an even harsher sentence? This does not seem to happen in reality.[236] Therefore, do we just assume that the offender will know that they will be punished more severely? Roberts and Frase found no clear evidence that offenders were aware of premiums or incorporated them into their decision-making process.[237] This makes it difficult for deterrence theory to explain trends even where they are observed.

The first question posed calls for a comparison between different jurisdictions. Roberts and Frase considered multiple Western jurisdictions, and despite the differences in their approaches to criminal history at sentencing, the reconviction rates appear to be relatively aligned. The reported differences in reconvictions between the Netherlands, England and Wales, and Scotland appear to be largely a product of different ways of measuring, rather than products of the significantly different penal systems.[238] An assessment of differences in recidivism rates

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[233] HELLAND, Eric and Alexander TABARROK. Does Three Strikes Deter? A Nonparametric Estimation. *The Journal of Human Resources*. 2007, vol. 42, no. 2, pp. 309–330.
[234] DRAGO, Francesco, Roberto GALBIATI and Pietro VERTOVA. The Deterrent Effects of Prison: Evidence from a Natural Experiment. *The Journal of political economy*. 2009, vol. 117, no. 2, pp. 257–280. DOI: 10.1086/599286
[235] ROBERTS, Julian V. and Richard S. FRASE. *Paying for the Past*, pp. 75–83.
[236] Ibid., p. 75.
[237] Ibid., pp. 75–76.
[238] WARTNA, Bouke S. J. et al. Comparison of reoffending rates across countries: An international pilot study. In: ALBRECHT, Hans-Jörg and Jörg-Martin JEHLE, eds. *National Reconviction Statistics and Studies in Europe*. Göttingen: Göttingen University Press, 2014, pp. 99–120. DOI: 10.17875/gup2014-791

between US counties with different criminal history enhancements did not find a substantial relationship between harsher criminal history enhancements and lower rates of recidivism.[239] While this does not *per se* invalidate the idea that criminal history enhancements might deter reoffending, it certainly does nothing to prove their efficacy.

If by comparison, we have not found clear results, perhaps they might be reached by considering the effect of custodial punishments. The idea is that the threat of custodial punishment might deter, or perhaps the experience of receiving a custodial punishment will deter even more. However, the studies quoted in Section 2.3.2 suggest that the choice of punishment has little deterrent effect.

A Dutch study found that less onerous forms of suspended sentences had a lower reconviction rate than more onerous forms.[240] A smaller Spanish study found that suspended sentences had a lower reconviction rate compared to unsuspended sentences.[241] In Italy, conditionally pardoned Italian offenders, who would be returned to serve the rest of their sentence on reoffending, had a lower recidivism rate when threatened with a higher residual sentence.[242]

A similar effect was noticed in Florida, with less burdensome sanctions leading to lower recidivism among matched pairs of offenders.[243] Further research in Florida looked into the effect of progressively tougher sanctions and showed that in 4 out of 12 scenarios, there was an appreciable effect of reducing recidivism when the sanction became tougher, while in 7 out

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[239] D'ALESSIO, Stewart J. and Lisa STOLZENBERG. Should Repeat Offenders Be Punished More Severely for Their Crimes? *Criminal Justice Policy Review*. SAGE Publications Inc, 2019, vol. 30, no. 5, pp. 731–747. DOI: 10.1177/0887403417701974

[240] AARTEN, Pauline G. M. et al. Reconviction Rates After Suspended Sentences: Comparison of the Effects of Different Types of Suspended Sentences on Reconviction in the Netherlands. *International Journal of Offender Therapy and Comparative Criminology*. SAGE Publications Inc, 2015, vol. 59, no. 2, pp. 143–158. DOI: 10.1177/0306624X13508929

[241] CID, José. Is Imprisonment Criminogenic?: A Comparative Study of Recidivism Rates between Prison and Suspended Prison Sanctions. *European Journal of Criminology*. SAGE Publications, 2009, vol. 6, no. 6, pp. 459–480. DOI: 10.1177/1477370809341128

[242] The terms of the conditional pardon stipulated that upon reoffending the pardoned offender would first serve out the residual pardoned sentence and then in addition would serve the new sentence. DRAGO, Francesco, Roberto GALBIATI and Pietro VERTOVA. *The Deterrent Effects of Prison: Evidence from a Natural Experiment*.

[243] COCHRAN, Joshua C., Daniel P. MEARS and William D. BALES. Assessing the Effectiveness of Correctional Sanctions. *Journal of quantitative criminology*. Boston: Springer Science+Business Media, 2014, vol. 30, no. 2, pp. 317–347. DOI: 10.1007/s10940-013-9205-2

of 12 scenarios, the effect of a tougher sanction was higher recidivism.[244] All these findings mainly suggest that there is no clear trend in the effects of progressively tougher sanctions.

Several authors opined that the evidence for specific deterrence of custodial sentences clearly shows that prison sentences do not have a particular deterrent effect and therefore a criminal history enhancement that sends repeat offenders to prison over community sanctions is unjustified on deterrence grounds.[245] This does not seem completely persuasive. A threat of imprisonment, as opposed to the experience, may have an appreciable effect on repeat offending, as suggested by Villettaz et al.,[246] which would align with some of the research specifically looking at repeat offenders, while remaining compatible with the criminological fact mentioned earlier, that *"custodial sanctions, including imprisonment, have no appreciable effect on reducing reoffending*".[247]

This leads to the final question, whether longer (enhanced) prison sentences have a perceivable deterrent effect. The current state of research suggests that longer prison sentences do not have an effect on reducing the rate of reoffending upon release when compared to shorter prison sentences.[248] What about the threat of a longer sentence? A well-known and often criticised example of such a recidivist statute[249] is the California three-strikes law. Under this law, an offender who commits two more felonies after committing one of the serious or violent felonies anticipated by the statute receives a life sentence. The researchers found a decrease of 17-20 % in the felony rearrest rate of offenders with two strikes (threatened by a life sentence).[250] Even though the effect is notable, one must question whether it is sufficient for a threat of this magnitude. Given the immense human costs and suffering caused by life sentences, it is deeply

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[244] MEARS, Daniel P. and Joshua C. COCHRAN. Progressively Tougher Sanctioning and Recidivism: Assessing the Effects of Different Types of Sanctions. *Journal of Research in Crime and Delinquency*. SAGE Publications Inc, 2018, vol. 55, no. 2, pp. 194–241. DOI: 10.1177/0022427817739338

[245] ROBERTS, Julian V. and Richard S. FRASE. *Paying for the Past*, pp. 80–81.; BAGARIC, Mirko. *The Punishment Should Fit the Crime - Not the Prior Convictions of the Person That Committed the Crime: An Argument for less Impact Being Accorded to Previous Convictions in Sentencing*.

[246] VILLETTAZ, Patrice, Gwladys GILLIERON and Martin KILLIAS. The Effects on Re-offending of Custodial vs. Non-custodial Sanctions: An Updated Systematic Review of the State of Knowledge. *Campbell systematic review*. 2015, vol. 11, no. 1, pp. 1–92. DOI: 10.4073/csr.2015.1

[247] PETRICH, Damon M. et al. *Custodial Sanctions and Reoffending*.

[248] WERMINK, Hilde et al. Short-Term Effects of Imprisonment Length on Recidivism in the Netherlands. *Crime and delinquency*. Los Angeles, CA: SAGE Publications, 2018, vol. 64, no. 8, pp. 1057–1093. DOI: 10.1177/0011128716687290; ROBERTS, Julian V. and Richard S. FRASE. *Paying for the Past*, pp. 81–83.

[249] Davis refers to this kind of law as an ungraded recidivist statue, which he considers fundamentally unprincipled and unjustifiable. In DAVIS, Micheal. *Recidivist Penalties Revisited*.

[250] HELLAND, Eric and Alexander TABARROK. *Does Three Strikes Deter? A Nonparametric Estimation*.

unlikely that such a limited reduction in crime makes it in any way pass a cost-benefit evaluation.

In summary, there is no preponderant evidence which would show that deterrence through criminal history enhancements occurs, making it an ineffective policy. In the cases where it appears to have worked, it has done so very inefficiently (three-strikes law) or with a weak effect (pardons in Italy). If deterrence is attempted, then at least courts should be very explicit about the enhancement the offender would receive upon reoffending.[251] Otherwise, criminal history enhancements, when justified by deterrence, do not appear to be an adequate policy.

3.3.2 Incapacitation

If deterrence does not provide an adequate empirically tested justification for criminal history enhancements, then perhaps the resolution could be found through the mechanism of incapacitation. In the case of a criminal history enhancements, the incapacitative effect manifests in the following manner. The prime assumption is that repeat offenders have a higher individual offence rate than other offenders; therefore, by imprisoning them longer crime is prevented. As most of the literature today on incapacitation concerns itself with predicting which offenders will reoffend,[252] the implication is that past convictions should predict future convictions.[253] In addition, for crime prevention to be effective, the benefits of this additional punishment ought to outweigh the costs of it.

The first question arises, do previous offences predict future ones? At face value, this seems to be so, as offenders with more previous offences have a higher recidivism rate.[254] But is this enough to justify a general criminal sentence enhancement on incapacitative grounds? This could be in cases where reoffending is extremely likely, such as for habitual petty offenders with 10 or more previous convictions. Such offenders were targeted by a habitual offender law in the Netherlands, which allowed judges in such cases to impose two-year imprisonment, which generally amounted to a substantial enhancement over a typical Dutch sentence in

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[251] One can imagine the judge stating after passing a suspended sentence for shoplifting items of a total value of CZK 40 000 „*Should you commit this crime again, not only will your sentence be executed, but the new sentence will not be for four months of imprisonment, but eight, so you will spend a year in prison in total*."

[252] As outlined in subsection 2.3.2.2

[253] ROBERTS, Julian V. and Richard S. FRASE. *Paying for the Past*, pp. 73–74.

[254] ROBERTS, Julian V. *Punishing Persistent Offenders: Exploring Community and Offender Perspectives*, pp. 30–31.

similar cases. Research showed this policy to have a substantial crime-reducing effect while remaining cost-effective.[255] However, this is an example of a policy that was: i) highly selective with its criminal history enhancement, and ii) optional in the sense, that it was up to the discretion of the judge whether to impose it.

However, many criminal history enhancement policies are neither discretionary nor very selective. Owens looked at a much more general enhancement. A natural experiment occurred in Maryland, where rules on criminal history scores related to juvenile delinquency were changed, making offenders who previously would have been sentenced as recidivists be sentenced as first offenders. Based on the number of offences committed by the "*lucky offenders*", who had received a more lenient sentence, during the time, they would have been imprisoned earlier, Owens estimated the number of crimes that had been prevented under the previous policy. Based on this she concluded that the enhancement had prevented substantial harm caused by crime, was cost-effective and increased social welfare.[256] This provides the best empirical defence within the examined literature for selective incapacitation through criminal history enhancements, unfortunately, her article has been seemingly overlooked by sentencing scholars.

Hester et al. offered a review of the research based on which they conclude that in aggregate terms, further incarceration offers few to no benefits and conclude that incapacitation cannot justify criminal history enhancements "*at least when they are mechanically and incrementally applied to all repeat offenders.*"[257] Kazemian also previously voiced a similar sentiment.[258] A report by the National Research Council (US) aimed to fit these findings with Vollard's and Owens' research by suggesting that these effective cases of incapacitation can be found in specific scenarios and applied to specific groups of repeat offenders. Nevertheless, if sentences overall become longer and more ubiquitous, these effects would become significantly smaller, as they apply increasingly to offenders with low individual offence rates.[259] One might then

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[255] VOLLAARD, Ben. *Preventing Crime Through Selective Incapacitation*.
[256] OWENS, Emily G. *More Time, Less Crime?*.
[257] HESTER, Rhys et al. Prior Record Enhancements at Sentencing: Unsettled Justifications and Unsettling Consequences. *Crime and Justice*. 2018, vol. 47, no. 1, pp. 209–254. DOI: 10.1086/695400
[258] KAZEMIAN, Lila. Assessing the Impact of a Recidivist Sentencing Premium on Crime and Recidivism Rates. In: *Previous Convictions at Sentencing: Theoretical and Applied Perspectives*. London: Hart Publishing, 2010, pp. 227–250. DOI: 10.5040/9781472565150
[259] TRAVIS, Jeremy et al., eds. *The growth of incarceration in the United States: exploring causes and consequences*. Washington, D.C: The National Academies Press, 2014, pp. 141–150.

expect greater potential for such policies in the context of mild European penal policies than in the context of American mass incarceration.

Therefore, a general, sharp criminal history enhancement for all offenders does not appear to be well supported by the data. In the case of the Maryland study, it should be noted that the offenders held for a year longer were relatively young offenders sentenced between the ages of 23 and 25. Based on the current understanding of criminal careers, they can be expected to be rather higher individual offence rate offenders, compared to older offenders with a similar record.[260] Therefore there is a need to identify high individual offence rate offenders, rather than apply the enhancement across the board. What then remains to be considered is whether previous convictions help identify these offenders.

Although there are normative objections to predictive systems, they tend to generally take issue with the use of data related to protected factors, such as race, ethnicity, or gender. Criminal history by comparison seems to be significantly less controversial. Roberts and Frase claim that the risk-prediction tools that have been used to justify incapacitating criminal history enhancements have not been accurately validated.[261] Unfortunately, they do not support this claim with any specific research, therefore we must make do with general concerns over predictive validity described here in Section 2.3.2. A further objection they raise is that prior offences are seen by American sentencing guidelines as a static risk factor, i.e., one that does not change over time. Instead, they propose that prior convictions be seen as a dynamic risk factor, i.e., one that evolves over time and that has ties to other factors.[262] This is in line with the multidimensional understanding of criminal history previously defined, according to which the simple number of previous offences is insufficient to properly describe the criminal history of an offender.

There are unfortunately many gaps in the research which could illuminate more targeted sentencing enhancements, broad enhancements, however, do not seem to be supported by the

[260] OWENS, Emily G. *More Time, Less Crime?*.
[261] ROBERTS, Julian V and Richard S. FRASE. The Problematic Role of Prior Record Enhancements in Predictive Sentencing. In: DE KEIJSER, Jan W, Julian V ROBERTS and Jesper RYBERG, eds. *Predictive Sentencing: Normative and Empirical Perspectives*. Hart Publishing, 2019, pp. 149–174. DOI: 10.5040/9781509921447
[262] Ibid.

data.[263] The intuition that with each further offence the punishment should be somewhat greater can hardly be justified on social welfare grounds. While Bagaric does support a general criminal history enhancement for violent and sexual crimes, this appears to be more of a result of his preference for a bifurcated policy in which these crimes are punished in a particularly harsher fashion.[264]

Therefore, on utilitarian grounds, the following conclusion is proposed. Neither deterrence nor incapacitation can empirically support a straightforward general criminal history enhancement based on prior convictions, as neither mechanism appears to reduce crime in a cost-efficient manner across the board. However, there is potential for targeted criminal history enhancements founded on a more complex understanding of criminal history, which could be cost-efficient and, therefore, justified on consequentialist utilitarian grounds.

3.4 Hybrid Models

Since the revival of interest in criminal history enhancements led by Julian Roberts in the 2000s, there have been attempts at squaring the intuition that repeat offenders should be punished more harshly with sentencing theories. In this section, the development of the most recent mixed theories justifying criminal history enhancements is traced and discussed, as well as the hybrid models they propose. The following passages describe them in a detailed fashion; this is considered unavoidable as they have not yet been discussed at all in the Czech context.

3.4.1 Enhanced Culpability

In his 2008 book, Roberts explored the relationship between public opinion and criminal history enhancements. In interviews with offenders, he found that convicted offenders considered the criminal history enhancement legitimate; however, they felt that the court applied it too mechanically. Instead of considering criminal history in more complete terms, paying attention to the efforts of the offenders, the courts were seen to just blindly apply punishment based on the number of previous offences.[265]

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[263] BAGARIC, Mirko. *The Punishment Should Fit the Crime - Not the Prior Convictions of the Person That Committed the Crime: An Argument for less Impact Being Accorded to Previous Convictions in Sentencing*.
[264] Ibid.; BAGARIC, Mirko. *The Contours of a Utilitarian Theory of Punishment in Light of Contemporary Empirical Knowledge about the Attainment of Traditional Sentencing Objectives*.
[265] ROBERTS, Julian V. *Punishing Persistent Offenders: Exploring Community and Offender Perspectives*, pp. 160–161.

Members of the public are also clearly sensitive to the criminal history of an offender. In 2007, public sentencing preferences in Great Britain were studied, with respondents assigning a far more severe punishment to a hypothetical offender with two or five prior convictions, as opposed to a hypothetical first offender who committed an identical crime. The respondents also perceived that the offences of the offenders with more previous convictions were more serious and these offenders were more likely to reoffend. The gap was significantly larger between the first offender, and the third time offender, suggesting that the majority of the change in perception occurs after the first instances of reoffending.[266] The public also sees the repeat offender as more culpable.[267]

This ties into the theoretical justification that Roberts offered in 2008. This model is called the enhanced culpability model. In this theory, culpability is defined as "*the degree to which blame may reasonably be ascribed to the offender*". This idea seems analogous to the degree of responsibility as defined by Nozick in his desert formula, reflecting the mental state of the offender, as mitigated by considerations such as fear or deprivation or aggravated by callousness and malice.[268]

The idea that culpability should play a role in sentencing can be evidenced by the role of remorse, which is almost universally considered a relevant mitigating factor.[269] On the other hand, a remorseless offender, who shows disregard for the consequences of their actions, will be judged more harshly, and sentenced as such.[270] This is reminiscent of Bennett's ideas. If the measure of punishment is to be determined by how much one has to apologise for, then it makes sense that the nonapologetic offender has more to apologise for, even if they commit an identical crime.[271]

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[266] Ibid., pp. 174–180.
[267] Ibid., p. 183.
[268] NOZICK, Robert. *Philosophical explanations*, p. 363.
[269] ROBERTS, Julian V. *Punishing Persistent Offenders: Exploring Community and Offender Perspectives*, pp. 74–77.
[270] Ibid., pp. 77–78.
[271] BENNETT, Christopher. *'More to Apologise For': Can a Basis for the Recidivist Premium Be Found within a Communicative Theory of Punishment?*.; BENNETT, Christopher. *Do Multiple and Repeat Offenders Pose a Problem for Retributive Sentencing Theory?*.

How does repeat offending relate to culpability? Roberts reasoned that the relationship is similar to that of premeditation and culpability. A premeditating offender had multiple chances to desist and abandon their crime but instead persisted throughout the whole planning process.[272] The repeat offender by reoffending shows a similar long-term disregard for the law and a higher degree of commitment to crime.[273] If this is so, then the repeat offender is essentially more blameworthy and *deserves* a higher sentence. However, this is not because they have defied the law, nor do they have an implicit obligation to desist, but because of the guiltier mind they possess.[274]

Enhanced culpability should not be seen as justifying an unlimited criminal history enhancement. Within the model, punishment is constrained by retributive proportionality. The seriousness of the offence remains the initial and guiding factor of the sentence. The aggravation caused by previous offences should never play a greater role than seriousness, with the initial tariff decided by seriousness and adjusted only mildly based on the criminal record. First offenders should be treated significantly more leniently as their culpability differs significantly from repeat offenders. The criminal history enhancement grows with more convictions, however, at a more modest rate than a simple cumulative model.[275]

The criminal history formula should also be reassessed. The efforts of the offender toward desistance should be credited. As intervals between offences increase, the culpability of the offender decreases.[276] However, Roberts rejects that the seriousness of previous offences should be taken into account, as he considers to be relevant only the fact that the offender has been convicted to increase culpability, regardless of the specific crime.[277] In real life, the recidivist sentencing premium could even be reconceptualised as a suspended sentence that would begin once the initial punishment would end.[278] While in practical terms, this would lead to strange situations, especially when combined with parole, probation, or supervised release, it is a useful way to think about it.

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[272] ROBERTS, Julian V. *Punishing Persistent Offenders: Exploring Community and Offender Perspectives*, pp. 80–81.
[273] Ibid., p. 85.
[274] Ibid., p. 88.
[275] Ibid., pp. 217–220.
[276] Ibid., pp. 220–222.
[277] Ibid., pp. 224–225.
[278] Ibid., pp. 226–227.

The first objection that can be raised against the idea of enhanced culpability is what kind of role should public opinion play in determining the desert of the subject. Suppose that the public has misled views which do not match up with any scientific findings. Should these opinions nevertheless form ideas of desert? For this reason, justifying a criminal history enhancement merely on the grounds that the public expects the repeat offender to have a more culpable mental state while offending may seem unprincipled.[279] Nevertheless, assuming that the repeat offender has a different mental state from the first offender, where does it come from? If the answer lies in their awareness of the censure communicated by the last punishment, then how can we be sure they are aware of it at the time of offending? Therefore, the premises of enhanced culpability seem less certain, as the mental state of the offender becomes more elusive.[280] Furthermore, it is hard to deny the proximity of Roberts' idea of enhanced culpability to general ideas about punishing for bad character, which for good reasons are rejected by many sentencing theorists.[281]

Another objection is that, while the theory assumes a significant discount for the first-time offender, it does not justify the discount within its framework, as it rejects discount theories such as progressive loss of mitigation. At the same time, there is no obvious cap on the enhancement which increases with every crime, and thus no exact guarantee of proportionality.[282]

The greatest advantage of Roberts' model is that it is grounded within a practice of criminal history enhancements, which is unlikely to go away. It creates limitations and principles for the application of the criminal history enhancement, which could have a significant impact on sentencing practice. Nevertheless, there remain questions whether it is not just an attempt to justify an existing, but fundamentally unjustifiable, practice by recasting it in retributive language.

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[279] RYBERG, Jesper and Thomas J. PETERSEN. *Punishment, Criminal Record, and the Recidivist Premium*.; TONRY, Michael. *The Questionable Relevance of Previous Convictions to Punishments for Later Crimes*.
[280] RYBERG, Jesper and Thomas J. PETERSEN. *Punishment, Criminal Record, and the Recidivist Premium*.; TONRY, Michael. *The Questionable Relevance of Previous Convictions to Punishments for Later Crimes*.
[281] TONRY, Michael. *The Questionable Relevance of Previous Convictions to Punishments for Later Crimes*.
[282] VON HIRSCH, Andrew. *Proportionality and Progressive Loss of Mitigation: Further Reflections*.

3.4.2 Limiting Retributivism

Frase's model of sentencing repeat offenders is an extension of his understanding of limited retributivism described in Section 2.4 and contains different limiting approaches to criminal history enhancements. The first advances that statutory maximums should be true maximums, even for repeat offenders. On these grounds, any habitual offender statutes, three-strikes provisions, or other special recidivist statutes are rejected.[283] In a later work, a modification is proposed which allows for two maximums, one for first-time offenders and another for second-and-subsequent offenders.[284] The second allows for a derogation from the principle of strict statutory maxima based on the idea of reserved desert. Similarly to Roberts, he considers that the court may explicitly *reserve* or suspend a part of the sentence at the first offence, which then turns into the enhancement at the repeat offence.[285] This is hard to imagine in practice, especially mixed with all the other mechanisms that allow for a sentence (or its parts) to be suspended, both in front- and back-door sentencing.

A utilitarian limit on criminal history enhancements would be the ends-benefit proportionality principle, which establishes that criminal history enhancements where the harms of further punishment outweigh the crime control benefits are unacceptable.[286] Given the questionable empirical merits of deterrence or incapacitation, this limit likely rules out any substantial criminal history enhancement. A second utilitarian limit is the alternative-means proportionality principle or the parsimony principle. A criminal history enhancement is seen to violate this principle when the desired effect of the punishment could have been achieved through less burdensome means. This can be the case, for example, where a recidivist statute sets out a mandatory minimum for repeat offenders, despite the longer sentence having no real crime prevention effects.[287]

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[283] FRASE, Richard S. Prior-conviction Sentencing Enhancements: Rationales and Limits Based on Retributive and Utilitarian Proportionality Principles and Social Equality Goals. In: *Previous Convictions at Sentencing: Theoretical and Applied Perspectives*. London: Hart Publishing, 2010, pp. 117–136. DOI: 10.5040/9781472565150

[284] FRASE, Richard S. *Just sentencing*, p. 190.

[285] FRASE, Richard S. *Prior-conviction Sentencing Enhancements: Rationales and Limits Based on Retributive and Utilitarian Proportionality Principles and Social Equality Goals*.

[286] Ibid.; FRASE, Richard S. *Just sentencing*, pp. 196–197.

[287] FRASE, Richard S. *Prior-conviction Sentencing Enhancements: Rationales and Limits Based on Retributive and Utilitarian Proportionality Principles and Social Equality Goals*.; FRASE, Richard S. *Just sentencing*, pp. 195–196.

Finally, Frase's emphasis on social equality requires that criminal history enhancements that would lead to greater disparity between racial or ethnic groups are rejected. He points to the fact that racial minority offenders in the US tend to have longer and more serious criminal records, with enhancements, therefore, hitting them seemingly disproportionally.[288] While this last point is problematic because it could lead to discrimination based on otherwise protected factors, it is undeniable that some of these ideas outline more clearly how the theories described in the previous sections might be used within a real-life sentencing system.

3.4.3 Model Criminal History Enhancements

Roberts and Frase wrote *Paying for the Past* in 2019, where they expanded on their earlier writing and introduced a model regime, which combines elements from both the enhanced culpability model and from limiting retributivism. In terms of theory, they require that enhancements be justified both by desert and crime prevention considerations. The desert of the repeat offender is determined by enhanced culpability, with a significant discount for the first time offender. Enhancements based on offender risk should be validated, as should any criminal history formula to reflect the actual predictive value of past convictions.[289]

The proportionality constraint in this model is such that the criminal history enhancement for offenders in the highest criminal history category should not exceed double the sentence that an offender in the lowest criminal history category would receive. Within the framework of sentencing guidelines that they presume, they also suggest that the minimum sentence in a given severity range should be equivalent to the maximum sentence in the previous severity range to ensure strict ordinal proportionality.[290] This is in some ways hard to imagine, as formulating strict ordinal proportionality is very difficult, given the problems inherent to attempts to order very heterogenous offences, which in themselves are committed in very heterogeneous ways.[291]

The resulting model being hybrid also incorporates utilitarian constraints. Specifically, efficiency and cost-effectiveness are highlighted. These are largely identical to the ends-benefit and alternate-means criteria postulated by Frase. Several clear negative consequences of

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[288] FRASE, Richard S. *Just sentencing*, pp. 197–198.
[289] ROBERTS, Julian V. and Richard S. FRASE. *Paying for the Past*, pp. 209–210.
[290] Ibid., p. 210.
[291] This problem is addressed in Section 2.2.2, however, without a satisfying resolution.

general criminal history enhancements are identified, among them increased incarceration, particularly of low-risk offenders, and unnecessarily long incarceration.[292]

When it comes to the question of discretion, a balance between consistency and individualisation is advised. In particular, judges should be allowed to disregard or discount prior sentences when they are deemed no longer relevant to the current risk of reoffending.[293] On the other hand, the model presumes a unified system of counting criminal history.[294]

As far as calculating criminal history is concerned, the model regime assumes that the score should increase only when that previous conviction predicts an actual increase in the risk of recidivism. Six problematic variables were identified: i) juvenile offences, ii) misdemeanour convictions, iii) convictions older than 10 years, iv) upweighting of prior felonies according to severity, v) patterning enhancements for same-crime recidivism, and vi) custody status at the time of the offence.[295] Therefore, it is recommended that these are not considered in the criminal history calculus, given their low predictive value and propensity towards causing the negative effects of criminal history enhancements listed above.

Therefore, the final result should be a system where sentence severity rises quickly in the initial groups of criminal history and then tapers off and increases only rather slightly. Absolute limits should be placed so that the enhancements do not cumulate infinitely. As a potential alternative, it is advised that criminal history scores be combined with other risk factors into a unified scale, which would allow for a purely risk-based enhancement.[296] Such an approach is however contingent on the existence of thorough risk evaluations, which is not the norm as of today.

The model regime is grounded within the US sentencing guidelines for which it was created. Nevertheless, it can be a source of guidance and inspiration, even for a discretionary codified continental approach such as the Czech one. The strengths include an emphasis on a realistic

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[292] ROBERTS, Julian V. and Richard S. FRASE. *Paying for the Past*, p. 211.; HESTER, Rhys, Julian V. ROBERTS and Richard S. FRASE. Adverse Impacts of Offense-Based Proportionality and Prison-Use Priorities. In: ROBERTS, Julian V. and Richard S. FRASE. *Paying for the Past*. Oxford University Press, 2019, pp. 114–127. DOI: 10.1093/oso/9780190254001.001.0001

[293] ROBERTS, Julian V. and Richard S. FRASE. *Paying for the Past*, p. 181.

[294] Ibid., pp. 211–212.

[295] Ibid., pp. 183–206, 212–215.

[296] Ibid., pp. 215–217.

approach within the current political and social constraints, rigorous empirical research on the effects of criminal history enhancements and the predictive strength of prior convictions, as well as a commitment to reductionist principles. The weaknesses that can be identified are mostly theoretical – most of the criticism related to the persuasiveness of enhanced culpability remains unanswered, and as such the retributive constraints of the model might stand on unsafe ground. Overall, it would be a mistake to discard the model entirely based on the unsettled justifications; pragmatic approaches are necessary if there is to be a connection between criminological theory and sentencing practice. Still, there remains a bitter aftertaste of pain deliverance to placate the public, a feeling hard to reconcile with liberal ideals.

4. The Role of Criminal History in Czechia

This chapter aims to bridge the gap between the theory, which has been written largely by authors operating within an English language literary tradition operating in a common law legal system. To this end, it looks at the Czech statutory framework for sentencing offenders with a criminal history record and suggests a new normative system to replace it.

