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PUNISHING CRIMINALS FOR THEIR CONDUCT: A RETURN TO REASON FOR THE ARMED CAREER CRIMINAL ACT

SHELDON A. EVANS*

Abstract

For over twenty-five years, the Armed Career Criminal Act has produced inconsistent results and has taxed judicial economy perhaps more than any other federal sentencing mechanism. This recidivist sentencing enhancement is meant to punish habitual criminals based on their numerous past crimes, but the Supreme Court's application of the Act too often allows habitual criminals to escape the intended enhancement on a legal technicality. This comes as a result of the Court's categorical approach, which punishes habitual criminal offenders based on the statutory elements of their past crimes rather than the conduct of their past crimes.

In an effort to find solutions for this ailing doctrine, this Article analyzes how states have structured their own recidivist sentencing laws to avoid the same problems wreaking havoc in the federal courts. Of all the state approaches, a conduct-based approach is most promising because of its practical application and ideological consistency. Moreover, the many roadblocks articulated by the Court over the years that have supposedly prevented it from taking a conduct-based approach are overcome after considering the constitutional and practical sentencing landscape.

I. Introduction

Mathis v. United States,¹ the Supreme Court's latest foray into its Armed Career Criminal Act (ACCA or "Act")² jurisprudence, has become the apex of the doctrine's problematic approach to sentencing habitual criminal offenders.

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1. 136 S. Ct. 2243 (2016).
2. 18 U.S.C. 924(e) (2012).

The *Mathis* case began in small-town Iowa, where panic swept over a family when their teenage boy went missing.³ Little did they know at the time that he had been lured to run away to a middle-aged, repeat criminal offender's house via online chats.⁴ This man with the checkered past, Richard Mathis, forcibly molested the boy and intended to do the same to two other young boys staying in the house during the same time.⁵ When police tracked the victim's phone to Mathis's house and eventually executed a search warrant, they found a cell phone with sexually explicit messages Mathis had sent to other young boys and a memory card containing child pornography.⁶ In addition, law enforcement officers found a loaded rifle, which Mathis was not allowed to possess as a previously convicted felon.⁷ Needless to say, this was only Mathis's latest criminal episode, one more to add to a long list of prior convictions and arrests; in addition to five past burglary convictions,⁸ Mathis also had a troubling history of sexually abusing young boys.⁹

The ACCA was meant for habitual offenders like Mathis. The ACCA is a federal sentencing enhancement designed to punish felons more severely if they have three previous convictions for "violent felonies."¹⁰ Burglary convictions, of which Mathis had many, are specifically referred to in the Act as violent felonies.¹¹ Thus, in Mathis's case, the government decided to forego child molestation charges and instead charged Mathis with being a felon in possession of a firearm¹²—a crime which, combined with his previous Iowa burglary convictions, triggered the ACCA sentencing enhancement. Mathis pleaded guilty and the district court later applied the ACCA, sentencing Mathis to 180 months of imprisonment.¹³

3. *Mathis v. United States*, 786 F.3d 1068, 1070 (8th Cir. 2015), *rev'd*, 136 S. Ct. 2243 (2016).

4. *Id.*

5. *Id.*

6. *Id.*

7. *Id.*

8. *Mathis v. United States*, 136 S. Ct. 2234, 2246 (2016).

9. Brief of Appellee at 21-22, *Mathis*, 786 F.3d 1068 (No. 14-2396).

10. 18 U.S.C. § 924(e) (2012).

11. *Id.* § 924(e)(2)(B)(ii).

12. *Mathis*, 786 F.3d at 1070. The jockeying between the Missouri government—which could have charged Mathis with more substantive crimes related to sexual abuse of minors—and the federal government cannot be discerned from the record. It is likely that Missouri deferred to the federal government's prosecution given its greater resources and stronger sentencing standards.

13. *Id.* at 1070-71.

Unfortunately, the Supreme Court found that the ACCA's increased punishment should not apply to Mathis because of a legal technicality. The Supreme Court decided many years ago that a categorical approach was the best way to determine whether a prior state conviction for burglary qualified as a "burglary" for purposes of the ACCA.¹⁴ Under the categorical approach, sentencing judges *cannot* look to the offender's conduct for the prior burglary; rather, judges may only consider whether the elements of the state burglary statute sufficiently coincide with the elements of the Court's own generic definition of burglary.¹⁵ If the elements do coincide, the past burglary will qualify as a predicate offense to be counted towards the three violent felonies necessary to apply the ACCA. If, however, the elements of the state burglary statute do not match up, or if the state statute criminalizes conduct that is broader than generic burglary, the past burglary will not count as a predicate offense. Notably, if the state burglary statute presents alternative sets of elements, courts may use a modified categorical approach, examining the record of conviction to discern under which set of elements the offender was convicted.¹⁶

In *Mathis*, explored further below, the Supreme Court overturned the district court's application of the ACCA because the Iowa burglary statute, under which Mathis was convicted, criminalized conduct outside of the Court's narrow generic burglary definition. Mathis's case is no isolated incident. The categorical approach has been used for over a half-century in criminal and immigration contexts, and often works in favor of the convicted, who escape enhanced punishment based on legal fictions and technicalities.¹⁷

If this categorical approach seems confusing, that's because it is. Commentators have referred to this doctrine as "an inconsistent patchwork of decisions,"¹⁸ and even likened it to the rule against perpetuities "in terms

14. *Taylor v. United States*, 495 U.S. 575, 600–02 (1990).

