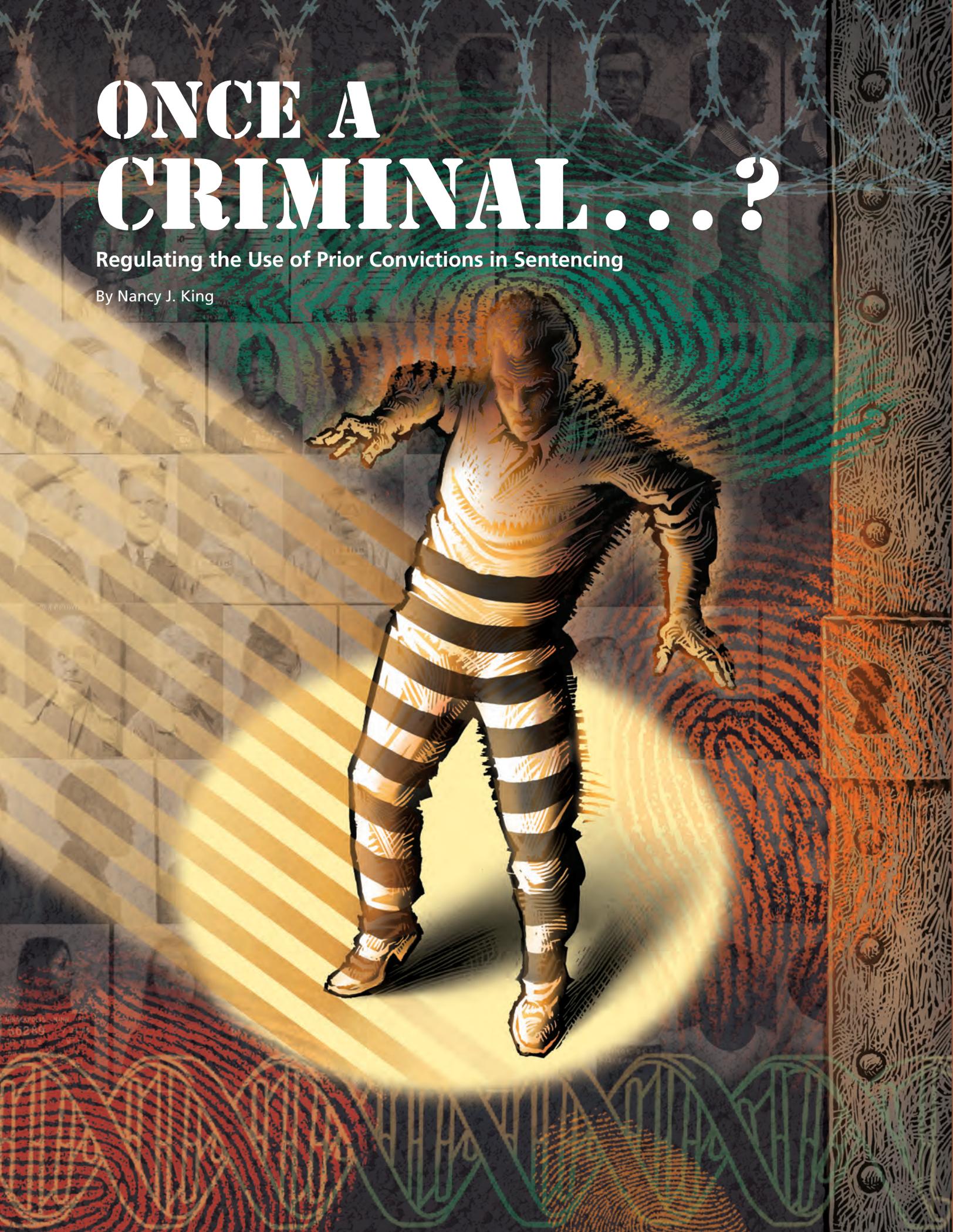


ONCE A CRIMINAL...?