4.1 Sentencing Repeat Offenders in Czech Law

The 2009 Czech Penal Code notably omits listing any aim or aims of punishment. According to the explanatory memorandum to the Penal Code, the aim of punishment is better left to jurisprudence and as such is not stated in the law itself.[297] This creates substantial difficulties when describing sentencing, as the aims pursued by punishment can conceivably vary from case to case, judge to judge, and court to court. In the following section, the current legal outlook on sentencing repeat offenders is reconstructed from statutes, case law, and commentaries.

4.1.1 General Provisions on Sentencing Repeat Offenders in the Penal Code

The first provision outlining sentencing is § 38 PC, which states three criteria for punishment: i) it should be proportionate to the seriousness of the crime and the circumstances of the offender, ii) where a less burdensome punishment would suffice, it should be imposed over a more burdensome sentence, and iii) the sentence must consider the legal interests of the victims.

A generous reading of the legal provision might assume that it entails a commitment to proportionality in criterion i), and to parsimony in criterion ii). The recurrent issue is the unanswered questions related to the goals. Proportionate in the sense of just deserts? In the sense of classical retribution? Or in the sense of Benthamite proportionality – only enough so that the system does not fall into disrepute? The same applies to parsimony. Should it suffice for deterrence, rehabilitation, incapacitation, or censure? One could argue that the indecisiveness of the provision suggests that all those aims be incorporated simultaneously,

[297] Druhy trestních sankcí a obecné zásady pro jejich ukládání (§ 36-38). In: ŠÁMAL, Pavel et al. *Trestní zákoník, 2. vydání*. Praha: Beck, 2012, pp. 486–508.

however, this argument falls apart given the fact that these aims are often in conflict, and impossible to resolve without at least some semblance of a normative hierarchy.

A more mainstream explanation of the proportionality criterion in § 38 (1) PC is as a limit on punishments in the interest necessary for the primary aim of crime prevention, [298] consisting of partial aims: individual retribution, individual prevention, and general prevention.[299] On the other hand, it is seen as clearly distinguished from classical retribution. Instead, it is understood to point towards individualised punishment, tailored to the characteristics of the offender and their crime.[300] Král concludes that since sentencing aims are not explicitly listed in the Penal Code, then the idea of proportionality in § 38 PC is mostly without substance.[301]

The case law related to proportionality in accordance with § 38 PC is limited, particularly because the Supreme Court has largely rejected extraordinary appeals[302] on grounds of disproportionality. The court has held that mere disproportionality, as opposed to the imposition of an illegal punishment, is not grounds for extraordinary appeal under § 265b (1) CPP.[303] However, in cases of extreme disproportionality, as instructed by the jurisprudence of the Constitutional Court, the Supreme Court has ruled that punishment imposed by a subordinate court was disproportionate. Such a ruling was delivered in the case of an unsuspended prison sentence, where neither of the lower courts had provided any justifications for the choice, while other more parsimonious punishments were available.[304]

Somewhat broader is the case law of the Constitutional Court, however, it also follows a restraintful doctrine, where it has held that the Constitutional Court does not concern itself with matters of choice and severity of punishment unless there is a breach of a constitutionally

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[298] In Czech the term „*ochrana společnosti*" is used which literally corresponds to the *protection of society*. A more nuanced, and in my view accurate, conceptual translation is *crime prevention*, as the generalised aim of most criminal justice systems. Judgment of the Constitutional Court, 23 April 1998, IV. ÚS 463/97 explicitly calls it protection of society *from criminality*.
[299] For these terms typical of Czech doctrine and how they relate to the terms used in this thesis see section 1.4.1.
[300] KALVODOVÁ, Věra. § 38 Přiměřenost trestních sankcí. In: ŠČERBA, Filip et al. *Trestní zákoník. 1. vydání (2. aktualizace).* Praha: C. H. Beck, 2022.; VANDUCHOVÁ, Marie. § 38 Přiměřenost trestních sankcí. In: ŠÁMAL, Pavel et al. *Trestní zákoník, 2. vydání*. Praha: Beck, 2012, pp. 502–508.
[301] KRÁL, Vladimír. § 38 Přiměřenost trestních sankcí. In: DRAŠTÍK, Antonín et al. *Trestní zákoník: komentář*. Praha: Wolters Kluwer, 2015.
[302] *dovolání*
[303] Decision of the Supreme Court, 2 September 2002, 11 Tdo 530/2002; Decision of the Supreme Court, 27 January 2021, 3 Tdo 1364/2020.
[304] Decision of the Supreme Court, 31 March 2020, 8 Tdo 45/2020.

guaranteed right[305] or such extreme violations of proportionality that are seen to violate Art. 39 of the Charter (legality of punishment).[306] The court has found such a violation in cases where a harsher punishment was imposed simply because the offender was a foreigner,[307] or where punishment is not adequately justified in the reasoning of the judgment.[308] A more recent judgment has declared the expectation that courts should refer to the aims the sentence is anticipated to pursue when justifying it.[309] The last decision is particularly interesting because of the unsettled aims that punishment ought to follow.

The 1961 Penal Law[310] in § 23 (1) outlined crime prevention as the primary and fundamental aim. This provision was interpreted by the Constitutional Court as consisting of individual repression (retribution), individual prevention and general prevention.[311] This definition as shown above has been incorporated into the commentary literature and has prevailed even in the age of the 2009 Penal Code. In newer judgments, however, a new conceptualisation of the aims of punishment was introduced: the familiar retributive and consequentialist division.[312] With this came a new understanding of proportionality, a more limiting retributivist delineation of the acceptable range of punishment, based on the seriousness of the crime. Consequentialist aims are forbidden from overruling this base proportionality – deviation is allowed only with the aim of greater parsimony.[313] Nevertheless, it remains unclear to what extent the hierarchy of aims set out by these two judgments has been applied, especially given the lack of reaction in the literature to a relatively notable development in the jurisprudence of the court.

§ 39 (1) of the Penal Code lists a very wide range of circumstances that the court should consider in sentencing: notably the seriousness of the crime, the personal, family, and financial circumstances of the offender, and *their conduct up to the present*, the potential for rehabilitation, their behaviour after the crime, especially attempts to make amends, and their conduct during the criminal proceedings, i.e., whether they pleaded guilty or assisted the investigation in other ways or not. Czech sentencing is not just based on the crime itself, but

[305] Decision of the Constitutional Court, 22 July 2010, IV. ÚS 1124/09-2.
[306] Decision of the Constitutional Court, 6 October 2020, II. ÚS 2603/20.
[307] Judgment of the Constitutional Court, 23 April 1998, IV. ÚS 463/97.
[308] Judgment of the Constitutional Court, 24 April 2008, II. ÚS 455/05.
[309] Judgment of the Constitutional Court, 7 August 2017, II. ÚS 2027/17.
[310] Act No. 140/1961 Coll., Penal Law (repealed).
[311] IV. ÚS 463/97.
[312] Judgment of the Constitutional Court, 11 June 2016, I. ÚS 4503/12.
[313] I. ÚS 4503/12, II. ÚS 2027/17.

instead considers a large number of factors related to the person of the offender, which are not inherently linked to the crime. Even the seriousness of the crime, defined by § 39 (2) PC, includes the importance of the interest protected by the criminal statute, the circumstances of the commission of the crime and the methods used, the resulting harms, *the character and status of the offender*, their culpability, motives, and intentions. As such, it is far broader than the typical combination of blameworthiness and harm.

For the interests of sentencing repeat offenders, many of these personal criteria are likely to be unfavourable, especially given the personal, family, and financial disruptions custodial sentences cause.[314] In particular the criterion of *conduct up to the present* bodes negatively for repeat offenders, as recidivism is considered to be a prime indicator that the offender has not conducted themselves appropriately up to the present.[315] Criminal history is also seen as lowering the potential for rehabilitation. Additionally, recidivism is considered to increase the seriousness of the crime, as it shows the poor character of the offender.[316]

4.1.2 Repeat Offending as an Aggravating Factor

In addition to the effect recidivism has in determining the sentence according to § 39 PC the Penal Code lists recidivism as a specific aggravating factor in § 42 q) PC. The provision states that it is an aggravating factor that the offender has been previously convicted; however, it also explicitly *allows* the court not to consider a previous conviction as an aggravating factor, based on the general circumstances of the latter offence, the time elapsed from the previous conviction, or in the case of an addicted offender if they have started addiction treatment.

Under § 42 q) PC a previous conviction may be considered an aggravating factor as long as it has not been expunged under § 106 PC, whether by a court decision (§ 105 PC) or *ex lege*.[317] However, this is specific to the aggravating condition under § 42 q) PC, as the court may

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[314] MAREŠOVÁ, Alena et al. *Kriminální recidiva a recidivisté: (charakteristika, projevy, možnosti trestní justice)*. Praha: Institut pro kriminologii a sociální prevenci, 2011, p. 251.
[315] Král rejects this interpretation but has no issue with the roles recidivism plays when determining the potential for rehabilitation and the character of the offender. The remaining commentary literature explicitly embraces it.
[316] KALVODOVÁ, Věra and Filip ŠČERBA. § 39 Stanovení druhu a výměry trestu. In: ŠČERBA, Filip et al. *Trestní zákoník. 1. vydání (2. aktualizace).* Praha: C. H. Beck, 2022.; PÚRY, František. § 39 Stanovení druhu a výměry trestu. In: ŠÁMAL, Pavel et al. *Trestní zákoník, 2. vydání*. Praha: Beck, 2012, pp. 509–526.; KRÁL, Vladimír. § 39 Stanovení druhu a výměry trestu. In: DRAŠTÍK, Antonín et al. *Trestní zákoník: komentář*. Praha: Wolters Kluwer, 2015.
[317] KRÁL, Vladimír. § 42 Přitěžující okolnosti. In: DRAŠTÍK, Antonín et al. *Trestní zákoník: komentář*. Praha: Wolters Kluwer, 2015.

consider expunged convictions to be relevant under § 39 (1) or (2) PC.[318] According to the commentaries, the sentencing court should therefore take into account i) the kind and seriousness of both the previous and current convictions, ii) the relationship between the past and current offence in the sense of what they communicate about the traits of the offender, and iii) the general profile of the offender and their way of life.[319]

As far as expungement of convictions is concerned, the process is regulated by § 105-106 PC, except for certain noncustodial sentences which are expunged automatically upon being completed. Based on the severity of the sentence, a trial period (1 - 15 years) defined in § 105 (1) PC must pass after the sentence was completed, during which the offender must lead uninterruptedly a *proper life*.[320] After this trial period passes, the court *shall* on request expunge the conviction. Further convictions during the trial period are generally considered incompatible with the idea of proper life, although this is not absolute. In addition, breaches of noncriminal statutes (e.g., administrative, civil, tax) can be sufficient for the conclusion that the offender has not led a proper life.[321] Under § 105 (3) PC the court *may* expunge the conviction sooner on request if the offender has shown with their *very good behaviour* that they have reformed. This even more restrictive condition is highly unlikely to be compatible with any conviction during the trial period.[322]

In reports of the Czechoslovak Supreme Court from the 1970s and 1980s, it has been held that unexpunged convictions, which at the time of sentencing would have satisfied the conditions of expungement, should be treated as expunged.[323] This appears to have been recently

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[318] Decision of the Supreme Court, 31 May 2016, 6 Tdo 449/2016; Decision of the Regional Court in Brno, 25 April 2000, 8 To 147/2000 (published by the Supreme Court as R 14/2001 tr.).
[319] PÚRY, František. § 42 Přitěžující okolnosti. In: ŠÁMAL, Pavel et al. *Trestní zákoník, 2. vydání*. Praha: Beck, 2012, pp. 554–581.; KALVODOVÁ, Věra and Filip ŠČERBA. *§ 42 [Přitěžující okolnosti]*.; DRAŠTÍK, Antonín. § 105 Podmínky zahlazení odsouzení. In: DRAŠTÍK, Antonín et al. *Trestní zákoník: komentář*. Praha: Wolters Kluwer, 2015.
[320] *řádný život* – a concept within Czech law related to the expectation of the sort of behaviour a citizen in good standing with the law should lead.
[321] PÚRY, František. § 41 Polehčující okolnosti. In: ŠÁMAL, Pavel et al. *Trestní zákoník, 2. vydání*. Praha: Beck, 2012, pp. 541–554.; ŠČERBA, Filip. § 83 Rozhodnutí o podmíněném odsouzení. In: ŠČERBA, Filip et al. *Trestní zákoník. 1. vydání (2. aktualizace).* Praha: C. H. Beck, 2022.
[322] DRAŠTÍK, Antonín. *§ 105 Podmínky zahlazení odsouzení*.; PÚRY, František. § 105 Podmínky zahlazení odsouzení. In: ŠÁMAL, Pavel et al. *Trestní zákoník, 2. vydání*. Praha: Beck, 2012, pp. 1223–1234.; SKUPIN, Zdeněk Jiří. § 105 Podmínky zahlazení odsouzení. In: ŠČERBA, Filip et al. *Trestní zákoník. 1. vydání (2. aktualizace)*. Praha: C. H. Beck, 2022.
[323] TRESTNÍ KOLEGIUM. *Správa o výsledkoch prieskumu a zhodnotenia praxe súdov pri trestnom postihu recidivistov (R 10/1974 tr.)*. Nejvyšší soud ČSSR, 1974.; TRESTNÍ KOLEGIUM. *Zhodnocení poznatků o praxi soudů při trestním postihu recidivistů (R 30/1981 tr.)*. Nejvyšší soud ČSSR, 1981.

questioned, as the Supreme Court has ruled that even if the conditions for expungement have been fulfilled, then unless there has been a formal decision expunging the conviction, there is no reason not to treat the offender as a recidivist.[324] However, given the specific circumstances of the case, it would be wise not to go as far as to claim that the opinion of the Czechoslovak Supreme Court has been outright overruled.

In summary, much of the relevance of unexpunged previous convictions as an aggravating factor (§ 42 q) PC) is undermined by the fact that courts can use criminal history to increase punishment as part of the seriousness of the offence or other character considerations included in § 39 (1) and (2) PC. Another problem is that old convictions can be kept unexpunged if the offender reoffends, even if the convictions are very old. Furthermore, even actual expunged offences can haunt the offender perpetually, as the limits on their use are far from clear. Therefore, the meaningfulness of expungements in their current form can be rightfully questioned.[325]

4.1.3 Special Recidivist Statutes

In addition to the general provisions governing the sentencing of repeat offenders, there is one for *especially serious recidivism*, as well as 38 specific cases where the offence is considered aggravated[326] if committed by someone who committed it previously.[327] The first represents a special variation of recidivism as an aggravating factor, while the others represent examples of what Davis refers to as graded recidivist statutes, i.e., they treat the crime committed by the offender as inherently worse, and therefore equivalent to more serious offences.[328]

Under § 59 PC, when sentencing an offender for a grievous felony[329], who has already been sentenced previously for a grievous felony, the court may impose a sentence that is up to one-third higher than the statutory maximum. One of two other criteria must be fulfilled: either the seriousness of the grievous felony given the recidivism and other circumstances is particularly

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[324] Decision of the Supreme Court, 17 March 2016, 11 Tdo 185/2016.
[325] GŘIVNA, Tomáš and Marie VANDUCHOVÁ. K problematice zahlazení odsouzení. *Trestněprávní revue*. 2009, no. 9, p. 263.
[326] *zvlášť přitěžující okolnost* lit. "especially aggravating circumstance", also referred to as "a circumstance mandating the use of a higher sentencing range"
[327] DRÁPAL, Jakub. Speciální skutkové podstaty pro recidivisty: nepromyšlené a škodlivé. *Trestněprávní revue*. 2022, no. 3, p. 172.
[328] DAVIS, Micheal. *Recidivist Penalties Revisited.*
[329] *zvlášť závažný zločin*

high, or the potential for the rehabilitation of the offender is reduced. A previous sentence can only trigger the provision if it has not been expunged; otherwise, the conditions for the extraordinary increase of punishment are not fulfilled.[330]

Graded recidivist statutes come in two basic variants. The first concerns itself whether the offender had been convicted of or punished for the same crime during a period preceding the current offence. An example of this is simple fraud, which sets out a punishment of up to two years of imprisonment, while if the offender has been punished for fraud in the past three years, the punishment increases to a minimum of 6 months and a maximum of three years.[331] However, aggravated fraud (damages over CZK 100 000, or other especially aggravating circumstances) makes no difference in the punishment ranges for first and repeat offenders.[332]

This structure is mostly kept the same for the 10 other offences that stipulate recidivism during a preceding period as an especially aggravated circumstance.[333] According to the case law, expunged offences do not trigger this aggravated range.[334] Other previous offences, apart from the triggering one, can be used as an aggravating circumstance under § 42 q) PC, and there is no obvious limit to considering any previous offence as increasing the seriousness of the crime and other considerations relevant to sentencing described in § 39 (1), (2) PC.[335]

The second group of recidivist statutes specifies an aggravated sentencing range when the crime has been committed repeatedly („*opětovně*"). There is a total of 26 such provisions, distributed among misdemeanours, felonies, and grievous felonies. An example of this is in the case of grievous bodily harm, where punishment increases from the base of three to ten years of incarceration, to a range of five to twelve years. By doing so, it is placed on level with other especially aggravating circumstances, which include if there were multiple victims, if the

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[330] KALVODOVÁ, Věra. § 59 Mimořádné zvýšení trestu odnětí svobody. In: ŠČERBA, Filip et al. *Trestní zákoník. 1. vydání (2. aktualizace).* Praha: C. H. Beck, 2022.; PÚRY, František. § 59 Mimořádné zvýšení trestu odnětí svobody. In: ŠÁMAL, Pavel et al. *Trestní zákoník, 2. vydání*. Praha: Beck, 2012, pp. 804–815.
[331] § 209 (1), (2) PC.
[332] § 209 (3), (4), (5) PC.
[333] For the full list see: DRÁPAL, Jakub. *Speciální skutkové podstaty pro recidivisty: nepromyšlené a škodlivé*.
[334] This is different for § 272 PC, public endangerment, where the word *opětovně* (repeatedly) is used making it follow different rules related to expunged offences, however the qualifier "in a short time" suggests that this should rarely matter.
[335] Judgment of the Supreme Court, 1 September 1998, 3 Tz 76/98; Judgment of the Supreme Court, 20 March 2013, 3 Tz 1/2013; Decision of the Supreme Court, 25 April 2018, 3 Tdo 402/2018; Decision of the Supreme Court, 16 January 2019, 3 Tdo 1523/2018.

victim was a child or a pregnant woman, or if the crime was committed out of a hateful motive.[336] These statutes are triggered both by a repeat offender committing the same crime, as well as when they happen in concurrence, i.e., perpetrated by a multiple offender. Any previous offences of the same kind will trigger the statute, no matter how old they are, whether they have been expunged, or even whether there is a conviction in force for them.[337]

Finally, a special recidivist statute closely related to the time-limited group is found in § 205 (2) PC. While simple theft[338] is punishable under Czech law through criminal law only if the damages exceed the value of CZK 10,000, if the offender has been convicted of or punished for this crime in the past three years, no minimum value is required. In addition, such an offender is automatically moved to the aggravated range of 6 months to 3 years, as opposed to the base range of up to two years.[339] This means that cases, that would have been otherwise dealt with by administrative means,[340] are instead dealt with by criminal means in the aggravated range. This provision is not found in other similar crimes, like fraud (§ 209 PC), or embezzlement (§ 206 PC).

This represents in cases where the damages are below CZK 10,000 an unparalleled source of aggravation, as the administrative infraction of theft merely carries a fine of up to CZK 70,000.[341] These petty thefts below CZK 10,000 account for 25 % of offenders sent to prison annually, meaning they have a large effect on the Czech incarceration rate, leading to calls for the abolishment of the provision.[342] Even with a more conservative reform, which would set the minimum damage for the recidivist to criminally offend to CZK 1000, 93 years of imprisonment could be saved annually.[343]

Drápal's estimate of the effect of special recidivist statutes paints a picture of intense aggravation, as the special recidivist statutes for theft, drug trafficking, DUI, and fraud,[344] lead to imposing an additional 1 850 years of incarceration yearly, costing approximately 1 billion

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[336] § 145 (1), (2) PC.
[337] Decision of the Supreme Court, 22 February 2011, 6 Tdo 84/2011.
[338] Not aggravated by the manner of commission such as in § 205 (1) b) – e) PC.
[339] § 205 (1), (2) PC.
[340] § 8 (1) a) 1., Act No. 251/2016 Coll, on certain infractions.
[341] § 8 (4), (5) Act on certain infractions.
[342] SCHOLLE, Jan. Zrušte § 205 odst. 2 trestního zákoníku. *Státní zastupitelství*. 2020, no. 4, p. 8.
[343] DRÁPAL, Jakub. *Speciální skutkové podstaty pro recidivisty: nepromyšlené a škodlivé*.
[344] §§ 205 – 206, § 283, § 274, §§ 209-212 PC respectively.

CZK a year.[345] Throughout this examination, repeat offending has been found to play a role at many points throughout the sentencing deliberation: i) in general sentencing provisions related to the seriousness of the offence and the character of the offender, ii) as a general aggravating factor, iii) in cases of repeated grievous felonies as a way of increasing the sentencing range, and iv) through special recidivist statutes.

4.1.4 The Czech Approach to Criminal History Enhancements

The prohibition of double counting aggravating factors in Czech law is stated as follows: "*A circumstance, that forms part of the legal definition of a crime, including such circumstance that mandates the use of a higher sentencing range, cannot be used as an aggravating or mitigating factor*."[346] It is presumed to be a reflection of the constitutional *ne bis in idem* principle, however, in practice, there are issues with a unified interpretation of when can a legal feature of a crime also be used as an aggravating factor.[347] In the context of repeat offences, this is obvious in the case law[348] related to using the offence triggering the special recidivist statute, other than that the limitations seem to be scarce. As such, if two or more specific aggravating provisions are triggered by the previous offence (e.g., § 42 q) PC and § 205 (2) PC), applying both would be considered to be double counting.[349] No such rules, however, seem to apply when the aggravation is hidden within § 39 PC, and the commentary literature is silent on the matter.[350] The extraordinary increase in punishment (§ 59 PC) seems to be explicitly excluded from double counting rules, hence the formulation of an increase, rather than it being labelled as an aggravating circumstance.

Not only is the law itself unclear on how and how many times can criminal history be counted, but the only source for how judges consider criminal history is within the written reasons for judgment. Without a sufficiently explained decision, it is impossible to tell which rules, if any,

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[345] DRÁPAL, Jakub. *Speciální skutkové podstaty pro recidivisty: nepromyšlené a škodlivé*.
[346] § 39 (5) PC.
[347] GŘIVNA, Tomáš and Hana ŠIMÁNOVÁ. Zákaz dvojího přičitání téže okolnosti u majetkových trestných činů. *Trestněprávní revue*. 2019, no. 11–12, p. 221.
[348] Judgment of the Supreme Court, 1 September 1998, 3 Tz 76/98; Judgment of the Supreme Court, 20 March 2013, 3 Tz 1/2013; Decision of the Supreme Court, 25 April 2018, 3 Tdo 402/2018; Decision of the Supreme Court, 16 January 2019, 3 Tdo 1523/2018.
[349] This conclusion is drawn mostly *a contrario* as case-law has been elusive on the matter. See also: Judgment of the Constitutional Court, 13 November 2012, III. ÚS 1250/12
[350] PÚRY, František. *§ 39 Stanovení druhu a výměry trestu*.; KALVODOVÁ, Věra and Filip ŠČERBA. *§ 39 Stanovení druhu a výměry trestu*.

the court followed in determining the sentence.[351] In addition, the rules for considering aggravating factors do not pay attention to the weight these factors should carry and any potential limits.[352] The reality of written reasons for judgments was rather different at least in 2016, as Tomšů and Drápal showed that sentencing deliberations are rarely duly recorded, and when they are, they tend to be general and unweighted, rather than specific to the case, and weighted appropriately.[353]

Despite the general findings, it is clear that judges care about criminal history, as it was mentioned most often as a reason for the sentence. Nevertheless, they do not seem to tailor the decision to the specific criminal past of the offender.[354] This situation does not appear to be new, as it was criticised already in 1981, with very similar findings.[355] It could be that matters have improved since then, especially given the obligation of state prosecutors to recommend and justify a sentence.[356] Unfortunately, there has been no research done yet on the reasons for a certain punishment stated by prosecutors in indictments.

The essential problem at the heart of the search for a Czech approach to criminal history enhancements is the lack of any guidance related to the effect criminal history should have on sentencing.[357] After examining the legal provisions and practice it can be surmised that serious enhancements can be and are imposed and that judges do seem to consider criminal history relevant enough to mention it the most among aggravating factors, and factors related to the seriousness of the offence and the character of the offender. Unfortunately, that is all that can be deduced concerning the role of criminal history from statutes and legal practice. Jurisprudence is then the last potential source of answers.

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[351] DRÁPAL, Jakub. Odůvodnění trestů: Argumenty pro a proti detailnímu odůvodňování trestů. *Státní zastupitelství*. 2019, no. 5, p. 15.
[352] DRÁPAL, Jakub. Individualizace trestů v České republice: Jak určujeme tresty a co o tom víme? *Státní zastupitelství*. 2018, no. 1, p. 9.
[353] TOMŠŮ, Kristýna and Jakub DRÁPAL. Odůvodnění trestů: Empirická studie rozhodnutí okresních soudů. *Státní zastupitelství*. 2019, no. 6.
[354] Ibid.
[355] MITLÖHNER, Miroslav and Karel HORNÝ. K ukládání trestů recidivistům. *Socialistická zákonnost*. 1981, vol. 29, pp. 285–290.
[356] § 177 d) CPP. The obligation to justify the recommended sentence is extrapolated from Art. 60 (2) and (4) of General Order of the Prosecutor General No. 9/2019, on the operation of public prosecutors in criminal proceedings, as amended by later orders. This was brought to my attention through DRÁPAL, Jakub. Odůvodnění trestů: Principy správného odůvodňování trestů. *Státní zastupitelství*. 2020, no. 1, p. 8.
[357] Ibid.

One potential source for such an approach is the principles set out by Mitlöhner and Horný in their 1981 article. They advise that sentencing judges should keep in mind the basic principle of crime prevention, highlighting the incapacitative ability of incarceration. Judges should not assess criminal history mechanically, but they should consider the seriousness and character of past offences, as well as the time that transpired from the last offence or punishment. Courts should request the entire file of previous cases to properly assess past offences, as well as their relatedness to the current crime. In addition, they denounce the leniency with which repeat offenders are treated, with incarceration not always used, and punishment being close to the lower limit of the range, instead of higher within it. Sentencers should also not overly concern themselves with expungement; instead, they should assess expunged sentences with the above criteria.[358] It is unlikely that in the liberal sentencing system introduced after 1989, such a harsh approach could survive fully. However, its character as an incapacitative approach means that similar theoretical principles could be used to justify an incapacitative utilitarian model of dealing with repeat offenders. Nevertheless, at the same time, the flaws of such a model, as described in Section 3.3.2, must be accounted for.

Drápal summarised Czech and Slovak theorists of the 20th and 21st centuries, finding that the only real reason that has been offered for the criminal history enhancement is that the offender has been warned – in ignoring this warning they merit the increased punishment that follows.[359] This hints at some sort of notice theory,[360] most likely one connected to the German retributive hyper-culpability theory.[361] When the offender is warned by the court,[362] they should exact more care that they do not reoffend. If they still reoffend, they are in essence, more culpable.[363] As such the offender's heightened culpability is linked to receiving a "notice" from the court, which is not so different from Roberts' enhanced culpability.

The issue with this argument is that it is often implied that any previous offence is enough for a criminal history enhancement; however, the notice was given only in relation to a specific

[358] MITLÖHNER, Miroslav and Karel HORNÝ. *K ukládání trestů recidivistům*.
[359] DRÁPAL, Jakub. *Ukládání trestů v případě jejich kumulace: Jak trestat pachatele, kteří spáchali další trestný čin předtím, než vykonali dříve uložené tresty*.
[360] LEE, Youngjae. *Recidivism as Omission: A Relational Account*.
[361] ROBERTS, Julian and Stefan HARRENDORF. *Criminal History Enhancements at Sentencing*.
[362] One can question how warned is the Czech or German offender who receives a sentence in the mail through a penal order.
[363] ROBERTS, Julian and Stefan HARRENDORF. *Criminal History Enhancements at Sentencing*.

crime. With different-in-kind recidivism, this poses a problem, as it is a question to what extent being warned about the wrongfulness of assault makes one more aware of the wrongfulness of fraud. But even if we suppose that only same-in-kind recidivism would be met with a criminal history enhancement, the problem is that it would mean that familiarity with the wrongfulness is grounds for determining punishment. If so, should it not be done in a complex way, looking at the entire life of the offender and what they had learnt about offending?[364] Since this is not the case, the notice argument ends up being rather unpersuasive.

Overall, in earnest, it is practically impossible to divine what is the Czech approach to criminal history enhancements. There are no qualms about their use; in fact, the statutory provisions encourage them. However, their magnitude is in no way specified and, as such, most likely significantly varies from case to case. To make matters worse, reasons for judgment do not provide any information on the magnitude of the enhancement or specific reason for why the criminal past should enhance the sentence, other than the simple fact that the offender had previous convictions. In the absence of legislative guidance, theory and doctrine do not offer a true alternative. The only exceptions are a hint of utilitarian incapacitation and a notice theory, both of which carry the flaws described earlier. It can therefore be said that within the books there is no consistent Czech approach to the role of criminal history, other than that it should enhance punishment.

