Previous Convictions at Sentencing: Exploring Empirical Trends in the Crown Court

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Most offenders appearing for sentencing have a criminal record. Despite the prevalence of previous convictions, little is known about their impact on sentence outcomes, and in particular the decision to imprison. How should previous convictions affect sentence outcomes? Competing theoretical models exist. Previous convictions may simply disentitle repeat offenders to first offender mitigation and then fail to aggravate (progressive loss of mitigation). Alternatively, prior convictions may be used to continuously increase the severity of sentence (cumulative sentencing). Until now, due to limitations of the sentencing statistics, it has been impossible to determine which model underpins sentencing practices. The Crown Court Sentencing Survey (CCSS) provides a more adequate source of data. Sentencers complete a return noting the factors taken into account at sentencing, including the number of prior convictions. This article reports new data from the CCCS which demonstrate that for most offences, courts continue to apply the principle of the progressive loss of mitigation. Once this mitigation is lost, there is little further increase in severity as measured by the custody rate, although some variation in the effect of previous convictions does emerge between offences.

Sentencing regimes around the world vary greatly, but almost all common and civil law jurisdictions punish repeat offenders more harshly.[1] Beyond this simple fact, arrangements become more complex: an offender's criminal record can affect sentence severity in different ways.[2] Some regimes courts apply the principle of

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[1] The exception would appear to be Western Australia. Section 7(2) of the Sentencing Act 1995 states that: "An offence is not aggravated by the fact that—(a) the offender pleaded not guilty to it; (b) the offender has a criminal record". For discussion of other jurisdictions, see J.V. Roberts, *Punishing Persistent Offenders* (Oxford: Oxford University Press, 2008), Ch.5.

[2] Ashworth notes four approaches to punishing persistence, the two identified here as well as "flat-rate" sentencing (where previous convictions play no role at all), and a model which employs prior convictions as justifying a rebuttable

the *progressive loss of mitigation*, well-established by the Court of Appeal over 30 years ago in *Queen*.[3] First offenders (and those with minor records) receive significant mitigation which is progressively withdrawn as they acquire additional convictions. Once this mitigation is exhausted, the offender receives the fully proportionate sentence, but sentences do not escalate in severity beyond this point.

Elsewhere, courts employ a *cumulative sentencing* approach, imposing ever more severe sentences to reflect the number and seriousness of previous convictions. Many US guidelines—including those found in Minnesota and Pennsylvania—follow this model.[4] For example, consider the sentencing of a serious assault under the Minnesota guidelines. Each prior conviction[5] results in the imposition of an additional 12 months of prison time.[6] This arrangement of automatically increasing severity greatly oversimplifies the consideration of prior convictions at sentencing.[7] Offenders are not more culpable, or higher-risk by exactly the same quotient for each prior conviction.

Different approaches to the use of previous convictions reflect contrasting underlying theories. Cumulative Sentencing assumes that each additional conviction increases the offender's culpability or risk of re-offending, and therefore justifies a concomitant increase in severity. In contrast, according to the progressive loss of mitigation, first offenders are awarded a sentence reduction to reflect a "lapse" from law abiding life to which many may succumb (and on more than a single occasion).[8] Repeat offenders are not deemed to be more culpable and risk of re-offending is not part of the equation.

Overview of article

In this article we draw upon Crown Court Sentencing Survey (CCSS) and Ministry of Justice data to address four important, unanswered questions:

- Has there been any recent change in the criminal history profiles of offenders appearing for sentencing?
- To what extent do courts consider all previous convictions to be relevant at sentencing?
- Which theoretical model of prior offending underpins the use of previous convictions—the cumulative sentencing model or the progressive loss of mitigation?
- Do prior convictions play a variable role depending upon the nature of the offence?

culpability-based presumption of a harsher sentence (see A. Ashworth, *Sentencing and Criminal Justice*, 5th edn (Cambridge: Cambridge University Press, 2010), pp.197–204. We focus here on the two most prominent models in common law jurisdictions.

[3] *Queen* (1981) 3 Cr. App. R. (S.) 245.

[4] See R. Frase, *Just Sentencing* (New York: Oxford University Press, 2012), Ch. 4; J.V. Roberts and O. Yalincak, "Revisiting Prior Record Enhancement Provisions in State Sentencing Guidelines" (2014) 26 *Federal Sentencing Reporter* 177.

[5] Or criminal history point; some prior convictions carry more weight, resulting in more points.

[6] See Minnesota Sentencing Guidelines Grid, 2012, available at: *http://mn.gov/sentencing-guidelines/images/2013%2520Standard%2520Grid.pdf* [Accessed June 2, 2014].

[7] For discussion of the complexities of interpreting a criminal history, see M. Wasik, "Dimensions of Criminal History: Reflections on Theory and Practice" in *The Role of Previous Convictions at Sentencing: Theoretical and Applied Perspectives* (Oxford: Hart Publishing, 2010).