Regulating the Use of Prior Convictions in Sentencing

By Nancy J. King



On November 18, 2013, **Nancy J. King**, the Lee S. and Charles A. Speir Professor at Vanderbilt Law School, delivered Marquette Law School's annual George and Margaret Barrock Lecture in Criminal Law. This is an abridgment of that lecture. A longer, essay version appears in the spring 2014 issue of the *Marquette Law Review*.



There is perhaps no principle in sentencing more familiar than boosting punishment for defendants who have been convicted before. But as widespread as this practice is, it has recently become quite controversial. In my remarks, I'll highlight two concerns: first, that repeat-offender penalties are not well designed to accomplish their intended goals, and second, that the procedures for imposing some of these sentences are unconstitutional. Let us start with the history of efforts to identify prior offenders—a history relevant to each of these two issues.

I. Repeat-Offender Punishment: A Look Backward

Punishing the Marked Offender—Colonial Times Through 1830

Statutes mandating stiffer sentences for repeat offenders have been with us since before the nation was formed. But in early America, courts had no photographs, fingerprints, or DNA to determine if a person who *claimed* to be a first offender was lying. So they used the same cheap identification method used in Europe for centuries—marking or branding the body of the person convicted.

Felonies during this period were generally punishable by death, but even until the late 1820s and early 1830s, a defendant convicted for the first time could seek from the judge “benefit of clergy,” essentially a reprieve from execution, and be branded on the palm or cheek instead. For example, in 1801, future president Andrew Jackson, sitting as a judge in Tennessee, granted benefit of clergy to a fellow convicted of delivering a “mortal bruise” to a man’s head with an oak plank. According to the court records, the defendant was immediately “burned in the left hand with the letter M,” marking him as ineligible for this leniency again. Marking bodies was also common for non-capital crimes. For example, first offenders convicted of some crimes lost one ear; second offenders lost the other. Punishments such as these were replaced by terms of incarceration only gradually, between the late 1790s and the 1830s, as each state built its very first prison. ▶▶



Discovering the Recidivist—Penitentiaries and the Deviant Type—1820–1880

These new penitentiaries ushered in a new punishment: lengthy terms of incarceration. For repeat offenders, these terms could increase with each additional lesson unheeded. When its prison was built in 1817, Massachusetts, for example, imposed an extra seven years on every second offender, and life in prison for every third offender.

The building of each state's penitentiary also offered new hope for identifying prior offenders. Prison records noted marks, scars, and tattoos, along with names. And there was—for the first time—just one set of records for all convicts in the state. But the records being organized by name, it was impossible to search by scar or missing digit. As de Tocqueville explained after visiting American prisons: “[T]he courts condemn, almost always, without knowing the true name of the criminal, and still less his previous life.”

Legislatures recognized this too, and a few changed their laws to address it. The established common law rule followed in every state at the end of the 18th century required that whenever a statute specified a more severe sentence for a repeat offender, the prior conviction had to be alleged in the indictment and proven to a jury beyond a reasonable doubt. After several years' experience with its new penitentiary, Massachusetts passed a new statute that required the warden to notify the state's attorney when he recognized a prior offender, and the state's attorney to charge the prisoner as a repeat offender in a supplemental charging document called an information. The prisoner would then be brought from prison back to court, where, if his past conviction was proven to a new jury or admitted, he would be sentenced to the longer term. But this innovation was not followed in most states.

Even as our Civil War ended, courts still had no practical, reliable way to identify a person as one who before conviction had been convicted previously. By 1930, everything had changed.