4.2 Towards a Normative Model for Sentencing Repeat Offenders[365]

Having explored the different approaches to sentencing repeat offenders, it is time to evaluate what a model of sentencing repeat offenders should look like in Czechia. First of all, it is essential to list the constraints: i) Czechia has a continental law system, where the principle of *nulla poena sine lege* significantly inhibits any creation of sentencing guidelines by the executive branch, ii) highly detailed guidance on how to exactly count specific factors such as criminal history can hardly be included in a statute such as the Criminal Code, which aims to provide concise, concentrated, and generalised provisions, and iii) there has been quite some

[364] LEE, Youngjae. *Recidivism as Omission: A Relational Account*.
[365] The bulk of this analysis is inspired by and follows the work of Jakub Drápal. In particular his article on individualizing punishment represents a starting point for the constraints and angles of intervention available: DRÁPAL, Jakub. *Individualizace trestů v České republice: Jak určujeme tresty a co o tom víme?*. Another significant inspiration for the structure is his article on sentencing principles for Czechia: DRÁPAL, Jakub. Formulace a konkretizace principů ukládání trestů: Zahraniční přístupy a řešení vhodná pro český právní systém. *Státní zastupitelství*. 2020, no. 6, p. 43.

resistance towards attempts at curbing judicial discretion, making interventions which rely on that exclusively particularly difficult.

Second, to create a principled system, it is necessary to establish the principles that should be followed. Within the literature, there appears to be a clear preference for a wide range of sentencing objectives. It makes therefore sense that such clear principles should be set out ideally in statutes. This thesis cannot aim to resolve the question of how the base objective of punishment should be stated, so the following recommendations are postulated based on the premise that a general sentencing objective similar to the US Model Penal Code would be adopted, that is, that the Penal Code would state that punishment should be "*within a range of severity proportionate to the gravity of offenses, the harms done to crime victims, and the* ***blameworthiness*** *of the offender*", and should also "*when reasonably feasible, to achieve offender rehabilitation, general deterrence, incapacitation of dangerous offenders, restitution to crime victims, preservation of families, and reintegration of offenders into the law-abiding community, provided these goals are pursued within the boundaries of proportionality*".[366] As such, the following account is grounded in a limiting retributivist perspective.

The justification stems from the model criminal history enhancement described in Section 3.4.3. Repeat offenders are more blameworthy, as they showed greater disregard for the law. This is not far from the idea that they have been warned, although it places more value on the (perceived) mental state of the offender. In addition, concerns about the incapacitation of dangerous offenders can also be incorporated into the hybrid justification for a criminal sentence enhancement.

Finally, the means of intervening within the constraints should be specified. The following methods can be used i) changes in legislation, ii) case law, iii) general opinions of the Supreme Court, iv) general orders of the Prosecutor General, and v) improved recording and sharing of sentencing data.[367]

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[366] THE AMERICAN LAW INSTITUTE. *Model Penal Code: Sentencing*.
[367] DRÁPAL, Jakub. *Formulace a konkretizace principů ukládání trestů: Zahraniční přístupy a řešení vhodná pro český právní systém*.

4.2.1 Proposed Legislative Changes

Having criticised, the current provisions on when previous convictions should be taken as an aggravating factor for being vague, several new provisions that would resolve some of the unresolved questions described earlier are suggested. A total of nine legislative changes were proposed, with a model substantive law clause which incorporates the first five suggestions, which can be found in Appendix I.

Substantive Law

1) The prohibition of double counting principle should be explicitly extended to past convictions in the form of forbidding criminal history from being used as anything else, but a general aggravating factor similar to the current § 42 q). If special recidivist statutes are left as they are, then the triggering offence should not be considered a general aggravating factor in any case, while other previous convictions could be. The justification for this is that the current system obscures the reality of criminal history enhancement by including it in consideration related to the seriousness of the crime, their moral character, and their potential for rehabilitation. By limiting criminal history to being an aggravating factor, if the court would wish to examine the character of the offender or their potential for rehabilitation, they would have to do so by examining other evidence than just the number of convictions. This would allow for a clearer and more transparent image of how criminal history is being treated.

2) Expungement of offences from the criminal register extract[368] should be independent of when convictions become time-barred from being used as an aggravating factor. A statutory limit on using convictions should be applied automatically after punishment is fully executed, after ten years for felonies and grievous felonies, and after three years for misdemeanours. This is based on the findings that the predictive value of previous convictions after this period becomes very low and is overall rather low for misdemeanours.[369] While the ten-year period is drawn from Roberts and Frase, the three-year interval is inspired by the most common special reoffending period in the current special recidivist statutes.[370]

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[368] *výpis z trestního rejstříku*

[369] ROBERTS, Julian V. and Richard S. FRASE. *Paying for the Past*, pp. 178–179, 212–215.

[370] DRÁPAL, Jakub. *Speciální skutkové podstaty pro recidivisty: nepromyšlené a škodlivé*. I would like to thank Vladimír Sharp, who brought this idea to my attention.

3) A further exclusionary provision should explicitly forbid the up-weighting of prior convictions according to severity, with except for a distinction between grievous felonies, felonies, and misdemeanours. While Roberts and Frase recommended totally against it, such an immense change in practice could lead to serious implementation issues. Special patterning enhancements for same-crime recidivism should ideally be abolished, or at least relegated only to the special recidivist statutes. Within the general provision, they should be disallowed. The justification for these steps is the low predictive value of more serious offences over less serious offences, as is the case for same-crime recidivism above different-crime recidivism.[371]

4) The value of the enhancement should diminish with every subsequent offence and never exceed twice the sentence that a first offender would receive in an identical case. This is done to ensure that the seriousness of the crime itself is never overshadowed by the criminal history of the offender. Following this principle, the first counted previous conviction should carry the greatest enhancement, while each of the further ones carries a slightly lesser one. Both limitations then serve to uphold the principle of proportionality stated in § 38 (1) PC as understood from a more retributive perspective.[372]

5) The rate at which the previous convictions were committed should lower the enhancement, where it is suggestive of desistance.[373] The court should be sensitive to attempts at desistance and reflect them in the sentence. Desistance is a volatile process, often accompanied by relapses.[374] Judges should also have the discretion to disregard old priors entirely, where they have significant evidence that the offender is making progress towards desistance.[375] The main reason behind these rules is the need to prevent overpunishing, especially in cases where the offender would have likely not committed any further crimes in the additional period for which they were incarcerated.

6) Courts should have the ability to impose an extraordinary increase in punishment for offenders who repeatedly commit very serious crimes. Although there are qualms about whether their criminal history enhancement should ever surpass the double limit set out in the

[371] ROBERTS, Julian V. and Richard S. FRASE. *Paying for the Past*, pp. 183–206, 212–215.
[372] Ibid., pp. 210, 215–216.
[373] Ibid., pp. 170–171.
[374] Ibid., pp. 56–57.
[375] Ibid., p. 181.

fourth suggestion, the threat posed by high-frequency serious violent offenders merits a second thought.[376] The proposed solution is amending the current extraordinary increase in punishment mechanism set out in § 59 PC, to instead allow for the imposition of the full criminal history enhancement allowed, if there is a high risk that a repeat offender, who has committed serious violent crimes, would reoffend during the additional period of imprisonment. The enhancement would additionally be allowed to surpass the upper range set out in the Penal Code by up to one-third.[377] The justification for this is the necessity to protect the public, as well as the integrity of the penal system, from particularly dangerous offenders, while allowing for certain desert constraints as well as avoiding the pitfalls of civil commitments.

Procedural Law

7) Sentences, especially for more serious crimes or when involving prison time, should be imposed after a sentencing hearing. The current system, in which the sentence is delivered with the guilty verdict, leads both the prosecution and the defence to focus on arguments related to the guilt of the defendant, while arguments related to the sentence are largely restricted to the prosecutor's recommendation and somewhat awkward mitigation pleas of the defence. [378] To give the defence proper space to advance mitigation pleas, as well as to give the prosecutor proper space to make a recommendation, it would be beneficial to allow for a hearing after the guilty verdict is returned. Given the more complex assessment of criminal history outlined above, this would allow, in particular, for arguments about whether any of the previous convictions should be set aside. As such, this could be a valuable step towards principled sentencing.[379]

8) Reasons for judgment should identify the part of the sentence that is the criminal history enhancement and how it was computed, especially listing the specific previous convictions that were taken into account and the weight that was applied to them. While § 125 CPP would

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[376] Ibid., pp. 231–232.

[377] E.g., an offender who has committed aggravated rape with grievous bodily harm (§ 185 (2), (3) c) PC) for the second time, in a way which would carry a penal value of seven years for the first-time offender, could be given up to a 14 year sentence immediately, without having to have many previous convictions (the current maximum being 12 years, with up to 16 years under § 59 PC).

[378] Consider the following: My client is innocent, however if he is to be found guilty, then I would like to submit, that within the prosecutor's version of events, he ensured that the victim would not be harmed more than was necessary to seize her purse.

[379] The same argument has been made in 2018 in: DRÁPAL, Jakub. *Individualizace trestů v České republice: Jak určujeme tresty a co o tom víme?*.

suggest that such a description of aggravating factors should be included in the reasons for judgments, empirical research suggests that this is not the case at all.[380] While this solution in and of itself cannot suffice, courts should be explicitly obligated by the law to specify the criminal enhancement in the above proposed terms. In doing so, the veil of obscurity related to the magnitude of the criminal history enhancement and the reasons for it being imposed would be lifted and, in addition, adequate appellate oversight would be ensured. Within the context of a push for better reasons given for sentences, it is a question of properly filling out the "Who? – Criminal past" section of the model sentencing form and transcribing it into the judgment, which should not prove overly tedious.[381]

9) The Supreme Court should be able to remand disproportionate sentences. Currently under § 265b (1) CPP, an extraordinary appeal on grounds of disproportionality cannot be filed. This could be amended by adding additional grounds of appeal: the lack of sufficient justification for a sentence in the reasons for judgment, and significant unjustified departure from standard sentencing practices. The first would be somewhat analogous to the ground for cassation within the administrative court system, where if the regional court decision cannot be reviewed due to a lack of justification in the reasons for judgment, the Supreme Administrative Court remands the decision back to the regional court.[382] The second would allow the Supreme Court to act as a unifier of sentencing practice and ensure compliance with case law.

4.2.2 Reforms in Practices of the Judiciary.

The first tool at the disposal of the judiciary is case law. Appellate courts and the Supreme Court can set out more detailed principles and approaches to specific criminal histories within their case law even without legislative intervention. This, however, requires at least some changes within current practice of writing reasons for judgment, as well as a willingness on the side of the courts to pursue a more active role in the criminal policy, that has been given to them by the legislator, when they omitted from declaring the aim of punishment in the Penal

[380] TOMŠŮ, Kristýna and Jakub DRÁPAL. *Odůvodnění trestů: Empirická studie rozhodnutí okresních soudů.*
[381] The model sentencing form was created by Jakub Drápal and is described in: DRÁPAL, Jakub. *Odůvodnění trestů: Principy správného odůvodňování trestů*.
[382] § 103 (1) d) Act No. 150/2002 Coll., Code of Administrative Court Procedure.

Code. However, to some extent, it is unlikely that a coherent system could emerge just from appellate decisions alone.[383]

Perhaps a more appropriate tool would be the issuance of a general opinion of the Supreme Court.[384] The Supreme Court can adopt a general opinion after monitoring the decision of subordinate courts in the interest of maintaining a unified practice.[385] Given the lack of any semblance of a unified approach to criminal history, as described in Section 3.5.4, it is quite obvious that an opinion on how courts should count criminal history and when and how to use enhance sentences accordingly would be in order. Within a general opinion, it would be particularly useful for the Supreme Court to unequivocally interpret the current § 42 q) PC, with precise guidance on when a court should not consider a previous conviction as an aggravating factor, which today is described rather vaguely. Furthermore, the Supreme Court could establish clear rules on the double counting of criminal history and the use of expunged convictions. The advantage is that such an approach would not require a legislative change and would decrease the chances that punitive populism intervenes in the clarification of how criminal history should be dealt with at sentencing.

Finally, the Prosecutor General can issue a general order,[386] which binds all public prosecutors in Czechia, to unify the approach of prosecutors in a certain area.[387] By doing this, the Prosecutor General could outline the approach of the Public Prosecutor's Office to criminal history when recommending sentences. In particular, prosecutors could be prevented from including expunged sentences in indictments. Additionally, unified standards should be adopted for how criminal history enhancements should be recommended. The recommendations should follow the formula outlined above, i.e., identify the part of the recommended sentence that is the criminal history enhancement, and how this amount was reached. Prosecutors should list previous convictions that they believe should be taken into account and suggest the weight that should be ascribed to them. This could either complement an equivalent policy on the side of courts or it could function independently. Given the strong

[383] DRÁPAL, Jakub. *Formulace a konkretizace principů ukládání trestů: Zahraniční přístupy a řešení vhodná pro český právní systém*.
[384] Ibid.
[385] § 14 (3) Act No. 6/2002 Coll., on courts and judges.
[386] § 12 (1) Act No. 283/1993 Coll., on the Public Prosecutor's Office.
[387] DRÁPAL, Jakub. *Formulace a konkretizace principů ukládání trestů: Zahraniční přístupy a řešení vhodná pro český právní systém*.

anchoring effect of prosecutorial recommendations, this could prove useful in stabilising the role of criminal history.[388]

4.2.3 Sentencing Information Systems

Sentencing information systems aggregate knowledge about sentencing within a given jurisdiction, providing a useful tool for practitioners. Within the Czech Republic, the only currently truly available platform with sentencing data is *Jak Trestáme*,[389] which contains descriptive statistics on sentences based on the crime committed and the aggravation level (as indicated by the highest subsection). In terms of criminal history, the application offers the option of sorting by the number of previous convictions.

The most complete set of sentencing data in Czechia is the Criminal Statistics Sheets collected and administered by the Ministry of Justice. The information on previous convictions represents some of the weakest data in the dataset, as the variable of "recidivist labelled by the court"[390] is considered unreliable, as it appears to be interpreted very differently by court officials. Regarding the number of previous convictions, while recidivists and first offenders were generally correctly distinguished, the number of previous convictions recorded in the individual sheets, and the number reported within the reasons for judgment was different in 24.32 % of cases.[391]

Some solutions to improve data quality would be to connect official criminal court data with data from the Register of Punishments. However, such a project is, at the time of writing, not completed. In the meantime, or in addition, it would be useful to change how data concerning criminal history are collected by court officials.[392] This would be best aligned with a general change in how criminal history is treated in the law and the reasons for judgment. Barring such a change, it would be beneficial to limit the timeframe of recorded previous convictions, while adding several new categories. According to the recommendations above, only the number of

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[388] ENGLICH, Birte. Blind or Biased? Justitia's Susceptibility to Anchoring Effects in the Courtroom Based on Given Numerical Representations. *Law & Policy*. 2006, vol. 28, no. 4, pp. 497–514. DOI: 10.1111/j.1467-9930.2006.00236.x

[389] lit. "How do we punish?". Available at: https://jaktrestame.cz.

[390] *soudem označený recidivista*

[391] VANČA, Tomáš and Jakub DRÁPAL. Statistické listy trestní soudů: Ověření jejich spolehlivosti. *Česká kriminologie*. 2021, no. 1–2, p. 14.

[392] VANČA, Tomáš and Jakub DRÁPAL. *Statistické listy trestní soudů: Ověření jejich spolehlivosti*.

previous sentences in the last ten years should be included. New categories for monitoring criminal history could include: i) the last offence committed, ii) whether the offender was on probation or had a suspended sentence hanging over them, iii) if the offence happened within a year or three years from when the last sentence was fully executed, and iv) the types of punishment imposed in the last sentence.[393] By doing so, all the dimensions of criminal history that were set out in Section 3.1. could be explored thoroughly, painting a more complete image of how criminal history is treated by courts. Researchers could then identify problematic ways in which criminal history is being treated and deliver more detailed findings and suggestions.

4.2.4 A Summary of the Normative Model

As described above, the following steps are proposed to create a new normative approach for criminal history enhancements in Czechia. The theoretical basis is derived from Roberts' enhanced culpability theory, Frase's limiting retributivism, and their joint model criminal history enhancements. The following legislative changes are proposed: i) substantial law amendments which set out rules for double counting, prohibit the use of old convictions, limit weight adjustments for previous conviction features with low predictive value, create desert-based proportionality constraints, allow courts to account for desistance efforts, and provide a mechanism which allows for extraordinary enhancements when dealing with high-risk violent offenders, while not completely abandoning proportionality; and ii) procedural law changes which introduce a sentencing hearing, create stricter rules for how criminal history enhancements should be treated in reasons for judgment, and introduce changes that would allow the Supreme Court to remand disproportionate sentences.

In addition, general opinions of the Supreme Court are recommended, which would unify the interpretation of past convictions as an aggravating factor, as well as deal with the currently ill-defined concept of double counting criminal history, and the role of expunged sentences. General orders of the Prosecutor General are proposed, which would oblige public prosecutors to identify the role of criminal history in sentence recommendations contained in their indictments. The final suggestion is meant to enhance the potential for future research and proposes finalising the connection between the Register of Punishments and the Criminal

[393] Suggestions for these categories are drawn from: VANČA, Tomáš and Jakub DRÁPAL. *Statistické listy trestní soudů: Ověření jejich spolehlivosti*, and the Slovakian Criminal Statistics Sheets administered by the Slovakian Ministry of Justice.

Statistics Sheets, as well as new categories related to criminal history that should be included in the Criminal Statistics Sheets. The recommendations above should allow for a complex reform of how criminal history is treated in Czech sentencing, which is consistent, principled, and aligned with both theoretical ethical views, as well as public opinion and expectations, and is viable within the current constraints of the penal system.

5. Sentencing Repeat Offenders in Action

While the first part of the thesis answered the question of how criminal history *should* affect sentencing, within the second part of the thesis, the following question was pursued, and that is, how criminal history *affects* sentencing outcomes. While the first question was answered primarily through intensive desk research, the latter being of an empirical nature calls for an empirical investigation. The inherent broadness of the question is constrained by the data available to the researcher: as such, it is distilled to an investigation of how previous criminal convictions affect whether a custodial sentence is delivered in Czechia.

The content of the second part is therefore sketched out as follows: i) basic concepts in criminal history enhancement research are introduced, ii) previous findings are discussed, iii) the current research is described, and its results presented and discussed.

5.1 Researching Criminal History Enhancements

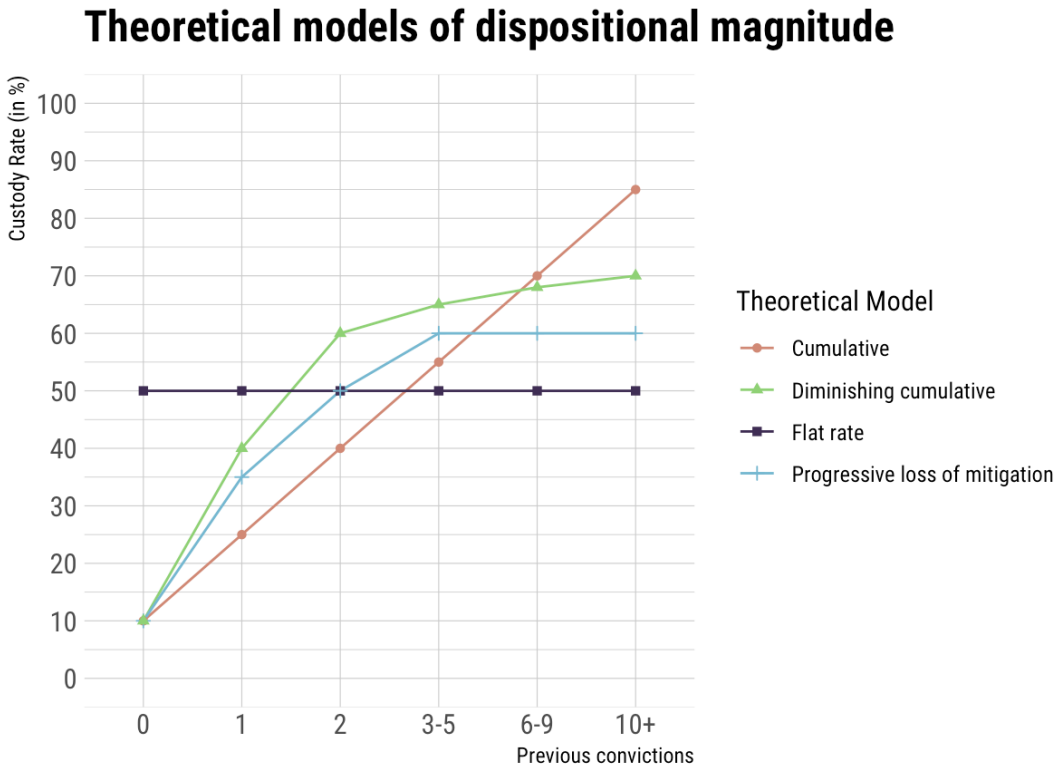
When observing criminal history enhancements from an empirical perspective, the variable of greatest interest tends to be the magnitude of the criminal history enhancement. The magnitude of the criminal history enhancement is best defined as the part of the penal value of the punishment that is imposed *solely* on the basis of criminal history. In research, two aspects are most frequently explored. The first is dispositional magnitude, which refers to what kind of punishment is imposed, most commonly whether the offender is imprisoned. The second is durational magnitude, which refers to the length of the punishment, in particular to the length of incarceration.[394]

In theory, there are four basic models of criminal history enhancements, which predict how the magnitude develops over multiple convictions: i) cumulative, where each further conviction affects the magnitude equally, as the criminal enhancement follows a linear pattern, ii) diminished cumulative, where each further conviction carries a slightly lesser criminal history enhancement, iii) flat rate, where there is no criminal history enhancement, and as such punishment remains equal, and iv) progressive loss of mitigation, where over the first couple

[394] FRASE, Richard S. and Rhys HESTER. Magnitude of Criminal History Enhancements. In: FRASE, Richard S. et al. *Criminal History Enhancements Sourcebook*. Robina Institute of Criminal Law and Criminal Justice, 2015, pp. 19–28.; HESTER, Rhys, Julian V ROBERTS and Richard S. FRASE. The Effects of Prior Convictions on Sentence Severity. In: ROBERTS, Julian V. and Richard S. FRASE. *Paying for the Past*. Oxford University Press, 2019, pp. 89–113. DOI: 10.1093/oso/9780190254001.001.0001

sentences the criminal history enhancement quickly rises, after which it flattens out.[395] Graph 4.1 shows how the custody rate changes relative to the number of previous convictions in each of the models.[396]

Graph 5.1



It should be pointed out that progressive loss of mitigation in action is practically impossible to tell from what could be referred to as progressive gain of aggravation. While empirically the same, theorists who refuse aggravation on the grounds of criminal history would reject the second option as unprincipled.[397]

When it comes to studying the magnitude of criminal history enhancements, two primary methods can be identified. The first studies sentencing guidelines, which precisely mandate the criminal history enhancement, primarily by using a two-dimensional grid with a predictable

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[395] ROBERTS, Julian V and Jose PINA SANCHEZ. Paying for the Past: The Role of Previous Convictions at Sentencing in the Crown Court. In: ROBERTS, Julian V., ed. *Exploring sentencing practice in England and Wales*. Houndsmills, Basingstoke, Hampshire ; New York, NY: Palgrave Macmillan, 2015, pp. 154–172.; ROBERTS, Julian V. and Richard S. FRASE. *Paying for the Past*, pp. 215–216.

[396] The graph is closely inspired by Figure 9.1 in ROBERTS, Julian V and Jose PINA SANCHEZ. *Paying for the Past: The Role of Previous Convictions at Sentencing in the Crown Court*., however it is expanded on and fitted towards a more lenient system than the English and Welsh crown courts.

[397] BAGARIC, Mirko. *The Punishment Should Fit the Crime - Not the Prior Convictions of the Person That Committed the Crime: An Argument for less Impact Being Accorded to Previous Convictions in Sentencing*.

criminal history score (*magnitude on paper*). The second looks at sentencing data and attempts through varying degrees of statistical sophistication to find the effect of various criminal history components (*magnitude in sentencing data*).[398] Both of these approaches have advantages and disadvantages, and while within the Czech context, only the second approach can be fully utilised,[399] the first still yields valuable data that can be used for comparison.

5.2 Magnitude on Paper

This research approach presumes a sentencing guideline that can be reduced to a two-dimensional matrix consisting of severity levels on one axis and criminal history scores on the other axis. One way in which dispositional magnitude could be approximated is by looking at cells within severity levels that allow for both custodial and noncustodial sentences. Then it is considered in how many cases the custodial sentence is imposed because of criminal history, i.e., where a noncustodial sentence would have been imposed if the criminal history score was lower.[400] Figure 4.1 illustrates the calculation method.

Of 13 US sentencing grids that were examined, the per cent of cells in which the offender is imprisoned for prior convictions ranged from 9% – 28%, with a mean of 18%.[401] However, sentencing data from Washington State and Minnesota suggested that this method of estimating dispositional magnitude is far from accurate, and obscures the significant differences between these jurisdictions. Therefore, this method is more appropriate to simply show the potential of the prior record to act as a sole reason for imprisonment, rather than to precisely estimate the dispositional magnitude in a given jurisdiction.

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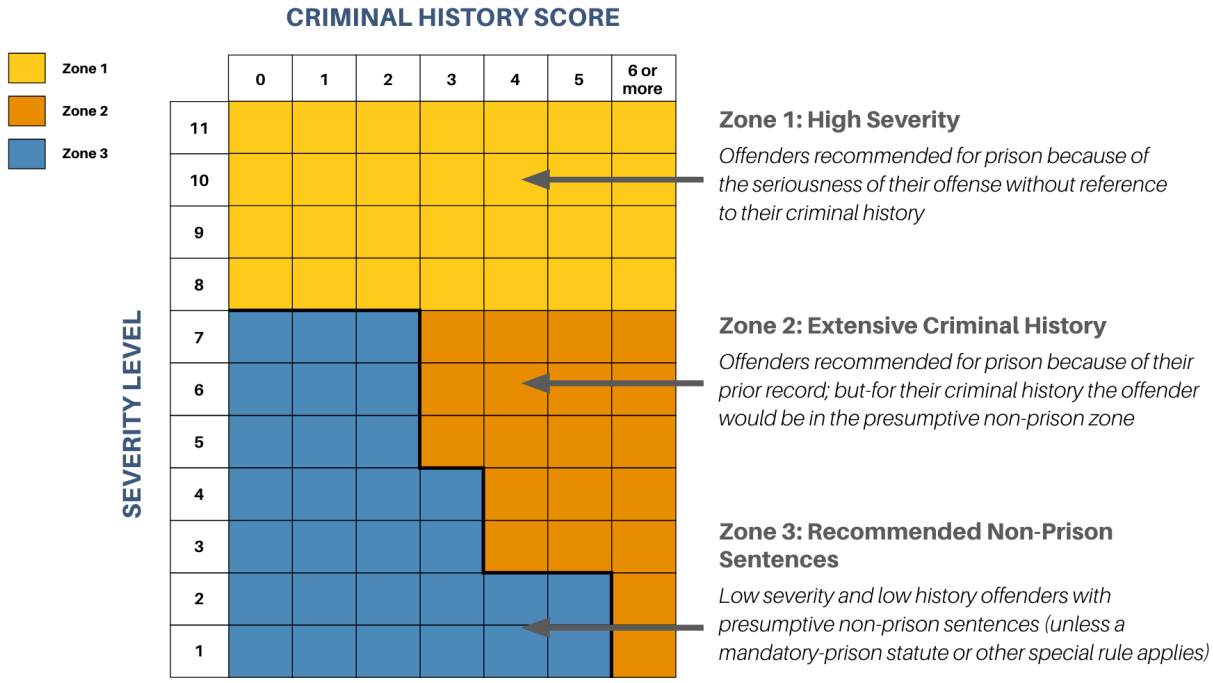
[398] FRASE, Richard S. and Rhys HESTER. *Magnitude of Criminal History Enhancements*.
[399] With the exception of special recidivist statutes, where the magnitude can be estimated by comparing what punishments would be like if they had been adjudicated under the standard provision, which is somewhat more akin to a magnitude on paper approach, which however still relies on sentencing data to estimate the sentences under the standard provision. See: DRÁPAL, Jakub. *Speciální skutkové podstaty pro recidivisty: nepromyšlené a škodlivé*.
[400] FRASE, Richard S. and Rhys HESTER. *Magnitude of Criminal History Enhancements*.; HESTER, Rhys, Julian V ROBERTS and Richard S. FRASE. *The Effects of Prior Convictions on Sentence Severity*.
[401] HESTER, Rhys, Julian V ROBERTS and Richard S. FRASE. *The Effects of Prior Convictions on Sentence Severity*. Table 5.1

Figure 5.1[402]



Note: The in/out formula applies to this sample grid as follows. Zone 2 contains 20 cells, and there is a total of 77 cells on the entire grid. Thus 20 out of 77, or 26%, of the cells on the grid recommend prison on account of criminal history.

Durational magnitude can be estimated on paper by looking at a given severity level on the grid and dividing the presumptive sentence for the highest criminal score by the presumptive score for the lowest criminal score.[403] A key finding is that this ratio decreases with increasing severity score, possibly because either the guidelines are based on an assumption that deterrence is more likely with low-severity offenders, or the sentences in the upper levels are so severe[404] that if they were enhanced at a similar rate, they would achieve lengths far beyond a single lifetime.[405] These average ratios across all severity levels range widely between the 13 jurisdictions, with a range of 1.7-14.4 and a mean of 6.3.[406] Sentencing data from Washington and Minnesota does not particularly validate this measure, as while the real ratio seems to be double in both cases, this doubling is caused by different mechanisms.[407]

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[402] FRASE, Richard S. and Rhys HESTER. *Magnitude of Criminal History Enhancements*. Figure 2.1.
[403] Ibid.; HESTER, Rhys, Julian V ROBERTS and Richard S. FRASE. *The Effects of Prior Convictions on Sentence Severity*.
[404] It is important to mention here that American sentences are generally significantly more severe than European sentences.
[405] HESTER, Rhys, Julian V ROBERTS and Richard S. FRASE. *The Effects of Prior Convictions on Sentence Severity*.
[406] Ibid. Table 5.3
[407] Ibid.