[8] See A. von Hirsch, "Proportionality and the Progressive Loss of Mitigation: Some Further Reflections" in *The Role of Previous Convictions at Sentencing: Theoretical and Applied Perspectives* (2010).

We begin, however, with a review of guidance provided by statutory provisions and definitive sentencing guidelines.

The evolution in sentencing policy in England and Wales

The role of previous convictions at sentencing in England and Wales has evolved significantly over the last 20 years. We begin our brief review of statutory guidance with the Criminal Justice Act 1991.[9] Section 29(1) of this statute restricted the aggravating effect of previous convictions when it directed courts that an offence was *not* to be regarded as more serious "by reason of any previous convictions of the offender". In the words of one commentator, this provision attempted to "force courts to focus on the defendant's current offence, rather than his past record".[10] The provision was amended two years later when the Criminal Justice Act 1993 permitted courts to aggravate sentence on a wider examination of previous convictions. Subsection 29(1) as amended stated that:

> "In considering the seriousness of any offence, the court *may* take into account any previous convictions of the offender or his failure to respond to previous sentences"(emphasis added).

An important government review of the existing provisions and research was conducted in 2001. The Report on sentencing in England and Wales concluded that:

> "Severity of sentence should be governed…by the following principles:
> - the severity of the punishment should reflect the seriousness of the offence and the offender's criminal history;
> - the seriousness of the offence should reflect its degree of harmfulness or risked harmfulness, and the offender's culpability in committing the offence;
> - the severity of the sentence should increase to reflect previous convictions, taking account of how recent and relevant they were."[11]

The Review endorsed a "clear presumption that sentence severity should increase as a consequence of sufficiently recent and relevant previous convictions", a presumption reflecting both retributive and risk-based preventive motives.[12] However, it is important to note that the Sentencing Review was targeting offenders who displayed a "continuing course of criminal conduct in the face of repeated attempts by the State to try to correct it".[13] Many offenders with previous convictions fail to conform to this description, either because their previous convictions were: relatively old, were spaced in a way that fails to demonstrate

[9] For more information about statutory developments prior to 1991, see Ashworth, *Sentencing and Criminal Justice* (2010), pp.196–198.

[10] L. Koffman, "The Rise and Fall of Proportionality: the Failure of the Criminal Justice Act 1991" [2006] Crim. L.R. 281.

[11] Home Office, *Making Punishments Work: Report of a Review of the Sentencing Framework for England and Wales* (London: Home Office, 2001), p.13.

[12] The Report notes that: "A continuing course of criminal conduct… calls for increasing denunciation and retribution" and "because previous convictions are a strong indicator of risk of reoffending", Home Office, *Making Punishments Work: Report of a Review of the Sentencing Framework for England and Wales* (2001), p.13.

[13] Home Office, *Making Punishments Work: Report of a Review of the Sentencing Framework for England and Wales* (2001), p.13.

"continuing conduct"; were different from the present crime; or arose out of pressures in the life of the offender that no longer exist. All of these (and other) possibilities may lead a court to disregard the previous convictions for the purposes of sentencing for a new offence.

In any event, the Review's proposals clearly guided subsequent legislation. Legislative guidance came full circle in 2003, when s.143(2) of the Criminal Justice Act directed courts that:

> "In considering the seriousness of an offence…committed by an offender who has one or more previous convictions, the court must treat each prior conviction as an aggravating factor if…the court considers that it can reasonably be so treated having regard to—
> (a) the nature of the offence to which the conviction relates and its relevance to the current offence, and
> (b) the time that has elapsed since the conviction".

The statutory direction thus evolved from *prohibiting* a broad consideration of relevant priors (in 1991), to *permitting* greater aggravation (1993), to *mandating* such a practice (in 2003). It is unsurprising that one scholar described this transformation as a "remarkable volte face" in sentencing policy.[14] The rapid changes in sentencing policy with respect to previous convictions reflect the chaotic and politicised policy environment at the time.

By affirming that each prior conviction should enhance the seriousness of the offence, the 2003 provision appears to repudiate this principle in favour of a cumulative sentencing model. One casualty of these statutory amendments, then, may have been the Progressive Loss of Mitigation. On the wane in the 1990s, in 2010 Ashworth suggested that the principle has "now vanished in English Law".[15]

Interpreting s.143(2)

Some scholars[16] were apprehensive that the 2003 provision would greatly increase the aggravating effect of previous convictions, by encouraging courts to consider each prior conviction as aggravating. The provision is reminiscent of many US guidelines where, as noted, custody rates increase progressively to reflect higher numbers of prior convictions. Courts have no discretion to discount or ignore previous convictions in the grid based US guidelines.[17] However, the clear aggravating direction of the first part of s.143(2) is qualified by the latter sections. These permit a court to consider whether it would be reasonable to take a prior conviction into account in aggravation. Moreover, the provision highlights the two primary dimensions affecting the determination of relevance: the extent to which

[14] R. Henham, writing in 1995, even before the final chapter in the story was known; see "Sentencing Policy and the Role of the Court of Appeal" (1995) 34 *Howard Journal* 21.