Technology to the Rescue—Photos, Bertillonage, and Fingerprints—1880–1930

Photography was first. The first “rogues’ gallery” was displayed at the New York Police Department in 1858, and by the 1880s police departments all over the world had mug-shot collections. But there was no efficient way to search hundreds of photographs. This problem was solved by a revolutionary identification system using an index of eleven bodily measurements. Indexing by measurement, not by name, the Bertillon system identified a prisoner in minutes. It won over the wardens in New York and Illinois, who mandated measurements for all inmates by the 1890s. Prisons and police departments in other states followed suit. Fingerprinting was not far behind. It was first used in criminal cases for *women*, as Bertillon operators found it awkward to measure the body parts of prostitutes. By 1920 it had been extended to men, and the NYPD’s fingerprint index had grown to 400,000 sets of prints.

Trusting Science—Parole for Some, Incapacitation for the Dangerous—1930–1970

These new, reliable means of identifying past offenders reinforced the belief that crime was committed by a small group of physically inferior deviants born with moral deficiencies. “Instinctive criminals,” argued one expert, could be identified by their “ill-shaped heads”; “asymmetrical faces”; “deformed, . . . ill-developed bodies”; “abnormal conditions of the genital organs”; “large, heavy jaws”; “outstanding ears”; and “a restless, animal-like, or brutal expression.” Many thought repeat offenders should be segregated from society, like the insane. Six states authorized involuntary sterilization of habitual criminals, a practice that the Supreme Court did not stop until 1942. Confident that judges now could reliably

sort less-dangerous first offenders from more-dangerous hardened criminals, legislatures in the 1920s and 1930s adopted both more-severe recidivist penalties and more-lenient probation and parole. By 1949, 43 of the 48 states had habitual felony offender statutes; more than half permitted or mandated life in prison for third or fourth offenders.

Punitive Turn—Three Strikes and Other Mandatory Sentencing Laws—1970 On

Two decades later, when legislators decided to rein in the discretion of judges and parole authorities, new sentencing guidelines keyed sentences to criminal history and quantified its effect on punishment. In states that retained discretionary parole release, parole eligibility was denied or delayed for repeat offenders. And by 1996, 24 states and the federal government had passed even tougher “two-,” “three-,” and “four-strikes and you’re out” laws, some requiring life without parole.

The effects of these repeat-offender premiums have varied by state. In Washington State as of last year, nearly 70 percent of the 637 prisoners serving life-without-parole sentences were sentenced under the state’s three-strikes laws. In California, where a second strike carries a doubled sentence and the third strike carries 25 to life, the effect was huge: maximum sentences statewide grew 6 percent longer, and the odds of a prison sentence rose nearly 23 percent. As of 2009, one of every four California prisoners was serving a second- or third-strike sentence, and, of these, most—55 percent—were convicted of a nonviolent offense.

With this background, let’s turn to two of the challenges that repeat-offender penalties pose for courts and legislatures. ▶▶

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II. Justifying Repeat-Offender Penalties: A Mismatch Between Theory and Practice

First, stiffer penalties for prior offenders—as applied—too often fail to advance the reasons that they were adopted. Let’s consider the reasons and the reality.

Deterrence—Weak Effects

Recent research has found that increased sentences for repeat offenders do not appear to be very effective *deterrents* to future crime. Here’s the nutshell version of what you can find in the sources in the literature: Three-strike statutes have had little detectable impact on crime in some states, such as California, and in others they are linked to only a small decrease in robbery and property offenses. As for deterring the sentenced offender himself from future crime, recent research suggests that the longer periods of incarceration appear to have “either no effect or undesirable effects” on rates of offending after release.

Incapacitating the Dangerous— Predicting Risk from Criminal History

A second, more commonly voiced rationale for recidivist penalties is the *incapacitation* of those most likely to commit future crime. The newest trend in sentencing is to use risk assessment and “evidence-based” predictions of reoffending to determine what sentence to impose. Lawmakers hope that risk assessment will help them trim prison populations while still getting the most bang for their criminal justice buck; judges like it because it makes sentencing seem more objective. In Virginia, risk scores determine who is eligible for alternative punishment. Missouri judges rely on an automated recommendation reporting the offender’s risk score and predicted recidivism after two years for other offenders in his specific risk category. Here in Wisconsin, a number of counties have been using risk measures for several years, as part of the AIM (Assess, Inform, and Measure) Pilot Project.