15. *Mathis v. United States*, 136 S. Ct. 2243, 2245 (2016). As the Supreme Court has found, elements, which "are the constituent parts of a crime's legal definition [that] must be proved beyond a reasonable doubt to sustain a conviction, . . . are distinct from 'facts,' which are mere real-world things" that are "extraneous to the crime's legal requirements." *Id.*

16. *Id.*

17. *See, e.g., United States ex rel. Guarino v. Uhl*, 107 F.2d 399, 400 (2d Cir. 1939) (Hand, J.) (recognizing that many immigrants who have committed serious offenses avoid deportation because of the categorical approach's focus on elements of an offense, rather than the facts of the offender's actual conduct).

18. Ted Koehler, Note, *Assessing Divisibility in the Armed Career Criminal Act*, 110 MICH. L. REV. 1521, 1523 (2012); *see also Begay v. United States*, 553 U.S. 137, 150 (2008)

of its complexity ‘Even lawyers who regularly practice [criminal law] can struggle to understand the doctrine and its occasionally perplexing results.’”¹⁹ Judges have lamented over the categorical approach doctrine as well, with one court going so far to say that in the twenty years since the adoption of the categorical approach, it “has struggled to understand the contours of the Supreme Court’s framework.”²⁰

Even more fundamental than the categorical approach’s confusing application are its ideological constraints. A “big drawback of the categorical approach is that it cuts against the grain of our intuitions about rough justice. . . . This last point cannot be stressed enough. The categorical approach is completely insensitive to *what happened here*.”²¹ Common sense and legal theory both tell us that offenders should be punished for their conduct. For example, if a burglar enters someone’s home and steals thousands of dollars of possessions, he or she should be punished for his or her specific crimes. The categorical approach applied by the Supreme Court, however, divorces what a habitual offender actually did from the punishment they are meant to receive.

The practical and ideological problems presented by the categorical approach have in turn increasingly taxed judicial economy. Judges have rightfully complained that “[t]he dockets of . . . all federal courts are now clogged with [ACCA] cases,”²² and that “no other area of the law has demanded more of [the courts’] resources.”²³ The very architect of the ACCA himself, the late Senator Arlen Specter, expressed his disappointment with the “costly and time-consuming [ACCA] litigation at every level of the Federal court system.”²⁴ With nearly ten percent of

(Scalia, J., concurring) (describing ACCA doctrine as “piecemeal, suspenseful, [and] Scrabble-like”).

19. Jennifer Lee Koh, *Rethinking Removability*, 65 FLA. L. REV. 1803, 1834 (2013) (quoting Doug Keller, *Causing Mischief for Taylor’s Categorical Approach: Applying “Legal Imagination” to Duenas-Alvarez*, 18 GEO. MASON L. REV. 625, 625 (2011)).

20. *United States v. Aguila-Montes de Oca*, 655 F.3d 915, 917 (9th Cir. 2011), *abrogated by* *Descamps v. United States*, 133 S. Ct. 2276 (2013).

21. Evan Lee, *Regulating Crimmigration* 23 (Univ. of Cal. Hastings Coll. of Law, Research Paper No. 128, 2015).

22. *United States v. Vann*, 660 F.3d 771, 787 (4th Cir. 2011) (Agee, J., concurring).

23. *Aguila-Montes de Oca*, 655 F.3d at 917; *see also* *Sykes v. United States*, 564 U.S. 1, 33 (2011) (Scalia, J., dissenting) (speculating that the Supreme Court would be analyzing state law under the ACCA “until the cows come home”).

24. 156 CONG. REC. S10,516 (daily ed. Dec. 17, 2010) (statement of Sen. Specter); *see also* Avi M. Kupfer, Note, *A Comprehensive Administrative Solution to the Armed Career Criminal Act Debacle*, 113 MICH. L. REV. 151, 152 (2014).

federal firearm offenders being sentenced under the ACCA²⁵ and an estimated 7000 offenders currently serving these sentences,²⁶ the strain that the categorical approach puts on judicial economy must be addressed.

Given the doctrine's well-documented problems, this Article seeks to find an efficient and practical replacement that conforms with fundamental notions of justice. In order to do so, this Article presents a comprehensive look into how the states deal with these same problems in their own habitual-offender statutes. Like the federal government's ACCA, nearly every state has sentencing enhancements that increase penalties for habitual offenders. Like the ACCA, these state habitual-offender statutes consider predicate offenses that offenders committed in other states. Unlike the ACCA, however, the states have taken a range of different approaches that offer simple application while achieving uniformity. Chief among these approaches is a conduct-based approach, which not only conforms with common-sense sentencing ideals (punishing criminals based on what they actually did), but offers a practical solution to the difficult application of the current categorical approach.

In exploring alternatives to the categorical approach, this Article proceeds as follows. Part II discusses the ACCA's legislative history and the roots of the categorical approach in the Court's jurisprudence. Part III explores the ideological and practical tensions of the categorical approach. In Part IV, the Article explains and justifies the methodology of analyzing state practice to solve the federal categorical approach problem. Then, in Part V, this Article explains possible solutions gleaned from the states and ultimately argues that a conduct-based approach is the most effective change to address the confusion-plagued categorical approach doctrine. This Article then offers conclusory remarks by looking to the future and commenting on the legal realism behind the Court's current jurisprudence.