[15] Ashworth, *Sentencing and Criminal Justice* (2010), p.204.

[16] L. Koffman described the provision as posing "a further challenge to the proportionality principle". In Koffman, "The Rise and Fall of Proportionality: the Failure of the Criminal Justice Act 1991" [2006] Crim. L.R. 281, 297; see also von Hirsch, A. and Roberts, J.V. "Legislating Sentencing Principles: The Provisions of the Criminal Justice Act 2003 relating to Sentencing Purposes and the Role of Previous Convictions" [2004] Crim. L.R. 639.

[17] If prior convictions have a powerful influence on sentence outcomes, offence-based proportionality will be undermined. An example from Minnesota illustrates the danger. An offender convicted of a serious assault and who has only three prior felony convictions is liable to a guideline sentence of 158 months. Since the guideline sentence for a first offender is 86 months, the repeat offender's sentence is 84% longer. Almost half (46%) of the repeat offender's sentence is a consequence of his former offending rather than his current offence.

the current offence is related to prior misconduct, and the recency of the prior convictions. It would be unreasonable to take into account prior convictions which are insufficiently related to the current offence, or are insufficiently recent. As Dingwall noted, there is no mandatory requirement to take all previous convictions into account.[18] The importance of judicial discretion is clear: a sentencer is best placed to determine whether it would be reasonable to take any given prior conviction into account.

Role of previous convictions in the definitive sentencing guidelines

Another player entered the scene in 2003.[19] The principal source of guidance after the Court of Appeal is of course the statutory authority responsible for issuing sentencing guidelines. In 2003, as a result of the Criminal Justice Act, the Sentencing Guidelines Council (SGC) was created and began to issue definitive guidelines. In comparison to the explicit direction of s.143, prior convictions played a relatively muted role in the SGC guidelines. Guidance comes in the form of an over-arching guideline regarding offence seriousness, and offence-specific guidelines.

Besides the offence-specific guidelines, in 2004, the SGC issued a "generic" guideline for determining offence seriousness. This guideline notes that: "The seriousness of an offence is determined by two main parameters; the culpability of the offender and the harm caused or risked by the offence".[20] The Seriousness Guideline does not cite s.143(2) or refer to the role of previous convictions in affecting the seriousness of the offence—the provision is conspicuous by its absence. The only reference to previous convictions is in the guideline's list of aggravating factors wherein they are listed as indicating higher culpability.

Similarly, the offence-specific guidelines omit any reference to s.143(2). For example, the assault guideline lists the most common aggravating factors for offences against the person, but previous convictions do not appear in the list. In the offence specific guidelines issued by the SGC, sentence ranges were predicated on the assumption that the offender had no prior convictions. The only direction is that:

> "Where the offender has previous convictions which aggravate the seriousness of the current offence, that may take the provisional sentence beyond the range given".[21]

The SGC and the Sentencing Advisory Panel were replaced by a single statutory body, the Sentencing Council of England and Wales in 2010. In its first definitive guideline (for the assault offences which became effective June 2011) the Sentencing Council issued a revised format. Taking on board criticism of the old guidelines,[22] the new Council took a different approach to previous convictions.

[18] G. Dingwall, "Deserting Desert? Locating the Present Role of Retributivism in the Sentencing of Adult Offenders" [2008] *The Howard Journal* 408.

[19] The Sentencing Advisory Panel, the other relevant statutory body, had been in existence since 1999.

[20] Sentencing Guidelines Council, *Overarching Principles: Seriousness* (London: SGC, 2004), p.3.

[21] Sentencing Guidelines Council, *Assault Offences: Definitive Guideline* (London: SGC, 2008), p.10.

[22] See I. Edwards, "Draft Sentencing for Assaults" [2010] *Criminal Law and Justice Weekly* 6. Critics claimed that assuming an offender without prior convictions was unrealistic in light of the fact that so many offenders appear for sentencing with previous convictions.

The SGC's guideline ranges had applied to a first offender; courts would then revise the sentence upwards to reflect any relevant prior convictions.[23]

Role of previous convictions in the new format guideline

The Council's assault offences guideline requires courts to follow a series of steps, the first two of which are key. At Step One the court determines which of three categories of seriousness is appropriate. Once this is determined, the court applies the range of sentence for the chosen category. At Step Two the court considers a wide range of mitigating and aggravating factors to determine a provisional sentence *within* the category range. The court therefore enters Step Two without having considered the offender's criminal history and then moves up (or down) from the starting point sentence within the relevant category range to reflect the presence (or absence) of relevant prior convictions. Thus, under the Council's new format for assault,[24] prior convictions are considered by a sentencing court at Step Two of the guidelines methodology.

