

# MADISON LECTURE

## THE POWER OF THE PRIOR CONVICTION

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### INTRODUCTION

Before becoming a judge, I worked as a federal public defender for nearly twenty years. Over that time, I represented hundreds of clients. During my first meetings with them and the ones that followed, my clients were focused on defending themselves against what they had just been charged with. I was, of course, always interested in having these conversations. But I also wanted to talk as soon as possible about their *prior* convictions.

This interest in my clients' criminal records was not always intuitive to them, especially those who had not been charged with a crime in years. If they were being accused of selling cocaine the day before, why did it matter that they had been convicted for robbery ten years earlier? I had to explain that their prior convictions were inextricable from the charges they were now facing.

In the federal system, every decision a criminal defendant makes is made in the long shadow cast by the sentence they might receive. These sentences tend to be significant—terms of imprisonment often much longer than a person would face for similar conduct in state

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court.<sup>1</sup> Aside from immigration offenses, firearm and drug offenses are the most commonly prosecuted federal crimes.<sup>2</sup> And the sentence imposed upon conviction is driven in significant part by a person's prior record.<sup>3</sup> Under federal recidivism statutes, prior convictions can trigger a mandatory minimum sentence and increase a statutory maximum sentence enormously.<sup>4</sup> For example, the Armed Career Criminal Act (ACCA), one of the federal recidivist statutes that I will be discussing in more detail shortly, converts a statutory range of zero to ten years for unlawful possession of a firearm to a statutory *minimum* of fifteen years, up to life, for someone who has three or more prior convictions for "violent felon[ies]" or "serious drug offense[s]."<sup>5</sup>

Similarly, under federal drug laws, mandatory minimum sentences are triggered not only by the total quantity of drugs involved in the offense, but also by a person's prior record.<sup>6</sup> Under the Controlled Substances Act (CSA)—the primary federal statute that criminalizes drug distribution—if you sell fifty grams or more of pure methamphetamine and are convicted, that is not just a fair amount of meth; it is also a sentence of no less than ten years.<sup>7</sup> But if you have served a sentence of a year or more on a conviction for either a "serious drug felony" or a "serious violent felony," the minimum sentence on your new federal charge may increase to fifteen years.<sup>8</sup> If you have two such prior convictions, your sentence would be no less than twenty-five years in prison.<sup>9</sup> And the United States Sentencing

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<sup>1</sup> See Sara Sun Beale, *Too Many and Yet Too Few: New Principles to Define the Proper Limits for Federal Criminal Jurisdiction*, 46 HASTINGS L.J. 979, 998–99 (1995) ("The sentences available in a federal prosecution are generally higher than those available in state court – often ten or even twenty times higher."); Michael A. Simons, *Prosecutorial Discretion and Prosecution Guidelines: A Case Study in Controlling Federalization*, 75 N.Y.U. L. REV. 893, 897 (2000) ("[T]here is little dispute that many, if not most, criminal defendants fare worse in federal court than in state court.").

<sup>2</sup> GLENN R. SCHMITT & CASSANDRA SYCKES, U.S. SENT'G COMM'N, FISCAL YEAR 2018: OVERVIEW OF FEDERAL CRIMINAL CASES 5 (2019), [https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2019/FY18\\_Overview\\_Federal\\_Criminal\\_Cases.pdf](https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2019/FY18_Overview_Federal_Criminal_Cases.pdf) [<https://perma.cc/TW34-BF9H>].

<sup>3</sup> See, e.g., Armed Career Criminal Act, 18 U.S.C. § 924(e); Controlled Substances Act, 21 U.S.C. § 841(b); 8 U.S.C. § 1326(b).

<sup>4</sup> See, e.g., 18 U.S.C. § 924(e); 21 U.S.C. § 841(b).

<sup>5</sup> 18 U.S.C. § 924(e).

<sup>6</sup> 21 U.S.C. § 841(b). Notably, as of September 2016, approximately half of federal inmates were drug offenders and nearly three quarters of those were convicted of an offense carrying a mandatory minimum sentence. CHARLES DOYLE, CONG. RSCH. SERV., R45075, MANDATORY MINIMUM SENTENCING OF FEDERAL DRUG OFFENSES IN SHORT 1 (2018), <https://sgp.fas.org/crs/misc/R45075.pdf> [<https://perma.cc/TK44-VU67>].

<sup>7</sup> 21 U.S.C. § 841(b)(1)(A)(viii).

<sup>8</sup> *Id.*

<sup>9</sup> *Id.* The application of these enhancements in any given case involves some degree of discretion and variability. For example, to trigger an enhanced penalty under the

Guidelines range—which must be calculated and considered for every federal sentencing—similarly places great weight on a person’s prior criminal record.<sup>10</sup>

There can be little dispute that the prior conviction plays a powerful role in federal sentencing. Yet why it does, whether it should, and what we might miss by taking its value for granted are issues worth exploring. What does a prior conviction really tell us about a person? And how comfortable should we be in relying on it as heavily as we do in federal court when determining the appropriate sentence for an individual defendant, especially when the result is a sentence of incarceration of years or even decades?

In considering these questions, I first provide some historical perspective, before looking at how we use prior convictions in federal sentencing and reviewing some of the criticisms of the current framework. Then, I expand on some of those criticisms to propose that we reexamine the wisdom of that framework. When we rely so heavily on prior convictions, I suggest, we do more than simply factor in a person’s prior unlawful conduct. We also risk importing a number of broader racial and socioeconomic inequities that may have contributed to the making of that prior conviction in the first instance.

I will note here that prior convictions affect litigants in the federal system in numerous ways beyond sentencing. Before a person is even arrested, a police officer’s knowledge that they have a criminal record can support the officer’s decision to stop and search them without a warrant.<sup>11</sup> At the charging stage, a prior felony conviction can transform possession of a firearm from a legal activity—indeed an activity

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Controlled Substances Act, 21 U.S.C. § 851 requires a prosecutor to “file an information providing notice of which prior convictions support the enhanced penalties.” U.S. SENT’G COMM’N, APPLICATION AND IMPACT OF 21 U.S.C. § 851: ENHANCED PENALTIES FOR FEDERAL DRUG TRAFFICKING OFFENDERS 2 (2018), [https://www.uscc.gov/sites/default/files/pdf/research-and-publications/research-publications/2018/20180712\\_851-Mand-Min.pdf](https://www.uscc.gov/sites/default/files/pdf/research-and-publications/research-publications/2018/20180712_851-Mand-Min.pdf) [<https://perma.cc/9A9G-TSDN>]. Prosecutors have “reported wide variations in the practices surrounding the filing of an 851 information seeking enhanced mandatory minimum penalties.” *Id.*

<sup>10</sup> See, e.g., U.S. SENT’G COMM’N, GUIDELINES MANUAL 2021 §§ 2K2.1(a), 2L1.1(a), 2L1.2, 4A1.1–4B1.5 (2021), <https://www.uscc.gov/sites/default/files/pdf/guidelines-manual/2021/GLMFull.pdf> [<https://perma.cc/SBS6-F2V6>]; see also 18 U.S.C. § 3553(a)(4).

<sup>11</sup> See, e.g., *Vasquez v. Maloney*, 990 F.3d 232, 239 (2d Cir. 2021) (“[P]olice officers may reasonably consider a person’s criminal history as part of the total mix of information guiding their reasonable suspicion analysis . . . .”); *United States v. Green*, 897 F.3d 173, 187 (3d Cir. 2018) (affirming that a criminal record is a “valid factor” in establishing reasonable suspicion); *United States v. Torres*, 987 F.3d 893, 904 (10th Cir. 2021) (noting that criminal history may become “critically relevant” when it interacts with the circumstances of a stop (quoting *United States v. Hammond*, 890 F.3d 901, 907 (10th Cir. 2018))); *United States v. Castle*, 825 F.3d 625, 636 (D.C. Cir. 2016) (emphasizing that criminal history may corroborate indications of ongoing criminality).

afforded constitutional protection<sup>12</sup>—to an illegal one, a crime nearly 8,000 people were convicted of in 2019, over half of whom were Black.<sup>13</sup> In the rare case that goes to trial in federal court,<sup>14</sup> a defendant's prior convictions can be used against them to prove their intent to commit the charged crime<sup>15</sup> or, if they take the stand, to impeach them.<sup>16</sup> Looking beyond criminal law, in immigration cases the fact and details of a person's criminal record take on tremendous importance in determining their eligibility for lawful status.<sup>17</sup> These are all important topics. But my focus here will be on how and why the prior conviction plays a role in federal sentencing—and specifically on the shortcomings of the current approach.

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<sup>12</sup> U.S. CONST. amend. II.

<sup>13</sup> U.S. SENT'G COMM'N, QUICK FACTS: FELON IN POSSESSION OF A FIREARM 1, [https://www.ussc.gov/sites/default/files/pdf/research-and-publications/quick-facts/Felon\\_In\\_Possession\\_FY19.pdf](https://www.ussc.gov/sites/default/files/pdf/research-and-publications/quick-facts/Felon_In_Possession_FY19.pdf) [<https://perma.cc/6SA2-Y96W>]. For more on the disparate outcomes under the federal felon-in-possession statute, see, for example, Zach Sherwood, Note, *Time to Reload: The Harms of the Federal Felon-in-Possession Ban in a Post-Heller World*, 70 DUKE L.J. 1429, 1457–66 (2021).

<sup>14</sup> See John Gramlich, *Only 2% of Federal Criminal Defendants Go to Trial, and Most Who Do Are Found Guilty*, PEW RSCH. CTR. (June 11, 2019), <https://www.pewresearch.org/fact-tank/2019/06/11/only-2-of-federal-criminal-defendants-go-to-trial-and-most-who-do-are-found-guilty> [<https://perma.cc/9YN4-BQJW>].

<sup>15</sup> FED. R. EVID. 404(b); see also Deena Greenberg, *Closing Pandora's Box: Limiting the Use of 404(b) to Introduce Prior Convictions in Drug Prosecutions*, 50 HARV. C.R.-C.L. L. REV. 519 (2015) (arguing for a more targeted application of Rule 404(b)); Brian Bryne, *Lost in a Maze of Character Evidence: How the Federal Courts Lack a Cohesive Approach to Applying Federal Rule of Evidence 404(b) in Drug Distribution Cases*, 36 PACE L. REV. 624 (2016) (exploring conflicting interpretations of Rule 404(b)); Steven Goode, *It's Time to Put Character Back into the Character-Evidence Rule*, 104 MARQ. L. REV. 709 (2021) (discussing 404(b)'s ambiguity and proposed amendments); Dora W. Klein, "Obviate!": *Addressing Magical Thinking About Limiting Instructions and Character Evidence*, 82 U. PITT. L. REV. 135 (2020) (criticizing the current approach to limiting instructions when evidence is introduced under Rule 404(b)).

<sup>16</sup> FED. R. EVID. 609; see also Jasmine B. Gonzales Rose, *Toward a Critical Race Theory of Evidence*, 101 MINN. L. REV. 2243, 2271 (2017) (referencing studies that show "jurors infer criminal propensity rather than poor credibility" when learning of a defendant's prior convictions).

<sup>17</sup> See, e.g., 8 U.S.C. § 1227(a)(2) (enumerating circumstances under which an individual may be deported on the basis of a criminal conviction); cf. *id.* § 1326(b)(2) (providing mandatory *minimum* of twenty years' imprisonment—rather than the otherwise-applicable two-year *maximum* sentence—for noncitizens who reenter the country after having been removed "subsequent to a conviction for commission of an aggravated felony").

## I

USE OF PRIOR CONVICTIONS IN SENTENCING: HISTORICAL  
PERSPECTIVE AND EVOLUTION

The use of prior convictions to increase someone's sentence is not new.<sup>18</sup> In colonial times, recidivist statutes focused mostly on the repeated commission of the identical crime,<sup>19</sup> such as theft or assault. Eventually, however, these statutes began to target people with prior criminal convictions generally, concerning themselves not so much with the particular type of crime previously committed but instead with the fact that the same person repeatedly engaged in criminal conduct.<sup>20</sup>

For example, in 1926, New York enacted legislation mandating a sentence of life imprisonment once a person had committed their fourth felony, an early version of what we might call today a three (or four) strikes law.<sup>21</sup> One noteworthy example of an early application of this statute is the case of Ruth St. Clair. In 1930, St. Clair was reportedly the first woman to be sentenced under this new law.<sup>22</sup> She had already been convicted three times for shoplifting when she pleaded guilty, her fourth time, to stealing from a department store—another case of shoplifting.<sup>23</sup> St. Clair then had a jury trial for the sole purpose of determining her sentence. The only issue for the jury was whether the State had proven that she had the requisite three prior convictions for application of the recidivist statute.<sup>24</sup> The witnesses who testified at the trial were the detectives who had arrested her: Each one said that she had previously been arrested and had pleaded guilty in connection with stealing dresses or a coat from shops on 5th Avenue and 34th Street.<sup>25</sup> The jury took only fifteen minutes to deliberate—they concluded that the State had met its burden, leaving the judge with no choice but to impose a life sentence.<sup>26</sup> After this sentence was

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<sup>18</sup> See Alexis M. Durham III, *Justice in Sentencing: The Role of Prior Record of Criminal Involvement*, 78 J. CRIM. L. & CRIMINOLOGY 614, 616–20 (1987) (discussing the history and evolution of prior justice system involvement as a factor in sentencing).