Interestingly enough, the dispositional and durational magnitude does not seem to be correlated, which suggests that the treatment of criminal history is either different from jurisdiction to jurisdiction or was as Hester et al. opine crafted without much in-depth consideration of its effect on sentence type and severity.[408] Overall the research on paper, while suggestive of the magnitudes of criminal history enhancements, does not shed much light on their exact extent. For this, we are left to look at how the magnitude appears in sentencing data.

5.3 Magnitude in Sentencing Data

Since the 1960s criminal record has been repeatedly found as the most important variable affecting whether an offender is imprisoned, and as the second most important determinant of the duration of a prison sentence.[409] Early regression research found no clear effect of arrest or conviction records on durational magnitude while finding a significant effect on dispositional magnitude as previous sentences indicated an incarceration decision.[410] It also showed that the definition of prior record matters, with prior prison record being a better predictor than previous convictions, who in turn, were a better predictor than previous arrests.

The operationalisation of criminal record within research can impact findings concerning other determinants, such as gender or race, leading to flawed conclusions about the presence or absence of discrimination. In the article by Spohn and Welch's, the effect on dispositional magnitude appeared to be greater for more serious offences.[411] This relates to the fact that later research on the magnitude of criminal history has been to a large extent incidental as researchers have struggled to determine whether minorities are discriminated against or not within the US legal system.

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[408] Ibid.
[409] WELCH, Susan and Cassia SPOHN. Evaluating the Impact of Prior Record on Judges' Sentencing Decisions: A Seven-City Comparison. *Justice Quarterly*. 1986, vol. 3, no. 4, pp. 389–408.; VIGORITA, Micheal S. Prior Offense Type and the Probability of Incarceration: The Importance of Current Offense Type and Sentencing Jurisdiction. *Journal of Contemporary Criminal Justice*. SAGE Publications Inc, 2001, vol. 17, no. 2, pp. 167–193. DOI: 10.1177/1043986201017002006
[410] WELCH, Susan and Cassia SPOHN. *Evaluating the Impact of Prior Record on Judges' Sentencing Decisions: A Seven-City Comparison*.
[411] SPOHN, Cassia and Susan WELCH. The Effect of Prior Record in Sentencing Research: An Examination of the Assumption that any Measure is Adequate Articles on Criminal Justice. *Justice Quarterly*. 1987, vol. 4, no. 2, pp. 287–302.

Within the discrimination research, repeated findings of a strong effect of prior record on sentencing severity were identified.[412] Equally, serious criminal records make guideline departures in favour of the offender much less likely.[413] Nevertheless, these findings were not replicated when looking strictly at drug offences (n = 14 819) in the US federal system between 1991-1992; [414] however, later research found the effect on severity even within drug offences in 1997-1998 data (n = 19 414).[415] A hierarchical linear model approach found significant effects of prior record on both dispositional and durational magnitude, as well as serious variation between how prior records were used between courts.[416] MacDonald et al. claim that a sufficiently complex model of criminal history (13 dummy variables) is capable of explaining differences between sentencing black and white American offenders when it comes to prison commitments for drug offences.[417] MacDonald and Rapheal repeated this finding by studying a further legislative change in 2020.[418] On the other hand, interactive effects of criminal history have been investigated, showing that criminal history appears to have a different effect based on the race of the offender, meaning the debate over race and criminal history is far from settled.[419]

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[412] ALBONETTI, Celesta A. An Integration of Theories to Explain Judicial Discretion Explaining Reactions to Deviance. *Social Problems*. 1991, vol. 38, no. 2, pp. 247–266.; KAUTT, Paula and Cassia SPOHN. Crack-ing down on black drug offenders? Testing for interactions among offenders' race, drug type, and sentencing strategy in federal drug sentences. *Justice quarterly*. ABINGDON: Taylor & Francis Group, 2002, vol. 19, no. 1, pp. 1–35. DOI: 10.1080/07418820200095151; MACDONALD, John et al. Decomposing Racial Disparities in Prison and Drug Treatment Commitments for Criminal Offenders in California. *The Journal of legal studies*. CHICAGO: University of Chicago Press, 2014, vol. 43, no. 1, pp. 155–187. DOI: 10.1086/675728

[413] KRAMER, John H. and Jeffrey T. ULMER. Sentencing Disparity and Departures from Guidelines. *Justice Quarterly*. 1996, vol. 13, no. 1, pp. 81–106.

[414] ALBONETTI, Celesta A. Sentencing under the Federal Sentencing Guidelines: Effects of Defendant Characteristics, Guilty Pleas, and Departures on Sentence Outcomes for Drug Offenses, 1991-1992. *Law & Society Review*. 1997, vol. 31, no. 4, pp. 789–822.

[415] KAUTT, Paula and Cassia SPOHN. *Crack-ing down on black drug offenders? Testing for interactions among offenders' race, drug type, and sentencing strategy in federal drug sentences*.

[416] ULMER, Jeffery T. and Brian JOHNSON. Sentencing in Context: A Multilevel Analysis. *Criminology (Beverly Hills)*. Oxford, UK: Blackwell Publishing Ltd, 2004, vol. 42, no. 1, pp. 137–178. DOI: 10.1111/j.1745-9125.2004.tb00516.x

[417] MACDONALD, John et al. *Decomposing Racial Disparities in Prison and Drug Treatment Commitments for Criminal Offenders in California*.

[418] MACDONALD, John and Steven RAPHAEL. Effect of scaling back punishment on racial and ethnic disparities in criminal case outcomes. *Criminology & public policy*. HOBOKEN: Wiley, 2020, vol. 19, no. 4, pp. 1139–1164. DOI: 10.1111/1745-9133.12495

[419] KAUTT, Paula and Cassia SPOHN. *Crack-ing down on black drug offenders? Testing for interactions among offenders' race, drug type, and sentencing strategy in federal drug sentences*.; FRANKLIN, Travis W. and Tri Keah S. HENRY. Racial Disparities in Federal Sentencing Outcomes: Clarifying the Role of Criminal History. *Crime & Delinquency*. SAGE Publications Inc, 2020, vol. 66, no. 1, pp. 3–32. DOI: 10.1177/0011128719828353

More specific research on 1990 data (n = 1 073) into dispositional magnitude using a logistic regression found as a statistically significant determinant of incarceration that the offender was previously incarcerated or that they previously committed an offence against the person. On the contrary, such an effect was not found when they committed other kinds of offences. Prior offence type and record were found to have a greater impact on offenders being sentenced for nonviolent or minor offences, while the effect on the probability of incarceration for offenders being sentenced for a violent or serious offence was much smaller.[420] A large study of dispositional magnitude in Florida (n = 567 061) found the effect of previous convictions for violent offences to be stronger than that of other prior convictions; however, all prior offences had a positive statistically significant effect on the incarceration decision.[421]

Research using only descriptive statistics showed that criminal history enhancements were present in and significantly increased sentences in China between 2000-2011, while the status of *repeated offender*[422] did not particularly affect the court's decision on incarceration or duration.[423] This may have however changed since the 2014 Supreme People's Court sentencing guidelines, which provide more detailed guidance for treating criminal history.[424] When looking at closer jurisdictions, a 2014 Dutch study (n = 99 213) found that the odds of incarceration increased between 1.14 - 1.22 for each previous conviction (based on the type of offence) with previous property offences increasing the odds slightly more. Having a previous prison sentence increased the odds of incarceration by 3.99. Prison sentences were also extended based on the number of previous convictions.[425]

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[420] VIGORITA, Micheal S. *Prior Offense Type and the Probability of Incarceration: The Importance of Current Offense Type and Sentencing Jurisdiction*.

[421] CROW, Matthew S. The Complexities of Prior Record, Race, Ethnicity, and Policy: Interactive Effects in Sentencing. *Criminal Justice Review*. SAGE Publications Inc, 2008, vol. 33, no. 4, pp. 502–523. DOI: 10.1177/0734016808320709

[422] Somewhat similar to the 1961 Czechoslovak Penal Code's „*zvlášť nebezpečný recidivista*" which expected the court to label and sentence more harshly certain categories of repeat offenders, however at the same time it is much broader and captures many more offenders.

[423] LAO, Jiaqi. The complexities of prior record, current crime type, and Hukou status in China: interactive effects in sentencing. *Peking University law journal*. Routledge, 2016, vol. 4, no. 1, pp. 125–142. DOI: 10.1080/20517483.2016.1174437

[424] ROBERTS, Julian V. and Wei PEI. Structuring Judicial Discretion in China: Exploring the 2014 Sentencing Guidelines. *Criminal Law Forum*. 2016, vol. 27, no. 1, pp. 3–33. DOI: 10.1007/s10609-015-9270-3

[425] WERMINK, Hilde et al. Expanding the scope of sentencing research: Determinants of juvenile and adult punishment in the Netherlands. *European Journal of Criminology*. 2015, vol. 12, no. 6, pp. 739–768. DOI: 10.1177/1477370815597253

Cassidy and Rydberg analysed Pennsylvania data for 2007-2010 (n = 75 675) using linear quantile mixed models to properly estimate durational magnitude. This analysis found the greatest relative durational enhancements for property crimes, followed by drug, violent, and sex offences. The greater the absolute sentences were for first-time offenders, the smaller the enhancements seemed to be.[426] In Minnesota with data spanning 1981-2013 (n = 355 551), King observed that criminal history seemed to not only increase incarceration chances for individual sentences but also was responsible through a cumulative effect of increasing the overall percentage of custodial sentences over the years.[427]

Czech research on the topic has been incidental by nature, since previous convictions were used as a covariate, rather than being the main subject of the research. Drápal and Pina Sánchez explored the effect of weather on sentencing in a sample of 20,064 cases of Prague district courts. Odds ratios of incarceration were reported ranging from 3.13 for offenders with 1 or 2 previous convictions, up to 28.5 for offenders with 10 to more convictions, when compared with first offenders.[428] In research on inter-court disparities in Czechia, very different effects of criminal history were reported for the three crimes analysed, with the effect being by far the largest on evasion of alimony payments (§ 196 PC), less so on frustrating execution of an official decision (§ 337 (1) a) PC), and by far the lowest on repeated theft (§ 205 (2) PC).[429]

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[426] CASSIDY, Michael and Jason RYDBERG. Analyzing Variation in Prior Record Penalties Across Conviction Offenses. *Crime & Delinquency*. SAGE Publications Inc, 2018, vol. 64, no. 7, pp. 831–855. DOI: 10.1177/0011128717693215

[427] KING, Ryan D. Cumulative Impact: Why Prison Sentences Have Increased. *Criminology*. 2019, vol. 57, no. 1, pp. 157–180.

[428] DRÁPAL, Jakub and José PINA-SÁNCHEZ. Does the weather influence sentencing? Empirical evidence from Czech data. *International Journal of Law, Crime and Justice*. 2019, vol. 56, pp. 1–12. DOI: 10.1016/j.ijlcj.2018.09.004

[429] DRÁPAL, Jakub. Sentencing disparities in the Czech Republic: Empirical evidence from post-communist Europe. *European Journal of Criminology*. SAGE Publications, 2020, vol. 17, no. 2, pp. 151–174. DOI: 10.1177/1477370818773612

6. Empirical Analysis of Sentencing Repeat Offenders in Czechia

6.1 Data, Variables, and Analytical Approach

6.1.1 Data

Given the fact that the Penal Code sets out only broad ranges for sentencing and does not provide a comprehensive framework for an on-paper analysis, the only possible approach is to look at real sentencing data. The best currently available dataset that contains real sentencing data in Czechia is the Criminal Statistics Sheets collected and administered by the Ministry of Justice. They are based on anonymous forms that are collected after every criminal proceeding is concluded.

There are some apparent advantages to these data: they represent a complete set for the entire country from 2006-2022 and contain basic demographic information about the offender, certain data about the type of procedure that was used, and complex data about the legal classification of the crime or crimes that were committed, as well as the punishment that was imposed.

The disadvantages are that legal categories can obscure the actual severity of the crime as they tend to encompass behaviours of different gravities. While the data contains two measures of criminal past, one being the number of previous convictions, the other being the category of "recidivist labelled by the court", there are issues with them. The first is somewhat unreliable, as courts tended to record slightly different numbers in the statistics than what was written in the reasons for judgment, while the category of "recidivist labelled by the court" was largely unreliable.[430] Vanča and Drápal recommend clustering the number of previous convictions while disregarding the data for "recidivist labelled by the court" completely.

For practical reasons, only convictions according to the current Penal Code are included in the regression models, meaning crimes committed after 1. 1. 2010. This is because the adoption of the current Penal Code substantially changed the level of criminal repression, mostly by lengthening sentences, but also changing the definitions of various crimes, making the inclusion of data before and after its entry into effect incredibly difficult without creating unnecessary imprecisions. Also omitted are records related to juvenile (< 18) offenders, as they are punished differently than adult offenders.

[430] VANČA, Tomáš and Jakub DRÁPAL. *Statistické listy trestní soudů: Ověření jejich spolehlivosti*.

6.1.2 Variables

Given the fact that the data about the seriousness of the offence is reduced to sentencing ranges, and data concerning criminal history is rather limited, it would be imprudent to attempt any OLS regression with the length of prison sentences as a dependent variable. Unfortunately, this makes measuring durational magnitude impossible; however, this is seen as preferable to including a misleading model.

Being left with dispositional magnitude, the incarceration decision can be used as the dependent variable. Incarceration is defined as an unsuspended prison sentence under § 52 (2) a) and § 55 PC and is coded as a dummy variable (1 = unsuspended prison sentence). Although suspended sentences can lead to a prison sentence upon revocation, they are used differently and seen as a different kind of punishment.[431] Therefore, all regression models measure the dispositional magnitude of the criminal history enhancement employing the incarceration variable.

As far as independent variables are concerned, the primary variable of interest is the number of previous convictions, which are clustered as 0, 1, 2, 3-5, 6-9 and 10+. This copies the model in Graph 4.1 and copies some of the key expected turning points of certain sentencing approaches. The other independent variables are described in the following passages.

Legal Factors

Legal factors include categories that are anticipated by the law and are generally considered to be licit and desirable determinants of punishment.

1. Seriousness was determined by the lower and upper bounds of punishment and split into five categories: i) petty (maximum ≤ 2 years), ii) misdemeanour (maximum ≤ 5), iii) felony (maximum > 5 and minimum < 5, iv) grievous felony (minimum ≥ 5), and v) fatal felonies (maximum ≥ 16). These categories are based on sentencing limitations (§ 55 (2), § 58 PC), and procedural rules (district v. regional courts in the first instance - § 17 CPP).

[431] DRÁPAL, Jakub. *Sentencing disparities in the Czech Republic: Empirical evidence from post-communist Europe.*

2. Key offence types were split into the following groups: i) Theft (§ 205-206 PC), ii) Fraud (§ 209-212 PC), iii) DUI (§ 274 PC), iv) Drugs (§ 283-287 PC), v) Assault (§ 145-146 PC), vi) Robbery (§ 173 PC).
3. Crime was represented as the number of the section where it is defined in the Penal Code. For district court data models, the 15 most common crimes adjudicated at that level are used, for regional court models the 10 most common crimes are used. See Appendix II. for the full descriptive statistics table.
4. Multiple offences were represented by a dummy variable, which is equal to 1 if the offender was sentenced for multiple crimes at the same time. For the purposes of the variables above, the most serious crime is considered.
5. Pre-trial detention was represented by a dummy variable which is equal to 1 if the offender was held in pre-trial detention.

Extra-legal factors

Extra-legal factors were chosen based on the fact that they have been identified in previous studies as explanatory. Court and region-specific data are used because of the strong disparities that have been observed.[432]

1. Age was clustered as i) 18-21 (close to juvenile according to case law), ii) 22-30, iii) 31-40, iv) 40-50, v) 50-65, vi) 65+. The older groups were somewhat more structured than usual, due to the suspected changing role of criminal history among the older groups.
2. Gender was represented by a dummy variable, which was equal to 1 when the offender is female.
3. Nationality was represented by a dummy variable, which was equal to 1 when the offender is not a Czech national.
4. The adjudicating court was represented both by a variable identifying the court, as well as variables denoting the region (2nd instance court) where it is located, and dummy variables indicating if the court is a district or regional court.

[432] Ibid.

6.1.3 Analytical Approach

In the first stage, descriptive statistics were computed, which describe the custody rates at the set levels of prior convictions for various types of offences. These are compared with theoretical models, as well as data from England and Wales Crown Courts.[433]

Logistic regression is the logical and most common approach to studying the incarceration decision, because of the binary outcome.[434] The binary dependent variable (incarcerated/not incarcerated) makes using an OLS regression inappropriate.[435] Given that the sentencing decision is based on many variables being considered by the sentencing judge, multiple logistic regression is necessary to account for as many potential confounding factors as possible.

Multiple models were used to examine the effect of previous convictions at the district / regional level and across offence types. This has two advantages, as comparisons can be made between them, and collinearities within the individual models can be avoided. The interactive effects between previous convictions and age, and previous convictions and seriousness were explored.

The program used for all the calculations was RStudio 2022.02.1+461 "Prairie Trillium" Release for macOS, R version 4.1.3 (2022-03-10). All packages used are cited in the appropriate section of the bibliography.

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[433] ROBERTS, Julian V. and Jose PINA-SÁNCHEZ. Previous convictions at sentencing: Exploring Empirical Trends in the Crown Court. *Criminal law review*. 2014, vol. 2014, no. 1, pp. 575–588.
[434] VIGORITA, Micheal S. *Prior Offense Type and the Probability of Incarceration: The Importance of Current Offense Type and Sentencing Jurisdiction.*; CROW, Matthew S. *The Complexities of Prior Record, Race, Ethnicity, and Policy: Interactive Effects in Sentencing.*; WERMINK, Hilde et al. *Expanding the scope of sentencing research*.
[435] WEISBURD, David et al. *Advanced statistics in criminology and criminal justice*. Cham, Switzerland: Springer, 2022, p. 130.

Table 6.1: Summary statistics (select variables)

Variable	N	Per cent	Variable	N	Per cent	Variable	N	Per cent
Incarceration	774915		**Regional court**	774915		**Common offence at district level**	662114	
... No	626480	80.84%	... No	762168	98.36%	... § 146 Bodily harm	25246	3.81%
... Yes	148435	19.16%	... Yes	12747	1.64%	... § 147 Negligent grievous bodily harm	7728	1.17%
Previous convictions	774915		**Region**	774915		... § 173 Robbery	10704	1.62%
... 0	246284	31.78%	... Southern Bohemia	49872	6.44%	... § 178 Trespassing	28659	4.33%
... 1	129261	16.68%	... Southern Moravia	120543	15.56%	... § 196 Evasion of alimony payments	84695	12.79%
... 2	88221	11.38%	... Prague	97515	12.58%	... § 201 Endangering the welfare of a child	9304	1.41%
... 3-5	155407	20.05%	... Northern Bohemia	124581	16.08%	... § 205 Theft	152729	23.07%
... 6-9	97158	12.54%	... Northern Moravia	148089	19.11%	... § 206 Embezzlement	15627	2.36%
... 10+	58584	7.56%	... Central Bohemia	89322	11.53%	... § 209 Fraud	31131	4.7%
Seriousness	774915		... Eastern Bohemia	72339	9.34%	... § 211 Loan fraud	19118	2.89%
... Petty	372747	48.1%	... Western Bohemia	72654	9.38%	... § 228 Property damage	10924	1.65%
... Misdemeanour	337040	43.49%	**Pre-trial detention**	774915		... § 274 DUI	123030	18.58%
... Felony	56246	7.26%	... No	732735	94.56%	... § 283 Drug trafficking	24716	3.73%
... Grievous felony	7273	0.94%	... Yes	42180	5.44%	... § 337 Frustrating execution of an official decision	96152	14.52%
... Fatal felony	1609	0.21%	**Age**	774915		... § 358 Public mischief	22351	3.38%
Offence type	774915		... 18-21	89416	11.54%	**Common offence at region level**	10266	
... Assault	30525	3.94%	... 22-30	239102	30.86%	... § 140 Murder	1091	10.63%
... Drugs	33372	4.31%	... 31-40	238021	30.72%	... § 145 Grievous bodily harm	810	7.89%
... DUI	123033	15.88%	... 41-50	136973	17.68%	... § 173 Robbery	812	7.91%
... Fraud	54626	7.05%	... 51-64	62213	8.03%	... § 185 Rape	667	6.5%
... Robbery	11516	1.49%	... 65+	9190	1.19%	... § 205 Theft	287	2.8%
... Theft	168925	21.8%	**Female**	774915		... § 206 Embezzlement	282	2.75%
... Other	352918	45.54%	... No	660109	85.18%	... § 209 Fraud	1732	16.87%
Multiple offences	774915		... Yes	114806	14.82%	... § 211 Loan fraud	350	3.41%
... No	599739	77.39%	**Foreigner**	774915		... § 240 Tax Evasion	1684	16.4%
... Yes	175176	22.61%	... No	713546	92.08%	... § 283 Drug trafficking	2551	24.85%
			... Yes	61369	7.92%			

6.2 Results

6.2.1 Descriptive Statistics

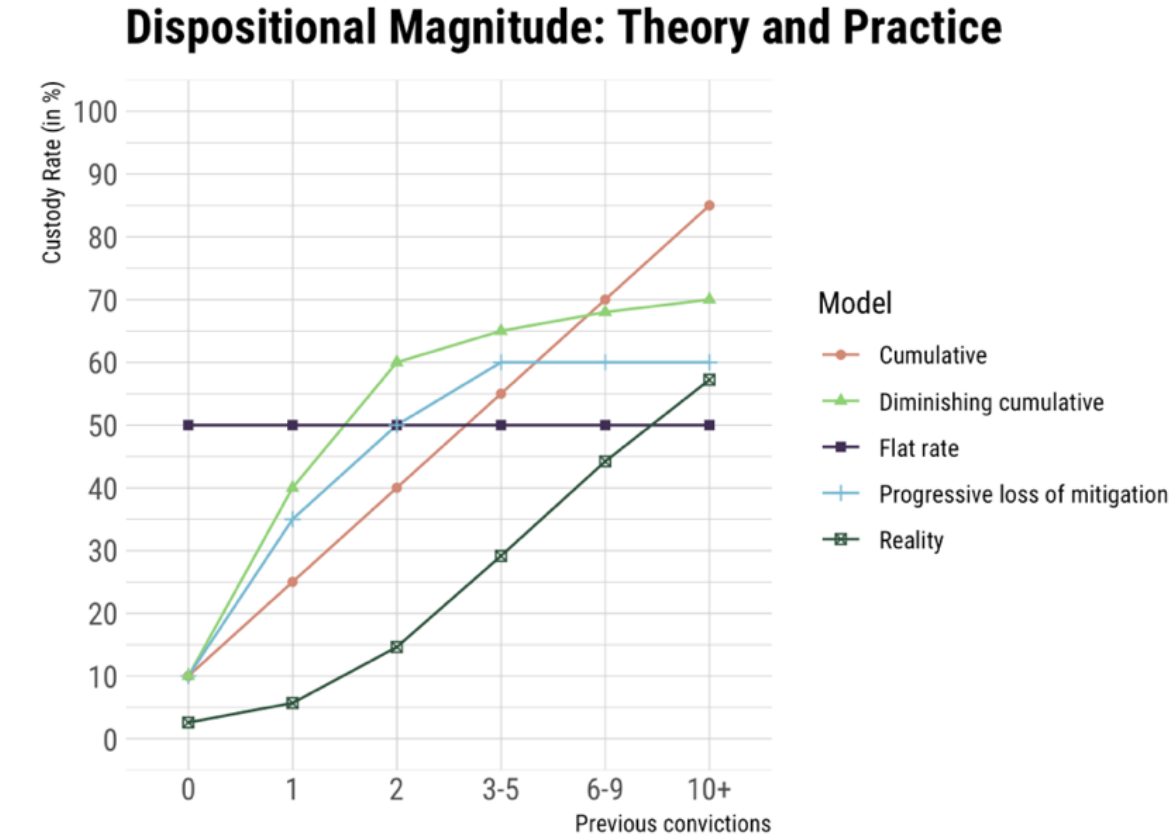
On a custody rate plot, the Czech system of criminal history enhancements most closely resembles the theoretical model of cumulative criminal history enhancements as shown in Graph 6.1. This is especially apparent in Graph 6.5 which clusters somewhat more uniformly. There seems to be a slightly lesser increase until the third offence, after which the pattern appears rather linear. The clustering unfortunately makes it difficult to state with confidence.

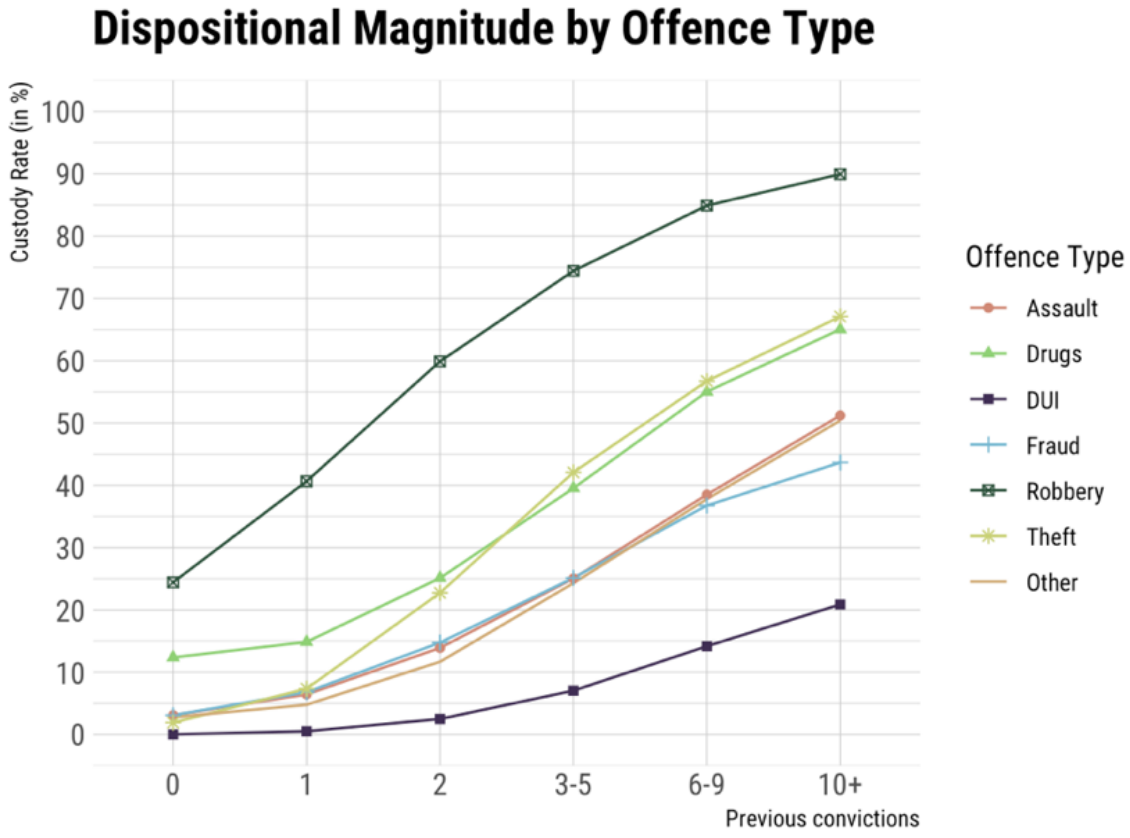
Table 6.2 Custody Rate by Offence Type

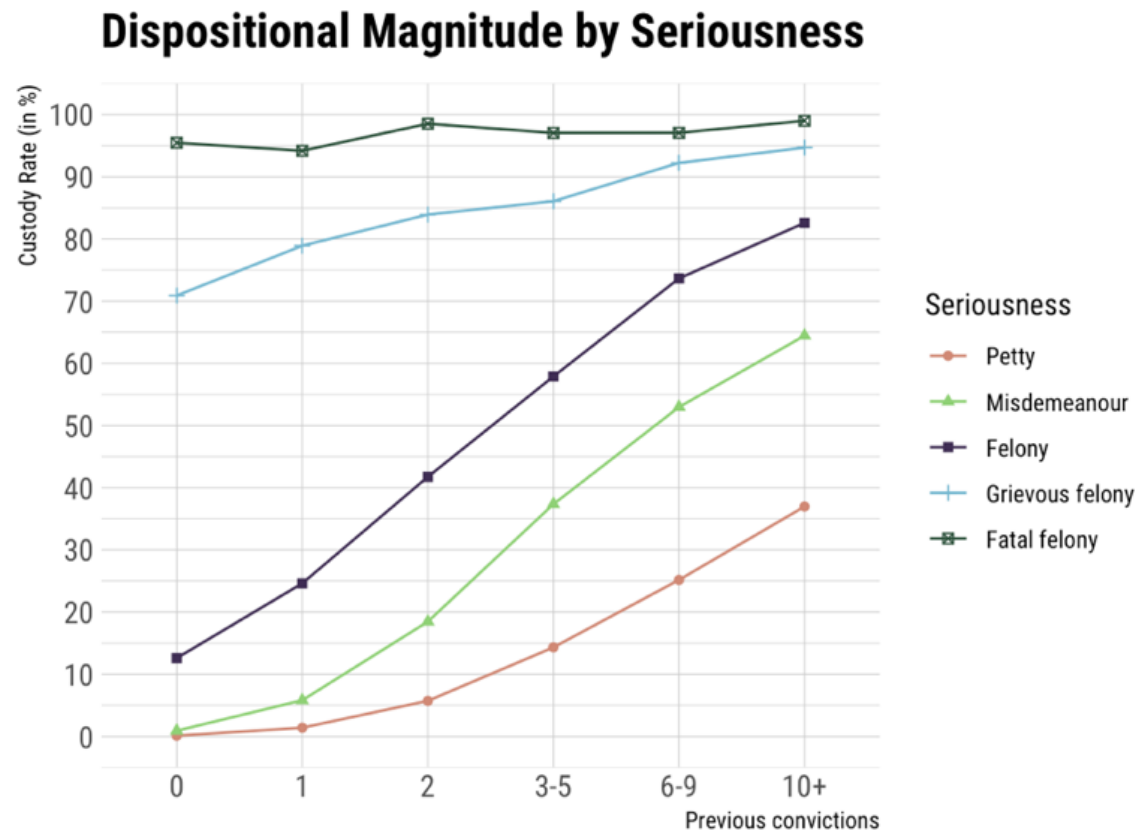
	Custody Rate (in %)							
Previous convictions	All offences	Theft	Fraud	DUI	Assault	Drugs	Robbery	Other
0	2.6	1.9	3.09	0.02	3.1	12.37	24.43	2.77
1	5.7	7.35	6.8	0.52	6.43	14.86	40.65	4.78
2	14.63	22.74	14.76	2.49	13.91	25.11	59.89	11.68
3-5	29.15	42.08	25.14	7.04	25.04	39.53	74.42	24.3
6-9	44.2	56.73	36.76	14.17	38.5	55.02	84.91	37.79
10+	57.22	67.1	43.66	20.88	51.21	65.05	89.94	50.4