25. Douglas A. Berman, *How Many Hundreds (or Thousands?) of ACCA Prisoners Could Be Impacted by a Big Ruling in Johnson?*, SENTENCING L. & POL'Y (June 13, 2015 10:07 AM), http://sentencing.typepad.com/sentencing_law_and_policy/2015/06/how-many-hundreds-or-thousands-of-acca-prisoners-could-be-impacted-by-a-big-ruling-in-johnson.html.

26. *Id.*; see also Jessica A. Roth, *The Divisibility of Crime*, 64 DUKE L.J. ONLINE 95, 97 n.7 (2015), https://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=1006&context=dlj_online (finding that "approximately 600 criminal defendants per year have been sentenced as Armed Career Criminals" under the Act).

II. The Roots of the ACCA and the Categorical Approach

A. The Forgotten Intent of Legislative History

Habitual-offender laws like the ACCA enjoy a long tradition in this country that dates back to colonial times.²⁷ Enhancing an offender's sentence based on their criminal history has proved attractive for lawmakers both from a policy and political standpoint. The ACCA, for example, was championed in the early 1980s in the midst of a heightened fear of drugs and crime,²⁸ during which time politicians found it expedient to convey a toughness on crime. More importantly, however, Congress was motivated by criminology research suggesting that a small number of criminals were responsible for committing a large percentage of crimes.²⁹ Thus, Congress believed that it could stymie rising crime rates by incapacitating habitual offenders for longer periods of time.

In the "interest of public safety" and to adequately deal with the rising threat of "armed repeat offenders who continue to commit serious

27. See *Parke v. Raley*, 506 U.S. 20, 26 (1992) ("Statutes that punish recidivists more severely than first offenders have a long tradition in this country that dates back to colonial times."); see also Ronald F. Wright, *Three Strikes Legislation and Sentencing Commission Objectives*, 20 LAW & POL'Y 429, 441 (1998); Krystle Lamprecht, Comment, *Formal, Categorical, but Incomplete: The Need for a New Standard in Evaluating Prior Convictions Under the Armed Carrier Criminal Act*, 98 J. CRIM. L. & CRIMINOLOGY 1407, 1412 (2008).

28. Michael Schearer, *The Armed Career Criminal Act: Imprecise, Indeterminate, and Unconstitutional* 3 (Dec. 8, 2015) (unpublished manuscript), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2698973 ("In the two decades from 1960 to 1980, violent crime in the United States rose by an astounding 271%. During the same time period, the burglary rate increased by 231% and robbery increased by 318%. Similar increases were noted in rates of forcible rape, aggravated assault, property crime, larceny, and motor vehicle theft.") (footnotes omitted).

29. *United States v. Hawkins*, 811 F.2d 210, 216 (3d Cir. 1987) ("Congress enacted the Armed Career Criminal provision for the purpose of incapacitating particular repeat offenders, who it found were responsible for a large proportion of crimes involving theft and violence."); see also S. REP. NO. 97-585, at 20 (1982) (citing evidence that "a small number of repeat offenders commit a highly disproportionate amount of the violent crime plaguing America today"); see also Schearer, *supra* note 28, at 4 (citing MARVIN E. WOLFGANG ET AL., *DELINQUENCY IN A BIRTH COHORT* (1972)) (finding that 6% of a study group was responsible for "61% of all homicides, 76% of all rapes, 73% of all robberies, and 65% of all aggravated assaults of those crimes perpetrated by members of the group"); *id.* (citing MARK A. PETERSON ET AL., *DOING CRIME: A SURVEY OF CALIFORNIA PRISON INMATES* xii (1980)) (finding that 25% of sampling group of prison inmates were responsible for "58% of all armed robberies, 65% of all burglaries, 60% of all motor vehicle thefts, and 46% of all assaults of those crimes reported by members of the sample group").

offenses,³⁰ Congress explored ways to incapacitate career criminals.³¹ This led members of Congress to introduce the ACCA as a three-strikes, strict liability law which would have imposed a mandatory life sentence after a third armed burglary or robbery.³² When Congress rejected this version on account of its overly harsh punishment,³³ then-Senator Arlen Specter reintroduced the Act with its now-enacted fifteen-year mandatory minimum sentence.³⁴ The logic behind this fifteen-year sentence was based on data that suggested that criminal careers commonly start at age fifteen and end at age thirty.³⁵ While this justification is rife with logical problems,³⁶ it ultimately proved more palatable to Congress than the mandatory life sentences imposed by the original bill.

The ACCA finally became law as one small piece of the Comprehensive Crime Control Act of 1984, which has been described as “the most extensive change[] ever made to the federal criminal justice system.”³⁷ The

30. S. REP. NO. 98-190, at 7 (1983).

31. Jill C. Rafaloff, Note, *The Armed Career Criminal Act: Sentence Enhancement Statute or New Offense?*, 56 FORDHAM L. REV. 1085, 1091 n.42 (1988) (quoting 130 CONG. REC. H101,551 (daily ed. Oct. 1, 1984)) (quoting Rep. Ron Wyden) (“We simply must put a stop to the career [criminals] . . . [W]e all know that a slap on the wrist won’t be enough to deter these criminals.”).

