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NOTE

Recidivist Sentencing and the Sixth Amendment

Benjamin E. Adams*

INTRODUCTION

A recidivist is someone who engages in criminal behavior after a prior criminal conviction.¹ “All jurisdictions impose harsher penalties on recidivists—a practice termed the ‘Recidivist Sentencing Premium.’”² Two decades ago, the United States Supreme Court held that a court may increase a defendant’s penalty under a recidivist sentencing enhancement scheme without proving the fact of that defendant’s prior convictions to a jury beyond a reasonable doubt.³ Following that decision, the Court in *Apprendi v. New Jersey* held that the Sixth Amendment requires any fact that increases the penalty to which a defendant is exposed to be found by a jury.⁴ Yet the *Apprendi* Court preserved recidivism as a “narrow exception to the general rule,” holding that the fact of prior convictions can still be found by a judge at the sentencing phase, rather than by a jury.⁵

This exception in cases of recidivist sentencing was meant to respect a prior decision, *Old Chief v. United States*,⁶ which recognized that the nature or even the name of prior offenses for which a defendant has been convicted can be prejudicial.⁷ Juries may be inclined to punish a defendant for prior conduct—rather than the current charge—if evidence of past crimes were to be presented at trial.⁸ As such, if

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¹ *Recidivist*, BLACK’S LAW DICTIONARY (11th ed. 2019).

² JULIAN V. ROBERTS, PUNISHING PERSISTENT OFFENDERS 2–3 (2008).

³ *Almendarez-Torres v. United States*, 523 U.S. 224 (1998).

⁴ 530 U.S. 466, 490 (2000); *see also* U.S. CONST. amend. VI.

⁵ *Id.*

⁶ 519 U.S. 172, 174 (1997) (holding that a prosecutor must accept a defendant’s offer to stipulate to prior offenses in order to avoid jury prejudice).

⁷ *Almendarez-Torres*, 523 U.S. at 235 (“Even if a defendant’s stipulation were to keep the name and details of the previous offense from the jury, jurors would still learn, from the indictment, the judge, or the prosecutor, that the defendant had committed an *aggravated* felony [without the exception].”) (citation omitted). It is not this Note’s position that the prior convictions exception itself will be eliminated, simply that the type of scheme devised by New York is unacceptable. For the broader argument, see Nancy J. King, *Juries and Prior Convictions: Managing the Demise of the Prior Conviction Exception to Apprendi*, 67 SMU L. REV. 577 (2014); Meg E. Sawyer, Note, *The Prior Convictions Exception: Examining the Continuing Viability of Almendarez-Torres Under Alleyne*, 72 WASH. & LEE L. REV. 409 (2015).

⁸ *Old Chief*, 519 U.S. at 180–81 (noting the likelihood that the jury might “generaliz[e] a

a legislative body seeks to establish a sentencing enhancement based on recidivism—including an analysis of the nature of the prior offenses and the history of the defendant—how can the competing interests be reconciled?

This is the dilemma New York currently faces. Its persistent felony offender statute requires two steps: first, the fact of the defendant's two qualifying predicate felonies must be proved beyond a reasonable doubt; and second, the judge must find that the nature of the prior offenses or the defendant's history and character are such that an extended sentence with lifetime supervision would be in the public interest.⁹ This statute has been challenged for its constitutionality multiple times since *Apprendi* was handed down,¹⁰ most recently in *People v. Garvin*,¹¹ which was denied certiorari by the Supreme Court in October 2018.¹² The Court of Appeals of New York has consistently held that the "sole determinant" and the "necessary and sufficient" condition for the defendant to be exposed to the greater penalty is the fact of the prior convictions; the further findings on the nature of the prior offenses, the history and character of the defendant, and extended punishment in the public interest are merely traditional exercises of discretion.¹³

The New York courts' interpretation of the persistent felony offender statute is unreasonable, as the statute plainly requires the nature and history findings to be made by a judge before imposing the enhanced sentence. This Note argues that the Supreme Court owes no deference to this interpretation simply because it was made by New York's highest court.¹⁴ Part I briefly examines theoretical justifications for recidivist sentencing schemes. Part II explores the Supreme Court's recent Sixth Amendment jurisprudence. Part III discusses the New York statute and the case law that has arisen from it while providing comparison to other states' responses to the dictates of *Apprendi*. Finally, Part IV argues that the Supreme Court should take up the next challenge to this statute in order to fulfill a

defendant's earlier bad act into bad character and tak[e] that as raising the odds that he did the later bad act now charged (or, worse, as calling for preventive conviction even if he should happen to be innocent momentarily)"). This problem had been recognized for decades even before the Supreme Court took it up in *Old Chief*. Anthony M. Radice, *Recidivist Procedures: Prejudice and Due Process*, 53 CORNELL L. REV. 337 (1967-1968) (discussing the prejudicial influence of prior convictions on juries in an era before the adoption of the Federal Rules of Evidence).

⁹ N.Y. PENAL LAW § 70.10 (McKinney 2018); N.Y. CRIM. PRO. LAW § 400.20 (McKinney 2018).

¹⁰ See *People v. Prindle*, 80 N.E.3d 1026 (N.Y. 2017) *cert. denied*, 138 S. Ct. 514 (2017); *People v. Quinones*, 906 N.E.2d 1033 (N.Y. 2009), *cert. denied*, 558 U.S. 821 (2009); *People v. Rivera*, 833 N.E.2d 194 (N.Y. 2005); *People v. Rosen*, 752 N.E.2d 844 (N.Y. 2001), *cert. denied*, 534 U.S. 899 (2001).

¹¹ 88 N.E.3d 319 (N.Y. 2017).

¹² *Garvin v. New York*, 139 S. Ct. 57 (2018).

¹³ *Rivera*, 833 N.E.2d at 197, 199 (quoting *Rosen*, 752 N.E.2d at 847).

¹⁴ Though discussed further below in Part IV, *infra*, the general rule that the Supreme Court defers to a state's highest court on the construction of state statutes is a longstanding one and can be found throughout much of the case law, but the Court has also consistently reinforced in such cases that it "is the final arbiter of whether the Federal Constitution necessitate[s] the invalidation of a state law." *New York v. Ferber*, 458 U.S. 747, 767 (1982).

promise made in *Apprendi*: that criminal defendants will always be afforded the right to have any fact which exposes them to increased punishment proved to a jury beyond a reasonable doubt.

I. THEORIES BEHIND RECIDIVIST PUNISHMENT

Recidivism is a fairly recent penological problem, as even low-level crimes were met with potentially lethal punishments in the era before a reforming mindset took hold.¹⁵ “If the larceny of twelve pence is met by hanging, . . . there is remarkably little scope for the development of any class of habitual recidivists.”¹⁶ Even for those who escaped the gallows once, a first offense would likely result in branding with special marks, making them easily identifiable and likely not spared the second time.¹⁷ During the Revolutionary Era and across the founding generation, those who crafted the new American republic sought to change these draconian punishments.¹⁸ These reform movements spread in the eighteenth and nineteenth centuries, imbued with the spirit of rehabilitating offenders, punishing their minds through incarceration rather than their bodies through corporal punishment.¹⁹ As a result, “this unexpected consequence of reform—the presence of the habitual criminal,” became a problem in need of solving.²⁰

History aside, the question of why we choose to punish repeat offenders more harshly remains. Because punishment involves some form of violence or duress inflicted on an offender, philosophers and criminologists have long examined the means by which a society chooses to justify inflicting punishment.²¹ The generally accepted theoretical justifications for punishment in the United States are:

¹⁵ Daniel Katkin, *Habitual Offender Laws: A Reconsideration*, 21 BUFF. L. REV. 99, 99 (1971) (“[W]hile there were unquestionably habitual criminals [in the pre-reform period], there were few whose careers were not ended by a first conviction.”).

¹⁶ NORVAL MORRIS, *THE HABITUAL CRIMINAL* 18 (1951).

¹⁷ Pieter Spierenburg, *The Body and the State: Early Modern Europe*, in *THE OXFORD HISTORY OF THE PRISON* 44, 48 (Norval Morris & David J. Rothman eds., 1998).

¹⁸ Jefferson and other leaders drew up plans for liberalizing the harsh penal codes of the colonial period, which had relied on bodily punishments of whipping, mutilation, and especially execution. . . . In the larger and less intimate worlds in which people now lived, public punishments based on shame seemed less meaningful. Instead, the criminals should be made to feel their individual guilt, by being confined in prisons. . . . Nowhere else in the Western world, as enlightened philosophes recognized, had such reforms been carried as far as they had in America.

GORDON S. WOOD, *THE RADICALISM OF THE AMERICAN REVOLUTION* 193 (Vintage Books 1993) (1991).

¹⁹ See generally MICHEL FOUCAULT, *DISCIPLINE AND PUNISH: THE BIRTH OF THE PRISON* (Alan Sheridan trans., Vintage Books 1979) (1975).

²⁰ Katkin, *supra* note 15.

²¹ See, e.g., Antony Duff & Zachary Hoskins, *Legal Punishment*, *STAN. ENCYCLOPEDIA PHIL.* (Fall 2018 ed.), <https://plato.stanford.edu/archives/fall2018/entries/legal-punishment/>.

deterrence, incapacitation, retribution, restitution, and rehabilitation.²² Once a central principle of punishment theory, “rehabilitation has lost its position of preeminence almost everywhere, but has hardly disappeared from view.”²³ Yet, as a logical matter, recidivist enhancements cannot have a rehabilitative function.²⁴ In fact, recidivist sentencing has been justified as anti-rehabilitative punishment for those who have proven themselves unable to change their purportedly inherent criminality.²⁵ Restitution, too, cannot logically survive as a justification if a repeat offender is prevented from gainful employment by incarceration.²⁶

As a result of this supposed inability of the repeat offender to reform or provide restitution, a sense arises that “society is not protected from the habitual criminal by normal criminal sanctions.”²⁷ This creates a need to find justification for recidivist punishment through one of the remaining theories. Sweeping broadly, there is generally a division between “consequentialist” or utilitarian punishment theories (deterrence and incapacitation), and “non-consequentialist” theory

²² ABA STANDARDS FOR CRIMINAL JUSTICE SENTENCING § 18-2.1(a) (AM. BAR ASS’N 1994).

²³ *Id.* § 18-2.1 cmt. at 13 (“As recently as the 1960s and early 1970s, rehabilitation was the prevailing theory of sentencing and corrections, and was the principal justification for the traditional structure of indeterminate sentences and parole.” (citing SAMUEL WALKER, *POPULAR JUSTICE: A HISTORY OF AMERICAN CRIMINAL JUSTICE* 176, 244 (1980))). Additionally, a federal statute admonishes judges to remember “that imprisonment is not an appropriate means of promoting correction and rehabilitation.” 18 U.S.C. § 3582(a) (2018); *see also* *Tapia v. United States*, 564 U.S. 319 (2011) (holding that the Sentencing Reform Act codified at § 3582 prohibits courts from lengthening a prison term for rehabilitative purposes).