It is unclear how the current Council's approach to previous convictions may have affected the use of previous convictions. One possibility is that the new format would constrain the inflationary effect of previous convictions on custody rates. The reasoning is that by placing the factor at Step Two[25] rather than Step One the Council may have limited its influence: Step Two factors affect only the location of the sentence *within* the guideline's category range of sentence. Had the factor been placed at Step One it would have more influence on sentence severity as it would affect which of three sentence ranges was applied to the case at bar.[26]

Against this view it may be noted that the guideline permits courts to move out of the identified category range in the event that the Step Two factors (including prior convictions) justify so doing. In addition, in the definitive burglary guideline[27] the Council highlights the relevance of previous convictions by noting that "in particular, relevant, recent convictions are likely to result in an upward adjustment",[28] although consideration of prior convictions is still restricted to Step Two. The enhanced role of previous convictions for the offence of domestic burglary reflects appellate case law, most recently in *Saw*. In that judgment the Court noted that: "We endorse the observations in *Brewster* that "the record of the offender is of more significance in the case of domestic burglary than in the case of some other crime".[29]

[23] Sentencing Guidelines Council *Assault and Other Offences Against the Person: Definitive Guideline* (2008), p.10.

[24] Sentencing Council, *Assault Offences: Definitive Guideline* (London: SC, 2011). The format created for assault serves as a model for most subsequent offence-specific guidelines, available at: *http://sentencingcouncil.judiciary.gov.uk/about/assault.htm* [Accessed June 2, 2006].

[25] One justification for placing priors at the first rather than second step is that Step One factors are described as being relevant to harm or culpability, whereas step two factors are listed under the heading "Factors increasing seriousness", which more closely reflects the statutory language of s.143 of the Criminal Justice Act 2003. In addition, Step One factors are described in the guideline as those which comprise the "principal" factual elements of the offence and previous convictions are presumably not a principal element.

[26] For example, for the crime of ABH, previous convictions will affect the sentence within a category range—for the intermediate category this is a low level community order to 51 weeks custody. If they were considered at Step One, they might make the difference between a category upper limit of three years rather than 51 weeks.

[27] As well as several subsequent guidelines issued by the Council—see later sections of this article.

[28] Sentencing Council, *Burglary offences: Definitive Guideline* (London: SC, 2011), p.9.

[29] *Saw* [2009] EWCA Crim 1; [2009] 2 All E.R. 1138 at [24].

Finally, there may be reason to expect the SC guideline to have more impact on sentencing practices than the guidelines issued by the SGC. Under the new guidelines regime courts are bound by a stricter compliance requirement. Prior to passage of the Coroners and Justice Act 2009, courts were required only to "have regard to" any relevant guideline.[30] This duty on courts was strengthened by the Coroners Act. Section 125(1)(a):

> "Every court — (a) must in sentencing an offender, follow any relevant sentencing guideline….unless the court is satisfied that it would be contrary to the interests of justice to do so".[31]

To summarise, if s.143(2) of the Criminal Justice Act 2003 enhanced the role of previous convictions, the Council's placement of this factor at Step Two may have exercised a countervailing limit on the power of previous convictions to aggravate sentence (except for domestic burglary). It is unclear how these statutory (and guideline) changes have influenced sentencing practices since there has been no recent research upon on the impact of previous convictions at sentencing — hence the need for fresh research.

Findings from previous research and limitations on sentencing statistics

The paucity of analysis on the effect of previous convictions may be explained by the inadequacies of the statistics to date. Until now, the only annual, publicly-available sentencing data were the official sentencing statistics which provide custody rates cross-tabulated with the number of previous convictions. Previous "one-off" research exercises have suggested that courts follow a cumulative approach, with incarceration rates steadily increasing, suggesting a linear relationship between the custody rate and the number of prior convictions.[32] For example, Flood-Page and Mackie concluded that: "The proportion of people imprisoned increased steadily as the number of previous convictions rose".[33] In the mid-1980s, Moxon and other researchers reached the same conclusion.[34] The most recent Ministry of Justice statistics echo these trends: In 2013, the immediate custody rate for adult offenders convicted of an indictable offence and with no prior convictions or cautions was 12 per cent. The custody rate then rises in a way that is generally consistent with the cumulative sentencing approach: 1-2 priors: 13 per cent; 3-6 priors: 18 per cent; 7-10 priors: 24 per cent; 11 or more priors: 66 per cent.[35]

[30] CJA 2003 s.172.
[31] Coroners and Justice Act s.125(1)(a).
[32] See C. Flood-Page and A. Mackie, *Sentencing Practice: An Examination of Decisions in the Magistrates' courts and the Crown Court* (London: Home Office, 2008). For discussion of later trends, see J.V. Roberts, *Punishing Persistent Offenders* (Oxford: Oxford University Press, 2008), p.103.
[33] C. Flood-Page and A. Mackie, *Sentencing Practice: An Examination of Decisions in the Magistrates' courts and the Crown Court* (London: Home Office, 2008), p.74.
[34] D. Moxon, *Sentencing Practices in the Crown Court*, Home Office Research Study 103 (London: Home Office, 1988), p.8.
[35] Ministry of Justice data, Table Q7.4, accessed March 1, 2014.