32. Jenny W.L. Osborne, Comment, *One Day Criminal Careers: The Armed Career Criminal Act’s Different Occasions Provision*, 44 J. MARSHALL L. REV. 963, 967 (2011) (citing *Career Criminal Life Sentence Act of 1981: Hearing on S. 1688, S. 1689, and S. 1690 Before the Subcomm. on Juvenile Justice of the S. Comm. on the Judiciary*, 97th Cong. (1982)).

33. See *infra* notes 204–207 and accompanying text.

34. Osborne, *supra* note 32, at 967-68 (citing S. REP. NO. 1688, 97th Cong. (1982)).

35. *Id.* (citing S. REP. NO. 97-585, at 77 (1983)) (explaining the rationale behind the fifteen-year mandatory minimum).

36. Apart from the fact that this statistic has drastically changed since the 1980s, it also suffers from inconsistent logic: in order to be eligible for this sentence, a minor at the age of fifteen would have already had to commit several crimes. It is likely that by the time this habitual offender even qualified for the fifteen-year sentence, he or she would be far into the age of maturity. Then, if criminal activity usually ceased at age thirty, most sentences that incarcerated criminals past that age would be overly harsh and ineffective. Also, this justification did not account for the reality that many offenders would be further hardened after fifteen years behind bars. Thus, an offender’s age is not nearly as determinative of recidivism as is their past experience and rehabilitation to successfully reenter society with the requisite opportunities needed to rebuild a life apart from crime. Nevertheless, these are critiques that enjoy the luxury of hindsight, which the politicians in the early 1980s did not enjoy.

37. Thomas O. Powell, *The Armed Career Criminal Act—Proposing a New Test to Resolve Difficulties in Applying the Act’s Ambiguous Residual Clause*, BEPRESS 1 (Mar. 16, 2009), https://works.bepress.com/thomas_powell/1/download/.

nuts and bolts of the ACCA mandated a fifteen-year mandatory minimum prison term for offenders found guilty of being a felon in possession of a firearm³⁸ who had also previously committed three violent felonies or serious drug crimes.³⁹

The 1984 version of the law had a narrow scope and was only to be applied to a “very small portion” of “hard core . . . career criminals.”⁴⁰ The law enumerated burglaries and robberies as “violent felonies” in part because of the frequency of such offenses when compared to more egregious violent crimes.⁴¹ Thus, for the most part, these crimes were enumerated as “violent felonies” more because of their frequency than their actual violence. Senator Specter, perhaps in hyperbole, also gained traction for the law by declaring that “[r]obberies and burglaries are the most damaging crimes to society.”⁴² As a result, Congress made it a priority to incapacitate habitual property offenders because “in terms of the likelihood of being victimized, burglary is the primary threat, followed by robbery.”⁴³

When in committee, the language was amended to maximize this intent. The original bill sought to punish burglary and robbery offenses “in violation of the ‘statutes’ of the States and the United States,” but the term “statute” was replaced by the broader term “laws” “to ensure that all conduct which the Committee intended to make punishable under the new offense was covered.”⁴⁴ As if peering into a crystal ball, Congress also tried to anticipate and fix potential problems that might arise from relying on state law to determine ACCA predicates. Congress understood “that culpable offenders might escape punishment on a technicality” due to “the wide variation among states and localities in the ways that offenses are labeled.”⁴⁵ Realizing the potential confusion in application, Congress added subsections that clearly defined what constituted predicate burglaries and robberies for the Act.⁴⁶ In particular, Congress defined burglary as “any offense involving entering or remaining surreptitiously within a building

38. 18 U.S.C. § 922(g) (2012).

39. *Id.* § 924(e)(1).

40. Lamprecht, *supra* note 27, at 1411 (quoting S. REP. NO. 97-585, at 62-63 (1983)).

41. S. REP. NO. 98-190, at 5 (1984) (“Burglaries are 40 times more common than rapes, and robberies are seven times more common than rapes.”); *see also Armed Career Criminal Act: Hearing on H.R. 1627 and S. 52 Before the Subcomm. on Crime of the H. Comm. on the Judiciary*, 98th Cong. 6, 33 (1984).

42. H.R. REP. NO. 98-1073, at 3 (1984).

43. S. REP. NO. 98-190, at 5 (1984).

44. *Id.* at 18.

45. *Id.* at 20.

46. *Id.*

that is the property of another with intent to engage in conduct constituting a Federal or State offense.”⁴⁷

Congress’s rationale for adopting these definitions and preventing reliance on what a state statute might define as being “burglary” was rooted in “fundamental fairness” and uniformity in sentencing habitual offenders consistently, no matter the state in which they committed their previous offenses. Thus, Congress wanted to acknowledge “the prerogatives of the States in defining their own offenses,” but at the same time ensure “that the same type of *conduct* is punishable on the Federal level in all cases.”⁴⁸ This made it clear that Congress had drafted the ACCA so that “it would *not* put Federal courts in a position of having to interpret and apply State laws on robbery and burglary in Federal criminal trials.”⁴⁹