The explosion of research and commentary affords an indication of how controversial this is. The *Federal Sentencing Reporter*, edited by Marquette’s own Professor Michael O’Hear, recently devoted an entire issue to it. Risk also triggered a major debate in the American Law Institute, ending in a provision of the new Model Penal Code—Sentencing, endorsing its limited use.

Many understandably object to the use of risk prediction in sentencing as unfair: it punishes a defendant just because he has the same characteristics as other people who were reincarcerated after release, and it deprives him of liberty for what he might do rather than what he actually did. Others are concerned that reliance upon factors *other* than prior criminal history, such as gender or age, violates the Equal Protection Clause. But a growing chorus is warning that even the use of criminal history to predict recidivism risk is unjustified and unwise. I’ll summarize some of these criticisms briefly.

1. *Risk prediction as applied at sentencing—questionable reliability.* First, even though the best risk-prediction instruments (an instrument here means essentially a questionnaire or list of weighted factors) can correctly predict the risk class of an offender as often as 7 out of 10 times, sentencing based

on criminal history as practiced is not risk assessment at its *best*. Here are just a few of the problems:

Much of the research supporting reliability of risk assessment has tested instruments used to predict recidivism by parolees. These instruments include “dynamic” factors that change after sentencing, as well as variables such as age, companions, marital status, gender, social achievement, or psychological health. When risk is predicted based on prior criminal history alone, all of these factors are ignored, increasing the number of cases in which the prediction is wrong.

Also, although research confirms that recidivism rates do increase as the number of prior convictions increases beyond three or four, the relationship between a single prior conviction and future crime is tenuous at best. For example, two years after release from their first conviction, offenders over age 41 are no more likely



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Photo: Sandy Campbell

to commit a crime than people with clean records; for those between 37 and 41, the rates converge after five years. So maybe the old adage referred to in the title of this talk might make sense if it were “*Four times a criminal recently, probably a criminal later,*” but to assume that a single criminal conviction dooms a person to a life of crime may be no more accurate than century-old predictions of future violence based on jaw size.

Finally, repeat-offender laws and criminal history scores usually don’t track the measures of past offending that research links to recidivism. Juvenile history is often included, despite research showing most people desist from crime after late adolescence. The recency of a prior conviction dramatically affects its predictive capacity, depending upon the age of an offender, but most criminal history provisions do not vary with the age of the defendant, and many impose no limit on the age of prior convictions. The *type* of prior crime also matters—property offenses, for example, are much more likely to be repeated than other offenses. But sentencing laws and guidelines often do not distinguish between crime types.

2. Costs of increasing sentences based on predictions from criminal history—exacerbating racial bias.

A second problem with basing the need for incapacitation on prior record is that even if it does improve predictions somewhat, any resulting marginal, and possibly temporary, reduction in crime might not be worth its costs. Reliance on criminal history exacerbates past racial bias in investigation, arrest, charging, bargaining, and sentencing. Bernard E. Harcourt in his book, *Against Prediction: Profiling, Policing, and Punishing in an Actuarial Age*, calls this the “ratchet effect,” and condemns risk prediction at all phases of the criminal justice process for this reason. Today, nearly one in three adults in this country has a criminal history record, and as of 2007, the percentage of blacks under correctional control was more than four times that of whites. Since California adopted its three-strikes law, black defendants have received significantly

longer prison sentences than whites and Latinos. A recent study found that two-thirds of racial differences in imprisonment rates in Minnesota resulted from the weighting of criminal history factors in sentencing. Just a few months ago, U.S. Attorney General Eric Holder ordered federal prosecutors to consider ignoring recidivism provisions, stating, “In some cases . . . recidivist enhancement statutes have resulted in unduly harsh sentences and perceived or actual disparities that do not reflect our Principles of Federal Prosecution.” This problem is so pronounced that the Equal Employment Opportunity Commission recently warned employers that using criminal history data in hiring decisions could expose them to disparate impact lawsuits.