Limitations on previous databases

However, these statistics suffer from three important limitations which can now be addressed. First, the Ministry data combine both previous convictions and cautions. Secondly, the Ministry statistics do not permit researchers to isolate the impact of previous convictions on sentence severity *independent* of the influence of other factors such as plea. Thirdly, the Ministry data include *all prior convictions recorded* in the case file, whether the court took them into account or not. However, even before, and particularly after the introduction of the 2003 Act, courts have exercised their discretion to disregard prior convictions if those convictions were old or insufficiently related to the current conviction. The Ministry of Justice sentencing statistics treat all prior convictions as though they were relevant, which is misleading. For this reason, a database is needed which includes only those convictions which the sentencer deemed to be relevant — and this is likely, as noted, to represent a subset of all his or her prior convictions.

A new source of data addresses these analytical limitations of the Ministry data. The Crown Court Sentencing Survey collects detailed information directly from the sentencing authority at the time of sentencing.[36] Crown Court sentencers complete a return noting all factors taken into account at sentencing, including the number of previous convictions. Because the sentencer is providing this information, the data permit a more accurate estimation of the effect of prior convictions at sentencing. The Ministry statistics are useful to answer other questions, however. For example, since their limitations are constant over time, we can explore historical trends in the volume of prior convictions as well as other important aspects of criminal history. Accordingly, this article draws upon both databases.

Crown Court Sentencing Survey

The CCSS emerged from a prototype conducted by the Sentencing Commission Working Group. This body conducted a trial data collection in 2008, with a view to exploring the feasibility of collecting data directly from sentencers. A small number of courts were asked to complete forms for just a month, and the response rate was approximately 50 per cent.[37] The Sentencing Council requires courts to continuously complete the forms and the national response rate is now close to 70 per cent. Comparisons made between cases captured by the survey and sentences not reported but captured by the Ministry suggest the two databases are very comparable—the missing data do not undermine the inferences that may be drawn.[38] All CCSS data reported here derive from 2011, the most recent year for which data were publicly available at the time of writing.[39]

[36] For further information about the survey, see Sentencing Council, *Crown Court Sentencing Survey* (London: Sentencing Council, 2013).

[37] Sentencing Commission Working Group, *Sentencing Guidelines in England and Wales: An Evolutionary Approach* (London: Sentencing Commission Working Group, 2008).

[38] See Sentencing Council, *Crown Court Sentencing Survey* (London: Sentencing Council, 2013), pp.40–47 for further details. The principal limitation on the CCSS data for the purposes of the present research is that courts do not record the exact number of prior convictions, but classify the case as having 0, 1–3, 4–9, or 10 or more previous convictions which were taken into account. This does not prevent researchers from determining the way that previous convictions affect the custody rate, however.

[39] For further discussion of the CCSS and additional empirical findings, see A. Ashworth and J.V. Roberts (eds), *Sentencing Guidelines: Exploring the English Model* (Oxford: Oxford University Press, 2013).

Findings

Volume and variability of previous convictions patterns

As can be seen in Table 1, over the decade 2003–2013 Ministry statistics reveal an increase in the proportion of offenders with the most serious records (11 or more prior convictions or cautions)—rising from 32 per cent to 44 per cent of the total sample. Although these data do not distinguish convictions from cautions, Ministry data issued for an indictable offence reveal a striking decline in the number of cautions, from 155,000 in 2004 to 98,000 in 2013.[40] This demonstrates that the increase in the proportion of offenders with the most serious records arises from convictions and not cautions. Data from the Ministry on criminal history statistics with only previous convictions (excluding cautions) confirm this conclusion. In 2004, 28 per cent of offenders appearing for sentencing had no previous convictions, while 27 per cent had 1–4 priors, 18 per cent 5–9 and 27 per cent 10 or more priors.[41] The increasing proportion of offenders with more serious criminal histories constitutes another reason for understanding the effect of previous convictions on sentence outcomes.

Table 1
Number of recorded convictions/cautions by year, indictable offences, 2003–2013 Source: Ministry of Justice, accessed March 1, 2014; Table Q7l(ii).