<sup>19</sup> Michael G. Turner, Jody L. Sundt, Brandon K. Applegate & Francis T. Cullen, “*Three Strikes and You’re Out*” *Legislation: A National Assessment*, 59 FED. PROBATION 16, 17 (1995).

<sup>20</sup> *Id.*

<sup>21</sup> See Caleb J. Stevens, *Nomos and Nullification: A Coverian View of New York’s Habitual Offender Law, 1926 to 1936*, 56 AM. CRIM. L. REV. 427, 427 (2019) (describing the 1926 New York legislation known as the “Baumes Law”).

<sup>22</sup> See *Woman Rudich Freed Gets Life Sentence*, N.Y. TIMES, Feb. 7, 1930, at 1.

<sup>23</sup> *Id.*

<sup>24</sup> *Id.*

<sup>25</sup> *Id.* at 1, 10.

<sup>26</sup> *Id.* at 1.

imposed, Ruth St. Clair promptly fainted, was revived, and was carried from the courtroom.<sup>27</sup>

It is one thing to have a statute that says a person with prior criminal convictions is to be sentenced more harshly; it is another to enforce it consistently. And we have not always had reliable methods of identifying who has reentered the criminal justice system on a repeat basis.<sup>28</sup> Early on, recidivist statutes were enforced in large part by old-fashioned recognition: As with Ruth St. Clair, a law enforcement officer or a prison warden would recognize you as someone who had been there before, and the prosecutor would proceed accordingly. But if you committed a crime outside your own community, perhaps offering up a different name than your own, your prior conviction might escape recognition. Ruth St. Clair herself was apparently known by more than one name, but at least one officer at her trial positively identified her by her “titian hair.”<sup>29</sup> The red-tinted color of her hair was sufficiently memorable that the officers remembered who she was, regardless of the name she used. By the early twentieth century, of course, we also had both photography and fingerprinting to identify who was coming through the criminal justice system. And now in the twenty-first century, technology allows us easy and automated access to even more information across multiple jurisdictions almost instantaneously.<sup>30</sup>

At the time of Ruth St. Clair’s fourth conviction in 1930, the *New York Times* called the State’s then-relatively new sentencing laws “crime-curbing statutes,”<sup>31</sup> but the expressed policies behind recidivist statutes are varied. These generally include deterrence, incapacitation, retribution, and rehabilitation.<sup>32</sup>

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<sup>27</sup> *Id.*

<sup>28</sup> See Nancy J. King, *Sentencing and Prior Convictions: The Past, the Future, and the End of the Prior-Conviction Exception to Apprendi*, 97 MARQ. L. REV. 523, 526–34 (2014).

<sup>29</sup> *Woman Rudich Freed Gets Life Sentence*, *supra* note 22, at 1.

<sup>30</sup> See, e.g., EMILY J. HANSON, CONG. RSCH. SERV., R41800, THE USE OF DNA BY THE CRIMINAL JUSTICE SYSTEM AND THE FEDERAL ROLE: BACKGROUND, CURRENT LAW, AND GRANTS (2021), <https://sgp.fas.org/crs/misc/R41800.pdf> [<https://perma.cc/8UUS-B6SU>] (describing use of national DNA databases for identification purposes); Jennifer Valentino-DeVries, *How the Police Use Facial Recognition, and Where It Falls Short*, N.Y. TIMES (Jan. 12, 2020), <https://www.nytimes.com/2020/01/12/technology/facial-recognition-police.html> [<https://perma.cc/K69J-P7D8>] (discussing use of facial recognition technology by law enforcement).

<sup>31</sup> *Woman Rudich Freed Gets Life Sentence*, *supra* note 22, at 1.

<sup>32</sup> These are generally the objectives that are considered in weighing the propriety of a sentencing scheme. See *Graham v. Florida*, 560 U.S. 48, 71–74 (2010) (evaluating whether life imprisonment of juvenile offenders without parole is justified by any of the four objectives); see also Mirko Bagaric, *The Punishment Should Fit the Crime—Not the Prior Convictions of the Person that Committed the Crime: An Argument for Less Impact Being*

The goal of rehabilitation gained favor in the nineteenth century and coincided with the rise of the penitentiary.<sup>33</sup> The penitentiary, a relatively new idea at the time, was a place where a person convicted of a crime could go to reflect on their behavior, and, it was hoped, be reformed such that they would not return to a life of crime upon release.<sup>34</sup> Ruth St. Clair appears to have been a beneficiary of this philosophy. In 1937, less than eight years after she started her prison term, the Governor commuted her sentence, noting that prison officials “spoke most highly of her” and said that her “conduct was exceptionally good.”<sup>35</sup> After originally receiving a life sentence, Ruth St. Clair was released from custody and placed on parole for the remainder of her life.<sup>36</sup>

The rehabilitative theory of punishment is premised on, at least in part, the idea that people are amenable to change for the good. But by the 1970s and 80s, and for reasons beyond the scope of this discussion, this model faced significant criticism, and the so-called “War on Crime” movement had increased in popularity.<sup>37</sup> During this time, a few key federal statutes passed that were informed by concerns quite distinct from rehabilitation.<sup>38</sup> Instead, concerns over increased rates of violent street crime and the notion that financial profit was a key driver of violent and persistent criminal behavior came to the forefront.<sup>39</sup> Indeed, the 1984 Sentencing Reform Act, which created the federal sentencing guidelines, removed rehabilitation as a meaningful consideration at sentencing,<sup>40</sup> a shift that the United States Supreme Court expressly recognized when upholding the constitutionality of the Act’s guidelines in *Mistretta v. United States*.<sup>41</sup>

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*Accorded to Previous Convictions in Sentencing*, 51 SAN DIEGO L. REV. 343, 348 (2014) (outlining potential objectives of sentencing law).

<sup>33</sup> See Adam J. Hirsch, *From Pillory to Penitentiary: The Rise of Criminal Incarceration in Early Massachusetts*, 80 MICH. L. REV. 1179, 1191–94 (1982).

<sup>34</sup> See *id.* at 1193–94.

<sup>35</sup> PUBLIC PAPERS OF HERBERT H. LEHMAN: FORTY-NINTH GOVERNOR OF THE STATE OF NEW YORK, THIRD TERM, 1937, at 583 (1940).

<sup>36</sup> *Id.*

<sup>37</sup> See LISA N. SACCO, CONG. RSCH. SERV., R43749, DRUG ENFORCEMENT IN THE UNITED STATES: HISTORY, POLICY, AND TRENDS 4–10 (2014), <https://sgp.fas.org/crs/misc/R43749.pdf> [<https://perma.cc/KMG3-VSEY>].

<sup>38</sup> See *e.g.*, Controlled Substances Act, Pub. L. No. 91-513, 84 Stat. 1236, 1242 (1970); Comprehensive Crime Control Act of 1984, Pub. L. No. 98-473, 98 Stat. 1837, 1976; Anti-Drug Abuse Act of 1986, Pub. L. No. 99-570, 100 Stat. 3207.

<sup>39</sup> See, *e.g.*, H.R. REP. NO. 98-1073, at 3 (1984) (reporting on the Comprehensive Crime Control Act of 1984 and stating that “[c]areer criminals often have no lawful employment; their full-time occupation is crime for profit and many commit crimes on a daily basis”).

<sup>40</sup> See 18 U.S.C. § 3582(a); 28 U.S.C. § 994(k).

<sup>41</sup> 488 U.S. 361, 366–67 (1989).

Instead, incapacitation seemed to motivate the new federal legislation.<sup>42</sup> In 1984, Congress also passed the ACCA, a statute designed to dramatically increase sentences for individuals who unlawfully possess a firearm after accumulating a serious criminal record.<sup>43</sup> The legislative history refers to this group as, among other things, “three-time losers”<sup>44</sup> and “the worst offenders in our society.”<sup>45</sup> As originally enacted, the ACCA applied only to those who had three or more prior convictions for robbery or burglary, but it was later expanded to include anyone with three or more prior convictions for any “violent felony” or “serious drug offense,” thus explicitly including prior drug convictions.<sup>46</sup>

According to legislative history, Congress viewed state law enforcement as both underfunded and overwhelmed in the effort to curb what it saw as an epidemic of drugs and violent crime across the country.<sup>47</sup> Their response? Get federal officials to play a more significant and effective role.<sup>48</sup> Congress similarly increased the sentencing ranges for those with prior convictions who violated federal drug laws under the CSA.<sup>49</sup>

So how do these federal recidivist statutes work? The statutory framework sounds relatively straightforward: impose longer sentences on people with prior criminal convictions. But it is important to get a sense of how this applies in practice. The caselaw relating to which convictions qualify—and which do not—is complex, nuanced, and everchanging. The basic idea is that to determine whether a prior conviction qualifies as a violent felony or a serious drug offense for purposes of increasing someone’s sentence, courts must apply the so-

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<sup>42</sup> See, e.g., H.R. REP. NO. 98-1073, at 2 (“Both Congress and local prosecutors around the nation have recognized the importance of incapacitating these repeat offenders.”).

<sup>43</sup> See Armed Career Criminal Act of 1984, Pub. L. No. 98-473, §§ 1801–03, 98 Stat. 1837, 2185 (codified as amended at 18 U.S.C. § 924(e)).

<sup>44</sup> *Armed Career Criminal Legislation: Hearing on H.R. 4639 and H.R. 4768 Before the Subcomm. on Crime of the H. Comm. on the Judiciary*, 99th Cong. 11 (1986) (statement of Rep. William J. Hughes, Chairman, Subcomm. on Crime, H. Comm. on the Judiciary).

<sup>45</sup> *Id.* at 8 (statement of Rep. Ron Wyden).

<sup>46</sup> Compare Armed Career Criminal Act §§ 1801–03, with Career Criminals Amendment Act of 1986, Pub. L. No. 99-570, §§ 1401–02, 100 Stat. 3207, 3239–40.

<sup>47</sup> See *The Armed Career Criminal Act Amendments: Hearing on S. 2312 Before the Subcomm. on Crim. L. of the S. Comm. on the Judiciary*, 99th Cong. 7 (1986) (statement of Rep. Ron Wyden) (characterizing local law enforcement as “outmanned, outgunned, outspent and overwhelmed in their efforts to stem [the] tide” of violent crime and serious drug offenses).

<sup>48</sup> See *id.* (framing the involvement of federal officials under the ACCA as “add[ing] one more arrow to the law enforcement quiver”).

<sup>49</sup> See Controlled Substances Act, 21 U.S.C. § 841(b).

called categorical approach.<sup>50</sup> This means that we can only look at the statutory elements of the crime you were previously convicted of.<sup>51</sup> In other words, what would a jury have to decide in order to find you guilty of violating that particular statute? We do not, and *cannot*, consider the actual underlying conduct that gave rise to the prior conviction.<sup>52</sup>

The result is that, for purposes of the ACCA, every “violent felony” and “serious drug offense” counts the same way, regardless of the severity of the underlying conduct—alleged or even conceded—on which the prior conviction was based.<sup>53</sup> A prior robbery conviction counts as one “violent felony” whether the defendant peeled a victim’s fingers back to take a few dollars from an arcade counter, or instead pointed a gun at a victim’s head, or worse, fired a shot at someone in the course of that robbery.<sup>54</sup> A qualifying assault conviction might as well be a conviction for murder, as both offenses count the same way—as a single “violent felony”—when determining whether the ACCA’s fifteen-year mandatory minimum sentence will apply.<sup>55</sup> Conversely, if a person was originally charged with a violent crime but was able to negotiate for a plea to something significantly less serious, the resulting conviction may not be one that would count to increase a sentence under either recidivist statute.