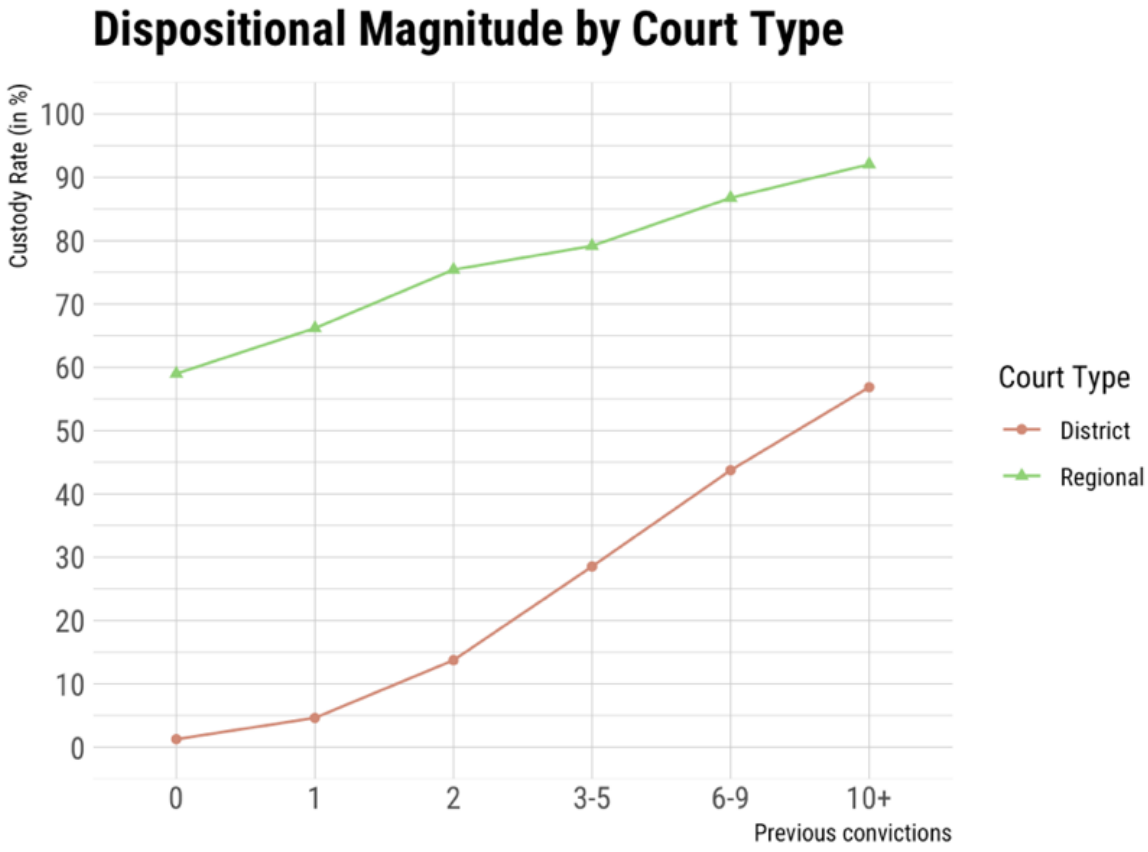
When it comes to the relationship between custody rate and prior offences examined by seriousness levels on Graph 6.3, two things are apparent: i) prior offences do not intrude on ordinal proportionality, as at all criminal history levels their respective custody rate is lined up by seriousness, and ii) the patterns for each seriousness level are different. For less serious crimes the overall changes are greater, as they ascend from low percentages to significantly higher ones. The difference between petty crimes and misdemeanours might not be perceptible for first offenders, but becomes very clear as criminal history intensifies. For felonies, the increase is the clearest; however, it seems to follow a somewhat more diminishing cumulative approach, rather than the typical cumulative approach. In grievous felonies a similar trend is observed; however, the initial custody rate is rather high, making the effect less dramatic. For fatal felonies, the initial custody rate is so high that there is no clear criminal history enhancement at all, which reflects the gravity of the crimes in this category.

Graphs of Dispositional Magnitude. 6.1: Theory and Practice. 6.2: by Seriousness. 6.3: by Offence Type. 6.4: by Court Type.






Dispositional Magnitude by Seriousness
Custody Rate (in %)
100
90
80
70
60
50
40
30
20
10
0
0
1
2
3-5
6-9
10+
Previous convictions
Seriousness
Petty
Misdemeanour
Felony
Grievous felony
Fatal felony


Dispositional Magnitude by Court Type
Custody Rate (in %)
100
90
80
70
60
50
40
30
20
10
0
0
1
2
3-5
6-9
10+
Previous convictions
Court Type
District
Regional

Looking at select offence types, it becomes apparent that ordinal proportionality is not respected as prior offences increase. This is especially clear for theft, which has the second lowest custody rate for first offenders and the second highest for 10+ prior offences offenders. Theft, therefore, seems to follow a particularly harsh kind of cumulation which appears during the third offence and beyond, almost as a strange variation on a three-strikes provision. For other crimes, the patterns are relatively typical, with cumulation being the standard for DUI, fraud, and assault as the less serious offences. Drug trafficking as an intermediately serious set of offences seems to follow a pattern of slightly diminishing cumulation, whereas robbery practically copies the general felony pattern, which is diminishing cumulative.

Differences between regional and district courts follow the seriousness of the crimes adjudicated there, with the regional graph most closely copying the trend for grievous felonies, while district courts followed the trend of misdemeanours.

Overall, the descriptive statistics can be summarised as pointing towards two trends unravelling at different levels of seriousness. Lesser crimes suffer from greater enhancements in custody rate, seemingly following a more cumulative model, whereas greater crimes have lesser relative enhancements, suggesting more of a diminishing cumulative model.

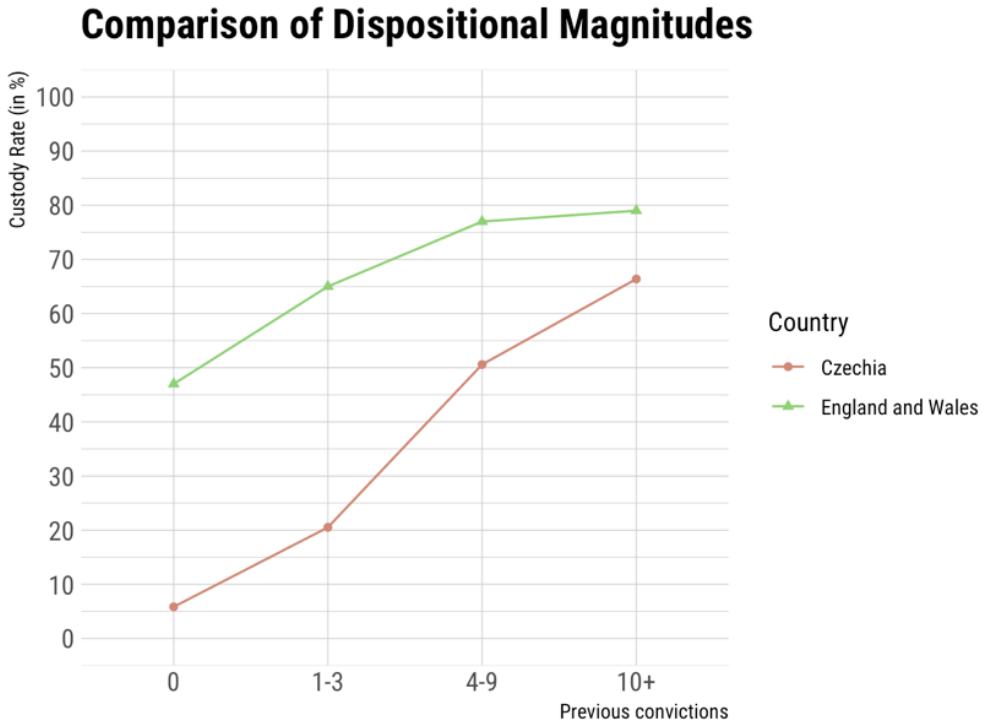
For the comparison between Czech and English data to be possible, the Czech data had to be reclustered to match the Crown Court data. In addition, for a fairer comparison, petty offences were dropped from the dataset, as their English equivalents could more likely be adjudicated in a Magistrates' Court.[436] The Crown Court data (2011) itself was taken from Roberts and Pina-Sánchez's book chapter.[437]

When comparing Czech results to England and Wales, some differences emerge. The Czech system starts as significantly more lenient, but through the cumulative model, it ends up with similar custody rates as the English one at 10+ convictions. However, the system in England and Wales is much more in line with a diminishing cumulative system. More detailed graphs

[436] There is no perfect way to do this, and perhaps not even a particularly good one. However, this appears to be the best known way to make the sentencing outcomes at least roughly comparable. With a complete English dataset, this could be largely improved on, and could be the subject of a future study.
[437] ROBERTS, Julian V and Jose PINA SANCHEZ. *Paying for the Past: The Role of Previous Convictions at Sentencing in the Crown Court*.

are provided in Appendix III., where the same trend as in Graph 6.1 can be observed across multiple offence types.

Graph 6.5



6.2.2 Regression Models

A total of 13 basic regression models were computed, which are reported in Tables 6.2 and 6.3 with an additional 9 models that are reported in Appendix IV. For the sake of conciseness, only the models based on regions are included in the body of the thesis, while the longer regression models based on individual courts are located in Appendix IV.

Model Description

In Table 6.2 model (1) represents the entire dataset, model (2) represents all cases that were adjudicated by district courts with seriousness as a covariate, model (3) represents cases where the 15 most common crimes were committed and which were adjudicated by district courts using the crime committed as a covariate instead of seriousness. Model (4) represents all cases that were adjudicated by regional courts with seriousness as a covariate, while model (5) represents cases where the 10 most common crimes adjudicated by regional courts were committed. Model (6) represents the interaction between previous convictions and age, while model (7) represents the interaction between previous convictions and the seriousness of the offence.

Table 6.2: General Regressions

Dependent variable: Incarceration							
	Odds Ratio (95 % CI)					Interactions	
	(1)	(2)	(3)	(4)	(5)	(6)	(7)
	All Cases	District (All)	District (top 15)	Regional (All)	Regional (top 10)	Age	Seriousness
Previous convictions : 1 (ref. 0)	3.83*** (3.66, 4.01)	4.66*** (4.43, 4.90)	5.13*** (4.83, 5.46)	1.68*** (1.47, 1.92)	1.46*** (1.27, 1.69)	4.31*** (3.99, 4.65)	6.97*** (6.41, 7.58)
Previous convictions : 2	14.75*** (14.13, 15.40)	18.47*** (17.61, 19.37)	20.43*** (19.26, 21.67)	2.74*** (2.29, 3.28)	2.31*** (1.91, 2.79)	18.30*** (17.06, 19.63)	28.29*** (26.13, 30.62)
Previous convictions : 3-5	46.29*** (44.46, 48.20)	58.41*** (55.83, 61.10)	61.30*** (57.92, 64.88)	3.34*** (2.84, 3.94)	3.02*** (2.54, 3.60)	63.00*** (59.07, 67.20)	88.97*** (82.43, 96.02)
Previous convictions : 6-9	111.33*** (106.74, 116.12)	141.17*** (134.72, 147.92)	136.78*** (129.04, 144.99)	6.29*** (4.93, 8.02)	3.95*** (3.07, 5.09)	155.77*** (145.60, 166.65)	206.70*** (191.30, 223.33)
Previous convictions : 10+	247.12*** (236.29, 258.45)	315.77*** (300.60, 331.71)	275.63*** (259.41, 292.88)	11.66*** (7.81, 17.39)	8.66*** (5.52, 13.59)	251.23*** (230.54, 273.78)	451.94*** (417.51, 489.22)
Petty (ref. Misdemeanour; Regional Courts: Felony)	0.39*** (0.39, 0.40)	0.40*** (0.39, 0.40)				0.40*** (0.39, 0.41)	0.16*** (0.13, 0.19)
Felony	2.19*** (2.13, 2.26)	2.12*** (2.06, 2.18)				2.21*** (2.15, 2.27)	8.07*** (7.38, 8.83)
Grievous felony	81.11*** (74.95, 87.77)			5.85*** (5.23, 6.53)		60.07*** (55.67, 64.82)	269.25*** (239.38, 302.84)
Fatal felony	171.12*** (127.69, 229.32)			19.54*** (14.65, 26.06)		133.70*** (100.24, 178.33)	618.78*** (414.13, 924.56)
Multiple offences	1.43*** (1.41, 1.46)	1.44*** (1.42, 1.46)	2.12*** (2.08, 2.16)	1.27*** (1.14, 1.42)	1.54*** (1.36, 1.75)	1.43*** (1.41, 1.46)	1.44*** (1.41, 1.46)
Pre-trial detention	20.46*** (19.74, 21.21)	22.40*** (21.57, 23.27)	25.83*** (24.71, 27.01)	6.19*** (5.46, 7.02)	5.56*** (4.81, 6.41)	20.38*** (19.67, 21.12)	18.46*** (17.82, 19.12)
Age 18-21 (ref. 22-30)	1.48*** (1.44, 1.52)	1.52*** (1.48, 1.57)	1.45*** (1.41, 1.50)	0.84 (0.68, 1.05)	0.84 (0.66, 1.08)	0.86*** (0.78, 0.96)	1.50*** (1.45, 1.54)
Age 31-40	0.56*** (0.55, 0.57)	0.56*** (0.54, 0.57)	0.60*** (0.58, 0.61)	1.02 (0.89, 1.18)	1.08 (0.93, 1.25)	1.12*** (1.03, 1.22)	0.56*** (0.55, 0.57)
Age 41-50	0.38*** (0.37, 0.39)	0.37*** (0.36, 0.38)	0.41*** (0.40, 0.42)	0.99 (0.86, 1.15)	1.12 (0.95, 1.32)	1.10* (1.00, 1.22)	0.38*** (0.37, 0.39)
Age 51-64	0.24*** (0.24, 0.25)	0.23*** (0.23, 0.24)	0.28*** (0.27, 0.29)	0.73*** (0.61, 0.88)	0.84* (0.69, 1.02)	1.01 (0.89, 1.15)	0.25*** (0.24, 0.26)
Age 65+	0.14*** (0.12, 0.15)	0.13*** (0.12, 0.15)	0.16*** (0.14, 0.18)	0.39*** (0.26, 0.58)	0.38*** (0.24, 0.61)	0.46*** (0.31, 0.67)	0.14*** (0.12, 0.16)
Female	1.11*** (1.08, 1.14)	1.13*** (1.10, 1.16)	1.06*** (1.04, 1.09)	0.68*** (0.58, 0.78)	0.61*** (0.52, 0.71)	1.11*** (1.08, 1.14)	1.12*** (1.09, 1.15)
Foreigner	1.89*** (1.82, 1.96)	1.89*** (1.82, 1.96)	1.69*** (1.62, 1.76)	2.45*** (2.09, 2.88)	2.47*** (2.08, 2.95)	1.82*** (1.75, 1.88)	1.85*** (1.78, 1.92)
Southern Bohemia (ref. Central Bohemia)	1.23*** (1.18, 1.28)	1.23*** (1.18, 1.28)	1.26*** (1.21, 1.32)	0.85 (0.65, 1.11)	0.85 (0.63, 1.14)	1.23*** (1.18, 1.28)	1.23*** (1.18, 1.28)

Southern Moravia	2.18*** (2.11, 2.25)	2.19*** (2.12, 2.26)	2.35*** (2.27, 2.42)	1.44*** (1.15, 1.80)	1.45*** (1.14, 1.84)	2.18*** (2.12, 2.25)	2.17*** (2.11, 2.24)
Prague	1.34*** (1.30, 1.38)	1.34*** (1.30, 1.39)	1.33*** (1.28, 1.37)	0.76** (0.62, 0.94)	0.81* (0.65, 1.02)	1.34*** (1.30, 1.38)	1.34*** (1.29, 1.38)
Northern Bohemia	1.78*** (1.73, 1.83)	1.80*** (1.75, 1.85)	1.81*** (1.76, 1.87)	0.94 (0.73, 1.21)	1.05 (0.80, 1.37)	1.78*** (1.73, 1.84)	1.77*** (1.72, 1.83)
Northern Moravia	1.92*** (1.87, 1.98)	1.94*** (1.88, 2.00)	2.07*** (2.01, 2.14)	1.34** (1.06, 1.71)	1.66*** (1.28, 2.14)	1.92*** (1.87, 1.98)	1.92*** (1.86, 1.98)
Eastern Bohemia	1.67*** (1.61, 1.73)	1.72*** (1.66, 1.78)	1.77*** (1.71, 1.84)	0.46*** (0.36, 0.59)	0.48*** (0.37, 0.62)	1.67*** (1.61, 1.73)	1.67*** (1.61, 1.73)
Western Bohemia	1.82*** (1.76, 1.89)	1.86*** (1.80, 1.92)	1.95*** (1.88, 2.02)	0.64*** (0.48, 0.84)	0.58*** (0.42, 0.78)	1.82*** (1.76, 1.88)	1.82*** (1.76, 1.88)

§ 147 Negligent grievous bodily harm[i]	2.16*** (1.86, 2.51)		
§ 173 Robbery	8.66*** (8.03, 9.35)		
§ 178 Trespassing	2.24*** (2.11, 2.37)		
§ 196 Evasion of alimony payments	1.95*** (1.84, 2.06)		
§ 201 Endangering the welfare of a child	0.80*** (0.70, 0.91)		
§ 205 Theft	4.29*** (4.08, 4.52)	§ 140 Murder[i]	15.82*** (9.68, 25.86)
§ 206 Embezzle-ment	1.99*** (1.83, 2.17)	§ 145 Grievous bodily harm	3.11*** (2.29, 4.23)
§ 209 Fraud	3.30*** (3.10, 3.52)	§ 173 Robbery	2.33*** (1.73, 3.14)
§ 211 Loan fraud	1.41*** (1.29, 1.54)	§ 185 Rape	1.34 (0.90, 1.99)
§ 228 Property damage	0.88** (0.79, 0.99)	§ 205 Theft	3.08*** (2.19, 4.34)
§ 274 DUI	0.77*** (0.72, 0.82)	§ 206 Embezzle-ment	2.32*** (1.84, 2.92)
§ 283 Drug trafficking	3.83*** (3.60, 4.09)	§ 209 Fraud	1.49** (1.08, 2.06)
§ 337 Frustrating an official decision	4.42*** (4.19, 4.66)	§ 211 Loan fraud	1.10 (0.87, 1.38)
§ 358 Public mischief	0.83*** (0.77, 0.90)	§ 240 Tax Evasion	1.39*** (1.11, 1.74)

Age 18-21 x. Previous convictions: 1[i]	Petty x. Previous convictions: 1[ii]	1.68*** (1.55, 1.81)	2.07*** (1.70, 2.51)
Age 31-40 x. Previous convictions: 1	Felony x. Previous convictions: 1	0.66*** (0.54, 0.77)	0.38*** (0.34, 0.43)

Age 41-50 x. Previous convictions: 1	Grievous felony x. Previous convictions: 1				0.61*** (0.47, 0.75)	0.28*** (0.23, 0.34)
Age 51-64 x. Previous convictions: 1	Fatal felony x. Previous convictions: 1				0.59*** (0.40, 0.77)	0.15*** (0.07, 0.31)
Age 65+ x. Previous convictions: 1	Petty x. Previous convictions: 2				0.74 (0.19, 1.29)	2.40*** (1.99, 2.89)
Age 18-21 x. Previous convictions: 2	Felony x. Previous convictions: 2				2.05*** (1.93, 2.17)	0.24*** (0.22, 0.27)
Age 31-40 x. Previous convictions: 2	Grievous felony x. Previous convictions: 2				0.48*** (0.38, 0.59)	0.10*** (0.08, 0.12)
Age 41-50 x. Previous convictions: 2	Fatal felony x. Previous convictions: 2				0.38*** (0.25, 0.50)	0.22** (0.05, 0.99)
Age 51-64 x. Previous convictions: 2	Petty x. Previous convictions: 3-5				0.28*** (0.10, 0.46)	2.45*** (2.05, 2.94)
Age 65+ x. Previous convictions: 2	Felony x. Previous convictions: 3-5				0.22*** (-0.40, 0.83)	0.18*** (0.17, 0.20)
Age 18-21 x. Previous convictions: 3-5	Grievous felony x. Previous convictions: 3-5				2.02*** (1.91, 2.14)	0.04*** (0.03, 0.05)
Age 31-40 x. Previous convictions: 3-5	Fatal felony x. Previous convictions: 3-5				0.43*** (0.34, 0.52)	0.03*** (0.01, 0.07)
Age 41-50: x. Previous convictions: 3-5	Petty x. Previous convictions: 6-9				0.30*** (0.19, 0.41)	2.58*** (2.16, 3.10)
Age 51-64: x. Previous convictions: 3-5	Felony x. Previous convictions: 6-9				0.19*** (0.04, 0.34)	0.20*** (0.18, 0.22)
Age 65+: x. Previous convictions: 3-5	Grievous felony x. Previous convictions: 6-9				0.19*** (-0.29, 0.67)	0.03*** (0.02, 0.04)
Age 18-21 x. Previous convictions: 6-9	Fatal felony x. Previous convictions: 6-9				1.51*** (1.35, 1.67)	0.01*** (0.004, 0.03)
Age 31-40 x. Previous convictions: 6-9	Petty x. Previous convictions: 10+				0.48*** (0.38, 0.57)	2.64*** (2.20, 3.16)
Age 41-50 x. Previous convictions: 6-9	Felony x. Previous convictions: 10+				0.28*** (0.17, 0.39)	0.21*** (0.18, 0.24)
Age 51-64 x. Previous convictions: 6-9	Grievous felony x. Previous convictions: 10+				0.18*** (0.03, 0.32)	0.02*** (0.01, 0.03)
Age 65+: x. Previous convictions: 6-9	Fatal felony x. Previous convictions: 10+				0.20*** (-0.29, 0.68)	0.02*** (0.002, 0.14)
Age 18-21 x. Previous convictions: 10+					0.75 (0.50, 1.12)	
Age 31-40 x. Previous convictions: 10+					0.66*** (0.60, 0.74)	
Age 41-50 x. Previous convictions: 10+					0.45*** (0.40, 0.50)	
Age 51-64 x. Previous convictions: 10+					0.31*** (0.26, 0.35)	
Age 65+ x. Previous convictions: 10+					0.42*** (0.27, 0.64)	
Constant	0.01*** (0.01, 0.01)	0.01*** (0.01, 0.01)	0.001*** (0.001, 0.001)	0.22*** (0.17, 0.28)	0.51*** (0.37, 0.69)	0.01*** (0.01, 0.01)	0.004*** (0.004, 0.004)
Nagelkerke's Pseudo R^2	0.531	0.52	0.53	0.441	0.347	0.533	0.535
Observations	774,915	762,117	662,083	11,738	9,892	774,915	774,915

Note: [i]ref. § 146 Bodily harm [ii]ref. same as for non-interaction *p<0.1; **p<0.05; ***p<0.01

Odds Ratio

The main outcome of interest within the regression table is the odds ratio. The odds ratio represents the ratio between the likelihood of the dependent variable (incarceration) given the current value of the independent variable (e. g. 3-5 previous convictions) and the likelihood of the dependent variable given the reference value of the independent variable (e. g. 0 previous convictions) *ceteris paribus*.[438]

In practice, in the example given above, the odds ratio at 3-5 previous convictions is 46.29 in the first model. This should be interpreted as an offender, of the same gender, nationality status, and age range, who is judged in the same region, for a crime of equal seriousness, that has the same status as a multiple offender, and who has been equally either held or not in pre-trial detention, however, who has 3-5 previous convictions as opposed to 0, is 45.29 times more likely to be sentenced to incarceration.

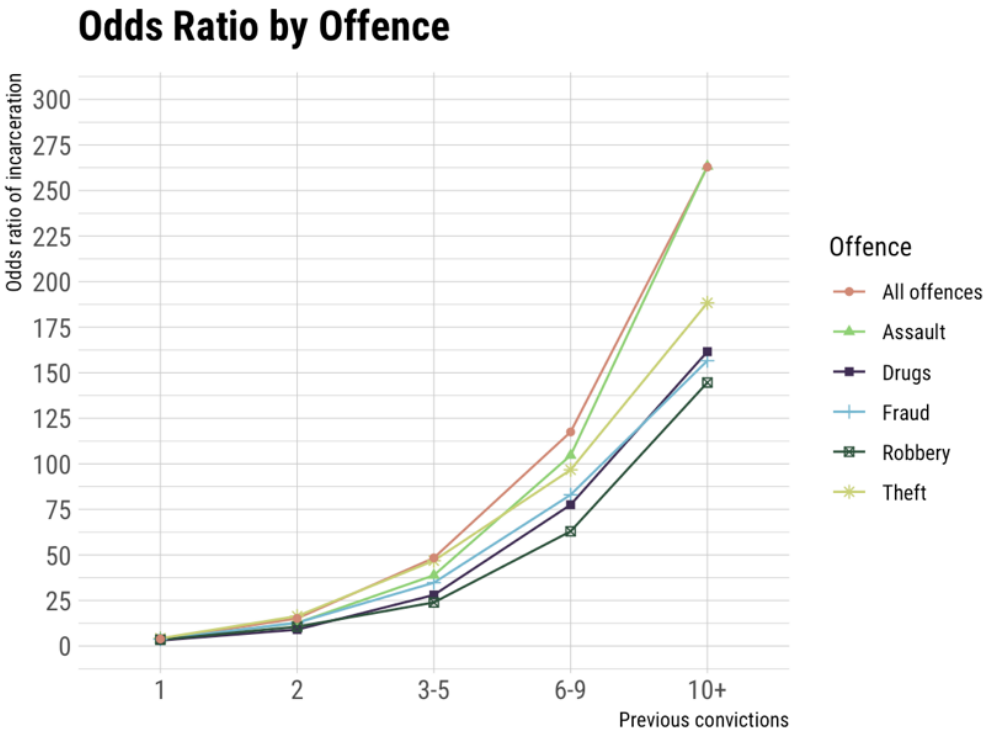
When the odds ratio is less than 1, this means that the likelihood of the dependent outcome has decreased compared to the reference level. For example, this is the case for the odds ratio of petty crimes, where the reference crimes are misdemeanours. In the first model, the odds ratio is 0.39. This means then that all other variables held equal, the offender is 61 % less likely to be incarcerated for a petty crime as opposed to if they committed a misdemeanour.

Legal Factors

The key output of the regression given the research question at hand is the odds ratios for different levels of previous convictions. The first finding of note is that the odds increase very dramatically as more crimes are committed. Where the custody rate graphs were more uncertain, Graph 5.6 suggests that the weight of previous convictions is not only cumulative in the sense that each further offence makes incarceration more likely but perhaps even exponential. When contrasted with other determinants, only seriousness seems to have a similar effect on the dispositional magnitude, with other factors being relatively minor. The only exception is pre-trial detention, which, however, does correlate to a certain degree of seriousness.

[438] WEISBURD, David et al. *Advanced statistics in criminology and criminal justice*, pp. 151–156.

Graph 6.6 [439]



Multiple offences, while having an appreciable effect on the dispositional magnitude, have a sufficiently low odds ratio, suggesting that only limited enhancements are applied. The model examining the 15 most common offences shows some deviations from what might be considered typical ordinal proportionality. Theft (§ 205 PC) has a particularly high odds ratio, especially when compared to the very similar crime of Embezzlement (§ 206 PC). Further deviations are observed, for example, when considering the difference between Frustration of an Official Decision and Drug Trafficking. This suggests that for less serious crimes, ordinal proportionality is weakly established, in the sense that the offence is more closely determined by other factors than the kind of crime committed. The results for seriousness would suggest that courts possibly look more at the range, with much less weight given to the specific section of the Criminal Code that defines the crime.

[439] DUIs are omitted from the graph as the increase in odds ratio is so sharp, it would obscure all the other offence types.

Regional court data in the model upend ordinal proportionality further when looking at crime types; however, the regional court models appear generally less reliable given the sample size, which is smaller by almost three orders of magnitude.

Extra-legal Factors

The results for many of the extra-legal variables are concerning. For models containing all crimes or crimes at the district court level, women were 10 % more likely to receive a prison sentence. This is largely surprising, as previous findings have mostly reported that men received harsher sentences. Although the difference is small enough, this could merit further research. It is, however, important to state that at the regional court level (considering the limitations) men are 35 % more likely to be incarcerated.

Increasing age led to significant decreases in the odds of incarceration. Interestingly, this trend is true up to the 18-21 group, which had an odds ratio higher than 1, suggesting that this group is more likely to be incarcerated than the reference group of 22-30, despite the general mitigating provision in § 41 f) PC of "age close to juvenile".

Both regions and courts played a role in either increasing or decreasing the odds while being mostly statistically significant. This links to Drápal's research on sentencing disparities and suggests that any future research must also account for this.[440]

Foreigners were significantly more likely to be incarcerated than Czech nationals. While there are multiple potential explanations, such as the difficulty of executing noncustodial punishments on nonresidents, the 90 % greater chance of incarceration certainly merits further enquiry.