²⁴ *See* ROBERTS, *supra* note 2, at 36 (“[I]t is clear that rehabilitation cannot justify a recidivist premium which consists of imposing a harsher or more intrusive sentence each time the offender is reconvicted.”).

²⁵ This theory of recidivism animated criminology for much of the twentieth century. *See, e.g.*, MORRIS, *supra* note 16, at 17–20.

²⁶ Notably, a recent study suggests that offenders ordered to pay restitution to their victims may ultimately have lower rates of recidivism as a result. *See* R. Barry Ruback, Lauren K. Knoth, Andrew S. Gladfelter & Brendan Lantz, *Restitution Payment and Recidivism: An Experimental Analysis*, 17 *CRIMINOLOGY & PUB. POL’Y* 789, 807 (2018) (“The results of our analyses indicated that paying economic sanctions, which almost always went toward the court-ordered restitution, significantly lowered recidivism. In addition, we found that providing offenders with information about their outstanding economic sanctions both reduced recidivism and induced additional payments of economic sanctions.”). However, as the authors of this study note, previous research on the topic has shown the difficulty of examining the causal and correlative relationships between recidivism and restitution, suggesting that further study and replication on a larger scale are necessary. *Id.* at 794, 808–09. Regardless, the logical point stands that extended incarceration prevents offenders from earning the money necessary to provide restitution to their victims. Moreover, surveys of crime victims and public opinion generally show that there is little appetite for extending restorative justice and restitution models to recidivists. *See, e.g.*, ROBERTS, *supra* note 2, at 44.

²⁷ MORRIS, *supra* note 16, at 20. Though the supposed “recidivist character” is often discussed in terms of violent crime, for an extension of the argument and the associated “antisocial personality disorder” into the realm of financial crimes and securities fraud, *see* Jayne W. Barnard, *Securities Fraud, Recidivism, and Deterrence*, 113 *PENN. ST. L. REV.* 189, 193 (2008).

(retribution).²⁸ As the demarcation suggests, the former theories look forward to some greater goal served by punishment, such as how it helps society or the offender's future; while the latter theory looks backward and sees punishment as justice for a wrong done, irrespective of any future result.²⁹

A. Retributivists

With their focus on justice, retributivists have a complicated relationship with recidivist punishment. As a basic matter, theories based in retribution argue that those who commit crimes deserve punishment (the enabling theory of "positive" retribution), but they only deserve punishment in proportion to the crimes committed (the limiting theory of "negative" retribution).³⁰ Under the basic form of either the positive or negative view, though, an offender is punished only for the crime they have committed, not for who they are; the punishment is calibrated to reflect blame for a single act.³¹ Therefore, retributive theorists who focus on what an offender deserves—that is, "desert-based" retribution—have struggled to reconcile the impulse to punish recidivists with harsher penalties.³²

Supporters of desert-based retribution recognize that proportionality between offense and offender is called into question by recidivist enhancements.³³ This is possibly best exemplified by the Supreme Court's handling of California's "three strikes" law in the case of *Ewing v. California*, where the theft of a few golf clubs led to a sentence of twenty-five years to life.³⁴ California's argument was that the law served retributive purposes, and that the repeat offender incurs more blame and culpability than a first-time offender; it was only at oral argument that the State abandoned this position under pressure from the Court, in favor of a rationale based on incapacitation.³⁵

Some desert theorists have argued that rather than seeing greater punishment for recidivists as an enhancement at all, we should regard recidivist

²⁸ See, e.g., MARK TUNICK, PUNISHMENT: THEORY AND PRACTICE 67–69 (1992).

²⁹ *Id.*

³⁰ See TUNICK, *supra* note 28, at 74; Duff & Hoskins, *supra* note 21.

³¹ See ROBERTS, *supra* note 2, at 52.

³² See ANDREAS VON HIRSCH, DESERVED CRIMINAL SENTENCES 72 (2017).

³³ See ANDREW VON HIRSCH & ANDREW ASHWORTH, PROPORTIONATE SENTENCING: EXPLORING THE PRINCIPLES 85 (2005) ("The larger the recidivist premium becomes, the more this conflicts with the proportionality principle's requirement that the seriousness of the conviction offence should be the main determinant."). For the argument that retributive theory should lead to the conclusion that recidivists deserve *less* punishment than novice offenders, see Thomas Søbirk Petersen, *Less for Recidivists? Why Retributivists Have a Reason to Punish Repeat Offenders Less Harshly than First-time Offenders*, in RECIDIVIST PUNISHMENTS: THE PHILOSOPHER'S VIEW (Claudio Tamburrini & Jesper Ryberg eds., 2011).

³⁴ 538 U.S. 11, 18–20 (2003).

³⁵ See Alice Ristroph, *Desert, Democracy, and Sentencing Reform*, 96 J. CRIM. L. & CRIMINOLOGY 1293, 1317 (2006); see also *infra* text accompanying notes 47–49.

punishment as the standard from which penalties for first-time offenders depart.³⁶ The main form of this model is one in which first-time offenders get a “discount” on their punishment, and that discount decreases as they commit more crimes; this is known as the “progressive loss of mitigation” model.³⁷ This approach may be the closest to explaining New York’s persistent felony offender enhancement,³⁸ as it relies on an examination of “the nature and seriousness of the offending,” in addition to the fact of the past crimes.³⁹ This theory flies in the face of many scholars’ basic retributive theory, which “accords no role for previous convictions at sentencing,” because the fact of having committed a previous crime has no bearing on the present crime.⁴⁰

Yet according to other retributive theories, persistent offenders are inherently more culpable for their crimes, either because they have ignored previous sanctions for their behavior, or because they repeatedly disregard the rights of others in committing their crimes.⁴¹ Nonetheless, critics have long questioned the viability of a retributive theory that rests on the increased culpability of repeat offenders.⁴²

B. Utilitarians

In large part, modern criminal justice tends to focus less on desert and retribution and more on utilitarian theories of deterrence and incapacitation.⁴³ Deterrence is often categorized as either “general,” meaning punishment aimed at deterring anyone in the population from committing crimes, or “specific,” meaning punishment aimed at deterring a particular offender or class of offenders from committing crimes.⁴⁴ In this sense, recidivist punishment is more likely to fall under

³⁶ See ROBERTS, *supra* note 2, at 54–55; VON HIRSCH, *supra* note 32, at 72.

³⁷ See generally Andrew von Hirsch, *Proportionality and Progressive Loss of Mitigation: Further Reflections*, in PREVIOUS CONVICTIONS AT SENTENCING: THEORETICAL AND APPLIED PERSPECTIVES 1 (Julian V. Roberts & Andrew von Hirsch eds., 2014).

³⁸ See *supra* text accompanying note 9; *infra* Section III.A.

³⁹ ROBERTS, *supra* note 2, at 58.

⁴⁰ Julian V. Roberts, *The Future of State Punishment: The Role of Public Opinion in Sentencing*, in RETRIBUTIVISM HAS A PAST—HAS IT A FUTURE? 101, 118 (Michael Tonry ed., 2011).

⁴¹ See Markus Dirk Dubber, *The Unprincipled Punishment of Repeat Offenders: A Critique of California's Habitual Criminal Statute*, 43 STAN. L. REV. 193, 205 (1990); see also Jesper Ryberg, *Retributivism and Multiple Offending*, 11 RES PUBLICA 213 (2005).

⁴² See ROBERTS, *supra* note 2, at 70; George P. Fletcher, *The Recidivist Premium*, 1 CRIM. JUST. ETHICS, no.2, 1982, at 54, 58–59.

⁴³ Paul H. Robinson & John M. Darley, *Intuitions of Justice: Implications for Criminal Law and Justice Policy*, 81 S. CAL. L. REV. 1, 42 (2007) (“[I]t is antidesert crime control theories—most notably deterrence and incapacitation—that have had the greatest influence in recent criminal justice reforms.”).

⁴⁴ Daniel S. Nagin, *Deterrence*, in 4 ACAD. FOR JUSTICE, REFORMING CRIMINAL JUSTICE 19, 19–20 (Erik Luna ed., 2017), https://law.asu.edu/sites/default/files/pdf/academy_for_justice/Reforming-Criminal-Justice_Vol_4.pdf [<https://perma.cc/K2ES-2VAU>].

specific deterrence, as it aims to deter individuals with past criminal records from reoffending.⁴⁵ Though it may be argued that if criminality can truly be habitual then deterrence would not be an effective strategy for combating it, proponents of the deterrent theory nonetheless claim that repeat offenders would commit *even more crimes* if they were not to some degree deterred by the presence of recidivist punishment.⁴⁶ Critics of this deterrence theory take issue with the “heroic and unrealistic assumptions about ‘threat communication’” that such a theory requires.⁴⁷

The most straightforward explanation for recidivist sentencing—though somewhat bound up in the specific deterrence model—is its incapacitating function: the notion cited above that society must be protected from repeat offenders. This is the language employed by New York’s persistent felony offender enhancement: the nature of the prior offenses or the defendant’s history and character are such that an extended sentence with lifetime supervision would be in the public interest.⁴⁸ Noted criminologist Michael Tonry has identified multiple problems with this approach, the most persuasive of which is that as individuals age they are less likely to engage in crime; what Tonry calls the “residual career length” problem.⁴⁹ This means that the state is incapacitating allegedly dangerous repeat offenders precisely when they are less dangerous.⁵⁰ Moreover, if it is really the “public

⁴⁵ See *Parke v. Raley*, 506 U.S. 20, 27 (1992) (“States have a valid interest in deterring and segregating habitual criminals.”).

⁴⁶ “Hard-core recidivist criminals” may offend whatever we do, but they would commit far more offences if they had *carte blanche* to do so. Deterrent effectiveness is always a matter of degree, and one who eventually offends may none the less have been deterred *to some degree*, in the sense that the range of circumstances in which he would offend is restricted. The threat is thus not pointless, and the violence it involves may be justifiable.

Anthony Ellis, *A Deterrence Theory of Punishment*, 53 PHIL. Q. 337, 350 (2003).

⁴⁷ Michael Tonry, *Purposes and Functions of Sentencing*, 34 CRIME & JUST. 1, 29 (2006) (“Mandatory minimum penalties including three-strikes laws are nothing more than efforts to deter crime through penalty increases. The clear weight of the evidence, not surprisingly given what we know about severity increases generally, is that they are seldom if ever crime preventatives.”) (citations omitted).