The categorical approach is in place, in large part, to protect defendants’ constitutional rights—when they pleaded guilty in the prior case, they only admitted each statutory element of the offense.<sup>56</sup> They did not, nor were they required to, admit to the specific underlying *conduct* alleged.<sup>57</sup> As a result, the set of elements they admitted

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<sup>50</sup> See *Taylor v. United States*, 495 U.S. 575, 600–02 (1990); see also Rachel E. Barkow, *Categorical Mistakes: The Flawed Framework of the Armed Career Criminal Act and Mandatory Minimum Sentencing*, 133 HARV. L. REV. 200 (2019) (criticizing the categorical approach that applies to the ACCA as unclear); Rebecca Sharpless, *Finally, a True Elements Test: Mathis v. United States and the Categorical Approach*, 82 BROOK. L. REV. 1275 (2017) (supporting the categorical approach as an elements test).

<sup>51</sup> See *Mathis v. United States*, 136 S. Ct. 2243, 2251 (2016).

<sup>52</sup> *Id.*

<sup>53</sup> See *Armed Career Criminal Act*, 18 U.S.C. § 924(e).

<sup>54</sup> See *Stokeling v. United States*, 139 S. Ct. 544, 555 (2019) (holding that “Florida robbery qualifies as an ACCA-predicate offense” and noting that “a defendant who grabs the victim’s fingers and peels them back to steal money commits robbery in Florida” (citing *Sanders v. State*, 769 So.2d 506, 507–08 (Fla. Dist. Ct. App. 2000))); *Black v. State*, 304 So.3d 45 (Fla. Dist. Ct. App. 2020) (denying post-conviction relief where the petitioner had been convicted of Florida robbery by pulling out a gun, putting it to the victim’s head, and taking a five-dollar bill from the victim); *Johnson v. State*, 720 So.2d 232, 233–34 (Fla. 1998) (describing a Florida robbery during which the defendant had fired a gun).

<sup>55</sup> See 18 U.S.C. § 924(e)(2)(B).

<sup>56</sup> *Mathis*, 136 S. Ct. at 2248.

<sup>57</sup> *Id.*

to is all that can be used to enhance their sentence under the recidivist statutes later.<sup>58</sup> The same is true for the jury's prior verdict: It was based on only the elements of the offense, and not the underlying conduct.<sup>59</sup>

But even with this layer of protection, recidivist statutes do not escape criticism. For one, sorting through records to determine whether a prior conviction qualifies as a violent felony for purposes of the ACCA can be a time-consuming task for everyone involved.<sup>60</sup> The fifty states each have their own criminal code, and a particular crime in one state may not be defined by the same elements as it is in a neighboring state. For example, the elements of aggravated assault in State *A* may be different than its elements in State *B*.<sup>61</sup> And that may mean that an aggravated assault conviction from State *A* counts as a violent felony, but one from State *B* does not.<sup>62</sup>

This crucial determination, whether a prior conviction counts for purposes of a federal recidivist statute, is not always an easy one to make.<sup>63</sup> Over the past six years, the Supreme Court has issued eight signed opinions<sup>64</sup> interpreting the ACCA and yet—let me assure

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<sup>58</sup> See *id.* at 2248–49.

<sup>59</sup> *Id.* at 2248.

<sup>60</sup> See *Shepard v. United States*, 544 U.S. 13, 26 (2005) (holding that the inquiry into whether a defendant's prior conviction qualifies as a violent felony under the ACCA can include review of "the terms of the charging document, the terms of a plea agreement or transcript of colloquy between judge and defendant in which the factual basis for the plea was confirmed by the defendant, or . . . some comparable judicial record of this information").

<sup>61</sup> Compare ARK. CODE ANN. § 5-13-204(a) (West 2021) (Arkansas aggravated assault), with OHIO REV. CODE ANN. § 2903.12 (West 2021) (Ohio aggravated assault), and TENN. CODE ANN. § 39-13-102(a)(1) (West 2021) (Tennessee aggravated assault), and N.D. CENT. CODE ANN. § 12.1-17-02(1) (West 2021) (North Dakota aggravated assault).

<sup>62</sup> See *United States v. Hataway*, 933 F.3d 940 (8th Cir. 2019) (some, but not all, Arkansas aggravated assaults are violent felonies under the ACCA); *United States v. Burris*, 912 F.3d 386 (6th Cir. 2019) (en banc) (holding that some Ohio aggravated assaults count as violent felonies under the ACCA, while others do not); *Borden v. United States*, 141 S. Ct. 1817 (2021) (certain Tennessee aggravated assaults are not violent felonies under the ACCA); *United States v. Schneider*, 905 F.3d 1088 (8th Cir. 2018) (certain North Dakota aggravated assaults qualify as ACCA predicate offenses while others do not).

<sup>63</sup> Barkow, *supra* note 50, at 206 ("[T]hese state statutory questions end up clogging the federal court dockets, as judges struggle to determine whether various statutes from the fifty states meet the ACCA's definition of 'violent felony.'"). For example, *Mathis v. United States* arose out of the Eighth Circuit; when the Supreme Court reversed, we began to apply the Court's holding to subsequent cases. We applied *Mathis* in *United States v. Sykes*, 844 F.3d 712 (8th Cir. 2016), which we later relied on in *United States v. Naylor*, 682 F. App'x 511 (8th Cir. 2017), to say that we were bound by our prior opinion. We then reconsidered *Naylor* en banc and overruled *Sykes*, but even that produced a lead opinion, a separate concurrence, and two dissents. *United States v. Naylor*, 887 F.3d 397 (8th Cir. 2018) (en banc).

<sup>64</sup> *Johnson v. United States*, 576 U.S. 591 (2015); *Welch v. United States*, 578 U.S. 120 (2016); *Mathis v. United States*, 136 S. Ct. 2243 (2016); *United States v. Stitt*, 139 S. Ct. 399

you—the analysis still can be challenging in any given case. And as a more objective measure of the burden of the everchanging ACCA landscape, these eight Supreme Court cases have been cited in more than 25,000 lower court opinions.<sup>65</sup>

These federal recidivist statutes have been described as “blunt instruments” for distinguishing among criminal defendants.<sup>66</sup> As I hope my examples show, they can be both underinclusive and overinclusive when applied. And when the ACCA or the CSA triggers application of mandatory minimum sentences, that severely limits a sentencing judge’s discretion to consider factors other than criminal history when imposing a sentence.

Whether these recidivist statutes have succeeded in reducing crime is a topic all its own.<sup>67</sup> The United States Sentencing

(2018); *Stokeling v. United States*, 139 S. Ct. 544 (2019); *Quarles v. United States*, 139 S. Ct. 1872 (2019); *Shular v. United States*, 140 S. Ct. 779 (2020); *Borden v. United States*, 141 S. Ct. 1817 (2021). After this Lecture was presented, the Supreme Court issued a ninth ACCA opinion. *Wooden v. United States*, 142 S. Ct. 1063 (2022).

<sup>65</sup> A Westlaw search for lower court opinions citing to these opinions revealed over 25,000 cases, including nearly 1,000 in the six months preceding the publication of this article.

<sup>66</sup> See, e.g., Stephen R. Sady, *The Armed Career Criminal Act—What’s Wrong with “Three Strikes, You’re Out”?*, 7 FED. SENT’G REP. 69, 69 (1994).

<sup>67</sup> Many have cast doubt on the effectiveness of recidivist statutes in reducing crime. See, e.g., Tomislav V. Kovandzic, John J. Sloan, III & Lynne M. Vieratis, “*Striking Out*” as *Crime Reduction Policy: The Impact of “Three Strikes” Laws on Crime Rates in U.S. Cities*, 21 JUST. Q. 207, 238–39 (2004) (finding no evidence that “three strikes” laws reduce crime); Michael Vitiello, *Three Strikes Laws: A Real or Imagined Deterrent to Crime*, AM. BAR ASS’N (Apr. 1, 2002), [https://www.americanbar.org/groups/crsj/publications/human\\_rights\\_magazine\\_home/human\\_rights\\_vol29\\_2002/spring2002/hr\\_spring02\\_vitiello](https://www.americanbar.org/groups/crsj/publications/human_rights_magazine_home/human_rights_vol29_2002/spring2002/hr_spring02_vitiello) [<https://perma.cc/Q7PC-3KSP>] (discussing a general lack of empirical evidence supporting the efficacy of “three strikes” laws). While some states that have enacted these “three strikes” laws have seen subsequent declines in overall crime rates, there are reasons to doubt a causal relationship. See Anthony Nagorski, *Arguments Against the Use of Recidivist Statutes That Contain Mandatory Minimum Sentences*, 5 U. ST. THOMAS J.L. & PUB. POL’Y 214, 226–27 (2010) (describing other researchers’ conclusion that the decreasing crime rate following enactment of California’s three strikes laws was caused by pre-existing trends rather than the laws themselves, and noting that “the lower rates could be attributed to the enactment of any number of new criminal statutes or deterrence methods, not due to the Three Strikes laws”); Joshua A. Jones, *Assessing the Impact of “Three Strikes” Laws on Crime Rates and Prison Populations in California and Washington*, 4 INQUIRIES J., no. 9, 2012 (noting that some of the offenses that saw declining rates were not covered under most of the three strikes laws being studied). Interestingly, some studies have associated three strikes laws with relative increases in murder rates. See, e.g., Thomas B. Marvell & Carlisle E. Moody, *The Lethal Effects of Three-Strikes Laws*, 30 J. LEGAL STUD. 89, 106 (2001) (finding both short-term and long-term increases in violent crimes following the passage of “three strikes” laws); Elsa Y. Chen, *Impacts of “Three Strikes and You’re Out” on Crime Trends in California and Throughout the United States*, 24 J. CONTEMP. CRIM. JUST. 345, 360 (2008) (“Murder rates appear to have increased about 12.9% more rapidly (or fallen 12.9% less rapidly) in states with Three Strikes laws in place.”).

Commission released its most recent Recidivist Report in September 2021, comparing rates of recidivism for those persons released from federal prison in 2010 with those released in 2005.<sup>68</sup> Generally speaking, the recidivism rate remained unchanged.<sup>69</sup> I will note, however, that as for Ruth St. Clair, she was arrested again in 1939, again for shoplifting, only two years after her release.<sup>70</sup>

## II

### EXAMINING THE FACTORS UNDERLYING PRIOR CONVICTIONS

The criticisms of these federal recidivist statutes are well taken. Several thoughtful scholars have analyzed them in greater detail than I have presented here,<sup>71</sup> and some have offered ways to improve the current framework to better capture the sentencing goals the statutes embody.<sup>72</sup> In this Lecture, I propose to go a bit deeper, to broaden the scope of the discussion to examine more carefully what a prior conviction represents. What are we in fact doing when we rely so heavily on a prior conviction in federal sentencing? As a legal matter, of course, the conviction means that, by trial or by plea, a person was found guilty of committing a crime. And a court's records tell us what that crime was and what sentence was imposed.

But there is much more behind a prior conviction than the elements of the crime, or even the details of what the person did to meet each of those elements. A prior conviction, in my view, also represents the culmination of a number of societal circumstances and decisions made along the way by people other than the defendant themselves. And the conviction reflects, at least to some degree, biases and inequities that exist in our society as a whole.

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<sup>68</sup> RYAN COTTER, COURTNEY SEMISCH & DAVID RUTTER, U.S. SENT'G COMM'N, *RECIDIVISM OF FEDERAL OFFENDERS RELEASED IN 2010*, at 4 (2021), [https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2021/20210930\\_Recidivism.pdf](https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2021/20210930_Recidivism.pdf) [<https://perma.cc/79N6-3H7S>].

<sup>69</sup> *Id.*

<sup>70</sup> *Pardoned 'Lifer' Is Arrested Again*, N.Y. TIMES, July 11, 1939, at 22.

<sup>71</sup> See, e.g., Barkow, *supra* note 50; Sheldon A. Evans, *Punishing Criminals for Their Conduct: A Return to Reason for the Armed Career Criminal Act*, 70 OKLA. L. REV. 623 (2018); Sarah French Russell, *Rethinking Recidivist Enhancements: The Role of Prior Drug Convictions in Federal Sentencing*, 43 U.C. DAVIS L. REV. 1135 (2010); Bagaric, *supra* note 32; Michael Tonry, *Federal Sentencing "Reform" Since 1984: The Awful as Enemy of the Good*, 44 CRIME & JUST. 99 (2015).

<sup>72</sup> See, e.g., Michael Vitiello, *Reforming Three Strikes' Excesses*, 82 WASH. U. L.Q. 1 (2004); Barkow, *supra* note 50, at 239–40.