Just Deserts in Proportion to Blame— A Mismatch with Repeat-Offender Penalties

For these reasons and many more, some retributivists are calling for a ban on the consideration of criminal history in setting sentences. Others committed to “just deserts” sentencing philosophy have argued that repeat offenders are actually more blameworthy than first offenders, because they are more defiant, or because they had already learned that their behavior was wrong. The problem is, current laws don’t advance either theory. Repeat-offender premiums are imposed on negligent, impulsive, and reckless action as well as knowing behavior, and they often punish defendants who have “prior” convictions not because their latest criminal acts were committed after a previous sentence, but only because prosecutors decided to prosecute multiple counts arising out of the same criminal episode sequentially. And in most jurisdictions, most defendants eligible for recidivist premiums end up bargaining for something less.

In sum, legislatures, sentencing commissions, and courts are not doing a very good job of aligning punishments for repeat offenders with either theory or research. ▶▶

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III. The Process:

A Changing Constitutional Landscape

A separate concern is that the process for imposing these penalties may violate the Constitution. This controversy started just over 13 years ago but has heated up in the past few months.

Apprendi, *Alleyne*, and the Exception for Prior Convictions

In the summer of 2000, the Supreme Court in *Apprendi v. New Jersey* held that a fact that increases the maximum penalty a defendant faces is an element of a crime, and a defendant has a right to have a jury find that fact beyond a reasonable doubt. Allowing a judge to determine merely that such a fact is probably true violates the Sixth Amendment right to a jury finding of every element, said the Court. This past summer, in *Alleyne v. United States*, the Court explained that this rule applies to facts that increase the minimum sentence range as well, and overruled a 2002 decision in which it had said otherwise. This element status brings with it at least three rights: the right to jury determination, by proof beyond a reasonable doubt, and, at least in the federal courts, inclusion in the indictment.

But in every one of its many decisions applying *Apprendi*, the Court has carefully stepped around statutes that raise punishment ranges for prior offenders. It has done this by consistently including in each declaration of the *Apprendi* rule an exemption for the particular fact of prior conviction. Not one of these cases has actually involved a recidivist penalty, so the announced exception remains dicta. Most recently, the *Alleyne* decision included a footnote explaining that the Court declined to revisit the exception because the parties had not contested it. But plenty of other defendants are contesting it, and a majority of justices may be ready to scrap it. Here's why they should.

No Clear Historical Basis for Exception

First, the historical record, so crucial to the Court in all of its *Apprendi* cases, does not support exempting prior convictions from the *Apprendi* rule.

Let's start with charging practice. Throughout the 19th century, courts followed the common law rule requiring the initial charge to allege any prior offense that increased punishment. Only a handful of states, such as Massachusetts, Virginia, and West Virginia, opted to permit the prosecution to allege the defendant's repeat offender status *after conviction*, if a defendant's alias was debunked upon arrival at prison. Eventually, in 1912 in *Graham v. West Virginia*, the Supreme Court concluded that this omission of the prior offense allegation from the initial indictment was not a *federal* constitutional problem, reiterating the rule (true still today) that states need not use indictments at all. After *Graham*, more states followed Massachusetts. But this limited development—affecting no more than a handful of states until 1912, and not followed in the federal courts until after World War II—is nothing like the established historical practices that have influenced the Court in prior cases.

As for the right to have a jury decide prior-offense status when that would raise the maximum sentence, this was the law in virtually every jurisdiction from the Revolutionary War past World War II. As late as 1946, only Alabama and Kansas allowed a judge to make this determination instead of a jury. Observers in other jurisdictions reported more than one case in which the jury, despite fingerprints and other “unmistakable evidence” that a defendant was indeed a multiple offender, “decided upon its oath that the prisoner was a first offender,” choosing to nullify the habitual offender law rather than apply it. ▶▶

“Criminal history, if it will justify a longer prison sentence, deserves the same pre-charge investigation as other facts that may aggravate a crime.”