Congress was not quite finished tinkering with the ACCA, and passed numerous amendments to the Act in 1986 to broaden its application.⁵⁰ When Senator Specter introduced the amendments, he noted that since the sentencing enhancement had been successful with classification of burglaries and robberies serving as predicate crimes, “the time has come to broaden that definition so that we may have a greater sweep and more effective use of this important statute.”⁵¹

In an effort to expand the predicate offenses that triggered the higher sentence, Congress replaced burglary and robbery crimes with three broad categories of offenses. First, Congress added “serious drug trafficking offenses,” which were in turn further defined by the statute.⁵² Second, Congress added “violent felonies,” which included enumerated offenses like burglary, robbery, extortion, and the use of explosives, as well as offenses involving physical force against property.⁵³ Third, Congress sought to include violent felonies that involved the use, attempted use, or threatened use of violence against a person.⁵⁴

47. *Id.* at 2.

48. *Id.* at 20 (emphasis added).

49. H.R. REP. NO. 98-1073, at 5–6 (1984) (emphasis added).

50. *See The Armed Career Criminal Act Amendments: Hearing on S. 2312 Before the Subcomm. on Criminal Law of the S. Comm. on the Judiciary*, 99th Cong. 1 (1986) (statement of Sen. Arlen Specter, Chairman, S. Comm. on the Judiciary) (claiming that only including burglary and robbery as predicate offenses was too limited, and that the ACCA should be amended to include additional predicate offenses).

51. 132 CONG. REC. 7697 (1986).

52. H.R. REP. NO. 99-849, at 3 (1986).

53. *Id.*

54. *Id.*

Yet another crucial change in 1986, which may have singlehandedly created the mire of ACCA jurisprudence, was the deletion of the statutory definitions of burglary and robbery.⁵⁵ While the legislative history on the deletion of these definitions is silent,⁵⁶ later developments suggest the deletion was merely an inadvertent, yet costly, mistake in draftsmanship.⁵⁷ When then-Senator Joseph Biden introduced a bill in 1989 to address the issue, he explained that the bill “corrects an error that occurred inadvertently when the definition of burglary was deleted from the Armed Career Criminal statute in 1986. The amendment reenacted the original definition, which was intended to be broader than common law burglary.”⁵⁸ The Senate passed the uncontroversial bill 100-0 and then sent it to the House, where it never made it past the House desk.⁵⁹ As a result of this enduring mistake, courts have had no choice but to give meaning to Congress’s omission.⁶⁰ Thus, courts have had to assume that Congress, for some unknown reason, meant to leave out the definition of burglary.⁶¹ Perhaps the inexcusable inaction of the House, too, can be categorized as an “inadvertent mistake” that has now produced one of the most muddled criminal sentencing doctrines in American jurisprudence.

This omission was not the only offense in draftsmanship that has contributed to the current mess of ACCA doctrine. In the immediate aftermath of the ACCA’s enactment, the language was so poorly drafted⁶²

55. See Career Criminals Amendment Act of 1986, Pub. L. No. 99-570, Subtitle I, Sec. 1402(2), § 924(e)(2), 100 Stat. 3207, 39-40 (codified as amended at 18 U.S.C. § 924(e) (2012)).

56. *Taylor v. United States*, 495 U.S. 575, 582 (1990).

57. *Id.* at 589–90 n.5.

58. *Id.* (quoting 135 CONG. REC. 23519) (statement of Sen. Biden).

59. See A Bill to Implement the President’s 1989 Drug Control Strategy, S. 1711, 101st Cong. (1989), <https://www.congress.gov/bill/101st-congress/senate-bill/1711/all-actions-without-amendments> (showing that the last recorded legislative action for Senate Bill 1711 was on October 18, 1989, where the record indicates it was being held at the House desk).

60. See *Descamps v. United States*, 133 S. Ct. 2276, 2287 (2013) (“If Congress had wanted to increase a sentence based on the facts of a prior offense, it presumably would have said so; other statutes, in other contexts, speak in just that way.”); *Taylor*, 495 U.S. at 600–01; see also *Inhabitants of Montclair v. Ramsdell*, 107 U.S. 147, 152 (1883) (stating that courts must “give effect . . . to every clause and word of a statute, avoiding, if it may be, any construction which implies that the legislature was ignorant” or made a mistake).

61. *James v. United States*, 550 U.S. 192, 230 (2007) (Scalia, J., dissenting) (referring to the ACCA as a “drafting failure”), *overruled by Johnson v. United States*, 135 S. Ct. 2551 (2015).

62. Rafaloff, *supra* note 31, at 1090 (citing *United States v. Jackson*, 824 F.2d 21, 25 (D.C. Cir. 1987) (“Lamentably, the ACCA . . . was not meticulously drafted . . .”); see, e.g.,

that courts could not even agree on whether the Act was a separate federal offense or merely a sentencing enhancement to existing offenses.⁶³ Soon after such problems arose, the Supreme Court stepped in to provide needed clarification on the interpretation and application of the Act. Unfortunately, over a quarter century later, we are still ironically dealing with the additional problems introduced by the Court in its effort to simplify interpretation of the ACCA.

B. From Taylor to Mathis: The Circle of Strife

“This categorical approach requires courts to choose the right category. And sometimes the choice is not obvious.”

Chambers v. United States, 555 U.S. 122, 126 (2009).