Why do I say this? As an initial matter, we know that not every crime is reported<sup>73</sup> and even if it is, a suspect is not always arrested or charged.<sup>74</sup> Law enforcement officers decide which suspects to arrest,<sup>75</sup> and prosecutors exercise their discretion in deciding what charges, if any, to pursue.<sup>76</sup> Once charged, not every defendant is convicted, or even convicted as originally charged.<sup>77</sup> And not every conviction results in a sentence of imprisonment, or a sentence of the same length.<sup>78</sup> At each one of these steps toward the making of a felony conviction, government actors make discretionary decisions that affect the outcome.

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<sup>73</sup> See John Gramlich, *Most Violent and Property Crimes in the U.S. Go Unsolved*, PEW RSCH. CTR. (Mar. 1, 2017), <https://www.pewresearch.org/fact-tank/2017/03/01/most-violent-and-property-crimes-in-the-u-s-go-unsolved> [<https://perma.cc/6XBR-3J5X>] (reporting that “[o]nly about half of the violent crimes and a third of the property crimes that occur in the United States each year are reported to police” and “[e]ven when violent and property crimes are reported to police, they’re often not solved”).

<sup>74</sup> See *id.* (“[M]ost of the crimes that *are* reported don’t result in the arrest, charging and prosecution of a suspect, according to government statistics.”).

<sup>75</sup> See, e.g., Jessica Huff, *Understanding Police Decisions to Arrest: The Impact of Situational, Officer, and Neighborhood Characteristics on Police Discretion*, 75 J. CRIM. JUST., July–Aug. 2021, <https://doi.org/10.1016/j.jcrimjus.2021.101829> [<https://perma.cc/7E6E-XJYA>]; see also Rachel A. Harmon, *The Problem of Policing*, 110 MICH. L. REV. 761, 780 n.76 (2012) (“Our criminal justice system gives police enormous discretion with the expectation they will often ‘exercise discretion *not* to search and arrest.’” (quoting William J. Stuntz, *Virtues and Vices of the Exclusionary Rule*, 20 HARV. J.L. & PUB. POL’Y 443, 445 (1997))).

<sup>76</sup> See, e.g., *United States v. Armstrong*, 517 U.S. 456, 464 (1996) (“In the ordinary case, ‘so long as the prosecutor has probable cause to believe that the accused committed an offense defined by statute, the decision whether or not to prosecute, and what charge to file or bring before a grand jury, generally rests entirely in his discretion.’” (quoting *Bordenkircher v. Hayes*, 434 U.S. 357, 364 (1978))).

<sup>77</sup> See, e.g., Gramlich, *supra* note 14 (noting that eight percent of defendants in federal criminal cases had their cases dismissed and that only 320 defendants—less than one percent of all federal defendants—won at trial); RAM SUBRAMANIAN, LÉON DIGARD, MELVIN WASHINGTON II & STEPHANIE SORAGE, VERA INST. OF JUST., *IN THE SHADOWS: A REVIEW OF THE RESEARCH ON PLEA BARGAINING* iii (2020), <https://www.vera.org/downloads/publications/in-the-shadows-plea-bargaining.pdf> [<https://perma.cc/2KQK-H8V2>] (“More than 90 percent of convictions, at both federal and state levels, are the result of guilty pleas.”).

<sup>78</sup> See, e.g., *id.* (“Individuals who choose to exercise their constitutional right to trial can face much higher sentences if they invoke the right to trial and lose . . . .”); see also U.S. SENT’G COMM’N, *DEMOGRAPHIC DIFFERENCES IN SENTENCING: AN UPDATE TO THE 2012 BOOKER REPORT* (2017), [https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2017/20171114\\_Demographics.pdf](https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2017/20171114_Demographics.pdf) [<https://perma.cc/H68M-7Z4P>] (reporting stark racial disparities in sentencing); *Race and Sentencing*, NAT’L ASS’N OF CRIM. DEFENSE LAWYERS (Nov. 10, 2021), <https://www.nacdl.org/Content/Race-and-Sentencing> [<https://perma.cc/NTE7-K4LY>] (“[F]ederal prosecutors file charges that carry mandatory minimum sentences 65% more often against Black defendants than against other defendants, all other conditions remaining the same.”).

### A. *Discretion and Bias in the Criminal Justice System*

Let us start with detection and arrest. As first-year law students and crime buffs know, a police officer needs only reasonable suspicion to stop and briefly detain a person.<sup>79</sup> An officer must have reasonable suspicion that “criminal activity may be afoot,”<sup>80</sup> which means the officer “must be able to point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant” the stop.<sup>81</sup> A hunch is not enough, but courts do consider an officer’s experience and expertise in determining whether they had reasonable suspicion in a particular situation.<sup>82</sup>

However, police presence is significantly higher in some neighborhoods than others—for example, in lower income neighborhoods and communities of color.<sup>83</sup> And we know that the nature of the relationship between citizens and law enforcement varies.<sup>84</sup> Some communities, communities of color in particular, may be less likely to view the presence of law enforcement as a good thing based at least in part on their prior experiences.<sup>85</sup>

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<sup>79</sup> See *Terry v. Ohio*, 392 U.S. 1, 30 (1968).

<sup>80</sup> *Id.* at 30.

<sup>81</sup> *Id.* at 21.

<sup>82</sup> See *id.* at 27 (“[I]n determining whether the officer acted reasonably . . . , due weight must be given not to his inchoate and unparticularized suspicion or ‘hunch,’ but to the specific reasonable inferences which he is entitled to draw from the facts in light of his experience.”).

<sup>83</sup> See Joe Soss & Vesla Weaver, *Police Are Our Government: Politics, Political Science, and the Policing of Race-Class Subjugated Communities*, 20 ANN. REV. POL. SCI. 565, 571–72 (2017) (referencing studies showing that high-volume stops and low-level arrests are weakly correlated with crime but strongly correlated with race and poverty); *Housing, Neighborhood Change, & Overpolicing*, NAT’L LOW INCOME HOUSING COALITION (Feb. 22, 2021), <https://nlihc.org/resource/housing-neighborhood-change-overpolicing> [<https://perma.cc/8EDR-5LEG>] (describing how gentrification exacerbates this phenomenon); see also Justin M. Feldman, Sofia Gruskin, Brent A. Coull & Nancy Krieger, *Police-Related Deaths and Neighborhood Economic and Racial/Ethnic Polarization, United States, 2015–2016*, 109 AM. J. PUB. HEALTH 458, 461 (2019) (finding that “greater concentrations of [economic] deprivation were associated with higher rates” of police-related deaths).

<sup>84</sup> See NANCY LA VIGNE, JOCELYN FONTAINE & ANAMIKA DWIVEDI, *URB. INST., HOW DO PEOPLE IN HIGH-CRIME, LOW-INCOME COMMUNITIES VIEW THE POLICE?* 1 (2017), [https://www.urban.org/sites/default/files/publication/88476/how\\_do\\_people\\_in\\_high-crime\\_view\\_the\\_police.pdf](https://www.urban.org/sites/default/files/publication/88476/how_do_people_in_high-crime_view_the_police.pdf) [<https://perma.cc/SU5C-NFUS>] (presenting the results of a broad-ranging survey study aiming to “represent residents in communities with the most tenuous relationships with law enforcement”—“people living in high-crime neighborhoods with concentrated disadvantage”); see also Monica C. Bell, *Police Reform and the Dismantling of Legal Estrangement*, 126 YALE L.J. 2054 (2017) (presenting a theory of “legal estrangement” to reframe understanding of the relationship between police and marginalized communities).

<sup>85</sup> A survey study conducted by the Urban Institute, polling a sample comprised largely by people of color (including 66.3% Black respondents and 10.6% Latinx respondents), found that only 34.3% of respondents believe that police “try to do what is best for the people they are dealing with,” and a majority of respondents believe that “[p]olice officers

This matters because courts accept that a person's negative reaction to seeing a police officer—for example, fleeing—may legitimately raise the officer's suspicions.<sup>86</sup> But if you walk the other way when you see a police officer, is that suggestive of wrongdoing or evasive behavior? Or is it simply avoiding potential problems? Justice Stevens warned us twenty years ago that for “some citizens, particularly minorities and those residing in high crime areas,” the sight of the police may be an entirely innocent reason to turn away, to avoid interaction, and to forestall a possibly dangerous encounter.<sup>87</sup> Perceptions matter, from the perspective of both police officer and citizen.

Similar concerns apply to traffic stops as well, perhaps the most common interaction between citizen and police.<sup>88</sup> Georgetown law professor Paul Butler describes a game his friend, a police officer, invented called “Pick a Car.”<sup>89</sup> The officer takes Professor Butler's students on a ride-along and tells them to pick any car on the street.<sup>90</sup> The officer then says he can follow that car and within a few blocks identify some traffic infraction the driver has committed.<sup>91</sup> He can then conduct a lawful stop.<sup>92</sup> Given the numerous laws and codes that govern the operation of a motor vehicle, the premise of this game is unsurprising yet startling in its simplicity.

And not all drivers are pulled over at the same rate.<sup>93</sup> Studies have consistently shown that Black drivers are more likely to be

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will treat you differently because of your race/ethnicity,” “[p]olice officers will judge you based on your race/ethnicity,” and “[t]he police act based on personal prejudices or biases” (55.5%, 53.5%, and 51.4%, respectively). LA VIGNE ET AL., *supra* note 84, at 5, 7 fig.6, 9 fig.8.

<sup>86</sup> See *Illinois v. Wardlow*, 528 U.S. 119, 124–25 (2000) (holding that an individual's “unprovoked flight” may properly inform reasonable suspicion for purposes of a *Terry* stop).

<sup>87</sup> *Id.* at 132–35 (Stevens, J., concurring in part and dissenting in part).

<sup>88</sup> See Marsha Mercer, *Police ‘Pretext’ Traffic Stops Need to End, Some Lawmakers Say*, PEW: STATELINE (Sept. 3, 2020), <https://www.pewtrusts.org/en/research-and-analysis/blogs/stateline/2020/09/03/police-pretext-traffic-stops-need-to-end-some-lawmakers-say> [<https://perma.cc/E7PR-ND58>] (discussing how traffic stops are disproportionately targeted at drivers of color, and noting that “[t]raffic stops are the most common interaction Americans have with police”); *Findings*, STAN. OPEN POLICING PROJECT, <https://openpolicing.stanford.edu/findings> [<https://perma.cc/EBA8-EX2K>] (finding significant racial disparities in policing at traffic stops).

<sup>89</sup> PAUL BUTLER, *CHOKEHOLD: POLICING BLACK MEN* 59 (2018).

<sup>90</sup> *Id.*

<sup>91</sup> *Id.*

<sup>92</sup> *Id.*

<sup>93</sup> See *United States v. Leviner*, 31 F. Supp. 2d 23, 33 (D. Mass. 1998) (“Studies from a number of scholars, and articles in the popular literature have focused on the fact that African American motorists are stopped and prosecuted for traffic stops, more than any other citizens.”); see also Radley Balko, *There's Overwhelming Evidence That the Criminal Justice System Is Racist. Here's the Proof.*, WASH. POST (June 10, 2020), <https://>

stopped by a police officer than white drivers.<sup>94</sup> Tellingly, one study showed that this difference lessens after sunset, when an officer presumably is less likely to be able to discern who is driving the car.<sup>95</sup> And data also show that once stopped, Black motorists are searched more often than whites, yet are less likely to be found in possession of drugs, guns, or contraband than whites.<sup>96</sup>

As lawyers, we understand that under the Fourth Amendment, the subjective intent of the police officer is not relevant to the legality of the stop.<sup>97</sup> The only thing that matters is whether the officer had probable cause to believe the driver had committed a traffic violation.<sup>98</sup> The wisdom of this rule of law is not the point here. Agree, disagree, or debate it, as many have.<sup>99</sup> But we cannot ignore the statistics: Some people are more likely to be stopped, more likely to be searched, and thus, more likely to be arrested than others.<sup>100</sup> And there is no meaningful mechanism in the law to check it.

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[www.washingtonpost.com/graphics/2020/opinions/systemic-racism-police-evidence-criminal-justice-system](http://www.washingtonpost.com/graphics/2020/opinions/systemic-racism-police-evidence-criminal-justice-system) [<https://perma.cc/3CMS-XX39>].

<sup>94</sup> See, e.g., Balko, *supra* note 93 (summarizing several studies); WILLIAM MARBACK & NATHANIEL WACKMAN, OFF. OF INSPECTOR GEN., CITY OF CHI., REPORT ON RACE- AND ETHNICITY-BASED DISPARITIES IN THE CHICAGO POLICE DEPARTMENT'S USE OF FORCE 31 (2022), <https://igchicago.org/wp-content/uploads/2022/02/Use-of-Force-Disparities-Report.pdf> [<https://perma.cc/W6PT-MA97>] (“Black people were overrepresented—relative to their share of population in the District—in investigatory stops in every [Chicago Police Department] District. . . . For example, in CPD’s 18th District, the population is 7.9% Black, and 73.5% of investigatory stops were of Black people.”).