	0	1–2	3–6	7–10	11 or more
2003	11%	19%	24%	15%	32%
2004	11%	18%	23%	14%	33%
2005	12%	18%	22%	14%	34%
2006	12%	19%	23%	13%	34%
2007	11%	19%	23%	13%	34%
2008	11%	18%	22%	13%	36%
2009	10%	17%	22%	13%	38%
2010	11%	18%	22%	13%	38%
2011	10%	17%	21%	13%	40%
2012	10%	16%	20%	12%	42%
2013	10%	15%	19%	12%	44%

What is striking about the trends summarised in Table 1 is the high volume of prior convictions and cautions: first offenders represent only 10 per cent of all indictable cases sentenced in 2013. However, in order to know how many were actually taken into account, we must turn to the Crown Court Sentencing Survey. Direct comparisons between the Ministry of Justice and CCSS databases are not possible because the former includes prior cautions as well as prior convictions

[40] A decline of 37% over the period; source: Ministry of Justice, Table Q2.3, accessed March 1 2014; "Offenders cautioned by type of offence".
[41] Home Office, *Sentencing Statistics 2004, Home Office Statistical Bulletin* (London: Home Office, 2005), fig.6.1.

while the latter captures only relevant prior convictions. Nevertheless, some broad conclusions may be drawn.

Correcting data limitations of the sentencing statistics

In contrast to the Ministry data, Table 2 provides a breakdown of prior convictions by offence category derived from the CCSS in 2011—those actually taken into account by the sentencer. It presents a very different picture, with much higher concentrations of cases in the first offender or modest prior offending categories. For example, approximately two-thirds (64 per cent) of all indictable cases involved offenders with no prior convictions for the purposes of sentencing. Relevant prior convictions are a subset of all previous convictions. Judicial practice in English courts thus contrasts with other jurisdictions whose less flexible schemes require all previous convictions to be counted at every subsequent sentencing decision. Compared to the US guidelines, Crown Court sentencers take a more nuanced approach to the issue of previous convictions at sentencing. That is, they filter out prior convictions which, for a variety of reasons, should play no role in the current sentencing exercise.

Table 2
Volume of Previous Convictions Taken into Account by Offence Category, 2011
Source: Crown Court Sentencing Survey

	0 Priors	**1–3 Priors**	**4–9 Priors**	**10 or more Priors**
All indictable offences	64%	21%	9%	6%
Sexual offences	80%	15%	3%	2%
Drug offences	70%	22%	5%	3%
Assault	69%	20%	8%	2%
Arson	67%	20%	8%	6%
Theft	56%	19%	12%	13%
Driving	53%	28%	11%	8%
Robbery	52%	25%	14%	8%

A number of judgments from the Court of Appeal endorse a nuanced approach to the use of previous convictions, one which contextualises prior misconduct. In *Langley*, while upholding a sentence outside the range due to previous convictions the Court noted that "a physical dependency which is difficult to cope with does put a different colour onto a career of recidivism." [42] The appellant in this case could make no such claim, but many other offenders will be able to do so. A history of addiction then is one reason why previous convictions may have less or little aggravating effect.

A second important trend emerging from Table 2 is the variability in criminal histories across different offence categories. As can be seen, offenders convicted of a theft offence were particularly likely to have longer, relevant criminal records:

[42] *Langley* [2011] EWCA Crim 2471 at [10].

over one quarter of the theft category had four or more relevant prior convictions, compared to 5 per cent of sexual offence cases. Indeed, four-fifths of the sexual offence group had no prior convictions taken into account. Repeat offending is clearly a more frequent occurrence for some types of offending.

Effects of previous convictions on the custody rate

Table 3 summarises custody rates from the CCSS for different categories of prior offending and reveals the model underlying the consideration of previous convictions in the Crown Court. The first offender (no priors) category attracts a significant reduction in severity compared to the second category (1–3 priors). Subsequent reconvictions trigger far less significant increments in severity. This pattern is more consistent with the progressive loss of mitigation, and less consistent with the cumulative approach.

Table 3
Custody Rates by Number of Prior Convictions, Offence Categories
Source: CCSS. We do not include sexual offences as the category contains too many diverse types of offences.