I. Taylor and the Categorical Approach

The Court’s first journey down its rocky jurisprudential path came in *Taylor v. United States*,⁶⁴ in which the Court addressed the Act’s application to predicate burglary offenses.⁶⁵ Arthur Lajuane Taylor pleaded guilty to being a felon in possession of a firearm,⁶⁶ and had a long criminal record that included robbery, assault, and two second-degree burglaries in Missouri.⁶⁷ In light of his record, the district court ultimately applied the ACCA and sentenced Taylor to the fifteen-year mandatory minimum.

Unfortunately, since Congress had deleted the definition of “burglary” from the Act in its 1986 amendments, the lower courts had disagreed on how to define the term. The Eighth Circuit upheld the district court’s application of the Act because it reasoned that “burglary” *should* correspond with whatever the states label as burglary in their criminal code.⁶⁸ If a state defined an offense as burglary, it reasoned, the federal courts should defer to this state-law label regardless of the elements of the state offense. Other courts reasoned that in the absence of a statutory definition, the courts should defer to the common law definition of

United States v. Rush, 840 F.2d 574, 577 (8th Cir. 1988) (en banc) (finding that the plain language and structure of ACCA was inconclusive).

63. Rafaloff, *supra* note 31, at 1087.

64. 495 U.S. 575 (1990).

65. *Id.* at 577–78.

66. See 18 U.S.C. § 922(g)(1) (2012).

67. *Taylor*, 495 U.S. at 578.

68. *Id.* at 579, 580 n.2 (citing *United States v. Taylor*, 864 F.2d 625, 627 (8th Cir. 1989) (defining burglary according to state law), *rev’d*, 495 U.S. 575 (1990); *United States v. Leonard*, 868 F.2d 1393, 1399 (5th Cir. 1989), *abrogated by Taylor*, 495 U.S. 575).

burglary.⁶⁹ Regardless of whether a defendant was convicted of burglary as defined by a state's law, the burglary conviction should only serve as an ACCA predicate if it would have been a burglary under the common law. Still other courts looked to the Act's 1984 definition of burglary to determine if a state law burglary conviction qualified as a predicate offense.⁷⁰ To these courts, it was "not readily apparent whether Congress intended 'burglary' to mean whatever the State of the defendant's prior conviction defines as burglary, or whether it intended that some uniform definition of burglary be applied to all cases in which the Government seeks a § 924(e) enhancement."⁷¹

With this disagreement serving as a backdrop, the Supreme Court examined the Act's legislative history and rightly found it "implausible that Congress intended the meaning of 'burglary' . . . to depend on the definition adopted by the State of conviction." This would mean that a person may or may not "receive a sentence enhancement based on exactly the same conduct, depending on whether the State of his prior conviction happened to call that conduct 'burglary.'"⁷² Instead, the Court found that Congress intended for "the same type of *conduct*" to be "punishable on the Federal level in all cases."⁷³

Next, the Court sought to establish a uniform definition of burglary to be used for purposes of determining predicate offenses under the Act. Citing a respected criminal law treatise,⁷⁴ the Court generically defined burglary as "having the basic elements of unlawful or unprivileged entry into, or remaining in, a building or structure, with intent to commit a crime."⁷⁵ The

69. *Taylor*, 495 U.S. at 592, 580 n.2 (citing *United States v. Chatman*, 869 F.2d 525, 530 (9th Cir. 1989) (defining burglary according to common law), *abrogated by Taylor*, 495 U.S. 575; *United States v. Headspeath*, 852 F.2d 753, 757 (4th Cir. 1988), *abrogated by Taylor*, 495 U.S. 575).

70. *See Taylor*, 495 U.S. at 580 n.2 (citing *United States v. Palmer*, 871 F.2d 1202, 1205-07 (3d Cir. 1989) (defining burglary as any offense that would have met the definition of burglary under a predecessor statute to § 924(e)); *United States v. Taylor*, 882 F.2d 1018, 1027-28 (6th Cir. 1989); *United States v. Dombrowski*, 877 F.2d 520, 530 (7th Cir. 1989); *United States v. Hill*, 863 F.2d 1575, 1581-82 (11th Cir. 1989)).

71. *Taylor*, 495 U.S. at 580.

72. *Id.* at 590-91.

73. *Id.* at 582 (quoting S. REP. NO. 98-190, at 5 (1983)) (emphasis added).

74. *Id.* at 598 (citing 1 WAYNE R. LAFAVE & AUSTIN W. SCOTT, JR., *SUBSTANTIVE CRIMINAL LAW* § 8.13, at 464 (1st ed. 1986)).

75. *Id.* at 599.

Court justified this definition by noting that it was “practically identical to the 1984 definition,”⁷⁶ and so was likely in line with congressional intent.