⁴⁸ N.Y. PENAL LAW § 70.10 (McKinney 2018); N.Y. CRIM. PRO. LAW § 400.20 (McKinney 2018).

⁴⁹ Tonry, *Purposes and Functions*, *supra* note 47, at 31 (“There may be other justifications for confining such offenders for extended periods; but from an incapacitative perspective, such sentences are expensive, inefficient, and largely ineffective.”); see also Dana Goldstein, *Too Old to Commit Crime? Why People Age out of Crime, and What It Could Mean for How Long We Put Them Away*, MARSHALL PROJECT: JUST. LAB (March 20, 2015, 1:00 PM), <https://www.themarshallproject.org/2015/03/20/too-old-to-commit-crime>.

⁵⁰ JOHN PFAFF, *LOCKED IN: THE TRUE CAUSES OF MASS INCARCERATION AND HOW TO ACHIEVE REAL REFORM 192–93* (2017). Furthermore, there stands what Tonry calls the “multiple offense paradox,” whereby offenders charged with multiple offenses concurrently get “bulk discounts,” reducing the time served for each particular offense, while those charged as recidivists get enhancements for their past crimes. Michael Tonry, *Solving the Multiple Offense Paradox*, in SENTENCING MULTIPLE CRIMES 241 (Jesper Ryberg, Julian V. Roberts & Jan W. de Keijser eds., 2018).

interest” that is to be served by such sentences, should it not be the jury—the democratic arm of the judicial branch⁵¹—making determinations about what that is? This is the question *Apprendi* was intended to answer.⁵²

II. APPRENDI AND ITS PROGENY

The rule announced in *Apprendi v. New Jersey* seems clear on its face: “Other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt.”⁵³ Yet despite its apparently simplicity, the Supreme Court has repeatedly faced new scenarios demanding the rule’s interpretation. Despite all these challenges, the exception contained in the first clause of the rule, “the fact of a prior conviction,” has remained intact.

As noted at the outset, the *Apprendi* Court linked this exception to its decision in *Almendarez-Torres* two years earlier.⁵⁴ This link, however, was not as simple as carving out a decisive exception; instead, it warranted nearly four pages of explanation.⁵⁵ The petitioner in *Almendarez-Torres* was caught reentering the United States after having been previously deported and was then sentenced under an enhancement provision for those whose deportation was due to prior convictions for aggravated felonies.⁵⁶ He challenged the conviction on the grounds that the prior conviction was an element of the crime, and therefore should have been charged in the indictment.⁵⁷ The Court ruled against him, saying that the enhancement was merely a “penalty provision” and need not be charged.⁵⁸ However, the majority opinion concluded that because the prior convictions had been admitted in the guilty plea, the court “express[ed] no view on whether some heightened standard of proof might apply to sentencing determinations that bear significantly on the severity of sentence.”⁵⁹

By contrast, the central issue in *Apprendi* was which standard of proof applied. In that case, a white man fired a gun into the home of an African American family and ultimately received an enhanced sentence pursuant to New Jersey’s hate

⁵¹ See *Blakely v. Washington*, 542 U.S. 296, 306 (2004) (“Just as suffrage ensures the people’s ultimate control in the legislative and executive branches, jury trial is meant to ensure their control in the judiciary.”); see also Jeffrey Abramson, *Four Models of Jury Democracy*, 90 CHI.-KENT L. REV. 861, 862 (2015).

⁵² See Joseph L. Hoffmann, *Apprendi v. New Jersey: Back to the Future?*, 8 AM. CRIM. L. REV. 255, 275 (2001) (“*Apprendi* deals with factors that do not define the line between *law-abiding citizen* and *criminal*; instead, they define the line between *criminal* and *worse criminal*.”).

⁵³ 530 U.S. 466, 490 (2000).

⁵⁴ See *supra* text accompanying notes 3–5.

⁵⁵ *Apprendi*, 530 U.S. at 487–91.

⁵⁶ *Almendarez-Torres v. United States*, 523 U.S. 224, 235 (1998).

⁵⁷ *Id.* at 227.

⁵⁸ *Id.* at 247.

⁵⁹ *Id.* at 248.

crimes law.⁶⁰ However, the indictment had not mentioned the hate crimes law, and the court imposed the enhancement after an evidentiary hearing before the judge, decided by a preponderance of the evidence.⁶¹ The Court reversed, finding this procedure in violation of due process and the Sixth Amendment right to a jury trial.⁶²

The opinion in *Apprendi* emphasized that Mr. Almendarez-Torres had admitted the prior convictions in his plea and only contested their use for an enhancement on the grounds that they had not been included in the indictment.⁶³ Therefore, “no question concerning the right to a jury trial or the standard of proof that would apply to a contested issue of fact was before the Court [in *Almendarez-Torres*].”⁶⁴ This point is crucial, as the prior convictions exception may itself not withstand such a challenge. As the Court went on to say, “it is arguable that *Almendarez-Torres* was incorrectly decided, and that a logical application of our reasoning today should apply if the recidivist issue were contested.”⁶⁵ However, because it was not at issue in Mr. Apprendi’s conviction, the Court decided to preserve the exception.⁶⁶

Though continuing to sidestep the recidivist issue, the cases following in the *Apprendi* line have certainly dealt with weighty matters. Among the earliest challenges was *Ring v. Arizona*, where the Court invalidated the Arizona death penalty procedure, under which the jury pronounced a defendant guilty of murder but the judge alone determined the aggravating factors for imposing the death sentence.⁶⁷ Arizona attempted to argue that the jury’s verdict exposed the defendant to either death or life imprisonment, and the aggravating factors were merely an exercise of judicial discretion.⁶⁸ The Court refuted this attempt by saying the death penalty statute “explicitly cross-references the statutory provision requiring the finding of an aggravating circumstance before imposition of the death penalty,” demonstrating that the judge’s factfinding was essential.⁶⁹ The Court’s holding was later reaffirmed in *Hurst v. Florida*, which invalidated Florida’s death penalty scheme on precisely the same grounds.⁷⁰

The next major milestone came in *Blakely v. Washington*, where the Court held that a defendant who pled guilty to kidnapping could not receive a sentence enhancement due only to a judge’s finding of “deliberate cruelty,” absent facts found

⁶⁰ *Apprendi*, 530 U.S. at 469.

⁶¹ *Id.* at 470–71.

⁶² *Id.* at 497.

⁶³ *Id.* at 488.

⁶⁴ *Id.*

⁶⁵ *Id.* at 489–90.

⁶⁶ *Id.*

⁶⁷ 536 U.S. 584 (2002).

⁶⁸ *Id.* at 603–04.

⁶⁹ *Id.* at 604.

⁷⁰ 136 S. Ct. 616 (2016).

by or admitted to a jury.⁷¹ Some commentators immediately read this decision as bolstering the prior convictions exception by drawing a line between characteristics of the *offense*, which a jury must find as part of guilt, and characteristics of the *offender*, which a judge may find pursuant to sentencing.⁷² However, the majority opinion in *Blakely* made clear:

Whether the judge's authority to impose an enhanced sentence depends on finding a specified fact (as in *Apprendi*), one of several specified facts (as in *Ring*), or *any* aggravating fact (as here), it remains the case that the jury's verdict alone does not authorize the sentence. The judge acquires that authority only upon finding some additional fact.⁷³

In light of this decision, the Court was soon faced with a massive choice. The Federal Sentencing Guidelines looked very similar to the Washington scheme struck down in *Blakely*, and even the dissenters knew that a challenge to that system was inevitable.⁷⁴ This premonition was correct, and in *United States v. Booker*, a strange split decision led to an excision of certain parts of the Federal Sentencing Guidelines that transformed them from mandatory to advisory.⁷⁵ In two consolidated cases, trial court judges refused (on the basis of *Blakely*) to employ the guidelines in a way that would involve their own fact-finding at the sentencing phase; in the first part of the *Booker* opinion, the Court affirmed those decisions.⁷⁶ In the later, remedial part of the decision, a majority made up of the four dissenters from the first part of the opinion plus Justice Ginsburg (the only one to join both controlling opinions), found that the guidelines were severable, and that selective excision to remove the mandatory character of the guidelines was the appropriate course.⁷⁷ The Federal Sentencing Guidelines are now only advisory.⁷⁸

The Court did eventually begin to tackle prior criminal conduct in light of *Apprendi*, but only in the context of the Armed Career Criminal Act (ACCA). The ACCA requires a court to impose an enhanced sentence on anyone who is convicted of a felony following three previous convictions for a "violent felony."⁷⁹ In cases such as *Shepard v. United States*⁸⁰ and *Descamps v. United States*,⁸¹ the Court faced the

⁷¹ 542 U.S. 296, 303 (2004).

⁷² See, e.g., Douglas A. Berman, *Conceptualizing Blakely*, 17 FED. SENT'G REP. 89 (2004).

⁷³ 542 U.S. at 305.

⁷⁴ *Id.* at 325–26 (O'Connor, J., dissenting) ("If anything, the structural differences that do exist make the Federal Guidelines more vulnerable to attack.").

⁷⁵ 543 U.S. 220, 227 (2006).

⁷⁶ *Id.*

⁷⁷ *Id.* at 245.

⁷⁸ The contours of the current, advisory role of the Guidelines are outside the scope of this Note. See generally Paul J. Hofer, *Federal Sentencing After Booker*, 48 CRIME & JUST. 137 (2019).

⁷⁹ 18 U.S.C. § 924(e) (2012).

⁸⁰ 544 U.S. 13 (2005).