Differences between Offence Types

Table 6.3 contains the odds ratios of the independent variables by offence type. The results show that the odds ratios vary among offences, but the reasons are rather unclear. At first glance, more serious offences tend to have a smaller increase between the different levels of previous convictions, whereas the increase seems to be greater for less serious crimes.

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[440] DRÁPAL, Jakub. *Sentencing disparities in the Czech Republic: Empirical evidence from post-communist Europe*.

At a closer glance, this holds up for robberies; however, the difference between fraud and theft is rather jarring. These crimes are relatively similar in the sense that they are predatory offences against property, with equivalent sentencing ranges as the damages increase. The only fundamental difference is the absence of a damage minimum that allows a repeat offender to be sentenced for theft of any value (§ 205 (2) PC). However, this does not pose a satisfactory answer to why the odds ratio for imprisonment increases substantially more with further convictions for theft than for fraud.

Fraud and theft are apart from that not so different from the overall average, which makes sense given that especially theft is the most common offence. Notable, however, is the fact that men are 19 % more likely to be imprisoned for fraud, for which there does not appear to be any clear explanation.

The odds ratio of imprisonment for DUI increases significantly more as convictions increase than for any other crime. This is most likely due to the fact that DUI is a very minor offence under Czech law, with incarceration being very rare, making even a few more cases as criminal history increases affect the odds ratio tremendously. Multiple offences also have a much higher effect on the odds ratio than for other crime types, most likely because in those situations the driver causes bodily harm, making the offence immediately vastly more serious. This pattern of a relatively petty offence that can turn rather serious can also explain the increased effect of pre-trial detention. The higher odds of incarceration (by 40 %) for women could be explained perhaps by the fact that women might be more likely to have children in the car while committing a DUI; however, this remains an untested hypothesis.

Assault remains a peculiar offence in the sense that despite violent offences being identified in the literature as particularly serious and worthy of incarceration, the custody rate is relatively low compared to even regular property offences. In that sense, the relatively higher increases in odds ratio as previous convictions increase seem more to testify to the idea of assault as a minor crime in sentencing practice. This idea is further developed since at the level of a grievous felony (intentional aggravated grievous bodily harm or bodily harm leading to negligent homicide as per either § 145 (2) or § 146 (3) PC), the odds ratio of incarceration is 34.05 when compared to misdemeanour assault. On the other hand, grievous felony fraud (over CZK 10,000,000) has an odds ratio of incarceration of 99.82 compared to misdemeanour fraud.

Grievous felony theft (over CZK 10,000,000) has an odds ratio of incarceration of 165.9 compared to misdemeanour theft. As such, it can be surmised that assault as the most stereotypical violent offence is not treated as a more serious offence than regular property offences.

Table 6.3: Regressions by Offence Type

	Dependent variable: Incarceration					
	Odds Ratio (95 % CI)					
	Theft	Fraud	DUI	Assault	Drugs	Robbery
Previous convictions: 1 (ref. 0)	4.27*** (3.79, 4.80)	3.61*** (3.13, 4.17)	19.22*** (11.49, 32.14)	3.62*** (2.98, 4.39)	2.77*** (2.39, 3.22)	3.32*** (2.80, 3.93)
Previous convictions: 2	16.30*** (14.58, 18.23)	11.99*** (10.37, 13.86)	96.97*** (58.86, 159.74)	11.74*** (9.70, 14.20)	8.14*** (6.99, 9.47)	9.81*** (8.15, 11.80)
Previous convictions: 3-5	44.94*** (40.33, 50.08)	32.53*** (28.48, 37.16)	341.47*** (208.94, 558.07)	35.22*** (29.53, 42.01)	24.83*** (21.57, 28.59)	22.05*** (18.47, 26.33)
Previous convictions: 6-9	91.42*** (81.86, 102.10)	75.72*** (65.42, 87.64)	984.47*** (598.67, 1,618.89)	92.65*** (76.45, 112.28)	66.87*** (57.18, 78.20)	55.69*** (44.78, 69.26)
Previous convictions: 10+	177.25*** (158.19, 198.61)	139.43*** (117.67, 165.21)	1,957.54*** (1,175.54, 3,259.75)	224.31*** (179.73, 279.95)	137.01*** (114.28, 164.27)	125.70*** (93.62, 168.77)
Petty (ref. Misdemea-nour)	0.18*** (0.17, 0.18)	0.27*** (0.25, 0.29)	0.72*** (0.62, 0.83)		0.67*** (0.59, 0.77)	
Felony	1.66*** (1.52, 1.81)	3.21*** (2.92, 3.52)		3.27*** (2.97, 3.61)	5.09*** (4.67, 5.53)	
Grievous felony[i]	165.89*** (118.9, 231.45)	99.82*** (84.36, 118.12)		34.05*** (25.29, 45.84)	56.17*** (45.01, 70.10)	25.82*** (18.32, 36.40)
Fatal felony				673.78*** (233.41, 1,946)	81.17*** (52.18, 126.25)	6.62* (0.74, 58.85)
Multiple offences	1.93*** (1.87, 1.99)	1.68*** (1.56, 1.82)	7.82*** (6.75, 9.06)	0.98 (0.88, 1.09)	2.03*** (1.87, 2.20)	1.55*** (1.39, 1.72)
Pre-trial detention	18.86*** (17.54, 20.27)	10.57*** (9.04, 12.37)	84.24*** (49.83, 142.40)	23.28*** (20.02, 27.07)	14.58*** (13.21, 16.09)	12.87*** (11.39, 14.54)
Age 18-21 (ref. 22-30)	1.37*** (1.31, 1.44)	1.15* (1.00, 1.32)	1.64*** (1.30, 2.07)	1.73*** (1.52, 1.98)	1.22*** (1.06, 1.40)	1.31*** (1.15, 1.49)
Age 31-40	0.65*** (0.63, 0.67)	0.63*** (0.58, 0.69)	0.52*** (0.46, 0.58)	0.47*** (0.42, 0.53)	0.68*** (0.62, 0.74)	0.67*** (0.58, 0.77)
Age 41-50	0.42*** (0.40, 0.44)	0.47*** (0.42, 0.52)	0.28*** (0.24, 0.33)	0.24*** (0.21, 0.28)	0.52*** (0.47, 0.59)	0.43*** (0.35, 0.52)
Age 51-64	0.30*** (0.28, 0.33)	0.32*** (0.28, 0.36)	0.13*** (0.10, 0.16)	0.15*** (0.12, 0.19)	0.31*** (0.26, 0.37)	0.37*** (0.26, 0.53)
Age 65+	0.23*** (0.18, 0.29)	0.16*** (0.11, 0.25)	0.03*** (0.01, 0.09)	0.03*** (0.01, 0.07)	0.10*** (0.05, 0.21)	0.24** (0.08, 0.75)
Female	0.99 (0.95, 1.03)	0.81*** (0.74, 0.88)	1.38** (1.06, 1.80)	1.00 (0.79, 1.26)	0.82*** (0.74, 0.92)	0.65*** (0.53, 0.81)
Foreigner	1.46*** (1.35, 1.57)	1.80*** (1.52, 2.14)	1.88*** (1.48, 2.38)	2.00*** (1.67, 2.40)	4.34*** (3.77, 4.99)	2.06*** (1.71, 2.48)
Southern Bohemia[ii]	1.13*** (1.05, 1.22)	0.96 (0.81, 1.15)	1.29* (0.98, 1.69)	0.89 (0.70, 1.12)	1.05 (0.88, 1.25)	1.01 (0.77, 1.32)

Southern Moravia	2.28*** (2.15, 2.42)	1.50*** (1.31, 1.73)	2.87*** (2.35, 3.50)	1.41*** (1.18, 1.68)	1.61*** (1.40, 1.85)	1.26** (1.01, 1.57)
Prague	1.43*** (1.35, 1.52)	0.80*** (0.69, 0.93)	0.88 (0.69, 1.12)	0.79** (0.64, 0.97)	0.74*** (0.64, 0.85)	0.69*** (0.56, 0.86)
Northern Bohemia	1.95*** (1.84, 2.06)	0.86* (0.74, 1.00)	2.73*** (2.23, 3.35)	1.20* (0.99, 1.44)	1.58*** (1.38, 1.81)	1.25** (1.01, 1.54)
Northern Moravia	2.13*** (2.02, 2.25)	1.25*** (1.09, 1.43)	2.64*** (2.18, 3.20)	1.16* (0.97, 1.37)	1.54*** (1.35, 1.77)	1.01 (0.83, 1.24)
Eastern Bohemia	1.51*** (1.41, 1.62)	1.28*** (1.09, 1.49)	2.83*** (2.28, 3.51)	1.28** (1.04, 1.57)	1.33*** (1.14, 1.55)	1.39** (1.07, 1.80)
Western Bohemia	2.27*** (2.13, 2.42)	1.24** (1.04, 1.48)	2.12*** (1.70, 2.63)	1.33*** (1.09, 1.61)	0.85** (0.72, 0.99)	0.87 (0.69, 1.11)
Constant	0.01*** (0.01, 0.01)	0.01*** (0.01, 0.02)	0.0001*** (0.0001, 0.0002)	0.01*** (0.01, 0.01)	0.01*** (0.01, 0.01)	0.05*** (0.04, 0.06)
Nagelkerke's pseudo-R^2	0.56	0.521	0.485	0.515	0.632	0.581
Observations	168,925	54,626	123,033	30,525	33,372	11,516

Note: [i]for Robbery ref. Felony; [ii]ref. Central Bohemia *p<0.1; **p<0.05; ***p<0.01

With drugs, the most notable finding is the unusually high odds ratio of incarceration for foreigners. The most plausible explanation would be that foreigners are more likely to be involved in transnational drug trade, which is quite possibly seen as more serious than local drug distribution.

Robbery then follows a pattern which is more in line with expectations on how serious offences are treated. The relatively high custody rate even for first offenders makes increases somewhat less possible, as there is a hard limit to the potential dispositional magnitude increase. The strong gender disparity suggests that for the most serious offences, men are more likely to receive prison sentences, which in turn are longer than for less serious offences, suggesting an answer to why the gender gap looks differently in research that looks at dispositional magnitude rather than durational magnitude.

Interaction effects

Examining the interaction effects in Table 6.2 shows some interesting insights. Model (6) examines the interaction between age and previous convictions. The model supports the idea that as offenders age, previous convictions carry a less weight. This is quite intuitive – a twenty-year old with five previous convictions tells a different story than a fifty-year old with the same amount. Adding the interaction strengthens the effect of previous convictions, while reducing the effect of age, making it largely statistically insignificant. This suggests that the standard model that ignores the interaction overestimates the effect of age while underestimating

previous convictions slightly. The interaction odds ratios themselves suggest that previous convictions increase the likelihood of incarceration the most for the youngest offenders while having a lesser effect on older offenders, which is in line with the idea described above.

Model (7) examines the interaction between seriousness and previous convictions. The literature review suggested that for more serious offences, previous offences have a lesser effect on the dispositional magnitude in cases of more serious crimes. This is supported by the interaction odds ratios, where the effect of previous convictions is strongest for petty offences while it is immensely weaker for more serious offences. Including the interaction effect in the model practically doubled the odds ratio of previous convictions and quadrupled the odds ratio of seriousness.

This implies that the real effects of previous convictions and seriousness related to the offender's odds of incarceration are stronger than model (1) suggests. Although model (1) appeared to give seriousness a somewhat more comparable effect to previous convictions, the interaction model suggests that seriousness is vastly more important when deciding whether an offender will be incarcerated and remains the primary determinant of dispositional magnitude.

Advantages and Limitations

The advantage of the current results is that they are based on the largest number of observations recorded in the literature, with previous research generally using a significantly lower number of convictions.[441] In addition, the dataset used is not a sample but represents complete data for all convictions based on the 2009 Penal Code up until the end of 2022. This leads to high external validity, as all potential cases are considered.

Another advantage is the overall high Nagelkerke pseudo R^2 of the models, with values between 0.5-0.6, which while leaving quite a bit of unexplained variance, represents an above-average result within the context of criminological literature.

[441] The closest was Crow's research in Florida with over 500 000 observations in CROW, Matthew S. *The Complexities of Prior Record, Race, Ethnicity, and Policy: Interactive Effects in Sentencing*., and Wermink et al.'s research in the Netherlands, which had over 200 000 observations in WERMINK, Hilde et al. *Expanding the scope of sentencing research*.

The main limitation is the unreliability of some of the key elements of the dataset which was exposed by Vanča and Drápal.[442] For this reason, the validity of the findings is in many ways contingent on the veracity of the reported values in the Statistical Sheets, over which there can be some doubts.

Further threats to internal validity are caused by the lack of more detailed data related to the criminal history of the offender, as clustered previous convictions can obscure some finer mechanisms. Additionally, the lack of more detailed data on the seriousness of convictions beyond their sentencing range may distort some of the observed effects and could explain, for example, some of the differences between fraud and theft that remain unexplained.

Finally, a better model of accounting for concurrent offences might help isolate effects that cannot be observed right now. The establishment of such a model, however, remains a task for future researchers, one that will hopefully push quantitative sentencing research even further.

6.3 Discussion

The above findings strongly suggest that in Czechia every conviction beyond the first increases the chances of incarceration by a relatively stable amount, leading to a conclusion of a cumulative approach. No evidence is found that would suggest some sort of lapse theory or progressive loss of mitigation. There are hints of the diminishing cumulative approach proposed by Roberts and Frase in some models, overall; however, the "diminishing" part is absent.[443]

Several previous convictions can easily have the same effect as committing a substantially more serious crime. Both descriptive statistics and regression models support this: theft with 3-5 priors has the same custody rate as a felony with 1 prior, despite theft and robbery generally being considered very different crimes, with robbery typically placed much higher on the ordinal proportionality scale.

Therefore, the main conclusion that can be drawn from the research is the apparent absence of any strong or even weak retributive limits on criminal history enhancements. Although

[442] VANČA, Tomáš and Jakub DRÁPAL. *Statistické listy trestní soudů: Ověření jejich spolehlivosti*.
[443] ROBERTS, Julian V. and Richard S. FRASE. *Paying for the Past*.

sentence-length research would be optimal to further explore this question, the current findings are considered strong enough to support this point.

This relates to the fact that the provision on proportionality in § 38 (1) PC is likely not in practice interpreted as a retributive constraint within a limiting retributivist approach or some other, similar hybrid model. Instead, as mentioned in Chapter 4., the aggravation can be rather limitless, with criminal history being potential grounds for aggravation in several different ways (seriousness, character, potential for rehabilitation, etc.). The findings support the lack of any theory beyond one that mandates more punishment for repeat offenders.

Across offence types, the odds ratio of incarceration increases more for less serious offences, while increasing much less for more serious offences as previous convictions accumulate. This is in line with the findings of Vigorita and of Cassidy and Rydberg.[444] Given these are all modern studies with larger samples, the current findings provide further validation for the assertion that less serious offences have greater criminal history enhancements.

From a comparative point of view, while comparison across jurisdictions is tricky, the current study found a much more linear criminal history enhancement than the research in England & Wales.[445] The odds ratio for the different levels of criminal history is substantially higher in Czechia than in similar studies in a "*non-guideline state*",[446] in Florida,[447] and in the Netherlands.[448]

Compared with previous Czech research,[449] the current research shows a somewhat higher odds ratio for different levels of previous convictions. The best explanation that can be offered is that this study counts penal orders as convictions in accordance with substantive criminal law.

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[444] VIGORITA, Micheal S. *Prior Offense Type and the Probability of Incarceration: The Importance of Current Offense Type and Sentencing Jurisdiction*.; CASSIDY, Michael and Jason RYDBERG. *Analyzing Variation in Prior Record Penalties Across Conviction Offenses*.
[445] ROBERTS, Julian V. and Jose PINA-SÁNCHEZ. *Previous convictions at sentencing: Exploring Empirical Trends in the Crown Court*.
[446] VIGORITA, Micheal S. *Prior Offense Type and the Probability of Incarceration: The Importance of Current Offense Type and Sentencing Jurisdiction*.
[447] CROW, Matthew S. *The Complexities of Prior Record, Race, Ethnicity, and Policy: Interactive Effects in Sentencing*.
[448] WERMINK, Hilde et al. *Expanding the scope of sentencing research*.
[449] DRÁPAL, Jakub and José PINA-SÁNCHEZ. *Does the weather influence sentencing? Empirical evidence from Czech data*.; DRÁPAL, Jakub. *Sentencing disparities in the Czech Republic: Empirical evidence from post-communist Europe*.

Penal orders cannot be used to sentence people to prison, making imprisonment much less likely throughout the data set. Furthermore, the dataset includes crimes with very low imprisonment rates, such as simple theft and DUI. For this reason, this discrepancy is considered insignificant. This approach might, however, make the criminal history enhancements seem more dramatic, but it provides a holistic picture.

The reason for Czech criminal history enhancements being so large is most likely because of the relative hesitation of Czech judges to impose prison sentences. For first offenders, incarceration rates are relatively low up to felony offences (< 12 %, Table 5.2). As previous convictions pile up, it becomes difficult to hand down any other punishment apart from an unsuspended prison sentence. In that sense, the dispositional magnitude of the criminal history enhancement in Czechia is more likely a testament to its leniency than its harshness.

From a policy point of view, it is appropriate to consider the implications on the prison system. Czechia has been struggling with one of the highest incarceration rates in the Council of Europe (no. 7 in 2021, 180.2 per 100,000).[450] However, once again it is difficult to imagine what sort of sentence other than imprisonment would be appropriate for career criminals and other high-frequency repeat offenders, while not throwing the sentencing system into disrepute. This in many ways is therefore a question of the durational magnitude of criminal history enhancements, which ought to be explored more thoroughly in future research.

Finally, considering the findings of this part, there is no need to alter the normative recommendations issued in Chapter 4. The main problems at hand are the lack of transparency, a lack of effective legal and judicial guidance, and a lack of limits on criminal history enhancements. If anything, the results of this part emphasise the need to adopt the measures suggested in Chapter 4, to develop a principled system of criminal history enhancements.

6.4 Beyond Previous Convictions: Exploring Criminal History

At this point, we turn toward the future and outline the potential for further research concerning the effects of criminal history on sentencing. In Section 3.1, the dimensions of criminal history were explored. They were as follows: i) the recency of the previous offence(s), ii) the relative

[450] AEBI, Marcelo F. et al. *Prisons and Prisoners in Europe 2021: Key Findings of the SPACE I Report*. Council of Europe and University of Lausanne., 2022.

seriousness of the previous offence(s) compared to the current one, iii) whether the previous offence(s) are similar or not to the current one, iv) the multitude of the previous offences, and v) what punishment has the offender been subjected to because of them.

Future research should aim to implement these dimensions as independent variables. For recency, this can be done either through clustering the time elapsed into several categories, or even calculating the period elapsed from the previous sentence as a continuous variable. The relative seriousness of the previous offence could be coded as a dummy variable, or as a factor variable (slightly more serious/same/slightly less serious etc…). Whether the previous offence was of the same type as the current one could be coded as a dummy variable. This could be used to study to what extent patterning matters. The previous punishment could then be a factor variable, or some set of dummy variables for all punishments imposed recently, or even a unique score of "accumulated punishment".

Furthermore, it could be useful to create a weighted prior conviction score, in which more serious previous crimes count for more, to simulate weighting and see if it has better explanatory power.

As far as data for such a study is concerned, within the Czech context, the best possible dataset would be merged Statistical Sheets and Criminal Register data. Other options for a more limited, but still more thorough look would be more detailed Statistical Sheets. Such a dataset exists in Slovakia and is managed by the Slovakian Ministry of Justice and is an attractive option for researchers for the time being, as well as for those interested either in comparison or in the Slovak justice system as such.

Another exciting challenge is measuring the durational magnitude of criminal history enhancements. Measuring sentence length is more difficult as the differences are more subtle – a few months more or less are a less striking difference than incarceration or not. In particular, disparities between courts are a source of concern. To that extent, a multilevel model approach can be recommended, such as the one that was used to study disparities between Czech courts.[451] It is conceivable that for specifically defined and relatively homogenous crimes this

[451] DRÁPAL, Jakub. *Sentencing disparities in the Czech Republic: Empirical evidence from post-communist Europe*.

could lead to a successful estimate of the durational magnitude of the criminal history enhancement.

Another research method that has great potential is the usage of linear quantile mixed models as outlined by Cassidy and Rydberg, because the effect of prior convictions on sentence length is not constant across the sentence length distribution. Their research suggested that the enhancement is stronger at the lower end of the sentence-length distribution, with the upper end not increasing as much as previous convictions pile up. This method could be used to further assess the idea of whether the criminal history enhancement is not only cumulative but related to the "*empty space*" it can fill before the sentence reaches immutable upper ranges.

Hopefully, with these remarks future empirical research in the area of criminal history enhancements has been outlined. Although criminal history enhancements have been empirically examined since the 1980s, the availability or potential availability of large datasets, as well as of sufficient computational power, make the current decade a prime time for further research into this interesting topic. Even if criminal history has been somewhat overlooked in favour of more "exciting" determinants such as race or gender, it remains in my opinion an essential determinant, with its precise magnitude a question for both sentencing theory and practice.

Conclusion

Two years ago in his Ph.D. dissertation, Drápal identified seriousness and criminal history as the two most important factors influencing sentence choice that need to be analysed. Specifically, he pointed towards criminal history as, unlike seriousness, it can be much more closely identified in the datasets available. Furthermore, he emphasised the need for sentencers to receive more specific guidance on the use of criminal history.[452]

This thesis serves as a response to this challenge, as it has set out to shed some light on two previously largely unexplored areas related to criminal history and sentencing in Czechia, those being the normative and empirical dimensions of the role of criminal history in sentencing.

In Czech theoretical discussions, the role criminal history should have in sentencing has been until now largely left untouched. At the same time, so far, little is known empirically about sentencing in Czechia in general, and even less was known until now about the effect of criminal history specifically.

In the first part of this thesis to create the necessary background for sentencing theory, an extensive overview of primarily English language literature was reviewed and synthesised. In particular, the division between retributivism and utilitarianism as the leading theories of punishment in the international literature of today was presented. Furthermore, the approaches to sentencing related to these basic branches of punishment theory were discussed. As far as retributive approaches are concerned, special attention was paid to concepts of proportionality of just deserts, which have had great influence since the 1980s.

On the side of utilitarian theories, analysis and criticism of Becker's economic theory of punishment were offered, as well as a summary of recent empirical findings supporting or refuting the basic mechanisms of utilitarian sentencing, which consist of deterrence, incapacitation, and rehabilitation. Based on the current literature, a modern utilitarian sentencing approach was proposed relying on absolute general deterrence created by the perceived possibility of arrest and subsequent conviction and incarceration, and risk-

[452] DRÁPAL, Jakub. *Sentencing in the Czech Republic: An Empirical Investigation*. 2021, Ph.D. Dissertation, Charles University, Faculty of Law, p. 132.

assessment driven incapacitation. Ethically, however, such a system carries many problems, as it largely relies on treating offenders merely as means in the goal of crime prevention.

Great emphasis was placed on the discussion of current theories of sentencing repeat offenders. As far as retributive approaches are concerned, the flat-rate model, progressive loss of mitigation, and omission theories were discussed. None of the approaches, however, was found satisfactory, with either the theories showing inner inconsistencies, or in the case of the flat-rate model being incompatible with any currently tenable sentencing policy.

While utilitarian approaches appeared more plausible on paper as adequate justifications for criminal history enhancements, the empirical evidence makes criminal history enhancements seem much less useful as means for achieving crime prevention or harm reduction. The only somewhat promising utilitarian approaches are policies based on heavily selective incapacitation of high frequency offenders, which are a far cry from the standard criminal history enhancement idea.

As far as hybrid theories, Roberts' theory of enhanced culpability provides a workable approach to a limited criminal history enhancement, however, the theoretical account was found to be unpersuasive. Further adaptations of the limiting retributivist/enhanced culpability approach by Roberts and Frase did not resolve the justification issues, yet they provided a feasible model for limiting criminal history enhancements.

Next, the current legal and theoretical status of criminal history enhancement in Czechia was assessed. Czech theory has practically completely evaded the topic of the justification for criminal history enhancements with only a hint of notice theory that is shared with German doctrine. Within the legal framework of sentencing, a criminal history can be used in a very broad way as an aggravating factor, with no clear mechanism to prevent double counting. This situation is seen as undesirable, as it does not satisfy traditional proportionality constraints and does not resolve concerns over the predictability of punishment.

To fully understand the situation in Czechia, an empirical investigation into criminal history enhancements was carried out. From previous research, it was assumed that criminal history is the second-largest determinant of the incarceration decision, as well as sentence length.

Furthermore, studies in other countries found that previous convictions have a significant effect on the odds of incarceration.

Methodologically, a dataset of Czech sentencing data was used ranging from 2010-2022 containing information on 774,915 convictions, which is quite likely the most extensive dataset used so far to study dispositional magnitude. In addition to descriptive statistics, 21 logistic regression models were calculated to study the relationship between the incarceration decision and previous convictions amid varying fixed effects.

The findings reflected an immense dispositional magnitude of criminal history enhancements. No matter the model, the findings significantly exceeded expectations set by foreign research, suggesting that criminal history enhancements are particularly large in Czechia. Unlike research done in England and Wales, the results suggested a “true” cumulative model in the sense that each additional conviction continues to increase the chances of incarceration, rather than the more typical scenario, where more convictions have a diminishing effect in the sense that the tenth prior has far less weight than the third.

There is the impression that to some extent the magnitude of the criminal history enhancement is related to the initial custody rate, as the 'ceiling' custody rate tends to be closer between jurisdictions. Additionally, the criminal history enhancement across crime types seems to also depend on the initial custody rate, as the enhancement seems to “fill up” the available space. This in practice leads to increases in odds of incarceration by hundreds of times for petty crimes with a low custody rate like DUIs due to previous convictions.

The overall impression is then one of immense enhancements which especially for minor crimes obscure the relationship between offence seriousness and punishment severity, essentially denying proportionality. Two sources are identified for this state. The first, which is seen as positive from a reductionist perspective, is the seeming effort to keep first offenders out of custody deployed by Czech courts, even if one can have doubts over whether this ought to be the case even for very serious crimes. The second, which is more problematic, is the fact that at a certain point, alternative punishments seemingly become untenable, and incarceration is imposed for the recidivist even if they commit a very minor crime. To alleviate the current state and further reductionist goals, more effort should be put into researching and implementing incapacitative punishments that do not involve incarceration.

While the durational magnitude was not the focus of the current research, given the incarceration rate in Czechia, the sentence length of these criminal history driven prison sentences should be studied. Intuitively, it is possible, that apart from suspended sentences, which appear to be a driver of the incarceration rate,[453] long criminal history driven sentences may have a similar effect.

Finally, we turn towards the policy implications. The main problem identified in the theory was a lack of upper limits, disjoining the seriousness of the crime from the severity of the punishments, and denying proportionality. The second identified problem was that there are no clear rules on the use of criminal history. The empirical findings suggested that the first problem manifests itself in the data. Especially for minor crimes, the enhancements are huge, with the odds of incarceration skyrocketing as prior convictions pile up.

Many suggestions were presented in Chapter 4 that address the unclear, but also seemingly overwhelming role of criminal history in Czech sentencing. Substantive and procedural law changes were proposed which would create clear rules for the use of criminal history, as well as impose strict proportionality limits and motivate desistance while giving courts sufficient room to consider criminal history fully and allowing higher courts to coordinate sentencing policy.

Non-legislative options were also explored, in particular general opinions of the Supreme Court and general orders of the Prosecutor General that would define more narrowly the role of criminal history in sentence recommendation and sentencing. Furthermore, more extensive data collection by the Ministry of Justice would allow further research to explore the role of criminal history in more detail.

This thesis hopes to contribute to the effort towards a reformed, principled sentencing policy in Czechia. Having started the exploration of the role of criminal history in theory and practice in Czechia, the final desire is for this research to continue and affect policy present and future.

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[453] DRÁPAL, Jakub. Podmíněné odsouzení: Jeho účel a vývoj na území Česka. *Státní zastupitelství*. 2021, no. 6, p. 18.; DRÁPAL, Jakub. *Ukládání trestů v případě jejich kumulace: Jak trestat pachatele, kteří spáchali další trestný čin předtím, než vykonali dříve uložené tresty*.; DRÁPAL, Jakub. *Sentencing multiple conviction offenders*.

List of Abbreviations

Charter	Charter of Fundamental Rights and Freedoms, declared by Resolution No. 2/1993 Coll., as amended.
CJ EU	Court of Justice of the European Union
CPP	Act No. 141/1961 Coll., Code of Penal Procedure, as amended.
ECHR	European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11, 14 and 15, supplemented by Protocols Nos. 1, 4, 6, 7, 12, 13 and 16, Council of Europe. 4 November 1950. ETS No. 5.
ECtHR	European Court of Human Rights in Strasbourg
EU Charter	Charter of Fundamental Rights of The European Union (2012/C 326/02)
MPC	Model Penal Code (United States)
PC	Act No. 40/2009 Coll., Penal Code, as amended.
OLS	Ordinary least squares (regression type)
RNR	Risk-needs-responsivity

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Appendix I. Model Aggravating Factor Provision

§ 00 Aggravation due to criminal history

(1) Criminal history cannot be used to justify any aggravation beyond that allowed by this section, with the exception of when repeat offending is a feature of the legal definition of the crime. If repeat offending is a feature of the legal definition of the crime, the offence that triggered the application of the statute must not be counted under this section.

(2) A previous conviction for the purposes of aggravation is a crime, for which the sentence has been fully executed:

a) in the case of a misdemeanour, in the last three years, or

b) in the case of a felony, in the last ten years.

(3) a) Each previous conviction serves as ground for enhancing the sentence.

b) Misdemeanours should count for less than felonies; felonies should count for less than grievous felonies.

c) Each conviction counted for aggravation beyond the first should enhance the sentence less than the previous one.