<sup>95</sup> Emma Pierson et al., *A Large-Scale Analysis of Racial Disparities in Police Stops Across the United States*, 4 NATURE HUM. BEHAV. 736, 737–38 (2020).

<sup>96</sup> See, e.g., MARBACK & WACKMAN, *supra* note 94, at 31 (“Given an investigatory stop, Black people were subjected to a search of their person 1.5 times more frequently than non-Black people, and also subjected to a pat-down 1.5 times more frequently than non-Black people.”); CIV. RTS. DIV., U.S. DEP’T OF JUST., INVESTIGATION OF THE FERGUSON POLICE DEPARTMENT 4 (2015), [https://www.justice.gov/sites/default/files/opa/press-releases/attachments/2015/03/04/ferguson\\_police\\_department\\_report.pdf](https://www.justice.gov/sites/default/files/opa/press-releases/attachments/2015/03/04/ferguson_police_department_report.pdf) [<https://perma.cc/Z9PU-NX58>] (“African Americans are more than twice as likely as white drivers to be searched during vehicle stops even after controlling for non-race based variables such as the reason the vehicle stop was initiated, but are found in possession of contraband 26% less often than white drivers . . . .”); Marc Mauer, *The Endurance of Racial Disparity in the Criminal Justice System*, in POLICING THE BLACK MAN: ARREST, PROSECUTION, AND IMPRISONMENT, 31, 42–43 (Angela J. Davis ed., 2017).

<sup>97</sup> See *Whren v. United States*, 517 U.S. 806, 813 (1996).

<sup>98</sup> See *id.* at 819.

<sup>99</sup> See, e.g., Gabriel J. Chin & Charles J. Vernon, *Reasonable but Unconstitutional: Racial Profiling and the Radical Objectivity of Whren v. United States*, 83 GEO. WASH. L. REV. 882, 884 n.2 (2015) (collecting articles criticizing *Whren* for effectively legitimizing racial profiling); David A. Harris, “Driving While Black” and All Other Traffic Offenses: The Supreme Court and Pretextual Traffic Stops, 87 J. CRIM. L. & CRIMINOLOGY 544, 545–46 (1997) (conceding that *Whren* “makes some sense, at least from the point of view of judicial administration,” but arguing that the rule is dangerous to a free, equal society).

<sup>100</sup> See *supra* notes 88–96 and accompanying text.

Let us turn now to the point after which a person has been arrested and a charge has been filed. At least for more serious charges, one of the first questions at an initial appearance in court is whether a person will be released pending trial.<sup>101</sup> If the judge decides to grant pretrial release, the next question is: on what conditions?<sup>102</sup> If a judge sets bail as one of those conditions, and you cannot pay it, you will remain in custody until your case goes to trial or you plead guilty.<sup>103</sup> While you will be appointed a lawyer to represent you if you do not have the money to hire one,<sup>104</sup> you are not entitled to the same assistance in posting bail.<sup>105</sup> And not all states provide counsel as early as a defendant's initial appearance, the stage at which the decision on bail is often made.<sup>106</sup>

Aside from the devastating impact pretrial custody can have on your ability to keep your home, your job, or custody of your children,<sup>107</sup> it can also have a significant and detrimental impact on your

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<sup>101</sup> See, e.g., FED. R. CRIM. P. 46(a); 18 U.S.C. § 3142; see also *infra* note 103 and accompanying text.

<sup>102</sup> See, e.g., 18 U.S.C. § 3142(c) (listing standard conditions for pretrial release under the Bail Reform Act).

<sup>103</sup> For a discussion of the magnitude of the problem of individuals remaining in custody due to inability to make bail, see, for example, Bernadette Rabuy & Daniel Kopf, *Detaining the Poor: How Money Bail Perpetuates an Endless Cycle of Poverty and Jail Time*, PRISON POL'Y INITIATIVE (May 10, 2016), <https://www.prisonpolicy.org/reports/incomejails.html> [<https://perma.cc/463X-9TP5>]; see also John Mathews II & Felipe Curiel, *Criminal Justice Debt Problems*, AM. BAR ASS'N (Nov. 30, 2019), [https://www.americanbar.org/groups/crsj/publications/human\\_rights\\_magazine\\_home/economic-justice/criminal-justice-debt-problems](https://www.americanbar.org/groups/crsj/publications/human_rights_magazine_home/economic-justice/criminal-justice-debt-problems) [<https://perma.cc/C8D6-8J5N>] (“As many as 500,000 people are held across the country in local jails because of their inability to pay bail, mostly for low-level offenses.”).

<sup>104</sup> See *Gideon v. Wainwright*, 372 U.S. 335, 341, 344–45 (1963) (holding that the Sixth Amendment—incorporated against states through the Fourteenth Amendment—grants criminal defendants who cannot afford an attorney the right to have one appointed for them by the state).

<sup>105</sup> Cf. Rabuy & Kopf, *supra* note 103 (“If the defendant is unable to come up with the money either personally or through a commercial bail bondsman, they can be incarcerated from their arrest until their case is resolved or dismissed in court.”).

<sup>106</sup> Charlie Gerstein, Note, *Plea Bargaining and the Right to Counsel at Bail Hearings*, 111 MICH. L. REV. 1513, 1516 (2013) (“Surprisingly, there is no federal right to appointed counsel for indigent defendants at bail hearings, and most states do not appoint counsel at all in such hearings.”); Douglas L. Colbert, *Prosecution Without Representation*, 59 BUFF. L. REV. 333, 384–86 (2011) (finding that in 1998 “only eight states and the District of Columbia guaranteed assigned counsel’s immediate in-court representation after a criminal prosecution began” but that by 2008–2009, there were signs of a marked trend toward more states and jurisdictions providing representation at the initial appearance stage).

<sup>107</sup> See Megan Stevenson & Sandra G. Mayson, *Pretrial Detention and Bail* 22 (Univ. of Pa. L. Sch., Pub. L. Rsch. Paper No. 17-18, 2018), <https://ssrn.com/abstract=2939273> [<https://perma.cc/VM7F-9C5M>].

criminal case.<sup>108</sup> On average, it takes about nine months for a felony case to go to trial, and in some cases, it can take years.<sup>109</sup> If the prosecutor approaches you after a few months of pretrial detention and offers a sentence to time served in exchange for your guilty plea, that deal can be hard to turn down, especially if you already know your trial setting is months down the road.<sup>110</sup> Thus, scholars suggest, pretrial custody can encourage guilty pleas even when the defendant might have a viable defense to the charge against them.<sup>111</sup>

Pretrial detention has also been shown to affect the actual outcome of a case. A study in a major U.S. city showed that those held in pretrial detention are more likely to be convicted, less likely to have their charges reduced, and more likely to be sentenced to a term of imprisonment than those who were released pretrial.<sup>112</sup> Several fac-

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<sup>108</sup> See *id.* (“Pretrial detention also affects case outcomes. No fewer than five empirical studies published in the last year, deploying quasi-experimental design, have shown that pretrial detention causally increases a defendant’s chance of conviction, as well as the likely sentence length.”). This may result in part from the fact that remaining in custody makes it more difficult for a person to meet with their defense counsel to prepare a defense, limits their financial resources to dedicate to their case, and “prevents people from engaging in ‘prophylactic measures’ that increase the likelihood of acquittal, dismissal, or diversion, such as paying restitution, seeking treatment or other services, and pursuing education and employment opportunities.” LÉON DIGARD & ELIZABETH SWAVOLA, *VERA INST. OF JUST., JUSTICE DENIED: THE HARMFUL AND LASTING EFFECTS OF PRETRIAL DETENTION* 5 (2019), <https://www.vera.org/downloads/publications/Justice-Denied-Evidence-Brief.pdf> [<https://perma.cc/K3N5-VETV>].

<sup>109</sup> BRIAN J. OSTROM, LYDIA E. HAMBLIN, RICHARD Y. SCHAUFFLER & NIAL RAAEN, *NAT’L CTR. FOR STATE CTS., TIMELY JUSTICE IN CRIMINAL CASES: WHAT THE DATA TELLS US* 6, [https://www.ncsc.org/\\_data/assets/pdf\\_file/0019/53218/Timely-Justice-in-Criminal-Cases-What-the-Data-Tells-Us.pdf](https://www.ncsc.org/_data/assets/pdf_file/0019/53218/Timely-Justice-in-Criminal-Cases-What-the-Data-Tells-Us.pdf) [<https://perma.cc/6HRA-JLWK>].

<sup>110</sup> See PATRICK LIU, RYAN NUNN & JAY SHAMBAUGH, *HAMILTON PROJ., THE ECONOMICS OF BAIL AND PRETRIAL DETENTION* 5–7 (2018), [https://www.brookings.edu/wp-content/uploads/2018/12/BailFineReform\\_EA\\_121818\\_6PM.pdf](https://www.brookings.edu/wp-content/uploads/2018/12/BailFineReform_EA_121818_6PM.pdf) [<https://perma.cc/YJ6K-6NVV>] (providing summary data on the duration of pretrial detention). The psychological toll of long terms of pretrial custody cannot be overstated, as illustrated by the tragic case of Kalief Browder, who took his own life after being held pretrial at Rikers Island for three years—two in solitary confinement—for allegedly stealing a backpack when he was sixteen years old. See Benjamin Weiser, *Kalief Browder’s Suicide Brought Changes to Rikers. Now It Has Led to a \$3 Million Settlement*, *N.Y. TIMES* (Jan. 24, 2019), <https://www.nytimes.com/2019/01/24/nyregion/kalief-browder-settlement-lawsuit.html> [<https://perma.cc/5RJ3-EWLQ>].

<sup>111</sup> See, e.g., DIGARD & SWAVOLA, *supra* note 108, at 4–5; Amy E. Lerman, Ariel Lewis Green & Patricio Dominguez, *Pleading for Justice: Bullpen Therapy, Pre-Trial Detention, and Plea Bargains in American Courts*, 68 *CRIME & DELINQUENCY* 159 (2021); Will Dobbie, Jacob Goldin & Crystal S. Yang, *The Effects of Pretrial Detention on Conviction, Future Crime, and Employment: Evidence from Randomly Assigned Judges*, 108 *AM. ECON. REV.* 201 (2018); Elsa Euvard & Chloe Leclerc, *Pre-Trial Detention and Guilty Pleas: Inducement or Coercion?*, 19 *PUNISHMENT & SOC’Y* 525 (2017).

<sup>112</sup> MARY T. PHILLIPS, *N.Y.C. CRIM. JUST. AGENCY, INC., A DECADE OF BAIL RESEARCH IN NEW YORK CITY: FINAL REPORT* 115 (2012), <https://www.prisonpolicy.org/scans/DecadeBailResearch12.pdf> [<https://perma.cc/BE2V-RDUT>]; see also LIU ET AL.,

tors likely interact here. But if a person's lack of financial resources means they are more likely to be treated less favorably in the criminal justice system, that is something those who rely on prior convictions to make sentencing decisions should understand.<sup>113</sup>

### B. Pipelines to the Criminal Justice System

As lawyers, concepts such as reasonable suspicion, probable cause, and guilty pleas are in our wheelhouse. But the criminal justice system is not an island. If we step outside our comfort zone of the legal framework, we see other factors that play a significant role in determining who is more or less likely to sustain a prior conviction. In other words, what goes on outside the criminal justice system influences who among us ever sees the inside of a courtroom at all.

One of the more important of these factors is what happens at school. The “school-to-prison pipeline” is a term used to describe the phenomenon whereby children are pushed out of schools and into the criminal justice system through certain types of disciplinary practices.<sup>114</sup> Many public schools have adopted zero tolerance policies that apply “predetermined consequences, most often severe and punitive in nature, . . . [to defined behavior] regardless of the gravity of behavior, mitigating circumstances, or situational context.”<sup>115</sup> These policies were originally embraced in the 1980s and 90s in response to concerns about serious criminal conduct at schools involving firearms

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*supra* note 110, at 11–12 (describing studies in other jurisdictions with the same results); *supra* note 108 and accompanying text.