With this uniform definition in hand, the Court implemented the categorical approach. This approach required sentencing courts to compare the elements of the prior state criminal offense to the elements of generic burglary.⁷⁷ If the elements of the state crime were within or narrower than the elements of generic burglary, the crime fit within the *category* of ACCA predicate offenses. If the state crime elements were different or broader than the generic offense, the opposite was true. Thus, the Court took a slightly unintuitive approach by interpreting a criminal sentencing statute to punish a habitual offender based on the *elements* of his prior offense, as opposed to punishing him for the *conduct* of his prior offense.⁷⁸

The Court justified its approach by looking to the language of the Act, which seemed to place an emphasis on the statutory elements of a prior state conviction, rather than the conduct that gave rise to the conviction. First, the Court noted that § 924(e)(2)(B)(i) of the Act called for the sentence enhancement when a criminal had been convicted of a crime “that has as an element—not any crime that, in a particular case, involves—the use or threat of force.”⁷⁹ Thus, the Court reasoned that this emphasis on elements should bleed into the following subsection that identified burglary as a “violent felony” predicate.⁸⁰

Second, the Court reasoned that Congress intended for courts to look to the elements of previous convictions, rather than to the conduct underlying those convictions.⁸¹ The Court’s argument was based on silence, stating that “[i]f Congress had meant to adopt an approach that would require the sentencing court to engage in an elaborate factfinding process regarding the defendant’s prior offenses, surely this would have been mentioned somewhere in the legislative history.”⁸² In other words, the Court argued that Congress intended a categorical approach based on what it did *not* say.

Third, the Court believed that a conduct-based approach would present practical difficulties that would require trial courts to undertake burdensome fact-finding inquiries to determine the conduct of the prior

76. *Id.* at 598.

77. *Id.* at 600.

78. *Id.*

79. *Id.* (quoting 18 U.S.C. § 924(e)(2)(B)(i) (1988)).

80. *Id.* at 600–01; 18 U.S.C. § 924(e)(2)(B)(ii).

81. *Taylor*, 495 U.S. at 601.

82. *Id.*

offense.⁸³ For example, would the record of the previous conviction even reveal the offender's criminal conduct? If not, would the parties have to examine witnesses from the prior criminal proceedings to determine the facts that gave rise to the previous conviction? If a sentencing court made such a determination, would that abridge a criminal defendant's Sixth Amendment right to a jury trial? Also, if a criminal pleaded guilty to a lesser crime than burglary in a previous conviction, would it be fair to hold him accountable as having committed burglary if his criminal conduct were within the bounds of generic burglary?⁸⁴ While the Court posed these questions, it did little to actually answer them. Instead, it used them to justify an elements-based, categorical approach as a way of practically simplifying the process. After all, what could go wrong when trying to determine whether the statutory elements of fifty different state definitions of burglary fit within the bounds of the generic limits?

2. *Taylor and the Modified Categorical Approach*

Ironically, just as soon as the Court denounced the practical difficulties of delving into the record of prior convictions, it outlined a clear doctrine for courts to do just that. The Court realized that there would be some cases in which a state criminal statute may sweep more broadly than the narrow generic definition of burglary. These "divisible" state statutes presented "multiple, alternative versions of the crime."⁸⁵ By way of example, the Court stated that many states' "burglary statutes . . . define burglary more broadly" than the generic definition "by including places, such as automobiles and vending machines, other than buildings."⁸⁶ In this "narrow range of cases," the Court instructed sentencing courts to "look beyond the statutory elements [of the prior crime] to 'the charging paper and jury instructions' used in [the previous criminal proceeding]."⁸⁷ Therefore, when a state burglary statute has "alternative elements"—for example, a burglary statute that prohibits entry into an automobile as well as a building—the sentencing court could use this "modified categorical approach" to look at a set of documents from the previous conviction to determine under which elements the defendant was actually convicted: the elements that fit within the generic burglary of buildings, or the elements that fall outside the

83. *Id.*

84. *Id.* at 601-02.

85. *Descamps v. United States*, 133 S. Ct. 2276, 2284 (2013).

86. *Taylor*, 495 U.S. at 599.

87. *Descamps*, 133 S. Ct. at 2283-84 (quoting *Taylor*, 495 U.S. at 602).

generic definition, such as burgling an automobile.⁸⁸ If the former, that conviction would count as one of the three necessary predicate offenses to apply the sentencing enhancement of the Act; if the latter, the opposite would be true.

After laying out these complex theoretical doctrines, the Court turned back to the case at hand. In order for Taylor to be subject to a fifteen-year minimum sentence under the Act, he first had to be found guilty of being a felon in possession of a firearm in the present case. Second, he had to have at least three prior convictions for “violent felonies” as defined by the Act.⁸⁹ Taylor conceded that his prior convictions for robbery and assault were violent felonies, but challenged whether his convictions for burglary should be considered violent felonies.⁹⁰ When Taylor was convicted of second-degree burglary in Missouri, the Missouri Code contained seven different second-degree burglary statutes, all of which “varied as to the type of structure and the means of entry involved” to be burgled.⁹¹ After the Court employed the modified categorical approach and examined the “sparse record,” it could not determine which of the seven statutes served the basis for Taylor’s conviction; as a result, the Court remanded the case to the Eighth Circuit.⁹²

3. *The Taylor Hypothetical Comes to Life in Shepard*

The next time the Court addressed application of the ACCA was in *Shepard v. United States*,⁹³ in which the Court sought to define exactly which types of documents courts could rely upon when employing the modified categorical approach.⁹⁴ In *Shepard*, “the hypothetical [the Court] posited in *Taylor* became real”⁹⁵ because the defendant had previously pleaded guilty to violating Massachusetts’s burglary statute, which

88. *Id.* at 2284.

89. *See* 18 U.S.C. § 924(e)(2)(B) (2012).