(4) Aggravation due to criminal history must not lead to erasing proportionality between the seriousness of the crime and the severity of the sentence. No matter the criminal history, the offender must not receive more than double of the sentence a similar first-offender would receive.

(5) a) No greater aggravation can be imposed based on the seriousness of the past offence beyond subsection (3) b).

b) No greater aggravation can be imposed based on the type of the previous offence.

(6) a) Where it appears the offender is attempting to desist from crime, the court may lower the enhancement that would otherwise be imposed under subsection (3).

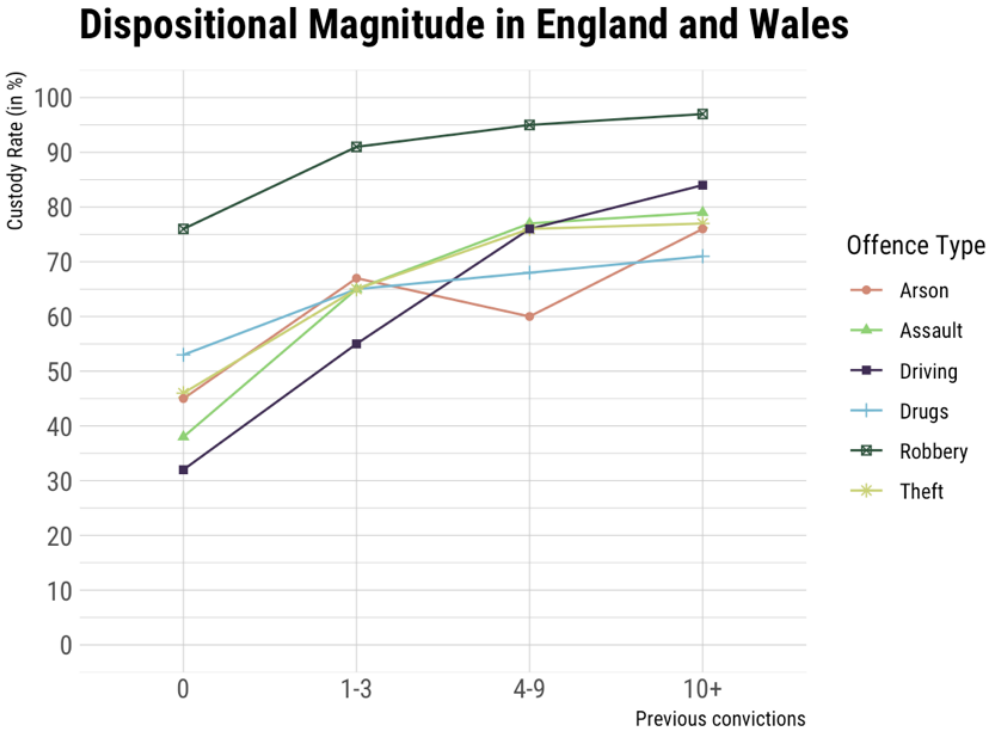
b) If there is strong evidence the current offence represents a lapse in an otherwise serious attempt at desistance, the court may refrain from imposing any aggravation due to criminal history.

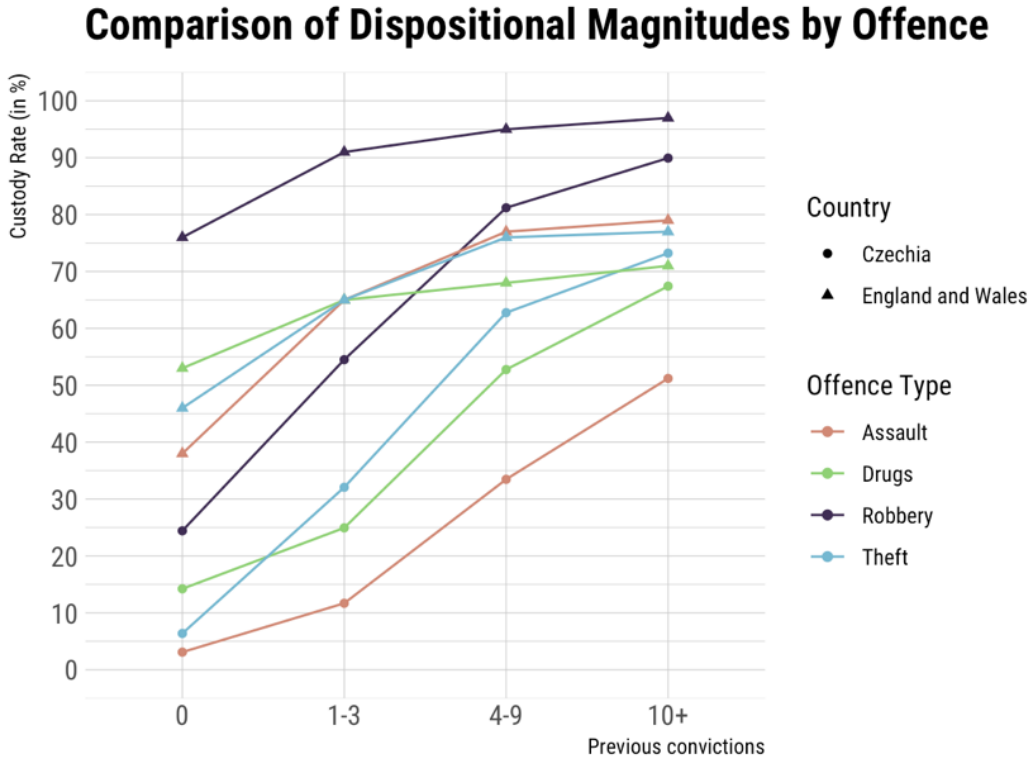
Appendix II. Summary Statistics Table by Court

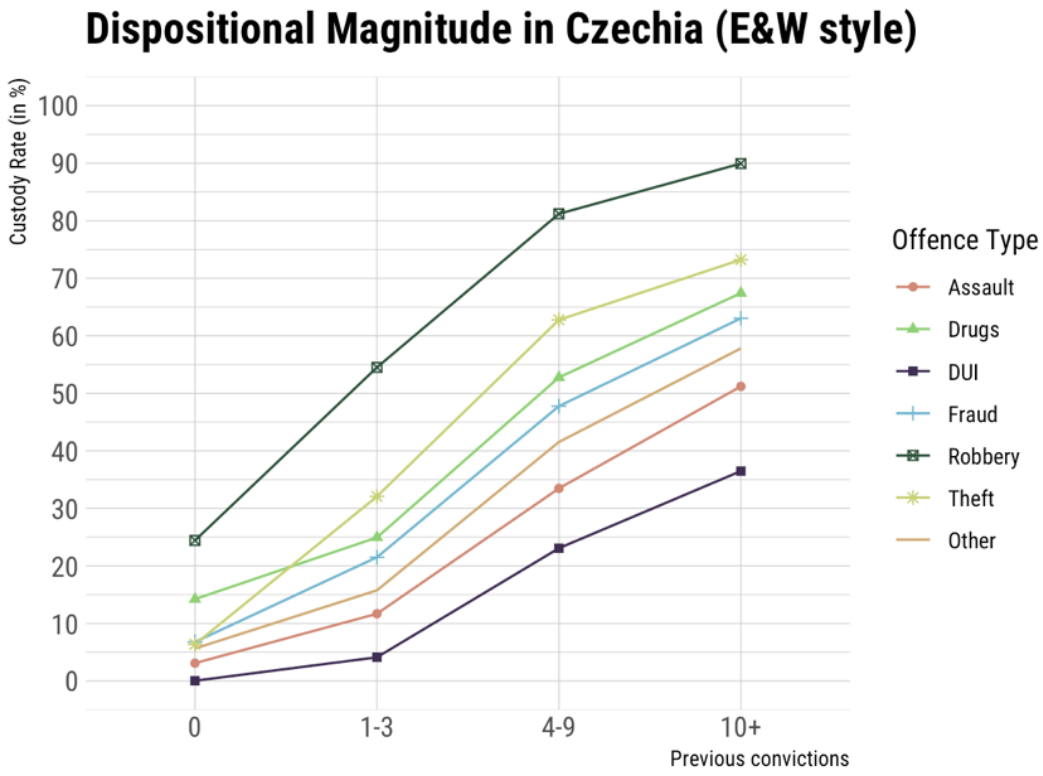
Variable	N	Percent	Variable	N	Percent	Variable	N	Percent
Incarceration	774915		**Regional Court**	774915		**Court (R = Regional)**	774915	
... No	626480	80.84%	... No	762168	98.36%	... R. České Budějovice	811	0.1%
... Yes	148435	19.16%	... Yes	12747	1.64%	... R. Brno	2215	0.29%
Previous convictions	774915		**Region**	774915		... R. Ústí nad Labem	1337	0.17%
... 0	246284	31.78%	... Southern Bohemia	49872	6.44%	... R. Ostrava	1959	0.25%
... 1	129261	16.68%	... Southern Moravia	120543	15.56%	... R. Praha	970	0.13%
... 2	88221	11.38%	... Prague	97515	12.58%	... R. Hradec Králové	1203	0.16%
... 3-5	155407	20.05%	... Northern Bohemia	124581	16.08%	... R. Plzeň	880	0.11%
... 6-9	97158	12.54%	... Northern Moravia	148089	19.11%	... M. Praha	3372	0.44%
... 10+	58584	7.56%	... Central Bohemia	89322	11.53%	... České Budějovice	14825	1.91%
Seriousness	774915		... Eastern Bohemia	72339	9.34%	... Český Krumlov	4795	0.62%
... Petty	372747	48.1%	... Western Bohemia	72654	9.38%	... Jindřichův Hradec	6234	0.8%
... Misdemeanour	337040	43.49%	**Moravian Court**	774915		... Pelhřimov	3386	0.44%
... Felony	56246	7.26%	... No	506283	65.33%	... Písek	4793	0.62%
... Grievous felony	7273	0.94%	... Yes	268632	34.67%	... Prachatice	3793	0.49%
... Fatal felony	1609	0.21%	**Common offence @ district**	662114		... Strakonice	5093	0.66%
Offence type	774915		... § 146 Bodily harm	25246	3.81%	... Tábor	6142	0.79%
... Assault	30525	3.94%	... § 147 Negligent grievous bodily harm	7728	1.17%	... Blansko	5293	0.68%
... Drugs	33372	4.31%	... § 173 Robbery	10704	1.62%	... Brno-město	32306	4.17%
... DUI	123033	15.88%	... § 178 Trespassing	28659	4.33%	... Brno-venkov	7586	0.98%
... Fraud	54626	7.05%	... § 196 Evasion of alimony payments	84695	12.79%	... Břeclav	8166	1.05%
... Robbery	11516	1.49%	... § 201 Endangering the welfare of a child	9304	1.41%	... Hodonín	8334	1.08%
... Theft	168925	21.8%	... § 205 Theft	152729	23.07%	... Jihlava	6239	0.81%
... Other	352918	45.54%	... § 206 Embezzlement	15627	2.36%	... Kroměříž	6693	0.86%
Multiple offences	774915		... § 209 Fraud	31131	4.7%	... Prostějov	5363	0.69%
... No	599739	77.39%	... § 211 Loan fraud	19118	2.89%	... Třebíč	5308	0.68%
... Yes	175176	22.61%	... § 228 Property damage	10924	1.65%	... Uherské Hradiště	6935	0.89%
Pre-trial detention	774915		... § 274 DUI	123030	18.58%	... Vyškov	3815	0.49%
... No	732735	94.56%	... § 283 Drug trafficking	24716	3.73%	... Zlín	9912	1.28%

... Yes	42180	5.44%	... § 337 Frustrating execution of an official decision	96152	14.52%	... Znojmo	7643	0.99%
Age	774915		... § 358 Public mischief	22351	3.38%	... Žďár nad Sázavou	4735	0.61%
... 18-21	89416	11.54%	**Common offence @ region**	10266		... Havlíčkův Brod	4649	0.6%
... 22-30	239102	30.86%	... § 140 Murder	1091	10.63%	... Praha 1	13712	1.77%
... 31-40	238021	30.72%	... § 145 Grievous bodily harm	810	7.89%	... Praha 2	14374	1.85%
... 41-50	136973	17.68%	... § 173 Robbery	812	7.91%	... Praha 3	4618	0.6%
... 51-64	62213	8.03%	... § 185 Rape	667	6.5%	... Praha 4	14495	1.87%
... 65+	9190	1.19%	... § 205 Theft	287	2.8%	... Praha 5	10604	1.37%
Female	774915		... § 206 Embezzlement	282	2.75%	... Praha 6	5247	0.68%
... No	660109	85.18%	... § 209 Fraud	1732	16.87%	... Praha 7	4909	0.63%
... Yes	114806	14.82%	... § 211 Loan fraud	350	3.41%	... Praha 8	6360	0.82%
Foreigner	774915		... § 240 Tax Evasion	1684	16.4%	... Praha 9	9998	1.29%
... No	713546	92.08%	... § 283 Drug trafficking	2551	24.85%	... Praha 10	9826	1.27%
... Yes	61369	7.92%				... Česká Lípa	11253	1.45%
Court cont.	**N**	**Percent**	**Court cont.**	**N**	**Percent**	... Chomutov	15349	1.98%
... Karviná	23404	3.02%	... Hradec Králové	8927	1.15%	... Děčín	14382	1.86%
... Nový Jičín	10348	1.34%	... Jičín	4890	0.63%	... Jablonec nad Nisou	6919	0.89%
... Olomouc	15003	1.94%	... Náchod	7864	1.01%	... Liberec	15700	2.03%
... Opava	10677	1.38%	... Pardubice	9927	1.28%	... Louny	7259	0.94%
... Ostrava	31774	4.1%	... Rychnov nad Kněžnou	4597	0.59%	... Litoměřice	9380	1.21%
... Přerov	9165	1.18%	... Semily	4143	0.53%	... Most	13192	1.7%
... Šumperk	8425	1.09%	... Svitavy	6114	0.79%	... Teplice	13223	1.71%
... Vsetín	8632	1.11%	... Trutnov	8421	1.09%	... Ústí nad Labem	16587	2.14%
... Beroun	5241	0.68%	... Ústí nad Orlicí	6663	0.86%	... Bruntál	10434	1.35%
... Benešov	5616	0.72%	... Cheb	9289	1.2%	... Frýdek-místek	14401	1.86%
... Kutná Hora	3778	0.49%	... Domažlice	4318	0.56%	... Jeseník	3867	0.5%
... Kladno	12758	1.65%	... Klatovy	5710	0.74%			
... Kolín	7644	0.99%	... Karlovy Vary	10631	1.37%			
... Mladá Boleslav	9609	1.24%	... Plzeň-jih	3832	0.49%			
... Mělník	7892	1.02%	... Plzeň-město	15351	1.98%			
... Nymburk	6958	0.9%	... Plzeň-sever	4425	0.57%			
... Příbram	7527	0.97%	... Rokycany	3369	0.43%			
... Praha-východ	9779	1.26%	... Sokolov	9787	1.26%			
... Praha-západ	8055	1.04%	... Tachov	5062	0.65%			
... Rakovník	3495	0.45%						
... Chrudim	4941	0.64%						

Appendix III. Additional Custody Rate Charts






Dispositional Magnitude in Czechia (E&W style)
Custody Rate (in %)
100
90
80
70
60
50
40
30
20
10
0
0
1-3
4-9
10+
Previous convictions
Offence Type
Assault
Drugs
DUI
Fraud
Robbery
Theft
Other

Appendix IV. Regression Tables by Court

	Dependent variable: Incarceration								
	Odds Ratio (95 % CI)								
	All Cases	District (All)	District (top 15)	Theft	Fraud	DUI	Assault	Drugs	Robbery
Previous convictions: 1 (ref. 0)	3.90*** (3.72, 4.08)	4.68*** (4.45, 4.93)	5.16*** (4.85, 5.50)	4.22*** (3.75, 4.76)	3.72*** (3.21, 4.30)	18.87*** (11.27, 31.61)	3.68*** (3.01, 4.49)	3.06*** (2.63, 3.56)	3.46*** (2.91, 4.12)
Previous convictions: 2	15.15*** (14.51, 15.83)	18.67*** (17.80, 19.59)	20.78*** (19.58, 22.05)	16.42*** (14.66, 18.38)	12.77*** (11.02, 14.79)	96.65*** (58.58, 159.48)	12.66*** (10.43, 15.38)	9.01*** (7.71, 10.54)	10.62*** (8.78, 12.84)
Previous convictions: 3-5	48.36*** (46.42, 50.38)	59.95*** (57.28, 62.74)	63.53*** (60.01, 67.27)	46.83*** (41.96, 52.26)	34.76*** (30.34, 39.81)	353.01*** (215.64, 577.88)	38.82*** (32.40, 46.51)	28.03*** (24.23, 32.42)	23.92*** (19.93, 28.71)
Previous convictions: 6-9	117.50***(112.57, 122.65)	146.24***(139.49, 153.32)	143.66***(135.46, 152.36)	96.71*** (86.45, 108.18)	83.01*** (71.50, 96.38)	1,032.68***(626.53, 1,702.09)	104.64***(85.88, 127.50)	77.54*** (65.93, 91.20)	62.95*** (50.31, 78.77)
Previous convictions: 10+	262.89***(251.16, 275.18)	329.16***(313.15, 346.00)	292.35***(274.96, 310.83)	188.32***(167.76, 211.41)	156.61***(131.62, 186.34)	2,143.79***(1,282.50, 3,583.50)	263.34***(209.56, 330.93)	161.55***(133.84, 194.99)	144.61***(106.88, 195.65)
Petty (ref. Misdemeanour; Robbery: Felony)	0.40*** (0.39, 0.40)	0.40*** (0.39, 0.40)		0.18*** (0.17, 0.18)	0.26*** (0.24, 0.29)	0.72*** (0.62, 0.84)		0.64*** (0.56, 0.73)	
Felony	2.13*** (2.07, 2.19)	2.13*** (2.07, 2.20)		1.70*** (1.55, 1.86)	3.17*** (2.88, 3.49)		3.19*** (2.88, 3.54)	4.97*** (4.55, 5.42)	
Grievous felony	34.05*** (30.10, 38.53)			87.17*** (51.87, 146.49)	70.39*** (51.32, 96.54)		10.77*** (7.00, 16.58)	44.34*** (33.14, 59.33)	9.29*** (4.81, 17.93)
Fatal felony	78.91*** (58.06, 107.25)						231.46***(72.14, 742.58)	54.84*** (33.81, 88.93)	3.13 (0.23, 43.30)
Multiple offences	1.47*** (1.45, 1.50)	1.48*** (1.45, 1.50)	2.19*** (2.15, 2.24)	2.04*** (1.98, 2.10)	1.72*** (1.59, 1.87)	9.26*** (7.95, 10.77)	1.06 (0.95, 1.18)	2.03*** (1.86, 2.20)	1.60*** (1.44, 1.78)
Pre-trial detention	20.30*** (19.58, 21.05)	22.45*** (21.61, 23.33)	26.17*** (25.02, 27.37)	18.98*** (17.64, 20.42)	10.78*** (9.19, 12.64)	92.53*** (54.26, 157.78)	22.46*** (19.23, 26.22)	14.93*** (13.48, 16.54)	13.51*** (11.91, 15.32)
Age 18-21 (ref. 22-30)	1.47*** (1.43, 1.52)	1.51*** (1.47, 1.56)	1.45*** (1.41, 1.50)	1.39*** (1.32, 1.45)	1.14* (0.99, 1.31)	1.62*** (1.28, 2.05)	1.72*** (1.50, 1.97)	1.24*** (1.08, 1.43)	1.31*** (1.14, 1.50)
Age 31-40	0.56*** (0.55, 0.57)	0.55*** (0.54, 0.56)	0.59*** (0.57, 0.60)	0.64*** (0.61, 0.66)	0.63*** (0.58, 0.69)	0.49*** (0.43, 0.55)	0.46*** (0.41, 0.51)	0.67*** (0.61, 0.73)	0.68*** (0.59, 0.78)
Age 41-50	0.38*** (0.37, 0.39)	0.37*** (0.36, 0.38)	0.41*** (0.40, 0.42)	0.41*** (0.39, 0.43)	0.46*** (0.42, 0.51)	0.27*** (0.23, 0.31)	0.23*** (0.19, 0.26)	0.50*** (0.45, 0.56)	0.41*** (0.33, 0.50)
Age 51-64	0.24*** (0.23, 0.25)	0.23*** (0.23, 0.24)	0.27*** (0.26, 0.29)	0.30*** (0.28, 0.32)	0.31*** (0.27, 0.36)	0.12*** (0.10, 0.16)	0.14*** (0.11, 0.18)	0.29*** (0.24, 0.35)	0.39*** (0.28, 0.56)
Age 65+	0.13*** (0.12, 0.15)	0.13*** (0.11, 0.15)	0.16*** (0.14, 0.18)	0.23*** (0.18, 0.28)	0.16*** (0.10, 0.25)	0.03*** (0.01, 0.09)	0.03*** (0.01, 0.08)	0.08*** (0.04, 0.17)	0.31* (0.10, 1.02)
Female	1.06*** (1.04, 1.09)	1.08*** (1.05, 1.11)	1.02* (1.00, 1.05)	0.93*** (0.89, 0.97)	0.81*** (0.74, 0.89)	1.35** (1.03, 1.78)	0.96 (0.76, 1.22)	0.80*** (0.71, 0.90)	0.63*** (0.51, 0.79)
Foreigner	1.84*** (1.78, 1.91)	1.84*** (1.77, 1.92)	1.65*** (1.58, 1.72)	1.39*** (1.29, 1.50)	1.82*** (1.53, 2.17)	1.87*** (1.47, 2.39)	1.95*** (1.62, 2.35)	4.34*** (3.76, 5.01)	2.05*** (1.70, 2.49)

R. České Budějovice (ref. Mělník)	3.43*** (2.68, 4.39)			5.99*** (2.01, 17.83)	1.17 (0.61, 2.24)		11.78*** (2.77, 50.20)	1.00 (0.54, 1.85)	29.91*** (3.01, 297.55)
R. Brno	8.24*** (6.89, 9.84)			8.02*** (3.73, 17.21)	3.48*** (1.98, 6.12)		5.95*** (2.77, 12.80)	3.33*** (1.94, 5.70)	8.03*** (2.49, 25.89)
R. Ústí nad Labem	2.98*** (2.41, 3.68)			2.00 (0.85, 4.73)	1.15 (0.58, 2.28)		10.77*** (4.49, 25.80)	3.04*** (1.79, 5.15)	8.96*** (2.50, 32.17)
R. Ostrava	4.77*** (3.90, 5.82)			4.53** (1.31, 15.63)	2.57*** (1.37, 4.80)		4.23*** (2.01, 8.91)	5.18*** (2.88, 9.31)	3.43** (1.20, 9.78)
R. Praha	4.16*** (3.25, 5.32)			4.53*** (1.92, 10.71)	2.50** (1.18, 5.30)		10.91*** (4.29, 27.75)	2.22** (1.06, 4.65)	4.19** (1.24, 14.09)
R. Hradec Králové	1.54*** (1.24, 1.91)			0.74 (0.31, 1.77)	0.96 (0.52, 1.79)		2.45** (1.08, 5.57)	0.77 (0.43, 1.36)	9.85*** (1.93, 50.38)
R. Plzeň	1.59*** (1.24, 2.03)			2.64 (0.55, 12.76)	0.28*** (0.12, 0.63)		6.88*** (2.93, 16.16)	0.77 (0.45, 1.34)	5.31** (1.49, 18.96)
M. Praha	3.20*** (2.74, 3.73)			2.04*** (1.24, 3.36)	0.99 (0.57, 1.73)		3.24*** (1.52, 6.91)	2.23*** (1.37, 3.62)	5.57*** (2.17, 14.29)
České Budějovice	1.47*** (1.33, 1.62)	1.47*** (1.34, 1.62)	1.50*** (1.35, 1.66)	1.29*** (1.07, 1.56)	1.13 (0.68, 1.88)	2.82** (1.26, 6.33)	1.18 (0.62, 2.24)	1.67** (1.05, 2.68)	2.14* (0.98, 4.68)
Český Krumlov	1.15** (1.01, 1.31)	1.15** (1.02, 1.31)	1.18** (1.03, 1.35)	0.83 (0.63, 1.09)	1.15 (0.59, 2.25)	4.12*** (1.64, 10.38)	0.91 (0.43, 1.91)	1.17 (0.61, 2.27)	3.19** (1.17, 8.73)
Jindřichův Hradec	1.49*** (1.33, 1.68)	1.50*** (1.33, 1.69)	1.61*** (1.42, 1.83)	1.26* (0.98, 1.61)	1.14 (0.61, 2.13)	3.60*** (1.52, 8.53)	1.27 (0.65, 2.49)	1.53 (0.85, 2.76)	3.93*** (1.56, 9.91)
Pelhřimov	0.62*** (0.53, 0.74)	0.62*** (0.52, 0.74)	0.62*** (0.51, 0.74)	0.38*** (0.27, 0.53)	0.34*** (0.15, 0.76)	0.17 (0.02, 1.45)	0.92 (0.30, 2.81)	0.59 (0.30, 1.14)	0.90 (0.23, 3.47)
Písek	0.61*** (0.53, 0.71)	0.61*** (0.53, 0.71)	0.57*** (0.49, 0.67)	0.50*** (0.38, 0.66)	0.43** (0.21, 0.87)	0.74 (0.17, 3.18)	0.66 (0.26, 1.67)	1.14 (0.64, 2.04)	1.70 (0.73, 3.98)
Prachatice	0.69*** (0.60, 0.80)	0.69*** (0.60, 0.80)	0.77*** (0.67, 0.90)	0.62*** (0.46, 0.82)	0.46** (0.22, 0.95)	1.46 (0.49, 4.39)	0.81 (0.37, 1.79)	0.94 (0.50, 1.78)	2.03 (0.73, 5.61)
Strakonice	0.55*** (0.48, 0.64)	0.55*** (0.48, 0.63)	0.55*** (0.47, 0.64)	0.45*** (0.34, 0.60)	0.47** (0.25, 0.89)	2.26 (0.82, 6.26)	1.07 (0.49, 2.31)	1.20 (0.58, 2.48)	0.86 (0.31, 2.38)
Tábor	1.82*** (1.62, 2.04)	1.83*** (1.63, 2.05)	1.86*** (1.64, 2.10)	1.36*** (1.09, 1.70)	2.03** (1.18, 3.49)	1.65 (0.59, 4.57)	1.86 (0.89, 3.92)	1.92** (1.16, 3.20)	1.77 (0.74, 4.21)
Blansko	1.22*** (1.07, 1.40)	1.23*** (1.07, 1.40)	1.25*** (1.08, 1.44)	0.86 (0.64, 1.15)	0.84 (0.43, 1.64)	5.31*** (2.27, 12.38)	2.54** (1.21, 5.32)	2.13** (1.19, 3.79)	1.49 (0.57, 3.87)
Brno-město	3.47*** (3.18, 3.78)	3.49*** (3.20, 3.81)	3.76*** (3.43, 4.12)	3.36*** (2.84, 3.98)	2.21*** (1.39, 3.51)	7.45*** (3.54, 15.70)	3.07*** (1.74, 5.41)	2.54*** (1.64, 3.93)	3.68*** (1.82, 7.45)
Brno-venkov	1.99*** (1.78, 2.23)	2.01*** (1.79, 2.25)	2.05*** (1.82, 2.31)	1.49*** (1.17, 1.90)	1.13 (0.63, 2.02)	9.75*** (4.40, 21.59)	1.48 (0.69, 3.16)	1.88** (1.03, 3.43)	1.43 (0.51, 3.99)
Břeclav	1.67*** (1.49, 1.86)	1.68*** (1.50, 1.88)	1.90*** (1.69, 2.14)	1.14 (0.90, 1.44)	0.71 (0.41, 1.24)	9.71*** (4.41, 21.41)	1.35 (0.69, 2.63)	1.93*** (1.18, 3.17)	2.54** (1.06, 6.08)
Hodonín	1.86*** (1.66, 2.08)	1.88*** (1.68, 2.10)	2.12*** (1.89, 2.39)	1.60*** (1.28, 2.00)	1.37 (0.79, 2.38)	4.82*** (1.97, 11.83)	1.52 (0.82, 2.83)	2.43*** (1.53, 3.88)	2.30** (1.00, 5.28)
Jihlava	1.90*** (1.69, 2.13)	1.91*** (1.70, 2.15)	2.02*** (1.79, 2.29)	1.78*** (1.41, 2.23)	1.36 (0.78, 2.37)	4.18*** (1.62, 10.77)	1.16 (0.61, 2.22)	3.23*** (1.93, 5.42)	1.84 (0.75, 4.53)
Kroměříž	0.97 (0.86, 1.10)	0.97 (0.86, 1.10)	1.05 (0.92, 1.20)	0.93 (0.72, 1.19)	0.54** (0.30, 0.96)	2.51* (0.99, 6.34)	1.71* (0.90, 3.25)	1.74* (0.97, 3.14)	0.95 (0.35, 2.56)
Prostějov	2.00*** (1.77, 2.27)	2.02*** (1.79, 2.28)	2.07*** (1.82, 2.36)	2.01*** (1.56, 2.59)	2.25*** (1.34, 3.80)	4.10*** (1.66, 10.10)	5.34*** (2.64, 10.82)	1.18 (0.61, 2.30)	1.75 (0.67, 4.61)
Třebíč	0.98 (0.86, 1.11)	0.98 (0.86, 1.11)	1.08 (0.94, 1.25)	0.60*** (0.45, 0.79)	0.65 (0.33, 1.30)	3.44*** (1.37, 8.61)	2.08** (1.08, 3.99)	2.02** (1.17, 3.49)	1.96 (0.69, 5.56)
Uherské Hradiště	1.28*** (1.13, 1.44)	1.28*** (1.14, 1.45)	1.40*** (1.23, 1.59)	1.03 (0.80, 1.32)	0.80 (0.44, 1.44)	1.94 (0.76, 4.93)	1.08 (0.53, 2.18)	1.56 (0.87, 2.78)	2.31* (0.92, 5.79)