<sup>113</sup> See MINNEAPOLIS FOUND., PRETRIAL JUSTICE: A REPORT ON THE CASH BAIL SYSTEM 4 (2019), [https://www.minneapolisfoundation.org/wp-content/uploads/2020/10/Report\\_Pretrial\\_Final.pdf](https://www.minneapolisfoundation.org/wp-content/uploads/2020/10/Report_Pretrial_Final.pdf) [<https://perma.cc/ZBK2-J6HX>] (arguing the same); Ellen A. Donnelly & John M. MacDonald, *The Downstream Effects of Bail and Pretrial Detention on Racial Disparities in Incarceration*, 108 J. CRIM. L. & CRIMINOLOGY 775 (2018).

<sup>114</sup> Jason P. Nance, *Students, Police, and the School-to-Prison Pipeline*, 93 WASH. U. L. REV. 919, 923 (2016).

<sup>115</sup> *Id.* at 933 (quoting Am. Psych. Ass'n Zero Tolerance Task Force, *Are Zero Tolerance Policies Effective in the Schools? An Evidentiary Review and Recommendations*, 63 AM. PSYCH. 852, 852 (2008)); David Simson, *Exclusion, Punishment, Racism and Our Schools: A Critical Race Theory Perspective on School Discipline*, 61 UCLA L. REV. 506, 508–09 (2014) (describing the disproportionate impact of zero tolerance policies on Black youth). On the effectiveness—or lack thereof—of zero tolerance policies in schools, see generally Russell J. Skiba, *The Failure of Zero Tolerance*, 22 RECLAIMING CHILD. & YOUTH 27, 30 (2014) (finding that “[n]o data exist to show that out-of-school suspensions and expulsions reduce disruption or improve school climate” and that “disciplinary removal appears to have negative effects on student outcomes and the learning climate”); Am. Psych. Ass'n Zero Tolerance Task Force, *supra* (assessing the advantages and disadvantages of zero tolerance policies in schools).

or illegal drugs.<sup>116</sup> But their application has expanded to a wide range of student behavior, much of which is not criminal.<sup>117</sup>

This means that even relatively minor misconduct can result in harsh punishment, often preordained consequences that leave no room for assessment of an individual student's circumstances. Some of the targeted conduct is indeed serious, such as perhaps bringing a weapon to school, but the policies also target misconduct such as insubordination, vandalism, or possession of a cell phone or over-the-counter medications.<sup>118</sup> Frequently, the mandatory punishments imposed include the suspension or expulsion of the student from school.<sup>119</sup>

A key mechanism for enforcement of these policies has been the School Resource Officer.<sup>120</sup> A School Resource Officer is a police officer assigned to work inside a school with the goal of ensuring a safe educational environment for the students.<sup>121</sup> School Resource Officers ostensibly play several positive roles in the school: mentor, role model, educator, and informal counselor, in addition to their law enforcement responsibilities.<sup>122</sup> But these officers can also escalate school misconduct—behavior that otherwise would have been handled by teachers or administrators in a school disciplinary proceeding—into an arrest or referral to juvenile court.<sup>123</sup> This escalation raises questions about whether the role these officers play in the schools is unnecessarily increasing the number of students being introduced to the juvenile justice system.

In Cedar Rapids, Iowa, where I live, the City Council recently adopted significant modifications to the District's School Resource Officer program.<sup>124</sup> These include cutting back on the number of officers in the schools, requiring the officers to familiarize themselves

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<sup>116</sup> Simson, *supra* note 115, at 508–09.

<sup>117</sup> *See id.* at 509.

<sup>118</sup> *See* S. David Mitchell, *Zero Tolerance Policies: Criminalizing Childhood and Disenfranchising the Next Generation of Citizens*, 92 WASH. U. L. REV. 271, 279–80 (2014); Farnell Maxime, *Zero-Tolerance Policies and the School to Prison Pipeline*, SHARED JUST. (Jan. 18, 2018), <https://www.sharedjustice.org/most-recent/2017/12/21/zero-tolerance-policies-and-the-school-to-prison-pipeline> [<https://perma.cc/7UG7-4CRH>].

<sup>119</sup> *See* Maxime, *supra* note 118.

<sup>120</sup> *See* Janel George, *Populating the Pipeline: School Policing and the Persistence of the School-to-Prison Pipeline*, 40 NOVA L. REV. 493, 505–06 (2016); Nance, *supra* note 114, at 946.

<sup>121</sup> George, *supra* note 120, at 506.

<sup>122</sup> *Id.*

<sup>123</sup> Nance, *supra* note 114, at 949–50.

<sup>124</sup> *See* Grace King, *Changes to Cedar Rapids School Resource Program Aim to Reduce Arrests*, GAZETTE (Sept. 28, 2021, 7:49 AM), <https://www.thegazette.com/k/changes-to-cedar-rapids-school-resource-program-aim-to-reduce-arrests> [<https://perma.cc/PG5H-CKHD>].

with and make appropriate referrals to social services available to young people, and encouraging officers to seek diversion options rather than criminal charges for students on their first encounter with the justice system.<sup>125</sup> Significant among the changes is also that School Resource Officers will no longer play a role in enforcing school rules or discipline, thus limiting the number and type of incidents in which the officers may become involved.<sup>126</sup>

A main catalyst behind these changes was data showing significant racial disparities in criminal complaints made against students in Cedar Rapids schools.<sup>127</sup> Despite research showing that white and Black students engaged in misconduct at similar rates,<sup>128</sup> Black students were significantly more likely to be charged in criminal complaints reported by the School Resource Officers.<sup>129</sup> In a recent five-year period, Black students comprised nineteen percent of the district's school population, but they accounted for sixty-one percent of the criminal allegations in the schools.<sup>130</sup> Put another way, only one in five students in Cedar Rapids is Black, but Black students were the subject of three out of five of the School Resource Officers' criminal referrals. The students themselves spoke out as well. In response to a survey, one in four Black students said they felt uncomfortable or very uncomfortable around the School Resource Officer.<sup>131</sup> Almost one-fourth of the students who responded to the survey said they had seen "racial disparities in how [school resource] officers discipline students."<sup>132</sup>

Studies show that Cedar Rapids is not an outlier. According to the Department of Education, Black students account for 16% of stu-

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<sup>125</sup> *Id.*

<sup>126</sup> *Id.*

<sup>127</sup> See Grace King, *Black Students Run 6 Times the Risk of White Students for Criminal Complaints in Cedar Rapids Schools*, GAZETTE (June 15, 2021, 9:56 AM), <https://www.thegazette.com/k/black-students-run-6-times-the-risk-of-white-students-for-criminal-complaints-in-cedar-rapids-school> [<https://perma.cc/L3N4-PLG6>].

<sup>128</sup> See Izabela Zaluska, *No Major Changes Needed to SROs, CRPD Says, Despite Data Showing Racial Disparities in Student Arrests*, LITTLE VILLAGE (July 14, 2021), <https://littlevillagemag.com/no-major-changes-needed-to-crp-d-sro-program> [<https://perma.cc/K8C8-XCBG>].

<sup>129</sup> *Id.*

<sup>130</sup> *Id.*

<sup>131</sup> Izabela Zaluska, *CRCSO Recommends Removing School Resource Officers from Middle Schools*, LITTLE VILLAGE (Aug. 24, 2021), <https://littlevillagemag.com/crcsd-recommends-removing-school-resource-officers-from-middle-schools> [<https://perma.cc/EP2B-EFFM>].

<sup>132</sup> Marissa Payne, *Cedar Rapids School District Commits to Changing School Resource Officer Program*, GAZETTE (June 15, 2021, 9:45 AM), <https://www.thegazette.com/education/cedar-rapids-school-district-commits-to-changing-school-resource-officer-program> [<https://perma.cc/3UH2-KKTQ>].

dent enrollment, but account for 27% of students who are referred to law enforcement, and 31% of students subject to in-school arrest.<sup>133</sup> Black students of all ages are three times more likely to be expelled or suspended than their white peers.<sup>134</sup> Black and low-income students also receive longer suspensions for the same or lesser misconduct or infractions.<sup>135</sup>

Studies suggest that these disparities are apparent even in preschool suspensions for misconduct. Approximately twenty percent of preschool students are Black, but Black children account for nearly half of all preschool students who have served more than one out-of-school suspension.<sup>136</sup> According to researchers, these disparities in the rates and severity of discipline cannot be explained by the frequency or severity of the student misconduct.<sup>137</sup>

Why does this matter? For a number of reasons. Perhaps most important is the evidence that juvenile incarceration has profound effects on a student's future educational, housing, employment, and

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<sup>133</sup> OFF. FOR CIV. RTS., U.S. DEP'T OF EDUC., CIVIL RIGHTS DATA COLLECTION: DATA SNAPSHOT: SCHOOL DISCIPLINE 1 (2014) [hereinafter DOE, CIVIL RIGHTS DATA COLLECTION], <https://ocrdata.ed.gov/assets/downloads/CRDC-School-Discipline-Snapshot.pdf> [<https://perma.cc/JR5Q-HZDA>]; see also U.S. DEP'T OF JUST., CIV. RTS. DIV., DEAR COLLEAGUE LETTER ON THE NONDISCRIMINATORY ADMINISTRATION OF SCHOOL DISCIPLINE 3 (2014), <https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201401-title-vi.pdf> [<https://perma.cc/42ZA-U76J>] (noting that "African-American students represent 15% of students" but "make up 35% of students suspended once, 44% of those suspended more than once, and 36% of students expelled"), *rescinded by* U.S. DEP'T OF JUST., CIV. RTS. DIV., DEAR COLLEAGUE LETTER (2018), <https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201812.pdf> [<https://perma.cc/JVL7-XFWA>].

<sup>134</sup> DOE, CIVIL RIGHTS DATA COLLECTION, *supra* note 133, at 1.

<sup>135</sup> "Black youth are more than four times as likely to be detained or committed in juvenile facilities as their white peers, according to nationwide data collected in October 2019." SENTENCING PROJ., BLACK DISPARITIES IN YOUTH INCARCERATION 1 (2021), <https://www.sentencingproject.org/wp-content/uploads/2017/09/Black-Disparities-in-Youth-Incarceration.pdf> [<https://perma.cc/H2Y8-MBKD>]. "Forty-one percent of youths in placement are Black, even though Black Americans comprise only 15% of all youth across the United States." *Id.*; see also NAT'L ASS'N OF SCH. PSYCHS., ZERO TOLERANCE AND ALTERNATIVE DISCIPLINE STRATEGIES: A FACT SHEET FOR EDUCATORS AND POLICYMAKERS 1 (2008) ("African American students have consistently been found to be suspended two to three times as often as other students, and similarly overrepresented in office referrals, corporal punishment, and school expulsion.").

<sup>136</sup> WALTER S. GILLIAM, ANGELA N. MAUPIN, CHIN R. REYES, MARIA ACCAVITTI & FREDERICK SHIC, YALE UNIV. CHILD STUDY CTR., DO EARLY EDUCATORS' IMPLICIT BIASES REGARDING SEX AND RACE RELATE TO BEHAVIOR EXPECTATIONS AND RECOMMENDATIONS OF PRESCHOOL EXPULSIONS AND SUSPENSIONS? 2 (2016), [https://medicine.yale.edu/childstudy/zigler/publications/Preschool%20Implicit%20Bias%20Policy%20Brief\\_final\\_9\\_26\\_276766\\_5379\\_v1.pdf](https://medicine.yale.edu/childstudy/zigler/publications/Preschool%20Implicit%20Bias%20Policy%20Brief_final_9_26_276766_5379_v1.pdf) [<https://perma.cc/45JM-JFQM>]; DOE, CIVIL RIGHTS DATA COLLECTION, *supra* note 133, at 1.

<sup>137</sup> See Simson, *supra* note 115; Areto A. Imoukuede, *The Right to Public Education and the School to Prison Pipeline*, 12 ALB. GOV'T L. REV. 52, 78–82 (2018).

military opportunities.<sup>138</sup> Moreover, for our immediate purposes, juvenile incarceration increases the probability of a student's future involvement in the criminal justice system.<sup>139</sup> Even students who avoid criminal referrals, but are nevertheless disciplined with out-of-school suspensions, are more likely to drop out of school than those who are not.<sup>140</sup> And students who drop out of school are more likely to be arrested.<sup>141</sup> It does not even take an adjudication of guilt for the effects to be felt. One study indicates that a first-time arrest during high school nearly doubles the chances that a student will drop out of school; a court appearance in connection with that arrest nearly quadruples it.<sup>142</sup>

The reasons why Black students, particularly Black boys, are targeted for harsher treatment in the school setting are troubling to say the least, but for our purposes here, I want to focus on the consequences of this pattern: The decision to arrest a student, rather than address the matter in a disciplinary process at the school, decreases the chances that the student will graduate from high school and, ultimately, increases the chances that the student will be tangled up in the criminal justice system as an adult.<sup>143</sup>

Experts remind us of the humiliation a student experiences when being forcibly removed from their school and the lasting effects that experience has on them, their interest in school, and their level of trust in the judicial system.<sup>144</sup> In short, the educational opportunities offered or denied to a young person are strongly correlated with later involvement in the criminal justice system. To the extent that either race or socioeconomic status, or both, contribute to these disparities, these are consequences those of us who are stewards of that criminal justice system should not ignore.