	0 Priors	**1–3 Priors**	**4–9 Priors**	**10 or more Priors**
All offences	*47%*	*65%*	*77%*	*79%*
Assault	38%	65%	77%	79%
Drugs	53%	65%	68%	71%
Theft	46%	65%	76%	77%
Arson	45%	67%	60%	76%
Driving	32%	55%	76%	84%
Robbery	76%	91%	95%	97%
Other offences	43%	59%	74%	72%

The assault offences provide a good illustration of the trend. As can be seen in Table 3, the gap between the first two categories of prior convictions is very striking—the custody rate for first offenders is almost 30 percentage points lower than the second category (from 38 per cent to 65 per cent). However, once the offender has multiple convictions, additional prior offences make little difference to the custody rate. Sentence severity levels out in a way that reflects the PLM model: Across all indictable offences, the custody rate rises from 47 per cent to 65 per cent and then to 77 per cent. Although the cumulative model would predict a further steep increment from the category 4–9 to 10 or more priors, no such increase occurs: the custody rate is approximately the same which reflects the pattern prescribed by the PLM. The same general pattern emerges for other categories of indictable offences (see Table 3). There is a very significant gap between custody rates for first offenders and those with modest records, but subsequent additional priors have only limited aggravating effect.[43]

[43] Recent judgments from the Court of Appeal appear to conform more to the progressive loss of mitigation model. In *Pettit*, the appellant who was convicted of dangerous driving had multiple, related prior convictions, albeit from the late 1990s. His most recent offence was also for a driving-related offence. The Court regarded the prior convictions

Figure 1 represents the relationship between prior offending and the probability of custody in graphical form. The figure plots the competing theoretical curves (progressive loss of mitigation; cumulative sentencing) and the actual pattern of custody rates. As can be seen, the empirical trajectory of severity for all offences rises in step with the progressive loss of mitigation and not the model prescribed by a cumulative sentencing approach to previous convictions.[44]

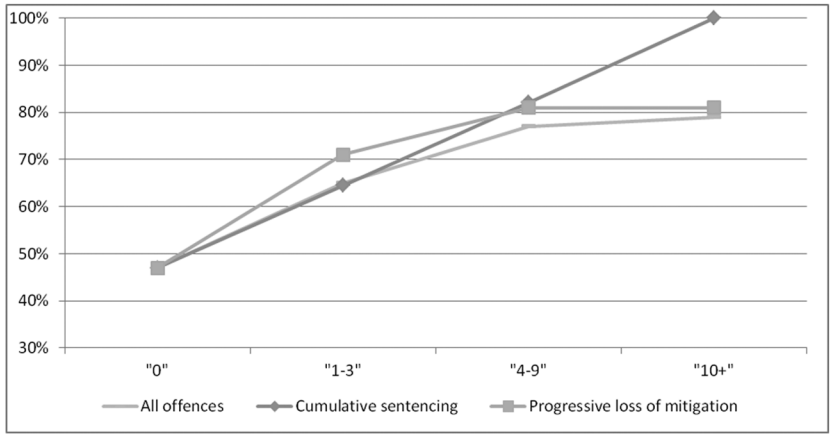

Figure 1 **Theoretical Projections and Empirical Trend: Effect of Previous Convictions on Probability of Custody**

Source: CCSS

Multivariate analyses

As noted, prior research was unable to control for the effect of correlated variables. Using the CCSS data we conducted multivariate analyses which revealed the effect of prior convictions on the probability of custody—having controlled for a range of other variables such as plea. These analyses generally confirmed the relationship between the number of prior convictions and the custody rate, although with more variation between offences than was apparent from the previous analysis.

First, in light of the specific reference in the definitive Burglary guideline to the importance of prior convictions the trends for this offence are particularly interesting. Figure 2 shows the multivariate pattern for four offences, GBH, burglary in a dwelling; non-domestic burglary, and possession with intent to supply. Once again, the progressive loss of mitigation model fits the data better than the cumulative approach, and this is true even for the domestic burglary cases.[45] However, departures from this pattern did emerge for theft offences. For these cases, the corrected probability of custody rose from .42 for first offenders to .46 for those with modest records to .54 for intermediate records and .61 for the most

to be "nonetheless relevant" but simply "because the appellant is not entitled to the important mitigation of a previous good driving record." *Langley* [2010] EWCA Crim 2107 at [6].

[44] There is some loss of precision in the data as a result of the fact that courts select a category of prior offending rather than recording the exact number of prior convictions taken into account. It is likely that the theoretical and empirical curves would be even closer together if the data were not grouped into four categories on the CCSS form.

[45] Corrected probabilities of custody for domestic burglary: .66; .81; .88; .89—revealing a significant increase from the first to the second category of criminal history, and no practically difference between the two most serious categories.

severe criminal history category. At least with respect to theft offences then, a more cumulative model was in effect, perhaps reflecting the fact that this category of offence contained the highest proportion of offenders in the longest prior conviction categories (as seen in Table 2). Courts may be reasoning that a recidivist sentencing premium is more important for offenders with higher recidivism rates.