⁸¹ 570 U.S. 254 (2013).

question of how to apply convictions under state criminal statutes. ACCA employs “generic” offenses to define “violent felony” as predicates for purposes of a sentencing enhancement under what the Court calls the “categorical approach”:

[Courts] compare the elements of the statute forming the basis of the defendant’s conviction with the elements of the “generic” crime—*i.e.*, the offense as commonly understood. The prior conviction qualifies as an ACCA predicate only if the statute’s elements are the same as, or narrower than, those of the generic offense.⁸²

The upshot of these cases is that, due to concerns about violating the Sixth Amendment as expressed in *Apprendi*, judges must employ this restrictive categorical approach to identifying those state crimes and their elements.⁸³ This confirms that a sentencing judge can examine a statute but cannot consider the factual circumstances of a prior conviction.⁸⁴

The Court has held that the *Apprendi* rule applies equally to facts which expose a defendant to an increased maximum *or* minimum penalty. *Harris v. United States*, decided shortly after the rule was announced, initially exempted mandatory minimums.⁸⁵ But when presented with an opportunity to reconsider, even Justice Breyer—who concurred in the *Harris* decision—eventually joined the majority to overrule *Harris* in light of subsequent developments.⁸⁶ The Court in *Alleyne* held that “[a]ny fact that, by law, increases the penalty for a crime is an ‘element’ that must be submitted to the jury and found beyond a reasonable doubt.”⁸⁷

This not only had the effect of overruling *Harris*, but also brought the Court’s jurisprudence on minimum sentences in line with cases involving an increase in statutory maximums, like *Apprendi* itself. In *Cunningham v. California*, for example, the Court invalidated California’s Determinate Sentencing Law (DSL) on the ground that it allowed judges to find aggravating facts which exposed a defendant to an elevated sentence beyond the otherwise prescribed statutory maximum.⁸⁸ In doing so, the Court refused to defer to the California Supreme Court’s interpretation of the DSL as merely allowing the judge to engage in traditional discretionary sentence selection, and read the statute in its plain language: requiring the aggravating factors to impose the enhancement.⁸⁹ Nonetheless, since *Apprendi*, the Court has yet to see a viable challenge to a state recidivist scheme that retains judicial fact-finding.

⁸² *Id.* at 257.

⁸³ *See id.* at 277–78.

⁸⁴ *See id.* at 269.

⁸⁵ 536 U.S. 545 (2002).

⁸⁶ *See Alleyne v. United States*, 570 U.S. 99 (2013); *see also infra* notes 182–84 and accompanying text.

⁸⁷ *Alleyne*, 570 U.S. at 103.

⁸⁸ 549 U.S. 270 (2007).

⁸⁹ *Id.* at 289.

III. PERSISTENT FELONY OFFENDER ENHANCEMENTS IN NEW YORK

This Note focuses on New York because that state has a central place in the history of American recidivist punishment. As historian David J. Rothman explains:

The New York Supreme Court in the pre-Revolutionary era regularly sentenced criminals to death [T]he court had frequent recourse to the scaffold—for those convicted of pickpocketing, burglary, robbery, counterfeiting, horse-stealing, and grand larceny as well as murder. Most of the petty criminals were second and third offenders [R]ecidivism inevitably brought the gallows.⁹⁰

New York was also the first state to pass a recidivist statute after the revolution, imposing additional punishment for second-time offenders in 1796.⁹¹ The law was adjusted over the following century, as it regularly posed problems for prison officials bent on reform, particularly by causing overcrowding.⁹² In 1926, New York again set the tone for other states by enacting the infamous Baumes Law,⁹³ which mandated a life term for any offender with a record of three prior felonies, regardless of the circumstances of any of the convictions.⁹⁴ At least twenty-three other states followed New York's lead in adopting similar laws, and this era has been called the “zenith” of the recidivist statute's popularity.⁹⁵

⁹⁰ DAVID J. ROTHMAN, *THE DISCOVERY OF THE ASYLUM: SOCIAL ORDER AND DISORDER IN THE NEW REPUBLIC* 51 (1971).

⁹¹ See LAWS OF THE STATE OF NEW YORK, COMPRISING THE CONSTITUTION, AND THE ACTS OF THE LEGISLATURE, SINCE THE REVOLUTION, FROM THE FIRST TO THE FIFTEENTH SESSION, INCLUSIVE 291 (Thomas Greenleaf, 1797), <https://heinonline.org/HOL/P?h=hein.nysstatutes/lwsneyo0003&i=307>; see also *People v. Morse*, 465 N.E.2d 12, 18–19 (N.Y. 1984) (describing history of persistent felony offender statutes in the state); Michael G. Turner, Jody L. Sundt, Brandon K. Applegate & Francis T. Cullen, “*Three Strikes and You're Out*” Legislation: A National Assessment, 59 FED. PROB. 16, 17 (1995) (“The New York law [in 1797] mandated that individuals convicted of their second felony be sentenced to prison ‘at hard labor or in solitude, or both, for life.’”).

⁹² See Edgardo Rotman, *The Failure of Reform: United States, 1865–1965*, in *THE OXFORD HISTORY OF THE PRISON*, *supra* note 17, at 151, 156 (noting that in the 1890s the Elmira Reformatory “held two times as many inmates as it was designed for,” largely because it “had been intended for first offenders between sixteen and thirty-one years of age, but in practice recidivists always constituted one-third of the inmates”).

⁹³ Clarence Darrow connected the passage of the Baumes Law to prohibition:

The open violence, the crowded prisons, the state of anarchy that prohibition has brought about led to a mad and senseless crusade against crime. New Penal Statutes were passed, prison terms were lengthened, courts and juries, in obedience to the mania, convicted defendants almost indiscriminately. Many innocent persons were sent to prison and executed in this carnival of hate. Such infamous acts as the Baumes Law—providing that a fourth offender should be sent to prison for life—were passed in most of the States.

CLARENCE DARROW, *THE STORY OF MY LIFE* 335–36 (DA CAPO PRESS 1996) (1932).

⁹⁴ Turner et al., *supra* note 91, at 17.

⁹⁵ JOHN PRATT, *GOVERNING THE DANGEROUS: DANGEROUSNESS, LAW, AND SOCIAL CHANGE* 35 (1998)

The enthusiasm for enhancing sentences of those with prior convictions coincided with a technological advancement that allowed the state to identify people almost as accurately as they had done with branding in an earlier age: fingerprinting.⁹⁶ Again, New York was at the forefront of fingerprint identification, even sending a delegation to the 1904 World's Fair to give a demonstration on the technique.⁹⁷ By the time the Baumes Law passed, the state had already identified tens of thousands of individuals in this manner.⁹⁸ When Governor Nelson Rockefeller appointed the Temporary Commission on Revision of the Penal Law and Criminal Code in the 1960s to update the state's criminal laws, it codified the current persistent felony offender statute.⁹⁹ New York also led the charge here, predating alterations to recidivist enhancements that other states and the federal government would undertake in the next decade.¹⁰⁰

The current recidivist regime authorizes a trial judge to impose a sentence of fifteen years to life when the defendant is found to be a persistent felony offender deserving the enhancement,¹⁰¹ even if the current charge carries a penalty as low as one year, or in some circumstances even less.¹⁰² The result is that one in five prisoners in New York are serving life or functional life sentences.¹⁰³ Moreover, the racial disparity in these sentences are obvious: 55.8% of these inmates are Black, 24.7% are Latino, but just 17.3% are White.¹⁰⁴ This despite the fact that African

(quoting George K. Brown, Note, *The Treatment of the Recidivist in the United States*, 23 CANADIAN B. REV. 640, 642 (1945)); see also BERNARD E. HARCOURT, AGAINST PREDICTION: PROFILING, POLICING, AND PUNISHING IN AN ACTUARIAL AGE 92 (2007) (describing the expansion of "Baumes Laws" to other jurisdictions).

⁹⁶ Nancy J. King, *Sentencing and Prior Convictions: The Past, the Future, and the End of the Prior Convictions Exception to Apprendi*, 97 MARQ. L. REV. 523, 531–32 (2014) (“[B]y the end of the 1930s fingerprinting was the dominant method for identification.”).

⁹⁷ SIMON A. COLE, SUSPECT IDENTITIES: A HISTORY OF FINGERPRINTING AND CRIMINAL IDENTIFICATION 137–38 (2002).

⁹⁸ King, *supra* note 96, at 532.

⁹⁹ *People v. Morse*, 465 N.E.2d 12, 19 (N.Y. 1984)

¹⁰⁰ See MICHAEL TONRY, SENTENCING FRAGMENTS: PENAL REFORM IN AMERICA, 1975-2025, at 57–62 (2016).

¹⁰¹ N.Y. PENAL LAW § 70.10(2) (McKinney 2018).

¹⁰² When a person, *other than a second or persistent felony offender*, is sentenced for a class D or class E felony, and the court, having regard to the nature and circumstances of the crime and to the history and character of the defendant, is of the opinion that a sentence of imprisonment is necessary but that it would be unduly harsh to impose an indeterminate or determinate sentence, the court may impose a definite sentence of imprisonment and fix a term of one year *or less*.

§ 70.00(4) (emphasis added).

¹⁰³ See ASHLEY NELLIS, SENTENCING PROJECT, STILL LIFE: AMERICA'S INCREASING USE OF LIFE AND LONG-TERM SENTENCES 7 tbl.1 (2017), <https://www.sentencingproject.org/wp-content/uploads/2017/05/Still-Life.pdf>.

¹⁰⁴ See *id.* at 15 tbl.4.

Americans are only 17.6% of the state's population, Latinos 19.2%, and Whites 55.4%—a particularly striking juxtaposition.¹⁰⁵

A. *The Statutory Scheme*

The persistent felony offender scheme in New York is governed by two statutory provisions: Penal Law section 70.10, which defines the status and the authorized sentence, and Criminal Procedure Law section 400.20, which lays out the steps a court must follow to impose the sentence. Section 70.10 is divided into two subsections, the first of which says that “[a] persistent felony offender is a person . . . who stands convicted of a felony after having previously been convicted of two or more felonies.”¹⁰⁶ Subsection one lays out further definitions and distinguishes this provision from the separate persistent violent felony offender statute.¹⁰⁷ Subsection two of section 70.10 describes the authorized sentence:

When the court has found, pursuant to the provisions of the criminal procedure law, that a person is a persistent felony offender, *and* when it is of the opinion that the history and character of the defendant and the nature and circumstances of his criminal conduct indicate that extended incarceration and life-time supervision will best serve the public interest, the court, in lieu of imposing the sentence of imprisonment authorized . . . for the crime of which such person presently stands convicted, *may impose* the sentence of imprisonment [of fifteen years to life] for a class A-I felony. In such event the reasons for the court's opinion shall be set forth in the record.¹⁰⁸

The language of this provision clearly requires findings that the defendant meets the definition and additional findings about the defendant's character, nature of the prior conduct, and the public interest. It also establishes that the enhancement is itself discretionary, and the sentencing court “may,” not “must” or “shall,” impose the increased sentence. It is important to note, however, that for the sentence to be valid, it must be supported by findings in the record.

The procedural section crystallizes these points even further. In its opening provision defining applicability, the criminal procedure law says that the persistent felony offender sentence “may not be imposed *unless*” the defendant meets the definition and his or her history and character and the nature of the prior offense have been evaluated by the judge.¹⁰⁹ Crucially, the statute empowers the judge to

¹⁰⁵ *Quick Facts: New York*, U.S. CENSUS BUREAU, <https://www.census.gov/quickfacts/ny> (last visited May 22, 2020).

¹⁰⁶ PENAL § 70.10(1)(a).