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<sup>138</sup> See Katayoon Majd, *Students of the Mass Incarceration Nation*, 54 How. L.J. 343, 376–78 (2011) (discussing long-term effects of juvenile incarceration).

<sup>139</sup> Jason P. Nance, *Dismantling the School-to-Prison Pipeline: Tools for Change*, 48 ARIZ. ST. L.J. 313, 319–20 (2016) (discussing scholarship that found prior incarceration was the strongest predictor of recidivism).

<sup>140</sup> See Elizabeth Pufall Jones, *The Link Between Suspensions, Expulsions, and Dropout Rates*, AMERICA'S PROMISE ALL. (Sept. 5, 2018), <https://www.americaspromise.org/opinion/link-between-suspensions-expulsions-and-dropout-rates> [https://perma.cc/3E3P-LSNA] (describing the result of a 2012 study finding “that suspension increased the chance of leaving school prior to graduation from 16 percent to . . . 32 percent”).

<sup>141</sup> See Nance, *supra* note 139, at 322–23.

<sup>142</sup> Imoukuede, *supra* note 137, at 73 (citing Gary Sweeten, *Who Will Graduate? Disruption of High School Education by Arrest and Court Involvement*, 23 JUST. Q. 462, 473 (2006)).

<sup>143</sup> See *supra* notes 138–42 and accompanying text.

<sup>144</sup> See Majd, *supra* note 138, at 376–81; Kristin Henning, *Boys to Men: The Role of Policing in the Socialization of Black Boys*, in POLICING THE BLACK MAN, *supra* note 96, at 63–68.

### C. Collateral Consequences of Conviction

Recidivist statutes, by definition, apply to those who have already been convicted of at least one crime.<sup>145</sup> For this reason, we also have to remind ourselves what it means to live with a prior conviction in this country. A person with a felony conviction faces a number of obstacles to successful reentry after release from prison. We need to understand these obstacles too if we are going to meaningfully assess the value a prior conviction brings to sentencing.

We generally term these obstacles the “collateral consequences” of a conviction.<sup>146</sup> The first that comes to mind is the loss of certain civil rights, including the right to vote.<sup>147</sup> Whether and how a person can get the right to vote restored varies by state. As of 2020, however, 5.2 million Americans remained ineligible to vote due to a felony conviction.<sup>148</sup> And one in every sixteen Black adults was disenfranchised, representing thirty-five percent of the total disenfranchised population.<sup>149</sup> This means that whatever the reason for a person’s inability to regain their right to vote, and thus participate in the democratic process, disenfranchisement affects Black Americans more harshly than it does whites.

But the restrictions on a person coming out of prison are even more pervasive than losing the right to vote. Many of the more immediate and damaging consequences are not ones that the judge warns you about before pleading guilty. As a public defender, I was sure to advise my clients before they made the decision on whether to go to trial or to plead guilty that a conviction would result in the loss of civil rights. But we did not take the time to warn our clients of other conse-

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<sup>145</sup> See generally *Recidivism*, NAT’L INST. JUST., <https://nij.ojp.gov/topics/corrections/recidivism> [<https://perma.cc/RB9K-B5NW>] (defining “recidivism” as “a person’s relapse into criminal behavior, often after the person receives sanctions or undergoes intervention for a previous crime”).

<sup>146</sup> See Cameron Kimble & Ames Grawert, *Collateral Consequences and the Enduring Nature of Punishment*, BRENNAN CTR. JUST. (June 21, 2021), <https://www.brennancenter.org/our-work/analysis-opinion/collateral-consequences-and-enduring-nature-punishment> [<https://perma.cc/TBV6-58ZF>].

<sup>147</sup> See generally *Felon Voting Rights*, NAT’L CONF. OF STATE LEGISLATURES (June 28, 2021), <https://www.ncsl.org/research/elections-and-campaigns/felon-voting-rights.aspx> [<https://perma.cc/MKR2-KTGW>] (describing state-by-state policies on voting rights and restrictions for those convicted of felonies).

<sup>148</sup> CHRISTOPHER UGGEN, RYAN LARSON, SARAH SHANNON & ARLETH PULIDO-NAVA, SENT’G PROJ., *LOCKED OUT 2020: ESTIMATES OF PEOPLE DENIED VOTING RIGHTS DUE TO A FELONY CONVICTION* 4 (Oct. 30, 2020), <https://www.sentencingproject.org/publications/locked-out-2020-estimates-of-people-denied-voting-rights-due-to-a-felony-conviction> [<https://perma.cc/RC4L-F89A>].

<sup>149</sup> *Id.* at 4, 16–17 tbls.3 & 4.

quences that would not be officially imposed by the court at sentencing.<sup>150</sup>

These are the consequences that are sometimes called “invisible punishments.”<sup>151</sup> Admittedly, many of us simply did not understand the type or the extent of the obstacles our clients would face upon release from prison.<sup>152</sup> Speaking for myself, it took years of working as a public defender and representing clients at revocation hearings or on subsequent charges before I began to recognize how hard we make reentry into one’s community. Collectively, we are just beginning to appreciate the profound effect these invisible punishments can have on the ability of a formerly incarcerated person to get back on their feet.<sup>153</sup>

For example, nearly every federal prison sentence includes a term of supervised release, ranging from one year to life.<sup>154</sup> During this timeframe, the previously incarcerated person’s continued release is subject to their compliance with myriad conditions.<sup>155</sup> These might include a substantive requirement like participation in drug, alcohol, or mental health treatment, or a more ministerial mandate to notify a supervising probation officer of a change of address.<sup>156</sup> At least in federal court, a standard condition also mandates that you not knowingly communicate or interact with another person who, like you, has previ-

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<sup>150</sup> See Gabriel J. Chin, *The New Civil Death: Rethinking Punishment in the Era of Mass Conviction*, 160 U. PA. L. REV. 1789, 1814–15 (2012) (noting that, with the exception of deportation, criminal defendants do not have a constitutionally protected right to notice about collateral consequences from the court or defense counsel when considering whether to plead guilty).

<sup>151</sup> See Eisha Jain, *The Mark of Policing: Race and Criminal Records*, 73 STAN. L. REV. ONLINE 162, 170–71 (2021).

<sup>152</sup> See generally Kimble & Grawert, *supra* note 146 (discussing limitations on employment, social safety net benefits, and voting rights); U.S. COMM’N ON CIV. RTS., COLLATERAL CONSEQUENCES: THE CROSSROADS OF PUNISHMENT, REDEMPTION, AND THE EFFECTS ON COMMUNITIES 130–31 (2019) (discussing also limitations on gun ownership, jury service, and more).

<sup>153</sup> See generally RACHEL ELISE BARKOW, PRISONERS OF POLITICS: BREAKING THE CYCLE OF MASS INCARCERATION (2019) (reviewing the long-term effects of criminal punishment after imprisonment); see also *United States v. Nesbeth*, 188 F. Supp. 3d 179, 184–86 (E.D.N.Y. 2016) (discussing the wide-ranging effects of collateral consequences).

<sup>154</sup> See U.S. SENT’G COMM’N, PRIMER: SUPERVISED RELEASE 2–3 (2021), [https://www.ussc.gov/sites/default/files/pdf/training/primers/2021\\_Primer\\_Supervised\\_Release.pdf](https://www.ussc.gov/sites/default/files/pdf/training/primers/2021_Primer_Supervised_Release.pdf) [<https://perma.cc/6EXJ-4RJT>]; 18 U.S.C. § 3583.

<sup>155</sup> See U.S. SENT’G COMM’N, *supra* note 154, at 4–11; 18 U.S.C. § 3583(d) (outlining the conditions of federal supervised release); U.S. SENT’G GUIDELINES MANUAL § 5D1.3 (U.S. SENT’G COMM’N 2021).

<sup>156</sup> See, e.g., U.S. SENT’G GUIDELINES MANUAL § 5D1.3(c)(5), (d)(4)–(5) (U.S. SENT’G COMM’N 2021). Other conditions contemplated by the U.S. Sentencing Guidelines include, among many, requirements related to meeting child support or debt payment obligations, restrictions on possession of weapons, and allowing probation officers to visit the defendant’s home at any time. *Id.* § 5D1.3(d)(1)–(2), (c)(6), (c)(10).

ously been convicted of a felony offense.<sup>157</sup> As a lawyer, I was always impressed when my clients were able to meet all of these varied obligations, and I silently wondered if I would be as successful if I were required to do the same.

One standard condition of supervised release in federal court is to maintain employment.<sup>158</sup> Employment is, not surprisingly, linked to reduced recidivism.<sup>159</sup> But the fact of the matter is that formerly incarcerated persons often have significant difficulty getting a job.<sup>160</sup> Under both state and federal law, some types of jobs are simply off-limits.<sup>161</sup> For example, many states prohibit those with prior convictions from holding certain occupational licenses.<sup>162</sup> And licensing, moreover, often requires training, examinations, and related fees. For someone coming out of prison, such requirements can be logistically, financially, and sometimes legally out of reach.

But even for those opportunities legally and realistically available, almost ninety percent of employers conduct a background check, and surveys indicate that most employers are unwilling to hire a person who has served time in prison.<sup>163</sup> Studies also show that a person with a criminal record is fifty percent less likely to get a call back or a job offer than a person without one.<sup>164</sup> And those who do

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<sup>157</sup> *Id.* § 5D1.3(c)(8).

<sup>158</sup> *Id.* § 5D1.3(c)(7).

<sup>159</sup> See, e.g., Grant Duwe & Makada Henry-Nickie, *A Better Path Forward for Criminal Justice: Training and Employment for Correctional Populations*, BROOKINGS 59 (Apr. 2021), <https://www.brookings.edu/research/a-better-path-forward-for-criminal-justice-training-and-employment-for-correctional-populations> [<https://perma.cc/SP7V-ELVN>] (“Having a job . . . has been shown to reduce recidivism, and individuals are less likely to commit crimes when they have stable, full-time employment.”); U.S. COMM’N ON CIV. RTS., *supra* note 152, at 39.

<sup>160</sup> See Michael Pinard, *Criminal Records, Race and Redemption*, 16 N.Y.U. J. LEGIS. & PUB. POL’Y 963, 972–75 (2013) (discussing obstacles to employment that individuals with criminal records face).

<sup>161</sup> See, e.g., U.S. COMM’N ON CIV. RTS., *supra* note 152, at 35 (describing the pervasiveness and impact of barriers such as “occupational licensing laws that disqualify workers with criminal records, and statutory hiring restrictions imposed by federal or state agencies”); Kimble & Grawert, *supra* note 146 (“Today, more than 27,000 rules bar formerly justice-involved people from holding professional licenses.”).

<sup>162</sup> See U.S. COMM’N ON CIV. RTS., *supra* note 152, at 35, 49–54 (discussing occupational license barriers); Chidi Umez & Rebecca Pirius, *Barriers to Work: Improving Employment in Licensed Occupations for Individuals with Criminal Records*, NAT’L CONF. OF STATE LEGISLATURES (2018), [https://www.ncsl.org/Portals/1/Documents/Labor/Licensing/criminalRecords\\_v06\\_web.pdf](https://www.ncsl.org/Portals/1/Documents/Labor/Licensing/criminalRecords_v06_web.pdf) [<https://perma.cc/3SY7-T6WF>].

<sup>163</sup> CRIM. JUST. SECTION, AM. BAR ASS’N, *COLLATERAL CONSEQUENCES OF CRIMINAL CONVICTIONS: JUDICIAL BENCH BOOK 4* (2018), <https://www.ojp.gov/pdffiles1/nij/grants/251583.pdf> [<https://perma.cc/44SL-ZKRH>].