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Precedent—Why *Almendarez-Torres* and Other Cases Do Not Support the Exception

Precedent shouldn't prop up this exception either. The case of *Almendarez-Torres v. United States* (1998) is considered the chief authority for the prior-conviction exception, but any basis it once had is no longer viable. The defendant in that case turned up in a Texas jail, after he'd been deported following a burglary conviction, and was charged with reentering the United States illegally. His indictment did not say whether he was being charged under subsection (a) of the relevant statute—which stated that the maximum sentence was two years—or subsection (b), which provided for up to 20 years if reentry occurred after a conviction for an aggravated felony. The defendant pleaded guilty and admitted his prior burglary conviction, but then argued at sentencing that because his indictment had not alleged his prior conviction, a fact that he argued was an element of the greater offense defined in subsection (b), he faced at most two years. The Supreme Court disagreed, and in a five-to-four decision, it upheld his seven-year sentence. Congress intended that the prior conviction triggering the 18-year increase would be a sentencing factor that the judge could find after conviction, the Court reasoned, not an element of a greater, aggravated version of the reentry offense. Two years later, when the Court announced in *Apprendi* that legislatures cannot bypass the right to jury trial by designating a fact that raises the maximum sentence as a “sentencing factor” instead of an element, it exempted the fact of prior conviction, citing its decision in *Almendarez-Torres*, and the “prior-conviction exception” to the Sixth Amendment rule in *Apprendi* was born.

The Court was wrong to carve out this prior-conviction exception in *Apprendi*, and it was wrong in *Almendarez-Torres*. Justice Stephen Breyer's opinion for the Court in *Almendarez-Torres* rested on *Graham*, from 1912, and *Oyler v. Boles* (1962), which also rejected claims that omitting a sentence-raising prior conviction from the initial indictment violated due process. But both of those cases construed the Constitution's limitations on *states*, not the scope of the indictment clause in the

Fifth Amendment, at stake in *Almendarez-Torres*, which doesn't even *apply* to state defendants. Moreover, both cases were decided before the Court declared that state defendants had a constitutional right to reasonable notice of the charge and the right to a jury trial.

The other cases relied on by the Court in *Almendarez-Torres* either have been overruled since *Apprendi* (in *Ring v. Arizona* in 2002 and *Alleyne*) or have nothing to do with charging and proof requirements for prior convictions. Several cases stated that a prior conviction that increases a sentence is not an element, but those cases involved claims that increasing a sentence because of a prior conviction was unconstitutional because it was improper punishment for the *prior* offense. In each, the Court explained that the heightened punishment was not punishment for the prior conviction but, instead, “a stiffened penalty for the latest crime.” None of those cases would be affected by abandoning the exception.

Policy—Managing Jury Prejudice

Nor should policy arguments keep the exception alive. The justices have worried that if prior convictions were to be presented to juries, defendants would suffer. But prior convictions are already elements of other crimes, such as felony firearm offenses. And courts have managed any prejudice just fine by using stipulations to limit what the jury hears about the prior conviction, by bifurcating trials and adjudicating the prior-conviction question only after the jury determines guilt on the other elements, by allowing the defendant to waive the jury for the prior-conviction element alone, or by allowing the defendant to admit that particular element, something like a partial plea of guilty. And they've been doing this for nearly 200 years, ever since Connecticut first chose to adopt bifurcated findings in its habitual-offender cases in the early 1800s.