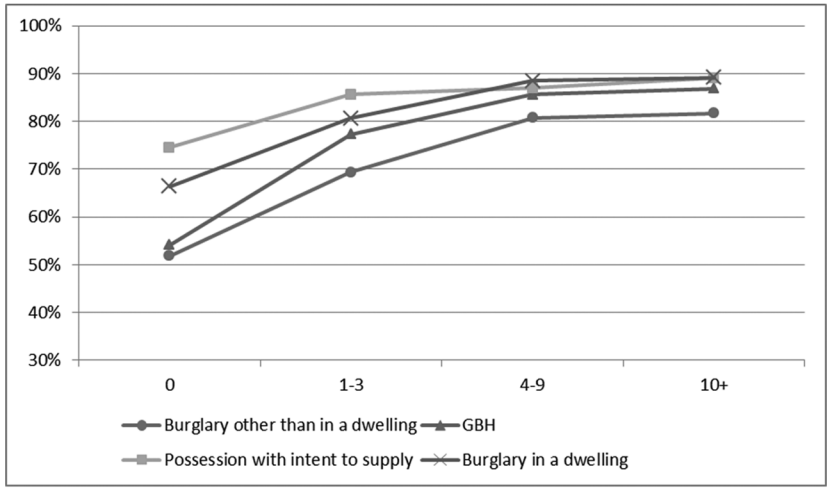

Figure 2 **Effect of Previous Convictions on Probability of Custody Controlling for Other Factors Source: CCSS**

Data limitations

Finally, we add a word about data limitations of these statistics. First, these data are drawn from a single year; once multiyear data become available we will be in a better position to draw robust conclusions about trends in the role of previous convictions over time. Secondly, the CCSS is by definition restricted to the Crown Court. In light of the fact that vast majority of sentences are imposed in the Magistrates' courts, it is important to conduct comparable analyses on sentences imposed in the Magistrates' courts. Thirdly, in several guidelines issued since the Burglary guideline, the Sentencing Council has included the highlighted direction to courts that: "In particular, relevant recent are likely to result in an upward adjustment".[46] Additional analyses once these guidelines have had a chance to fully take effect will reveal whether the role of previous convictions is enhanced by such a direction.

Conclusions

We draw several conclusions from these findings. First, if the Criminal Justice Act 2003 was designed to promote a robust and cumulative approach to previous convictions it has not had that effect on sentencing in the Crown Courts. The latest CCSS data suggest that courts are sensitive to the potential threat that previous

[46] Most recently, in the Definitive Guideline for Sexual Offences which applies to all offenders sentenced on or after April 1, 2014. See Sentencing Council *Sexual Offences: Definitive Guideline* (London: Sentencing Council, 2014).

convictions carry for offence-based proportionality, and limit the influence of prior convictions accordingly. For offenders in the more serious criminal history categories, courts are moderating the increase in severity to ensure that previous convictions do not overwhelm the seriousness of the current offence.

The principle of the progressive loss of mitigation therefore appears intact, almost a decade after the introduction of the Criminal Justice Act 2003. One interpretation of these trends is that as Piper and Easton comment, courts interpret the provision "in a way which is not significantly different from the progressive loss of mitigation doctrine".[47] These data may also support the opinion expressed by Martin Wasik who observed in 2010 that based on his experience at least, s.143(2) of the CJA "had little, if any impact, or at least that it has not taken matters in a different direction from earlier practice".[48]

To date, it has been the convention to express the progressive loss of mitigation principle in the following terms: repeat offenders are those who have lost their first offender mitigation. The latest data from the Crown Court suggest that a more accurate description is that offenders with the most previous convictions have exhausted both their first offender mitigation and their repeat offender aggravation. The effect may be more accurately termed "progressive loss of mitigation *and* aggravation".

Finally, these findings also confirm the utility of a bespoke survey derived directly from sentencers in the Crown Court.[49] England and Wales is the only jurisdiction which routinely collects and publishes sentencing data in this way. Data provided by sentencers are of great benefit to policy-makers contemplating reforms, as well as the statutory authority responsible for devising and issuing sentencing guidelines. Without these data, both groups would be working in the dark. The CCSS illustrates the way that Crown Courts in England and Wales apply important sentencing provisions such as s.143 of the Criminal Justice Act 2003. This assists more than just policy-makers and the Sentencing Council; the data promote understanding across all interested parties, including legal professionals and criminal litigants.

[47] S. Easton and C. Piper, *Sentencing and Punishment* (Oxford: Oxford University Press, 2012), p.86.

[48] M. Wasik, "Dimensions of Criminal History: Reflections on Theory and Practice" in, *Previous Convictions at Sentencing: Theoretical and Applied Perspectives* (2010), p.165. Dingwall also concluded that "one should be wary of concluding that the 2003 Act was the final nail in the coffin for desert." Dingwall, "Deserting Desert? Locating the Present Role of Retributivism in the Sentencing of Adult Offenders" (2008) *The Howard Journal* 409.

[49] Since the CCSS is by definition restricted to the Crown Court, these findings shed no light on the way that previous convictions are used in sentencing in the Magistrates' courts. This is an important area for additional research if data are ever collected in the same way in these courts.