<sup>164</sup> See U.S. COMM’N ON CIV. RTS., *supra* note 152, at 35.

get work are paid significantly lower wages.<sup>165</sup> Many factors are likely to play into these numbers, of course, including differences in education and marketable skills. But in the end, sixty percent of formerly incarcerated persons remain unemployed in the first year after their release.<sup>166</sup>

Trying to maintain financial stability without a job is difficult enough for anyone. But individuals recently released from prison often face additional financial burdens above housing, food, and child-care: court-imposed financial liabilities. In Iowa, the Legal Aid organization has taken particular interest in court debt and the impact it has on their clients. According to the director of the organization, it is not the fines or restitution that is most burdensome for low-income Iowans—rather, what creates the biggest debt for people is simply being a part of the criminal justice system in the first place.<sup>167</sup> In many states, like Iowa, you are obligated to pay the costs of your legal defense as well as jail fees for your pretrial detention, even though you were deemed indigent when charges were first brought against you.<sup>168</sup> Iowa law provides that these court debts can be assessed only to the extent of a person's ability to pay.<sup>169</sup> But most of the people charged with paying the cost of their court-appointed counsel or their stay in jail pending trial are simply unable to pay those costs in full.<sup>170</sup> Yet the debt does not go away, and the consequences can be financially debilitating.<sup>171</sup>

This phenomenon is not unique to Iowa. According to the National Institute of Justice, more than eighty-five percent of people on probation and parole are required to pay some type of supervision

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<sup>165</sup> HALF IN TEN & SENTENCING PROJ., AMERICANS WITH CRIMINAL RECORDS 2 (2014), <https://www.sentencingproject.org/wp-content/uploads/2015/11/Americans-with-Criminal-Records-Poverty-and-Opportunity-Profile.pdf> [<https://perma.cc/L3C3-YLRZ>] (“[T]hose who do find jobs take home 40 percent less pay annually.”).

<sup>166</sup> *Id.*

<sup>167</sup> See Lee Rood, *Critics Say Bill Touted as Reforming Court Fines and Fees Would Be a Civil Rights Setback*, HAWK EYE (June 28, 2020, 12:01 AM), <https://www.thehawkeye.com/story/news/local/2020/06/28/critics-say-bill-touted-as-reforming-court-fines-and-fees-would-be-civil-rights-setback/112765244> [<https://perma.cc/3WDA-FZQM>] (reporting that Alex Kornya, litigation director for Iowa Legal Aid, “said that in Iowa, the two largest costs for low-income defendants are indigent defense counsel fees and pretrial jail fees that often pile up because defendants cannot afford bail or bond”).

<sup>168</sup> See *id.*

<sup>169</sup> See *id.*

<sup>170</sup> See *id.* (“Most low-income Iowans do not have the ability to pay all the costs being levied against them in a court case, regardless of whether they are convicted of a crime.”).

<sup>171</sup> See, e.g., Alex Kornya, Danica Rodarmel, Brian Highsmith, Mel Gonzalez & Ted Mermin, *Crimsumerism: Combating Consumer Abuses in the Criminal Justice System*, 54 HARV. C.R.-C.L. L. REV. 107, 108–10 (2019) (sharing representative examples of the long-term financial costs resulting from interactions with the criminal system).

fee, court costs, fine, or restitution, and they are subject to sanction for failure to do so.<sup>172</sup> In total, “some 10 million people owe more than \$50 billion from their contact with the criminal justice system.”<sup>173</sup> Considering that a large number of those directly involved are indigent, it is not difficult to imagine the additional burden these financial penalties can impose on individuals and their families.

More than 600,000 people return to their communities each year after serving a term of imprisonment in either federal or state prison.<sup>174</sup> If these and other collateral consequences operate to limit a person’s ability to reenter their community, earn a living wage, and remain law-abiding, the policies underlying collateral consequences ultimately exacerbate the use of recidivist statutes.<sup>175</sup> Additional statistics are telling here as well: Almost 2.3 million people are currently incarcerated in the United States, over 200,000 of them in federal custody.<sup>176</sup> The vast majority of defendants prosecuted in federal court qualify for court-appointed counsel.<sup>177</sup> Of all federal defendants who received an enhanced sentence in 2019 for possession of a firearm pursuant to the ACCA—that is, they had three or more prior convictions for a violent felony or serious drug offense—almost seventy-five percent were Black.<sup>178</sup> Of those convicted of a federal felony drug offense

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<sup>172</sup> KARIN D. MARTIN, SANDRA SUSAN SMITH & WENDY STILL, SHACKLED TO DEBT: CRIMINAL JUSTICE FINANCIAL OBLIGATIONS AND THE BARRIERS TO RE-ENTRY THEY CREATE 5 (2017), <https://www.ojp.gov/pdffiles1/nij/249976.pdf> [<https://perma.cc/N7ZT-6CNN>].

<sup>173</sup> *Id.*

<sup>174</sup> Lucius Couloute & Daniel Kopf, *Out of Prison & Out of Work: Unemployment Among Formerly Incarcerated People*, PRISON POL’Y INITIATIVE (July 2018), <https://www.prisonpolicy.org/reports/outofwork.html> [<https://perma.cc/9GDR-L8M5>].

<sup>175</sup> See Eisha Jain, *Prosecuting Collateral Consequences*, 104 GEO. L.J. 1197, 1203–10 (2016) (discussing collateral consequences and plea bargaining in the context of criminal law administration); April Frazier-Camara, *Overcriminalization of Redemption: Fixing a Broken System, Not Broken People*, 28 CRIM. JUST. 19, 19–20 (2013) (reviewing barriers to reentering communities after release from prison); Shon Hopwood, *Improving Federal Sentencing*, 87 UMKC L. REV. 79, 80 (2018) (noting that “the entire package of punishment” includes not only the prison term but also “the lifelong punishment that begins when a person is released”).

<sup>176</sup> Wendy Sawyer & Peter Wagner, *Mass Incarceration: The Whole Pie 2020*, PRISON POL’Y INITIATIVE (Mar. 24, 2020), <https://www.prisonpolicy.org/reports/pie2020.html> [<https://perma.cc/CE6G-SHJ2>].

<sup>177</sup> See *Defender Services*, U.S. CTS., <https://www.uscourts.gov/services-forms/defender-services> [<https://perma.cc/BT8Z-639P>] (“Federal defender organizations, together with the more than 12,000 private ‘panel attorneys’ who accept CJA assignments annually, represent the vast majority of individuals who are prosecuted in our nation’s federal courts.”).

<sup>178</sup> U.S. SENT’G COMM’N, FEDERAL ARMED CAREER CRIMINALS: PREVALENCE, PATTERNS, AND PATHWAYS 22 (2021), [https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2021/20210303\\_ACCA-Report.pdf](https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2021/20210303_ACCA-Report.pdf) [<https://perma.cc/YF9S-VX26>].

who saw their mandatory minimum sentence increase due to their prior record, over fifty percent were Black.<sup>179</sup>

### CONCLUSION

None of this is to say that a person's prior record is not relevant at the time of sentencing. I want to make clear that this is not the point of my remarks. First, as a legal matter, the practice of using prior convictions to enhance a sentence has been upheld against several challenges at the Supreme Court.<sup>180</sup> For those charged, it does feel like double jeopardy, at least as a layperson generally understands the concept.<sup>181</sup> As a public defender, I certainly had that discussion numerous times with clients who were concerned with the amount of time they were facing if convicted. But the Supreme Court has been clear that recidivist statutes do not violate the prohibition against double jeopardy.<sup>182</sup> More than one hundred years ago, the Court explained that you are not being punished again for the earlier offense.<sup>183</sup> Instead, the repetition of criminal conduct aggravates your guilt on the current offense.<sup>184</sup> The Court recently reiterated this notion when it said that recidivism is "as typical a sentencing factor as one might imagine."<sup>185</sup>

Second, as a practical matter of public safety, there can be little question that prior criminal conduct and an inability to conform one's behavior to the law are relevant factors to consider when determining an appropriate punishment. The judicial system must be structured in such a way as to take into account, for example, particularly violent or antisocial behavior. Prior conduct, both good and bad, is indeed relevant at a criminal sentencing hearing.

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<sup>179</sup> U.S. SENT'G COMM'N, *supra* note 9, at 33 (reporting that 57.9% of offenders subject to an enhanced mandatory minimum sentence were Black); *see also* Rhys Hester, Richard S. Frase, Julian V. Roberts & Kelly Lyn Mitchell, *Prior Record Enhancements at Sentencing: Unsettled Justifications and Unsettling Consequences*, 47 CRIME & JUST. 209, 238 (2018) (discussing racially disproportionate effects of prior record sentence enhancements).

<sup>180</sup> *See, e.g.*, *Rummel v. Estelle*, 445 U.S. 263 (1980).

<sup>181</sup> *See* U.S. CONST. amend. V ("No person shall . . . be subject for the same offense to be twice put in jeopardy of life or limb . . ."). For a critique of the prevailing, narrow interpretation of double jeopardy as a legal concept, *see, for example*, Carissa Byrne Hessick & F. Andrew Hessick, *Double Jeopardy as a Limit on Punishment*, 97 CORNELL L. REV. 45, 46 (2011) ("Increasing a defendant's punishment based on a previous conviction—a conviction for which the defendant has already served a sentence—constitutes a second punishment for the first crime of conviction.").

<sup>182</sup> *See* Hessick & Hessick, *supra* note 181, at 57–58 & n.66.

<sup>183</sup> *Graham v. West Virginia*, 224 U.S. 616, 623 (1912).

<sup>184</sup> *Id.*

<sup>185</sup> *Almendarez-Torres v. United States*, 523 U.S. 224, 230 (1998).

The question, in my view, is not *whether* a prior conviction should be considered at sentencing. Rather, the question is *how*. Lawyers and judges have tried to apply recidivist statutes even-handedly. We have created a structured analysis that we apply to assure ourselves that similar prior convictions are treated similarly. We spend a significant amount of time categorizing these prior offenses, all in an effort to ensure that the federal recidivist statutes are applied consistently and in accordance with due process of law as to each individual defendant.

But by implementing recidivist statutes that rely solely on the category of the prior conviction, we may be “thinking like lawyers” to a fault. Some scholars and jurists lament the fact that a sentencing judge cannot look to the underlying facts to see what a defendant actually did in the course of committing the crime underlying their prior conviction when conducting the analysis.<sup>186</sup> That information, some argue, is particularly relevant.<sup>187</sup> That discussion is worth having.

I suggest that our singular focus on the elements of the offense and the straightforward fact of the prior conviction has other consequences that go beyond the current criticisms. Our current approach makes no room for the countless factors that may contribute to a person being convicted of a criminal offense. If we ignore that, we risk operating a criminal justice system that fails to recognize the realities of how our society operates. Research tells us there are significant racial and socioeconomic biases and inequities, which manifest themselves as early as preschool, that correlate to an increased likelihood of involvement in the criminal justice system. My concern is that when we rely so heavily on a prior conviction at sentencing, those same biases and inequities make their way into, and become part of, the current sentencing structure. When that happens, we not only recycle inequality, but we are also likely to amplify its effect.

We should be idealists in our quest for equal justice under the law. But we should be realists about what pulls or pushes a person

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<sup>186</sup> See, e.g., Robert A. Zauzmer, *Fixing the Categorical Approach “Mess,”* 69 DEP’T JUST. J. FED. L. & PRACTICE 3, 10–16 (2021) (noting that “judicial criticism of the categorical approach has become an avalanche” and providing some examples of this body of criticism); Evans, *supra* note 71, at 625–27 (2018) (discussing the “well-documented problems” of the categorical approach); Krystle Lamprecht, Comment, *Formal, Categorical, but Incomplete: The Need for a New Standard in Evaluating Prior Convictions Under the Armed Career Criminal Act*, 98 J. CRIM. L. & CRIMINOLOGY 1407 (2008) (critiquing the categorical approach and proposing an alternative framework for evaluating prior convictions under ACCA).

<sup>187</sup> See Evans, *supra* note 71, at 626 (“‘The categorical approach is completely insensitive to *what happened here*.’ Common sense and legal theory both tell us that offenders should be punished for their conduct.” (quoting Evan Lee, *Regulating Crimmigration* 23 (Univ. of Cal. Hastings Coll. of the L., Rsch. Paper No. 128, 2015), <https://ssrn.com/abstract=2559485> [<https://perma.cc/8VFW-P8UK>])).

into the criminal justice system. I have no clear-cut answers or fool-proof solutions. And the issues I have discussed today are not new to those concerned about social justice and who encourage us to examine inequality through the lens of intersectionality. But one thing seems true to me: The amount of time we spend on categorizing a prior conviction accurately, and the power we give it, should be commensurate with the value that prior conviction adds to a sentencing determination. I submit that, at a minimum, the value of that conviction is far more variable than federal law currently allows us to acknowledge.

My interest in the power of the prior conviction began in my years as an advocate but it has not waned during my time on the bench. I continue to see the issue as one worthy of our careful attention, and I sincerely appreciate the opportunity to explore it as part of the Madison Lecture series.