¹⁰⁷ *Id.* § 70.08.

¹⁰⁸ *Id.* § 70.10(2) (emphasis added).

¹⁰⁹ N.Y. CRIM. PROC. LAW § 400.20(1) (McKinney 2018) (emphasis added).

initiate proceedings for an enhancement under this statute, not the prosecutor.¹¹⁰ In practice, however, many hearings under the scheme do arise from a motion by the state.¹¹¹ If a judge decides that there are reasons for the enhancement, an order is filed with the clerk and notice is sent to the defendant, defense counsel, and district attorney, setting a date for a hearing and spelling out the relevant prior convictions and the factors influencing the history and nature finding.¹¹²

Under this procedural section, not one but two separate hearings may be necessary to impose the sentence. In every case where the court seeks to impose the enhancement, it must hold a preliminary hearing where the defendant has the opportunity to controvert either the fact of the prior convictions or the background and criminal conduct factors warranting imposition of the sentence.¹¹³ If the defendant declines to contest the sentence enhancement on either ground, or the court determines that any evidence the defendant does have to present would not affect its decision, no further hearing is required.¹¹⁴ However, if the defendant does wish to controvert the findings—and can present relevant evidence—then a second hearing may be held.¹¹⁵ In either situation, no jury is present, and though the fact of the prior convictions must be proved beyond a reasonable doubt, “the defendant’s history and character and the nature and circumstances of his criminal conduct may be established by any relevant evidence . . . regardless of admissibility under the exclusionary rules of evidence, and the standard of proof with respect to such matters shall be a preponderance of the evidence.”¹¹⁶

After the hearings, in order to authorize the sentence, the judge must enter findings into the record. If only the preliminary hearing has been conducted, and the “the uncontroverted allegations in the statement of the court are sufficient” to meet both subdivisions (1) and (2) of section 70.10, “the court may enter a finding that the defendant is a persistent felony offender” and impose the enhanced sentence.¹¹⁷ Where the court has conducted the secondary hearing, at its conclusion, “the court must make a finding as to whether or not the defendant is a persistent felony offender and, upon a finding that he is such, must then make such *findings of fact* as it deems relevant to the question of whether a persistent felony offender

¹¹⁰ When information available to the court prior to sentencing indicates that the defendant is a persistent felony offender, and when, in the opinion of the court, the available information shows that a persistent felony offender sentence may be warranted, the court may order a hearing to determine (a) whether the defendant is in fact a persistent felony offender, and (b) if so, whether a persistent felony offender sentence should be imposed.

Id. § 400.20(2).

¹¹¹ *See, e.g.*, *People v. Rivera*, 833 N.E.2d 194, 195 (N.Y. 2005) (“The People moved for a persistent felony offender sentence, so as to treat defendant’s class E conviction as a class A–I felony.”).

¹¹² CRIM. PROC. § 400.20(3)–(4).

¹¹³ *Id.* § 400.20(7).

¹¹⁴ *Id.* § 400.20(8).

¹¹⁵ *Id.* § 400.20(9).

¹¹⁶ *Id.* § 400.20(5).

¹¹⁷ *Id.* § 400.20(8).

sentence is warranted.”¹¹⁸ The text of the statute itself clearly refers to findings of fact made by the judge. Throughout the process, the court may decide *sua sponte* to suspend the hearings but may not enhance the sentence, “unless the court recommences the proceedings and makes the necessary findings.”¹¹⁹

B. The Response to Apprendi

As a result of this statutory scheme, in order to impose the enhancement on a defendant, specific findings must be made by the court related to the history and character of the defendant and the nature of the past criminal conduct.¹²⁰ Absent such findings, appellate courts have regularly reversed and remanded for resentencing, stretching back to the earliest days of this statutory scheme.¹²¹ Moreover, trial courts will refrain from imposing the enhanced sentence if the first prong of section 70.10—the fact of prior convictions—is met, but the second—the history, character, and nature—is not.¹²²

Yet the Court of Appeals of New York has repeatedly resisted overturning the statute in the years since *Apprendi* was decided, as new challenges to the scheme follow whenever the Supreme Court takes another step at expanding that holding. The first challenge arose mere months after *Apprendi*, when a defendant found guilty of sexual assault and endangering a minor received an enhanced sentence under the persistent felony offender statute.¹²³ In applying the Supreme Court’s new rule, the Court of Appeals in *People v. Rosen* held that section 70.10 had two distinct parts, and that “[o]nly after it has been established that defendant is a twice prior convicted felon may the sentencing court, based on the preponderance of the evidence . . . determine whether actually to issue an enhanced sentence.”¹²⁴ As

¹¹⁸ *Id.* § 400.20(9) (emphasis added).

¹¹⁹ *Id.* § 400.20(10).

¹²⁰ It should be noted of course that the federal sentencing factors also take into account the “history and characteristics of the defendant,” 18 U.S.C. § 3553(a)(1), and of course the defendant’s criminal history score. However, after *Apprendi* and *Booker*, those factors are used only to evaluate the advisory sentencing guidelines range, *see supra* note 78, and are cabined by the statutory maximum penalty for the instant offense; whereas in New York, as explored in the previous section, they are employed to impose an enhancement *beyond* the statutory maximum.

¹²¹ *See People v. Murdaugh*, 833 N.Y.S.2d 557, 559 (N.Y. App. Div. 2007) (“The sentencing court’s failure to state ‘the reasons for [its] opinion . . . in the record,’ makes it impossible for this court, as the reviewing court, to determine what conduct or circumstances the sentencing court relied upon in determining that the second prong of the required persistent felony offender analysis was satisfied.” (alteration in original) (citations omitted)), *lv. to appeal denied*, 872 N.E.2d 888 (N.Y. 2007); *see also People v. Garcia*, 700 N.Y.S.2d 44 (N.Y. App. Div. 1999); *People v. Dell’Orfano*, 602 N.Y.S.2d 646 (N.Y. App. Div. 1993); *People v. Fluitt*, 558 N.Y.S.2d 852 (N.Y. App. Div. 1990), *order aff’d*, 605 N.E.2d 357 (N.Y. 1992); *People v. Gaines*, 524 N.Y.S.2d 70 (N.Y. App. Div. 1988); *People v. Frey*, 473 N.Y.S.2d 630 (N.Y. App. Div. 1984); *People v. Blackwell*, 302 N.Y.S.2d 78 (N.Y. App. Div. 1969).

¹²² *See, e.g., People v. Agnello*, 65 N.Y.S.3d 629 (Monroe Cty. Ct. 2017).

¹²³ *People v. Rosen*, 752 N.E.2d 844 (N.Y. 2001), *cert. denied*, 534 U.S. 899 (2001).

¹²⁴ *Id.* at 847.

such, the court held that the fact of two or more prior felony convictions is the “sole determina[nt]” to expose a defendant to the sentence enhancement, and that in making findings regarding the history, nature, and public interest, “the sentencing court is thus only fulfilling its traditional role—giving due consideration to agreed-upon factors—in determining an appropriate sentence within the permissible statutory range.”¹²⁵ No Judges of the Court of Appeals dissented from the decision.

Commentators immediately saw the contradiction here, and some noted that either *Apprendi* or the New York sentence enhancement would have to give way eventually.¹²⁶ Yet the Court of Appeals doggedly stuck to its interpretation four years later in *People v. Rivera*.¹²⁷ In this case, the defendant had been convicted of a felony carrying a four-year maximum sentence, but the court imposed the persistent felony offender enhancement and sentenced him to fifteen years to life.¹²⁸ Despite taking note of the recent expansions in the Supreme Court’s Sixth Amendment jurisprudence in *Blakely* and *Booker*, the Court of Appeals upheld the sentence, reasoning that because the Supreme Court had not expressly overruled *Almendarez-Torres*, the prior convictions exception still stood.¹²⁹ The Court of Appeals could only achieve this by reinforcing the statutory construction used in *Rosen* and concluding that the defendant’s two predicate felonies were the “necessary and sufficient conditions” for imposition of the sentence enhancement.¹³⁰

However, there was a dissent in this case from Chief Judge Kaye, who had concurred in the court’s judgment in *Rosen*. Her position was that in light of subsequent developments (particularly in *Ring v. Arizona*) and due to the stilted construction of “necessary and sufficient conditions,” the statute could no longer survive constitutional challenge.¹³¹ Judge Ciparick, too, filed a dissent along much

¹²⁵ *Id.*

¹²⁶ See, e.g., Christopher H. Lindstrom, Note, *In the Shadow of Apprendi: People v. Rosen Reveals the Impractical Nature and Uncertain Future of Apprendi v. New Jersey*, 36 COLUM. J.L. & SOC. PROBS. 103 (2002).

Undertaking this sentencing procedure is appropriate for a court, as it is consistent with the traditional role of a judge. Even so, it conflicts with the explicit holding of *Apprendi*. Under the Supreme Court’s rule, a court should not make these factual findings beyond the existence or nonexistence of a prior conviction. This contradiction between the need for judicial participation and the *Apprendi* standard was the challenge faced by the Court of Appeals in *Rosen*.

Id. at 113. See generally Joseph E. Fahey, *Discretionary Persistent Felony Offender Sentencing in New York: Can it Survive Apprendi?*, SYRACUSE U.: SURFACE (July 26, 2012), <https://surface.syr.edu/lawpub/68>.

¹²⁷ 833 N.E.2d 194 (N.Y. 2005).

¹²⁸ *Id.* at 195–196.

¹²⁹ *Id.* at 198.

¹³⁰ *Id.* at 199.

¹³¹ I agree that the statutory scheme the Court describes would pass constitutional muster. The problem, though, is that the statute as construed by the majority was not before today the law in New York. The language of the statute is plain, and reflects the intent of the

the same lines.¹³² Their positions went unheeded, and as the U.S. Supreme Court continued to expand the coverage of the *Apprendi* rule, New York stuck to its position.¹³³

The next challenge to the statute came after the Supreme Court invalidated California's determinate sentencing law in *Cunningham*.¹³⁴ Continuing to insist that New York's scheme required only the finding of the predicate felonies to "expose" defendant to the higher penalty, the Court of Appeals held:

Unlike the sentencing schemes in *Apprendi*, *Ring*, *Blakely*, *Booker* and *Cunningham*, all of which effectively provided for judicial fact-finding of an element(s) of an offense as a prerequisite to enhancing a sentence *beyond* the relevant sentencing range, the New York sentencing scheme, after a defendant is deemed eligible to be sentenced as a persistent felony offender, requires that the sentencing court make a qualitative judgment about, among other things, the defendant's criminal history and the circumstances surrounding a particular offense in order to determine whether an enhanced sentence, *under* the statutorily prescribed sentencing range, is warranted.¹³⁵

Thus, the artificial barrier between the two required prongs of the persistent felony offender enhancement was preserved.¹³⁶

During this time, the federal courts in New York were not silent on the issue and saw some tension between judges at the district court level and those in the United States Court of Appeals for the Second Circuit. In particular, Judge John Gleeson in the Eastern District of New York seemed to take a special interest in the sentencing scheme, twice granting habeas petitions in cases involving the persistent felony offender enhancement, and twice being reversed on appeal.¹³⁷ The second of

Legislature, that not every two-time (nonviolent) recidivist is eligible, without more, to be sentenced to an indeterminate life term. Only some are.