Vyškov	1.10 (0.95, 1.28)	1.11 (0.95, 1.29)	1.21** (1.03, 1.43)	0.98 (0.72, 1.34)	0.85 (0.39, 1.84)	3.11** (1.20, 8.01)	1.23 (0.57, 2.63)	0.38** (0.16, 0.88)	1.24 (0.38, 4.06)
Zlín	1.95*** (1.75, 2.17)	1.97*** (1.77, 2.19)	2.10*** (1.87, 2.35)	1.46*** (1.19, 1.79)	0.93 (0.54, 1.59)	7.02*** (3.11, 15.82)	1.83* (0.99, 3.39)	1.15 (0.67, 1.98)	1.58 (0.57, 4.38)
Znojmo	1.72*** (1.54, 1.93)	1.74*** (1.55, 1.95)	1.74*** (1.54, 1.96)	1.33** (1.05, 1.67)	1.47 (0.85, 2.56)	4.11*** (1.72, 9.84)	1.52 (0.79, 2.94)	2.04*** (1.20, 3.46)	7.02*** (2.56, 19.23)
Žďár nad Sázavou	0.68*** (0.59, 0.79)	0.68*** (0.59, 0.79)	0.75*** (0.64, 0.87)	0.31*** (0.23, 0.42)	0.65 (0.32, 1.32)	0.31* (0.08, 1.19)	0.56 (0.25, 1.27)	1.53 (0.86, 2.74)	3.19** (1.18, 8.60)
Praha 1	1.47*** (1.33, 1.61)	1.47*** (1.34, 1.62)	1.52*** (1.38, 1.69)	1.58*** (1.33, 1.89)	0.63* (0.38, 1.05)	16.55*** (5.41, 50.64)	0.70 (0.35, 1.37)	0.62** (0.40, 0.95)	1.22 (0.57, 2.62)
Praha 2	0.68*** (0.61, 0.76)	0.68*** (0.61, 0.76)	0.72*** (0.64, 0.81)	0.65*** (0.54, 0.79)	0.65 (0.35, 1.20)	0.82 (0.38, 1.76)	0.61 (0.26, 1.43)	0.65 (0.35, 1.19)	0.82 (0.34, 1.97)
Praha 3	1.03 (0.91, 1.17)	1.03 (0.91, 1.16)	1.03 (0.91, 1.18)	1.01 (0.81, 1.26)	0.68 (0.37, 1.23)	1.73 (0.41, 7.29)	0.97 (0.41, 2.29)	0.58* (0.32, 1.06)	1.34 (0.60, 2.97)
Praha 4	1.14*** (1.03, 1.25)	1.14*** (1.03, 1.26)	1.06 (0.96, 1.18)	1.00 (0.83, 1.20)	0.56** (0.34, 0.93)	2.26* (0.90, 5.70)	1.09 (0.57, 2.06)	1.05 (0.66, 1.69)	1.55 (0.73, 3.27)
Praha 5	1.18*** (1.06, 1.30)	1.18*** (1.06, 1.30)	1.12** (1.00, 1.25)	1.11 (0.92, 1.34)	0.89 (0.53, 1.49)	1.66 (0.57, 4.82)	1.00 (0.48, 2.08)	0.72 (0.44, 1.20)	1.44 (0.66, 3.13)
Praha 6	1.56*** (1.39, 1.76)	1.57*** (1.40, 1.77)	1.59*** (1.40, 1.80)	1.42*** (1.14, 1.76)	0.87 (0.49, 1.54)	3.76** (1.07, 13.21)	0.88 (0.41, 1.91)	1.32 (0.76, 2.30)	1.06 (0.47, 2.40)
Praha 7	1.40*** (1.24, 1.58)	1.40*** (1.24, 1.58)	1.43*** (1.26, 1.63)	1.42*** (1.14, 1.77)	0.94 (0.53, 1.68)	4.38** (1.35, 14.22)	1.19 (0.53, 2.67)	0.77 (0.43, 1.37)	1.44 (0.61, 3.42)
Praha 8	1.42*** (1.27, 1.58)	1.42*** (1.27, 1.59)	1.41*** (1.25, 1.59)	1.37*** (1.11, 1.69)	0.77 (0.45, 1.34)	3.21** (1.07, 9.60)	1.57 (0.77, 3.21)	0.73 (0.42, 1.29)	1.49 (0.66, 3.36)
Praha 9	1.30*** (1.18, 1.44)	1.31*** (1.18, 1.45)	1.33*** (1.19, 1.48)	1.33*** (1.11, 1.61)	0.90 (0.53, 1.51)	1.91 (0.75, 4.90)	1.22 (0.61, 2.42)	0.92 (0.55, 1.55)	1.83 (0.85, 3.92)
Praha 10	1.54*** (1.39, 1.70)	1.55*** (1.40, 1.71)	1.47*** (1.32, 1.64)	1.51*** (1.25, 1.82)	1.09 (0.65, 1.82)	6.28*** (2.59, 15.22)	1.18 (0.59, 2.37)	1.57* (0.97, 2.55)	1.14 (0.53, 2.43)
Česká Lípa	1.20*** (1.09, 1.33)	1.20*** (1.09, 1.33)	1.29*** (1.16, 1.43)	1.27** (1.04, 1.54)	0.90 (0.53, 1.51)	1.81 (0.74, 4.42)	1.12 (0.58, 2.16)	1.41 (0.87, 2.27)	1.69 (0.72, 3.95)
Chomutov	1.03 (0.94, 1.14)	1.03 (0.93, 1.13)	1.05 (0.95, 1.16)	1.02 (0.85, 1.24)	0.64* (0.38, 1.07)	3.79*** (1.69, 8.47)	1.33 (0.73, 2.44)	1.59* (1.00, 2.52)	3.25*** (1.53, 6.90)
Děčín	1.52*** (1.38, 1.67)	1.52*** (1.38, 1.67)	1.45*** (1.31, 1.60)	1.36*** (1.14, 1.64)	0.58* (0.34, 1.01)	5.32*** (2.36, 12.00)	1.21 (0.63, 2.33)	1.96*** (1.24, 3.10)	1.57 (0.71, 3.48)
Jablonec nad Nisou	0.83*** (0.74, 0.93)	0.83*** (0.73, 0.93)	0.85** (0.75, 0.96)	0.71*** (0.56, 0.89)	0.78 (0.41, 1.48)	1.64 (0.63, 4.23)	1.08 (0.54, 2.19)	1.84** (1.03, 3.28)	0.71 (0.30, 1.68)
Liberec	1.28*** (1.16, 1.40)	1.28*** (1.16, 1.41)	1.31*** (1.18, 1.45)	1.21** (1.01, 1.46)	0.87 (0.52, 1.47)	2.87** (1.27, 6.47)	1.57 (0.85, 2.91)	1.42 (0.90, 2.25)	1.89* (0.90, 3.99)
Louny	2.84*** (2.55, 3.16)	2.87*** (2.57, 3.19)	2.86*** (2.55, 3.21)	2.85*** (2.29, 3.54)	0.62 (0.30, 1.26)	11.59*** (5.14, 26.16)	4.50*** (2.19, 9.24)	3.90*** (2.39, 6.37)	5.21*** (2.20, 12.34)
Litoměřice	2.13*** (1.92, 2.35)	2.14*** (1.93, 2.37)	1.99*** (1.79, 2.22)	1.76*** (1.44, 2.16)	1.27 (0.74, 2.20)	4.57*** (1.93, 10.82)	2.32** (1.15, 4.66)	2.24*** (1.33, 3.78)	4.61*** (2.07, 10.26)
Most	1.51*** (1.37, 1.67)	1.51*** (1.37, 1.66)	1.55*** (1.40, 1.72)	1.31*** (1.09, 1.58)	0.53** (0.31, 0.91)	7.17*** (3.27, 15.69)	1.63 (0.86, 3.07)	1.33 (0.84, 2.11)	2.50** (1.20, 5.22)
Teplice	2.36*** (2.14, 2.59)	2.37*** (2.15, 2.60)	2.50*** (2.26, 2.76)	2.71*** (2.26, 3.27)	0.94 (0.56, 1.58)	12.61*** (5.77, 27.52)	1.00 (0.49, 2.04)	2.16*** (1.39, 3.36)	2.78*** (1.33, 5.80)
Ústí nad Labem	2.72*** (2.49, 2.98)	2.73*** (2.49, 3.00)	2.72*** (2.47, 3.00)	2.92*** (2.45, 3.49)	1.11 (0.67, 1.84)	5.21*** (2.32, 11.72)	2.19** (1.15, 4.15)	2.92*** (1.86, 4.60)	3.34*** (1.60, 6.99)
Bruntál	2.00*** (1.81, 2.22)	2.01*** (1.82, 2.23)	2.64*** (2.37, 2.94)	1.77*** (1.42, 2.20)	1.23 (0.74, 2.05)	7.06*** (3.21, 15.53)	1.60 (0.88, 2.93)	1.31 (0.82, 2.11)	1.95 (0.82, 4.62)
Frýdek-místek	2.22*** (2.02, 2.45)	2.24*** (2.03, 2.46)	2.23*** (2.02, 2.48)	2.57*** (2.13, 3.11)	1.29 (0.77, 2.16)	4.09*** (1.90, 8.83)	2.01** (1.08, 3.76)	2.40*** (1.51, 3.81)	2.22** (1.04, 4.75)
Jeseník	1.23*** (1.07, 1.41)	1.23*** (1.07, 1.41)	1.55*** (1.34, 1.80)	1.46*** (1.10, 1.95)	1.69 (0.84, 3.39)	0.83 (0.21, 3.31)	1.52 (0.78, 2.96)	1.50 (0.91, 2.47)	3.98** (1.18, 13.40)
Karviná	2.01*** (1.84, 2.19)	2.01*** (1.84, 2.20)	2.11*** (1.92, 2.32)	2.03*** (1.71, 2.42)	1.21 (0.74, 1.97)	3.66*** (1.67, 8.03)	1.78** (1.01, 3.13)	2.82*** (1.80, 4.42)	2.84*** (1.41, 5.71)

Nový Jičín	1.09 (0.98, 1.21)	1.09 (0.98, 1.21)	1.17*** (1.04, 1.31)	0.97 (0.79, 1.19)	1.06 (0.62, 1.79)	2.19* (0.94, 5.08)	1.45 (0.78, 2.70)	1.08 (0.64, 1.82)	1.14 (0.48, 2.69)
Olomouc	1.98*** (1.80, 2.18)	1.99*** (1.81, 2.20)	2.07*** (1.87, 2.29)	1.84*** (1.52, 2.22)	1.60* (0.98, 2.61)	8.32*** (3.90, 17.77)	1.11 (0.59, 2.10)	2.64*** (1.63, 4.29)	2.77** (1.24, 6.21)
Opava	1.26*** (1.13, 1.39)	1.26*** (1.13, 1.39)	1.36*** (1.22, 1.52)	1.09 (0.89, 1.34)	1.00 (0.60, 1.68)	2.47** (1.07, 5.75)	1.29 (0.69, 2.40)	1.49* (0.93, 2.38)	2.32** (1.00, 5.36)
Ostrava	2.28*** (2.09, 2.49)	2.29*** (2.10, 2.49)	2.40*** (2.18, 2.63)	2.37*** (2.00, 2.80)	1.20 (0.74, 1.92)	7.98*** (3.78, 16.82)	1.91** (1.09, 3.35)	2.51*** (1.63, 3.86)	1.92* (0.96, 3.82)
Přerov	0.83*** (0.74, 0.93)	0.83*** (0.74, 0.93)	0.94 (0.84, 1.06)	0.68*** (0.55, 0.84)	0.77 (0.45, 1.31)	4.04*** (1.74, 9.38)	0.59 (0.31, 1.13)	1.03 (0.62, 1.70)	1.62 (0.68, 3.89)
Šumperk	1.56*** (1.40, 1.74)	1.57*** (1.41, 1.75)	1.75*** (1.56, 1.97)	1.71*** (1.37, 2.14)	1.15 (0.68, 1.95)	4.23*** (1.80, 9.97)	1.36 (0.73, 2.54)	1.58* (0.93, 2.69)	0.91 (0.40, 2.07)
Vsetín	1.43*** (1.28, 1.60)	1.44*** (1.28, 1.61)	1.42*** (1.26, 1.60)	1.21* (0.97, 1.50)	0.70 (0.39, 1.25)	2.92** (1.26, 6.75)	1.49 (0.77, 2.88)	1.56 (0.88, 2.76)	1.96 (0.74, 5.18)
Beroun	0.43*** (0.37, 0.50)	0.43*** (0.37, 0.50)	0.44*** (0.38, 0.52)	0.31*** (0.24, 0.42)	0.73 (0.36, 1.49)	1.30 (0.48, 3.51)	0.38* (0.13, 1.09)	0.58* (0.33, 1.03)	1.07 (0.43, 2.66)
Benešov	0.98 (0.86, 1.11)	0.98 (0.86, 1.11)	1.01 (0.89, 1.16)	1.03 (0.80, 1.32)	1.40 (0.76, 2.58)	1.80 (0.71, 4.56)	1.41 (0.64, 3.12)	0.71 (0.34, 1.50)	1.02 (0.37, 2.79)
Kutná Hora	0.86** (0.74, 1.00)	0.86** (0.74, 1.00)	0.88 (0.75, 1.03)	0.72** (0.54, 0.96)	1.01 (0.48, 2.14)	1.44 (0.50, 4.20)	1.74 (0.68, 4.50)	1.61 (0.69, 3.80)	1.81 (0.58, 5.68)
Kladno	1.25*** (1.13, 1.38)	1.25*** (1.13, 1.38)	1.24*** (1.11, 1.38)	1.32*** (1.09, 1.61)	0.97 (0.56, 1.66)	2.77** (1.24, 6.19)	1.60 (0.80, 3.21)	1.57* (0.99, 2.50)	1.68 (0.78, 3.59)
Kolín	0.68*** (0.60, 0.76)	0.67*** (0.60, 0.75)	0.66*** (0.58, 0.74)	0.55*** (0.44, 0.68)	0.65 (0.36, 1.18)	0.72 (0.24, 2.20)	0.67 (0.31, 1.42)	0.71 (0.41, 1.23)	1.38 (0.57, 3.33)
Mladá Boleslav	0.84*** (0.75, 0.93)	0.84*** (0.75, 0.94)	0.80*** (0.72, 0.90)	0.70*** (0.57, 0.86)	0.52** (0.27, 0.99)	1.75 (0.72, 4.24)	0.91 (0.41, 2.04)	1.10 (0.64, 1.87)	2.19* (0.99, 4.85)
Nymburk	1.38*** (1.23, 1.54)	1.38*** (1.23, 1.55)	1.46*** (1.29, 1.65)	1.26** (1.00, 1.58)	1.18 (0.63, 2.21)	2.63** (1.06, 6.51)	2.14** (1.06, 4.30)	2.22*** (1.31, 3.76)	7.83*** (3.04, 20.19)
Příbram	0.85*** (0.76, 0.96)	0.85*** (0.76, 0.96)	0.87** (0.77, 0.99)	0.96 (0.77, 1.21)	1.10 (0.62, 1.95)	1.01 (0.36, 2.82)	1.15 (0.56, 2.38)	0.94 (0.57, 1.55)	5.14*** (2.16, 12.19)
Praha-východ	0.71*** (0.64, 0.80)	0.71*** (0.64, 0.80)	0.69*** (0.61, 0.78)	0.62*** (0.50, 0.78)	0.70 (0.39, 1.25)	1.15 (0.49, 2.69)	1.14 (0.54, 2.38)	1.35 (0.83, 2.20)	2.28 (0.79, 6.57)
Praha-západ	0.86** (0.77, 0.97)	0.86** (0.77, 0.97)	0.90* (0.80, 1.02)	0.73*** (0.58, 0.91)	1.27 (0.69, 2.35)	2.85** (1.26, 6.48)	0.51 (0.21, 1.22)	1.32 (0.80, 2.19)	2.47* (0.95, 6.42)
Rakovník	1.49*** (1.30, 1.72)	1.50*** (1.31, 1.73)	1.48*** (1.28, 1.72)	1.10 (0.81, 1.50)	0.88 (0.40, 1.97)	2.35 (0.82, 6.72)	4.11*** (2.04, 8.29)	2.78*** (1.58, 4.89)	3.69* (0.86, 15.82)
Chrudim	1.69*** (1.49, 1.92)	1.70*** (1.50, 1.93)	1.70*** (1.48, 1.94)	1.57*** (1.21, 2.05)	0.93 (0.48, 1.81)	6.08*** (2.57, 14.35)	1.22 (0.54, 2.73)	1.87* (0.95, 3.67)	1.36 (0.48, 3.89)
Havlíčkův Brod	0.64*** (0.55, 0.74)	0.64*** (0.55, 0.74)	0.67*** (0.57, 0.79)	0.56*** (0.42, 0.75)	0.54 (0.24, 1.22)	1.54 (0.55, 4.33)	0.49* (0.22, 1.09)	1.22 (0.69, 2.16)	1.26 (0.40, 3.96)
Hradec Králové	2.23*** (2.01, 2.48)	2.25*** (2.02, 2.50)	2.26*** (2.01, 2.53)	2.22*** (1.80, 2.74)	1.81** (1.08, 3.02)	6.53*** (2.81, 15.18)	2.09** (1.03, 4.23)	1.33 (0.78, 2.28)	2.16* (0.91, 5.16)
Jičín	0.68*** (0.59, 0.78)	0.68*** (0.59, 0.78)	0.65*** (0.56, 0.75)	0.44*** (0.33, 0.59)	0.26*** (0.12, 0.58)	0.81 (0.20, 3.33)	0.97 (0.44, 2.13)	1.31 (0.74, 2.30)	1.48 (0.52, 4.19)
Náchod	1.59*** (1.43, 1.78)	1.60*** (1.43, 1.79)	1.90*** (1.69, 2.14)	1.28** (1.02, 1.60)	1.03 (0.60, 1.74)	4.97*** (2.10, 11.77)	1.60 (0.79, 3.21)	1.50 (0.91, 2.46)	1.83 (0.80, 4.20)
Pardubice	1.95*** (1.76, 2.17)	1.97*** (1.78, 2.19)	1.94*** (1.73, 2.16)	1.57*** (1.29, 1.91)	1.83** (1.10, 3.04)	6.75*** (2.97, 15.36)	2.98*** (1.51, 5.85)	1.60* (0.95, 2.71)	8.60*** (3.74, 19.76)
Rychnov nad Kněžnou	1.37*** (1.20, 1.56)	1.38*** (1.21, 1.58)	1.39*** (1.21, 1.60)	0.79* (0.60, 1.04)	1.69* (0.94, 3.03)	5.12*** (2.02, 12.96)	2.32* (0.98, 5.47)	2.34** (1.18, 4.65)	3.73** (1.33, 10.48)
Semily	1.91*** (1.67, 2.18)	1.92*** (1.69, 2.20)	2.03*** (1.76, 2.34)	1.69*** (1.28, 2.22)	1.58 (0.84, 2.96)	4.96*** (2.04, 12.05)	1.58 (0.64, 3.91)	1.27 (0.68, 2.39)	2.34 (0.83, 6.57)
Svitavy	0.67*** (0.59, 0.76)	0.67*** (0.59, 0.76)	0.73*** (0.64, 0.84)	0.41*** (0.32, 0.53)	0.41*** (0.22, 0.78)	1.82 (0.75, 4.39)	0.58 (0.25, 1.34)	1.68* (0.99, 2.85)	1.10 (0.34, 3.53)
Trutnov	1.98*** (1.78, 2.20)	1.99*** (1.79, 2.21)	2.05*** (1.84, 2.30)	1.68*** (1.36, 2.08)	1.52 (0.89, 2.60)	3.07*** (1.32, 7.15)	2.63*** (1.37, 5.03)	2.09*** (1.27, 3.46)	2.48** (1.01, 6.08)

Ústí nad Orlicí	2.74*** (2.45, 3.07)	2.78*** (2.48, 3.11)	2.70*** (2.39, 3.05)	2.14*** (1.70, 2.70)	2.03** (1.15, 3.57)	24.17*** (11.02, 53.02)	4.64*** (2.38, 9.05)	4.01*** (2.46, 6.52)	7.03*** (2.64, 18.72)
Cheb	2.36*** (2.14, 2.61)	2.37*** (2.15, 2.63)	2.46*** (2.21, 2.73)	2.67*** (2.20, 3.26)	1.59* (0.92, 2.76)	7.20*** (3.26, 15.88)	2.46*** (1.25, 4.85)	1.55* (0.95, 2.51)	2.06* (0.96, 4.42)
Domažlice	0.62*** (0.53, 0.72)	0.62*** (0.53, 0.72)	0.58*** (0.50, 0.68)	0.48*** (0.36, 0.65)	0.61 (0.27, 1.38)	0.67 (0.22, 2.02)	0.57 (0.20, 1.67)	0.45** (0.23, 0.87)	0.88 (0.30, 2.56)
Klatovy	1.18*** (1.05, 1.33)	1.18*** (1.05, 1.34)	1.26*** (1.11, 1.43)	1.03 (0.81, 1.31)	0.70 (0.34, 1.44)	2.10 (0.83, 5.36)	1.84 (0.85, 3.98)	0.78 (0.41, 1.47)	1.87 (0.69, 5.08)
Karlovy Vary	1.21*** (1.09, 1.34)	1.21*** (1.09, 1.34)	1.38*** (1.24, 1.54)	1.30*** (1.07, 1.58)	0.85 (0.50, 1.45)	2.59** (1.14, 5.88)	1.46 (0.79, 2.70)	0.75 (0.46, 1.23)	1.61 (0.70, 3.68)
Plzeň-jih	1.81*** (1.59, 2.08)	1.83*** (1.60, 2.10)	1.78*** (1.54, 2.06)	2.04*** (1.55, 2.68)	1.56 (0.66, 3.67)	6.90*** (2.90, 16.42)	2.72** (1.05, 7.08)	0.90 (0.46, 1.75)	2.11 (0.68, 6.53)
Plzeň-město	3.35*** (3.05, 3.67)	3.38*** (3.08, 3.71)	3.53*** (3.19, 3.90)	3.80*** (3.17, 4.55)	2.30*** (1.38, 3.81)	6.70*** (3.07, 14.63)	3.09*** (1.73, 5.51)	1.97*** (1.22, 3.18)	2.36** (1.14, 4.91)
Plzeň-sever	0.77*** (0.67, 0.89)	0.77*** (0.67, 0.89)	0.73*** (0.63, 0.85)	0.61*** (0.46, 0.80)	0.11*** (0.02, 0.49)	2.04 (0.72, 5.80)	0.70 (0.25, 1.98)	0.17*** (0.07, 0.41)	1.86 (0.51, 6.76)
Rokycany	1.14* (0.98, 1.32)	1.15* (0.99, 1.33)	1.10 (0.94, 1.28)	1.12 (0.85, 1.47)	0.58 (0.25, 1.37)	1.79 (0.58, 5.58)	0.79 (0.28, 2.25)	1.13 (0.54, 2.40)	1.67 (0.56, 4.98)
Sokolov	1.66*** (1.50, 1.83)	1.66*** (1.50, 1.83)	1.94*** (1.74, 2.16)	2.20*** (1.81, 2.67)	1.65* (0.95, 2.89)	4.81*** (2.16, 10.71)	1.14 (0.62, 2.11)	2.01*** (1.23, 3.30)	1.07 (0.45, 2.55)
Tachov	1.18*** (1.04, 1.34)	1.19*** (1.05, 1.34)	1.18** (1.04, 1.35)	1.04 (0.81, 1.33)	0.73 (0.33, 1.59)	1.83 (0.62, 5.37)	0.77 (0.36, 1.66)	0.86 (0.47, 1.57)	0.91 (0.37, 2.24)
§ 147 Negligent grievous bodily harm (ref. § 146 Bodily harm*)*			2.27*** (1.95, 2.64)						
§ 173 Robbery			8.39*** (7.77, 9.06)						
§ 178 Trespa-ssing			2.22*** (2.09, 2.36)						
§ 196 Evasion of alimony payments			2.00*** (1.88, 2.11)						
§ 201 Endange-ring the welfare of a child			0.78*** (0.69, 0.89)						
§ 205 Theft			4.11*** (3.90, 4.34)						
§ 206 Embezzle-ment			1.95*** (1.79, 2.13)						
§ 209 Fraud			3.32*** (3.11, 3.54)						
§ 211 Loan fraud			1.35*** (1.23, 1.47)						
§ 228 Property damage			0.86*** (0.77, 0.96)						

§ 274 DUI			0.79*** (0.74, 0.85)						
§ 283 Drug trafficking			3.94*** (3.69, 4.20)						
§ 337 Frustrating an official decision			4.45*** (4.21, 4.70)						
§ 358 Public mischief			0.84*** (0.77, 0.91)						
Constant	0.01*** (0.01, 0.01)	0.01*** (0.01, 0.01)	0.001*** (0.001, 0.001)	0.01*** (0.01, 0.01)	0.01*** (0.01, 0.02)	0.0001*** (0.0000, 0.0002)	0.004*** (0.002, 0.01)	0.01*** (0.004, 0.01)	0.02*** (0.01, 0.04)
Nagelkerke's pseudo R^2	0.544	0.533	0.544	0.579	0.534	0.511	0.534	0.644	0.598
Observations	774,915	762,117	662,083	168,925	54,626	123,030	30,525	33,372	11,516

Note: *p<0.1; **p<0.05; ***p<0.01

Role trestní minulosti při ukládání trestů v teorii a praxi

Abstrakt

Přestože přídatky za trestní minulost jsou běžné, představují zároveň z hlediska teorie problematickou praxi. V této práci byl zhodnocen rozdíl mezi retributivními a utilitárními teoriemi trestání, přičemž byly popsány obvyklé přístupy k trestání a tyto byly následně podrobeny kritickému rozboru. Bylo zjištěno, že žádný z těchto přístupů nenabízí ucelený a funkční systém trestání. Byla zde představena hybridní teorie omezujícího retributivismu a doporučena k použití v praxi, jakožto realistický a pragmatický přístup.

V práci byly zváženy a navzájem konfrontovány různé přístupy k trestání recidivistů. Nebylo zjištěno, že by retributivní či utilitární přístupy dostatečně ospravedlňovaly plošné přídatky za trestní minulost. Modely přídatku za trestní minulost založené na teorii zvýšené míry zavinění nebo omezujícího retributivismu byly sice shledány z hlediska teorie nepřesvědčivými, avšak v praxi použitelnými jako přístupy zajišťující přiměřenost trestu.

V České republice nebyly nalezeny téměř žádné náznaky promyšleného odůvodnění zpřísňování trestů recidivistům. Právní rámec byl ve vztahu k přídatkům za trestní minulost zhodnocen jako příliš vágní a nepřesný. Byly navrženy změny *de lege ferenda* vycházející z Robertsova a Fraseho hybridního modelu, které by umožnily dosáhnout jasnějších limitů pro přídatky za trestní minulost a nastolit transparentní a spravedlivý proces jejich stanovování.

Dále byl zkoumán vliv předchozích odsouzení na rozhodnutí o uložení nepodmíněného trestu odnětí svobody v České republice v kontextu nestrukturovaného systému ukládání trestů. Na základě kompletních údajů o trestech z let 2010-2022 byly zjištěny výrazně větší druhové přídatky za trestní minulost ve srovnání s předchozími výzkumy v jiných soudních systémech. Napříč všemi typy trestných činů platilo, že čím závažnější byl trestný čin, tím menší byl přídatek za trestní minulost. Při srovnání s Anglií a Walesem byl v Česku zjištěn výrazně větší přídatek za trestní minulost a nalezeny důkazy existence "pravého" kumulativního modelu. Jedním z možných vysvětlení těchto výsledků je relativní mírnost soudců vedoucí k nízké míře ukládání nepodmíněných trestů prvopachatelům, ale zároveň výrazně vyšší míra nepodmíněných trestů s přibývajícími předchozími odsouzeními, která se blíží té v Anglii a Walesu.

Klíčová slova: teorie trestání, ukládání trestů, trestní minulost, kvantitativní kriminologie

The Role of Criminal History in Sentencing Theory and Practice

Abstract

While criminal history enhancements are ubiquitous, they are also a theoretically problematic practice. The distinction between retributive and utilitarian punishment theory was introduced, while typical approaches within these theories of punishment were described and subjected to critical analysis. None of these approaches was found to offer a complete and workable sentencing system. The hybrid theory of limiting retributivism was presented and suggested as a realistic and pragmatic approach.

The approaches to sentencing repeat offenders were considered and mutually confronted. Neither the retributive nor the utilitarian approaches were found to be sufficient justifications for broad criminal history enhancements. Enhanced culpability and limiting retributivist models of criminal history enhancements were found theoretically unconvincing but usable in practice as approaches ensuring proportionality.

Almost no evidence was found for a coherent justification for enhanced punishment for repeat offenders in Czechia. The legal framework was assessed as too vague and imprecise regarding criminal history enhancements. Policy suggestions based on Roberts and Frase's hybrid model were offered to achieve clearer limits of the criminal history enhancement and a transparent and fair process of their determination.

The effect of previous convictions on the in/out incarceration decision in Czechia was examined in the context of an unstructured sentencing system. Using complete sentencing data from 2010-2022, an extremely large dispositional magnitude of criminal history enhancements was found compared to previous research in other jurisdictions. Across offence types, the more serious an offence was, the lesser was the criminal history enhancement. When compared with England and Wales, a significantly greater criminal history enhancement was found in Czechia along with evidence for a "true" cumulative model. One potential explanation of these results is relative lenience leading to a low custody rate for first-offenders, but a higher custody rate that approaches England and Wales with accumulating prior offences.

Keywords: punishment theories, sentencing, criminal history, quantitative criminology