As for the policy reason that initially led to the alternative charging practice from which the exception grew, that reason has vanished. Identification occurs in plenty of time to include in the initial charging instrument those prior convictions that actually raise the sentence range. State and local law enforcement has

been submitting and retrieving fingerprints electronically from the FBI for about 15 years. The largest biometric database in the world, the FBI's Integrated Automated Fingerprint Identification System (IAFIS), contains fingerprints and criminal histories for more than 70 million people and reportedly matches fingerprints in an average of 30 minutes. Criminal history, if it will justify a longer prison sentence, deserves the same pre-charge investigation as other facts that may aggravate a crime.

Stare Decisis: Eroded Doctrine, Shifting Votes

If all of the possible justifications for the prior-conviction exception to the *Apprendi* rule are as weak as I suggest, the Court is unlikely to decide that stare decisis warrants keeping it on life support. Justices Antonin Scalia, Clarence Thomas, and Ruth Bader Ginsburg have already made their opposition to the exception clear, so its demise would require only two more votes, from Justices Stephen Breyer, Sonia Sotomayor, or Elena Kagan. In *Allelyne*, Justice Breyer agreed to overrule as “anomalous” the Court’s decision (a decision where he had written in support) exempting from the *Apprendi* rule facts that raise the minimum sentence. The exception for prior convictions is equally, if not more, anomalous, and Justice Breyer may very well be ready to overrule his prior opinion for the Court in *Almendarez-Torres*, too. And the justification that Justices Sotomayor and Kagan provided in *Allelyne* is equally applicable here: When prosecutors are perfectly able to charge and prove these matters to a jury, Justice Sotomayor wrote for herself (and Justices Kagan and Ginsburg), “stare decisis does not compel adherence to a decision whose ‘underpinnings’ have been ‘eroded’ by subsequent developments of constitutional law.”

If the Court discards the exception, it will finally end cases like David Appleby’s. Appleby was charged with third-offense DUI and third-offense driving on a revoked license. At his plea proceeding, he was informed that his maximum sentence on each charge was three years, for six years total. He was not warned that his plea would actually expose him to *life* in prison if the prosecutor decided to file a “recidivist information.” So he pleaded guilty, and before sentencing, the prosecutor did file a recidivist information, alleging that Appleby had been previously convicted of other felonies (namely, one assault, several felony versions of DUI, and driving on a

revoked license). A jury found Appleby to be the same person who had been convicted before, and the judge sentenced him to life in prison. In 2010, a divided panel of the Fourth Circuit, relying on *Almendarez-Torres*, rejected Appleby’s constitutional challenge. But in dissent, Judge William B. Traxler cut to the heart of the problem: “Appleby was sentenced to *life* on the charges to which he pleaded guilty after being told that he could be sentenced to no more than *six years*” (my modified emphasis). It is time for the Court to require prosecutors in West Virginia to do what prosecutors elsewhere seem to have no trouble doing: determine whether the defendant is eligible for recidivist punishment, decide whether to pursue that punishment, and give formal notice of this to the defendant—*before* conviction.

Prosecutors, courts, and legislatures can’t have it both ways: If a recidivist premium is indeed punishment for the crime a defendant admits at his guilty plea and not additional punishment for the prior convictions that boost his sentence, then the Constitution requires that he be informed of the actual sentence range that he faces if convicted, before he decides whether to admit or contest the charge.

I do not advocate abandoning using criminal history in sentencing. But as courts, legislatures, and commissions revisit how criminal history affects punishment, I hope that they take the opportunity not only to bring these rules into compliance with the Constitution but also to consider whether they make sense given what we have learned about their effects. For example, if a criminal history aggravator is supposed to isolate the most violent offenders for incapacitation, then the prior convictions that trigger a lengthier sentence should be narrowed to those that predict violent behavior, and back-end release provisions should be made available for those who by anyone’s measure do not pose that risk, such as the elderly and the very ill. Changes such as these, bringing sentencing practice into line with theory and research, may seem incremental, but the potential impact is significant, not only for those branded as convicted criminals—figuratively not literally nowadays—but also for everyone who bears the costs of using incarceration to control crime. ■