Id. at 202 (Kaye, C.J., dissenting) (citation omitted).

¹³² *Id.* at 205 (Ciparick, J., dissenting).

¹³³ See Laura I Appleman, *Retributive Justice and Hidden Sentencing*, 68 OHIO ST. L.J. 1307, 1357–61 (2007) (discussing New York's persistent felony offender scheme in the wake of *Blakely*); Fahey, *supra* note 126.

¹³⁴ See *supra* text accompanying notes 88–89.

¹³⁵ *People v. Quinones*, 906 N.E.2d 1033, 1041 (N.Y. 2009).

¹³⁶ See Carissa Byrne Hessick & William W. Berry III, *Sixth Amendment Sentencing After Hurst*, 66 UCLA L. REV. 448, 490 (2019) ("It is difficult to understand how the statute simultaneously authorizes a higher sentence without any further findings, while at the same time requires that further findings be made before a judge decides to impose the higher sentence.").

¹³⁷ See *Portalatin v. Graham*, 478 F. Supp. 2d 385 (E.D.N.Y. 2007), *rev'd*, 624 F.3d 69 (2d Cir. 2010); *Brown v. Greiner*, 258 F. Supp. 2d 68 (E.D.N.Y. 2003), *rev'd*, 409 F.3d 523 (2d Cir. 2005). While on the bench, Judge Gleeson was known to be a supporter of sentencing reform. See, e.g., Nicole Hong, *John Gleeson, Prominent Brooklyn Federal Judge, to Step Down*, WALL ST. J.: L. BLOG (Jan. 4, 2016, 7:06 PM), <https://blogs.wsj.com/law/2016/01/04/john-gleeson-prominent-brooklyn-federal-judge-to-step-down/>.

these cases, *Portalatin v. Graham*, still governs the practice of the Second Circuit and held that it was bound by the New York Court of Appeals' interpretation of the statute.¹³⁸

Shortly after the Second Circuit handed down the *Portalatin* decision, the New York Court of Appeals had yet another chance to revisit its interpretation of the statute. Two cases decided on the same day resulted in the court choosing to “decline defendant’s invitation” to do so.¹³⁹ The second of those cases, *People v. Battles*, came with another stinging dissent, this time from Chief Judge Lippman, who noted that the Second Circuit had been somewhat hamstrung by the “extraordinarily deferential review standard applicable in federal habeas proceedings,” and thus *Portalatin* “hardly places a federal imprimatur upon our *Apprendi* jurisprudence.”¹⁴⁰ He articulated that courts in Connecticut, Maine, Ohio, Minnesota, Hawaii, New Mexico, Tennessee, and Arizona had all tackled their recidivist statutes in response to *Apprendi*.¹⁴¹ He referred back to the dissents in *Rivera*, and proceeded to say that the court’s continued mangling of the statutory text was no different than the California court’s attempt to misread its laws, rejected by the Supreme Court in *Cunningham*.¹⁴² However, the interpretation survived Judge Lippman’s dissent, too.

i. The Comparison to Other States

Chief Judge Lippman was right: in other states, the highest courts have recognized that their similar procedures for recidivist sentencing violate *Apprendi* and must be overturned. The most prominent example is Connecticut, which in 2007 struck down a nearly identical statute as a violation of the Sixth Amendment.¹⁴³ The statute at issue first required a finding that a defendant met the definition for “persistent dangerous felony offender” through proof of predicate felonies, and then a secondary finding that “*the court is of the opinion that such person’s history and character and the nature and circumstances of such person’s criminal conduct indicate that extended incarceration and lifetime supervision will best serve the public interest.*”¹⁴⁴ This language is nearly identical to New York’s

¹³⁸ We must presume that the New York Court of Appeals meant what it said: the statutory directive to consider the history and character of the defendant, and the nature and circumstances of his crime, is a procedural requirement that is only triggered once a judge is already *authorized* to impose the class A–I sentence.

624 F.3d at 90.

¹³⁹ *People v. Bell*, 940 N.E.2d 913, 914 (N.Y. 2010); *People v. Battles*, 942 N.E.2d 1026 (N.Y. 2010).

¹⁴⁰ *Battles*, 942 N.E.2d at 1031 (Lippman, C.J., dissenting).

¹⁴¹ *Id.* at 1031–32.

¹⁴² *Id.* at 1032–34.

¹⁴³ *State v. Bell*, 931 A.2d 198 (Conn. 2007).

¹⁴⁴ *Id.* at 227.

current statute,¹⁴⁵ and so the Supreme Court of Connecticut discussed the decisions in *Rivera* and *Brown v. Greiner*, but took the New York Court of Appeals' interpretation at face value to establish a distinction between the two statutes.¹⁴⁶ To resolve the issue, the court excised the words "the court is of the opinion that" from the statutory text, which it said would make it clear that the jury, rather than the judge, had to rule on the defendant's history and character, the nature of the prior offense, and the public interest.¹⁴⁷

Whereas Connecticut provides a handy comparison for its similarity, Indiana supplies an illustrative contrast for its dissimilarity. Indiana's sentencing scheme, including its habitual offender law, had been in place since 1977 and though it had been tweaked by frequent minor amendments, 2005 marked a dramatic year in its history. First, the Indiana Supreme Court ruled that the state's judicial sentencing structure was unconstitutional due to its similarity to the Washington scheme struck down in *Blakely*.¹⁴⁸ Indiana's structure of presumptive fixed terms from which a sentencing judge could depart upward or downward based on aggravating or mitigating factors was, in the Indiana Supreme Court's view, precisely what the *Apprendi* and *Blakely* decisions sought to abolish.¹⁴⁹ Just two months before the New York Court of Appeals shrugged off the challenge to its scheme in the *Rivera* case, the Indiana Supreme Court humbly stated: "Whether [the *Blakely* decision] represents sound jurisprudence or policy is of no moment for us under the Supremacy Clause, and we cannot see any grounds for sustaining Indiana's sentencing scheme given the *Blakely* holding."¹⁵⁰ The court held that *Blakely* established a "new rule of criminal procedure," and that future decisions regarding any factors of the type envisioned by *Blakely* would have to be found by a jury in Indiana criminal courts.¹⁵¹

The Indiana General Assembly thought this was the wrong approach, however, and took mere weeks to rewrite the entire sentencing scheme to fashion a more *Booker*-type remedy, rendering the Indiana sentencing ranges merely advisory rather than mandatory.¹⁵² This fix was approvingly cited in Justice Ginsburg's opinion in *Cunningham* as among those systems in which a state has chosen to allow a judge to exercise a great deal of discretion within a wide statutory range,

¹⁴⁵ N.Y. PENAL LAW § 70.10(2) (requiring the court to determine if "it is of the opinion that the history and character of the defendant and the nature and circumstances of his criminal conduct indicate that extended incarceration and life-time supervision will best serve the public interest").

¹⁴⁶ *Bell*, 931 A.2d at 232–34.

¹⁴⁷ *Id.* at 235–36.

¹⁴⁸ *Smylie v. State*, 823 N.E.2d 679, 683 (Ind. 2005).

¹⁴⁹ *Id.* at 684 ("[W]e see little daylight between the *Blakely* holding and the Indiana system.").

¹⁵⁰ *Id.* at 683.

¹⁵¹ *Id.* at 687.

¹⁵² Frank Sullivan, Jr., *Selected Developments in Indiana Criminal Sentencing and Death Penalty Law (1993-2012)*, 49 IND. L. REV. 1349, 1357–58 (2016).

thus not implicating Sixth Amendment concerns.¹⁵³ In fact, the remedy crafted by the Indiana Supreme Court in *Smylie* would have fit neatly into Justice Ginsburg's other box for acceptable responses to *Apprendi* and *Blakely*, by retaining determinate sentencing but requiring all relevant facts to be proved to the jury.¹⁵⁴

More importantly, had the legislature preserved rather than overruled the Indiana Supreme Court's remedy, it might in fact have been more reflective of the Indiana Constitution. Indiana is one of two states with a constitutional provision that arguably empowers a jury in a criminal case beyond even the bounds of the federal constitution: "In all criminal cases whatever, the jury shall have the right to determine the law and the facts."¹⁵⁵ While the high court has ruled that this provision does not grant a right to jury nullification,¹⁵⁶ the provision has posed an interesting difficulty in the realm of the habitual offender law. Since its modern inception in 1977, and continuing through the 2005 amendments, the Indiana habitual offender enhancement has always required a bifurcated proceeding in jury trials: after conviction, the jury reconvenes for a sentencing hearing with new instructions based on a separate document that alleges the prior convictions, appended to the main charging instrument.¹⁵⁷ In holding that the jury retains the prerogative not to apply a habitual offender sentence even if the state succeeds in proving all of the required elements, the court noted that "the interplay between the habitual offender statute [and the constitutional provision] operates to give a jury latitude in defining habitual offender status in a way that it does not in defining guilt or innocence."¹⁵⁸ Therefore, in addition to requiring the jury to find the facts necessary to impose the sentence, it may also refuse to do so in the face of all the evidence necessary to impose the enhancement—quite a contrast to the state of the law in New York.

ii. The Continued Adherence to Flawed Interpretation

Recent developments in the Supreme Court's jurisprudence have spawned a new wave of challenges to the New York persistent felony offender law. Since the decisions in *Alleyne*, *Descamps*, and *Hurst*, two challenges have come before the New York Court of Appeals in consecutive years, and subsequently both were denied certiorari by the Supreme Court.¹⁵⁹ The first of these two, *People v. Prindle*, confronted the Court of Appeals' precedents head on, focusing particularly on the

¹⁵³ *Cunningham v. California*, 549 U.S. 270, 294 (2007).

¹⁵⁴ *See id.*

¹⁵⁵ IND. CONST. art. 1, § 19; *see also* GA. CONST. art. I, § 1, para. XI(a) ("In criminal cases, the defendant shall have a public and speedy trial by an impartial jury; and the jury shall be the judges of the law and the facts.").

¹⁵⁶ *Walden v. State*, 895 N.E.2d 1182, 1187 (Ind. 2008).

¹⁵⁷ IND. CODE § 35-50-2-8 (2017).

¹⁵⁸ *Walden*, 895 N.E.2d at 1185 (citations omitted).

¹⁵⁹ *See People v. Garvin*, 88 N.E.3d 319 (N.Y. 2017), *cert. denied*, 139 S. Ct. 57 (2018); *People v. Prindle*, 80 N.E.3d 1026 (N.Y. 2017), *cert. denied*, 138 S. Ct. 514 (2017).

effect of the *Alleyne* decision on the New York statute. The Court of Appeals held that since the persistent felony offender enhancement remains discretionary even once all hearings have been conducted and findings made, *Alleyne* did not pose a problem, because the mandatory minimum sentence to which the defendant was exposed had not been altered.¹⁶⁰ No dissents were filed, though two judges took no part in the decision.¹⁶¹

Another challenge was brought in *People v. Garvin*. This case contained a separate, key issue around whether the Fourth Amendment allowed a suspect to be arrested while standing in his doorway without a warrant or exigent circumstances, and that was the focus of much of the Court of Appeals' opinion.¹⁶² Only in the final paragraph of the majority opinion did the court address the enhanced sentence, and it did so simply by saying *Prindle* was the governing precedent, with no further analysis.¹⁶³ But Judge Fahey (one of those who had not participated in the *Prindle* decision) took the opportunity to write an opinion concurring in the Fourth Amendment holding while dissenting from the ruling on the Sixth Amendment question.¹⁶⁴ His dissent was a stark statement that the persistent felony offender statute was flatly unconstitutional, as direct as any presented by a judge of the Court of Appeals:

Being a "persistent felony offender" is, however, only one of two necessary conditions for the imposition of an enhanced sentence under the pertinent sentencing statute. The other necessary condition is that the sentencing court must be of the reasoned opinion, as set out in the sentencing record, "that the history and character of the defendant and the nature and circumstances of his criminal conduct indicate that extended incarceration and life-time supervision will best serve the public interest." If the first necessary condition is met, but not the second, a persistent felony offender may not be given enhanced sentencing.¹⁶⁵

Judge Fahey then went on to rail at the "fundamentally flawed" analysis of the *Rosen* court and how it had wrongly been upheld, even as the Supreme Court consistently found new areas into which *Apprendi* extended.¹⁶⁶ He concluded: "Exposing defendants to criminal penalties more severe than could be imposed based upon the jury verdict and prior convictions alone, without a jury making the

¹⁶⁰ *Prindle*, 80 N.E.3d at 1031 ("In short, the minimum sentence did not increase because the lower courts always retained the discretion to sentence defendant 'as if no recidivism finding existed.'" (quoting *People v. Rivera*, 833 N.E.2d 194, 199 (N.Y. 2005))).

¹⁶¹ *Id.*

¹⁶² *Garvin*, 88 N.E.3d at 319.

¹⁶³ *Id.* at 330.

¹⁶⁴ *Id.* (Fahey, J., dissenting).

¹⁶⁵ *Id.* at 330–331 (citations omitted).

¹⁶⁶ *Id.* at 332–335.

factual determinations necessary for the enhancement in punishment, is abhorrent not only to the Federal Constitution but also to basic justice.”¹⁶⁷

iii. The Inevitable Challenge

These recent cases, *Prindle* and *Garvin*, have each been flawed in some way that excused the Supreme Court for denying certiorari. *Prindle*, as noted above, presented a question that would have required the Court to read the New York statute as increasing the mandatory minimum, thereby violating *Alleyne*. But this reading of the statute suffers from the fact that the procedural section clearly leaves the minimum sentence in the judge’s hands even after the findings on nature and history have been made.¹⁶⁸ *Garvin* befell a different fate: because the Fourth Amendment question was simultaneously so novel and so narrow—and because it was the main focus of the Court of Appeals’ decision and both the petitioner’s and government’s briefs to the Supreme Court—denial of certiorari was similarly understandable.¹⁶⁹

So, under what circumstance would the court take up this challenge? As noted in *Portalatin*, and in Chief Judge Lippman’s dissent in *Battles*, a habeas case originating in federal court is unlikely due to the “extraordinarily deferential review” in such cases.¹⁷⁰ In fact, *Battles* had some of the characteristics that might elevate a case in this area as it was, in the Chief Judge’s words, “a vivid example of impermissible judicial fact-finding,” because the judge’s finding “did not merely supplement the verdict, as ordinarily occurs in consequence of following the statute, it materially differed from, indeed conflicted with it.”¹⁷¹ But like *Garvin*, the case also presented another question on which the majority chose to focus—namely, the

¹⁶⁷ *Id.* at 336.

¹⁶⁸ N.Y. CRIM. PRO. LAW § 400.20(9) (“If the court both finds that the defendant is a persistent felony offender and is of the opinion that a persistent felony offender sentence is warranted, it *may* sentence the defendant in accordance with the provisions of subdivision two of section 70.10 of the penal law.” (emphasis added)). *But see* N.Y. PENAL LAW § 70.00(4) (implying that once the findings are made, the judge may no longer impose the discretionary reduced sentence for class D and E felonies).

¹⁶⁹ *See* Petition for Writ of Certiorari, *Garvin v. New York*, 139 S. Ct. 57 (2018) (No. 17-1320); Brief in Opposition, *Garvin*, 139 S. Ct. (No. 17-1320).

¹⁷⁰ *People v. Battles*, 942 N.E.2d 1026, 1031 (2010) (Lippmann, C.J., dissenting); *see also* *Portalatin v. Graham*, 478 F. Supp. 2d 385, 406–07 (E.D.N.Y. 2007), *rev’d*, 624 F.3d 69 (2d Cir. 2010).

¹⁷¹ *Battles*, 942 N.E.2d at 1033 (Lippman, C.J., dissenting).

It is one thing for a court to make enhancement findings that add to the predicate supplied by the verdict, defendant admissions and prior convictions—that is objectionable enough under *Apprendi*—it is quite another when the court’s findings essentially nullify a critical component of the verdict. Yet, under this statute that can happen because the judge is directed to form an “opinion” respecting “the nature and circumstances of [the defendant’s] criminal conduct” and may, unlike the jury, do so upon a mere preponderance of the evidence.

Id. at 1033–34 (alteration in original).

propriety of imposing consecutive as opposed to concurrent sentences.¹⁷² It may be that the Supreme Court needs a case limited to the persistent felony offender statute, involving a similarly “vivid example,” yet stripped of all other contested issues.

This necessity for a square and isolated presentation of the issue is due to the general practice of deference to the interpretation a state’s highest court gives to its state’s own statutes. The Supreme Court has a long history of deferring to such interpretations.¹⁷³ However, it would be nonsensical to say that the Court cannot disagree with a patently elusive construction of a state statute—after all, this is precisely what the Court did in both *Ring* and *Cunningham* when faced with creative readings from a state’s high court.¹⁷⁴ This exercise of power comports with the Court’s position as “the final arbiter of whether the Federal Constitution necessitate[s] the invalidation of a state law.”¹⁷⁵ Moreover, as the federal courts have noted in this specific context, deference is only given to an interpretation of a statute’s ambiguous meaning, and not its “operative effect.”¹⁷⁶

Though this Note does not argue that the prior conviction exception itself will inevitably be overturned,¹⁷⁷ evaluating the positions staked out by the members of the Court on that question helps guide an analysis of their likely votes on the New York law. It is, however, difficult to predict what result might be reached if certiorari were granted in a future case, due to recent changes in the Court’s makeup and the strange bedfellows that arise from cases in this arena. Justices Ginsburg and Thomas are on record as flatly opposed to the prior conviction exception.¹⁷⁸ Justice Thomas recently wrote in an ACCA case: “The exception recognized in *Almendarez-Torres* for prior convictions is an aberration, has been seriously undermined by subsequent precedents, and should be reconsidered.”¹⁷⁹ Chief Justice Roberts, though he dissented in *Alleyne*, did join the majorities in *Cunningham*, *Descamps*, and *Hurst*, demonstrating that he is generally supportive of expanding (or at least reinforcing) the *Apprendi* rule. Justices Kagan and Sotomayor, as authors of the majority opinions in *Descamps* and *Hurst*, respectively, seem to be similarly inclined. In contrast, Justice Alito has been a consistent dissenter, even in the 8-1 decisions in *Descamps* and *Hurst*, and likely would be unswayed by any arguments to extend *Apprendi*. Though this calculation

¹⁷² *Id.* at 1028–29 (majority opinion).

¹⁷³ See *Wainwright v. Stone*, 414 U.S. 21, 22–23 (1973); *Gooding v. Wilson*, 405 U.S. 518, 520 (1972).

¹⁷⁴ See *supra* text accompanying notes 68, 69, 89.

¹⁷⁵ *New York v. Ferber*, 458 U.S. 747, 767 (1982).

¹⁷⁶ See *Portalatin v. Graham*, 624 F.3d 69, 90 (2d Cir. 2010) (“[W]e are bound only by the New York Court of Appeals’ interpretation of what the terms of the statute mean, and that we are not similarly constrained by that court’s pronouncement of the statute’s ‘operative effect’ for constitutional purposes.” (citing *Wisconsin v. Mitchell*, 508 U.S. 476, 483–84 (1993))).

¹⁷⁷ See *supra* note 7.

¹⁷⁸ King, *supra* note 96, at 562.

¹⁷⁹ *Sessions v. Dimaya*, 138 S. Ct. 1204, 1253 (2018) (Thomas, J., dissenting).

would provide a tenuous five-justice majority, it is nonetheless worth examining the other members of the Court.

Justice Breyer is difficult to read in these cases because of his early opposition to the *Apprendi* rule.¹⁸⁰ But after his crucial contribution as the author of the remedial opinion in *Booker*, rendering advisory the guidelines of which he himself served as an author,¹⁸¹ his mind seems to have changed. He concurred in the judgment in *Harris*, finding that *Apprendi* did not apply to mandatory minimums.¹⁸² Yet later, Justice Breyer relented, joining the majority in *Alleyne* to overrule the *Harris* decision: “I continue to disagree with *Apprendi*. . . . But *Apprendi* has now defined the relevant legal regime for an additional decade.”¹⁸³ His reasoning points to the fact that he is unsatisfied with any “anomaly in *Apprendi*’s application,”¹⁸⁴ which may open the door for his joining in striking down *Almendarez-Torres* (another decision he authored), as he has bent his views to the Court’s will in previous cases.

This leaves the two newest additions to the Court. Justice Gorsuch not only assumed Justice Scalia’s seat, but seems to occupy a similar ideological space,¹⁸⁵ and Scalia was adamantly opposed to the prior conviction exception from its inception.¹⁸⁶ Given the fact that Justice Gorsuch has already become known for his novel readings of cases and his use of originalism,¹⁸⁷ he might even be tempted by a different reason to mount a challenge to the prior conviction exception—or at minimum to challenge the New York law—on double jeopardy grounds.¹⁸⁸ With the Court’s recent consideration of the double jeopardy clause in relation to the

¹⁸⁰ See generally *Apprendi v. New Jersey*, 530 U.S. 466, 555–66 (Breyer, J., dissenting).

¹⁸¹ See Robb London, *Aftermath: The Federal Sentencing Guidelines Are Dead. Long Live the Guidelines*, HARV. L. BULL., Summer 2005, at 12, 15 (“A leading proponent of the federal guidelines was Stephen Breyer . . . who helped draft them before he became an associate justice of the Supreme Court.”).

¹⁸² See *Harris v. United States*, 536 U.S. 545, 570 (2002) (Breyer, J. concurring) (“I join [the Court’s] opinion to the extent that it holds that *Apprendi* does not apply to mandatory minimums.”)

¹⁸³ *Alleyne v. United States*, 570 U.S. 99, 122, 124 (Breyer, J., concurring) (citations omitted) (“While *Harris* has been the law for 11 years, *Apprendi* has been the law for even longer; and I think the time has come to end this anomaly in *Apprendi*’s application. Consequently, I vote to overrule *Harris*.”).

¹⁸⁴ *Id.* at 124.

¹⁸⁵ See, e.g., Adam Feldman, *Empirical SCOTUS: How Gorsuch’s First Year Compares*, SCOTUSBLOG (Apr. 11, 2018, 12:00 PM), <http://www.scotusblog.com/2018/04/empirical-scotus-how-gorsuchs-first-year-compares/>.

¹⁸⁶ See generally *Almendarez-Torres v. United States*, 523 U.S. 224, 248–271 (Scalia, J., dissenting); see also King, *supra* note 96, at 562.

¹⁸⁷ See, e.g., *Carpenter v. United States*, 138 S. Ct. 2206, 2267–71 (2018) (Gorsuch, J., dissenting) (elaborating a property-based approach to Fourth Amendment interpretation).

¹⁸⁸ See Carissa Byrne Hessick & F. Andrew Hessick, *Double Jeopardy as a Limit on Punishment*, 97 CORNELL L. REV. 45 (2011).

“separate sovereigns” doctrine in mind, this could potentially be a fruitful alternative avenue for a future litigant.¹⁸⁹

Justice Kavanaugh poses a difficulty, as he is fairly new to the Court. Some commentators have suggested that he has a particular interest in criminal sentencing and might be somewhat “pro-defense” in the general criminal context.¹⁹⁰ Others, however, note he has a particularly law-enforcement-oriented view of the Fourth Amendment, and that he testified in favor of a mandatory sentencing guidelines system in 2009.¹⁹¹ Critically for this analysis, his views differ in some ways from his predecessor, Justice Kennedy (a dissenter in *Cunningham*, though part of the majority in some cases), regarding the *Apprendi* rule.¹⁹² While far from certain, it is not inconceivable that either Justice Kavanaugh or Justice Gorsuch would support overturning New York’s persistent felony offender statute.

CONCLUSION

When ruling that the Sixth Amendment right to a jury trial was incorporated against the states by the Fourteenth Amendment, the Supreme Court opinion written by Justice White noted the “deep commitment of the Nation to the right of jury trial in serious criminal cases as a defense against arbitrary law enforcement.”¹⁹³ This commitment reflects a broader skepticism of government power and a persistent belief in the positive influence provided by democratic participation in each branch of government. “Fear of unchecked power, so typical of our State and Federal Governments in other respects, found expression in the criminal law in this insistence upon community participation in the determination of guilt or innocence.”¹⁹⁴ The Sixth Amendment itself was the product of demand laid out by opponents to the ratification of the Constitution, who were assuaged by the guarantee of a forthcoming Bill of Rights, which would more specifically enshrine the jury trial right that every state constitution contained at the time of the founding.¹⁹⁵

¹⁸⁹ See *Gamble v. United States*, 139 S. Ct. 1960 *passim* (2019).

¹⁹⁰ See, e.g., Rory Little, *Judge Kavanaugh’s Record in Criminal Cases*, SCOTUSBLOG (Aug. 27, 2018, 1:53 PM), <http://www.scotusblog.com/2018/08/judge-kavanaughs-record-in-criminal-cases/>.

¹⁹¹ See Priya Raghavan, *Open Questions: Brett Kavanaugh and Criminal Justice*, BRENNAN CTR. FOR JUST. (July 26, 2018), <https://www.brennancenter.org/our-work/analysis-opinion/open-questions-brett-kavanaugh-and-criminal-justice>; *Public Hearing of the U.S. Sentencing Comm’n*, U.S. SENT’G COMM’N, at 34, 37–44 (July 9, 2009) (testimony of Hon. Brett M. Kavanaugh) (describing the advisory guidelines system as “workable” but advocating for a return to mandatory guidelines system), https://www.ussc.gov/sites/default/files/Public_/Hearing_Transcript_0.pdf.

¹⁹² CONG. RESEARCH SERV., R45293, JUDGE BRETT M. KAVANAUGH: HIS JURISPRUDENCE AND POTENTIAL IMPACT ON THE SUPREME COURT 90 (2018).

¹⁹³ *Duncan v. Louisiana*, 391 U.S. 145, 156 (1968).

¹⁹⁴ *Id.*

¹⁹⁵ Abramson, *supra* note 51, at 863 n.12 (2015) (“[T]he question [for the Antifederalist opponents of ratification] was not fundamentally whether the lack of adequate provision for jury trial would

Recent developments in Supreme Court jurisprudence, spurred by the *Apprendi* decision, have led to a reexamination of this commitment. Despite that line of cases' nominal expansion of the jury's role in determining appropriate sentencing, the commitment is eroding all around, with a minute percentage of those facing criminal charges ever likely to see a jury at trial (however robust the debate over the causes of jury trials' decline).¹⁹⁶ The promise of *Apprendi* was to provide a role for the democratic check on the judiciary and ensure that the constitutional right to jury trial had real meaning for that small percentage of defendants who chose not to enter into plea bargains.

Yet if that promise is to have meaning at all, it must be available to defendants seeking to challenge laws that run afoul of this constitutional right. Given that African Americans make up less than 15% of the general population but make up nearly 40% of persons convicted of a felony in state criminal justice systems, with similar gaps for other minority groups,¹⁹⁷ there is clearly a problem of disparate impact with recidivist sentencing schemes. In New York specifically, sentencing disparity is particularly acute at the top end, with African Americans comprising 62% of those serving sentences of life without parole,¹⁹⁸ despite being less than 20% of the state population.¹⁹⁹

New York's persistent felony offender statute requires two steps: first, the court must find that the defendant has been convicted of two prior felonies; second, the judge, sitting alone and without a jury, must find that the nature of the prior offenses or the defendant's history and character are such that an extended sentence with lifetime supervision would be in the public interest.²⁰⁰ While the judge retains the discretion to impose the normal sentence, without this second step, the enhanced sentence may not be imposed. The trial judge must, according to the statute, include factual findings in a decision to support the enhanced sentence.

This scheme violates the Sixth Amendment, according to the rule announced in *Apprendi*, yet the New York Court of Appeals continues illogically to insist that only the first step of the analysis "exposes" a defendant to the enhanced sentence. No principles of deference or comity require the Supreme Court to accept this interpretation, and in order to protect the right to a jury trial, this scheme should be

weaken a traditional bulwark of individual rights (although that was also involved) but whether it would fatally weaken the role of the people in the *administration* of government." (quoting HERBERT J. STORING, WHAT THE ANTI-FEDERALISTS WERE FOR: THE POLITICAL THOUGHT OF THE OPPONENTS OF THE CONSTITUTION 19 (Murray Dry ed., 1981)).

¹⁹⁶ See, e.g., Robert J. Conrad & Katy L. Clements, *The Vanishing Criminal Jury Trial: From Trial Judges to Sentencing Judges*, 86 GEO. WASH. L. REV. 99 (2018) (examining the various theories behind the decline in jury trials).

¹⁹⁷ ASHLEY NELLIS & RYAN S. KING, SENTENCING PROJECT, NO EXIT: THE EXPANDING USE OF LIFE SENTENCES IN AMERICA 13 (2009), <https://www.sentencingproject.org/wp-content/uploads/2016/01/No-Exit-The-Expanding-Use-of-Life-Sentences-in-America.pdf>.

¹⁹⁸ *Id.* at 15.

¹⁹⁹ See *supra* notes 103–04 and accompanying text.

²⁰⁰ See *supra* Part III.A.

overturned. Regardless of whether the prior conviction exception to the general rule stands, New York's statute still must fall.

There is of course the danger that altering this law would in fact harm criminal defendants. First, it may mean that the law transforms into a basic "three strikes" law, as the Court upheld in *Ewing*, qualifying anyone convicted of three felonies, no matter the circumstances, for a life sentence. Second, if the factual findings are retained but properly placed in the jury, it could have the unwanted effects of either prejudicing defendants in a single-phase trial or generating great expense to the system in bifurcated proceedings. Moreover, this change might simply shift discretion from judges to prosecutors. At the outset, a prosecutor may have the discretion to charge or not to charge all of the relevant conduct and factors, opening up a new avenue for plea bargaining power. Even efforts to replace this kind of prosecutorial or judicial discretion with algorithmic tools to "predict" an offender's likelihood of recidivism (and thereby increase the severity of punishment) have also proven to be problematic, with many of the data inputs bearing the hallmarks of structural bias and racism.²⁰¹

All those dangers, though, must be weighed against the rights of the individual defendant as expounded by the Supreme Court's interpretation of the Constitution. The right to a jury trial is central to liberty and should not be treated lightly. As the Supreme Court has found this right to comprise greater protections from enhanced sentences of various types, courts and legislatures in states like Connecticut and Indiana have responded, while New York continues defiantly to retain its own laws. If a defendant is to be given an enhanced sentence in the public interest, let the democratic check on the judicial branch impose it. The process has been on a protracted collision course for two decades, and absent a reevaluation by the Court of Appeals or preemptive action by the legislature in the state capital, it must come to an end on First Street in the Nation's Capital.

²⁰¹ See Jessica M. Eaglin, *Constructing Recidivism Risk*, 67 EMORY L.J. 59, 94–99 (2017).