90. *Taylor*, 495 U.S. at 579.

91. *See id.* at 578 n.1 (citing MO. REV. STAT. § 560.045 (1969) (breaking and entering a dwelling house); *id.* § 560.050 (having entered a dwelling house, breaking out of it); *id.* §§ 560.055, 560.060 (breaking an inner door); *id.* § 560.070 (breaking and entering a building, booth, tent, boat, or railroad car); *id.* § 560.075 (breaking and entering a bank; *id.* § 560.080 (breaking and entering a vacant building)).

92. *Id.* at 602.

93. 544 U.S. 13 (2005).

94. *Id.* at 16.

95. *Descamps v. United States*, 133 S. Ct. 2276, 2284 (2013) (discussing *Shepard*).

“cover[ed] entries into ‘boats and cars’ as well as buildings.”⁹⁶ Just as the Court had contemplated in *Taylor*:

No one could know, just from looking at the statute, which version of the offense Shepard was convicted of. Accordingly, [the Court] again authorized sentencing courts to scrutinize a restricted set of materials . . . to determine if the defendant had pleaded guilty to entering a building or, alternatively, a car or boat.⁹⁷

The Court expressly limited these reviewable materials—later called *Shepard* documents—to the “charging document, written plea agreement, transcript of plea colloquy, and any explicit factual finding by the trial judge.”⁹⁸

When the Court limited its inquiry to the *Shepard* documents, it overturned the lower courts’ decision to apply the ACCA to the offender because it had relied upon police reports and complaint applications to perform the categorical analysis.⁹⁹ Even though the record showed that the defendant had never disputed that he indeed broke into a building (which would categorically qualify as a predicate ACCA offense), the Court nevertheless reversed his sentence based on the technicality of which documents were examined under the confusing modified categorical approach.¹⁰⁰

4. *The Dicta of Descamps and Its Second Footnote*

The Court continued down this rabbit hole of legal fiction in *Descamps v. United States*,¹⁰¹ which introduced yet another level of confusion to the categorical approach. In *Descamps*, the Court held that a prior conviction under a California burglary statute¹⁰² could not serve as an ACCA predicate

96. *Id.* (quoting *Shepard*, 544 U.S. at 17).

97. *Id.* (citing *Shepard*, 544 U.S. at 26).

98. *Shepard*, 544 U.S. at 16.

99. *Id.* at 18, 26.

100. *Id.* at 23 (citing *Taylor v. United States*, 495 U.S. 575, 602 (1990); *Patterson v. McLean Credit Union*, 491 U.S. 164, 172–173 (1989) (commenting on the importance of *stare decisis*, following the doctrine as laid out in *Taylor*, and noting “[c]onsiderations of *stare decisis* have special force in the area of statutory interpretation, for here, unlike in the context of constitutional interpretation, the legislative power is implicated, and Congress remains free to alter what we have done”).

101. 133 S. Ct. 2276 (2013).

102. CAL. PENAL CODE § 459 (West 2017).

because it did not contain a necessary element of generic burglary.¹⁰³ Whereas generic burglary required “an *unlawful entry* along the lines of breaking and entering,”¹⁰⁴ the California burglary statute had no such “unlawful entry” requirement.¹⁰⁵ Consequently, because it was unnecessary for California to prove that the defendant “broke and entered,” a California burglary conviction could not serve as an ACCA predicate.¹⁰⁶ The Court expressly disavowed an analysis of the defendant’s conduct—whether he “did break and enter makes no difference.”¹⁰⁷

The holding of the case, however, is somewhat inconsequential when compared to its dicta, which cleaved a deep circuit split regarding the categorical and modified categorical approaches. The Court confirmed that the modified categorical approach only comes into play when a statute is divisible—that is, when it presents an alternative set of elements of which one set corresponds with generic burglary and the other set does not.¹⁰⁸ Consequently, a court cannot use the modified categorical approach to glean information from prior conviction documents when the convicting statute only has one set of indivisible elements.¹⁰⁹ As it had before,¹¹⁰ the Court offered as an example of a divisible statute, one that that

criminalizes assault with any of eight specified weapons; and suppose further . . . that only assault with a *gun* counts as an ACCA offense. A later sentencing court need only check the charging documents and instructions . . . to determine whether in convicting a defendant under that divisible statute, the jury necessarily found that he committed the ACCA-qualifying crime.¹¹¹

In the Court’s second footnote, it responded to a dissent, authored by Justice Alito, which raised the issue of whether the Court’s previous holdings and examples highlighted different *elements*, or merely different factual *means* of fulfilling that element.¹¹² The Court stated that “if, as the

103. *Descamps*, 133 S. Ct. at 2292–93.

104. *Id.* at 2285 (citing 3 WAYNE R. LAFAVE, SUBSTANTIVE CRIMINAL LAW § 21.1(a) (2d ed. 2003)) (emphasis added).

105. *Id.* (citing CAL. PENAL CODE § 459 (2017)).

106. *Id.* at 2285–86.

107. *Id.* at 2286.

108. *Id.* at 2290.

109. *Id.*

110. *See Taylor v. United States*, 495 U.S. 575, 602 (1990).

111. *Descamps*, 133 S. Ct. at 2290.

112. *Id.* at 2285 n.5.

dissent claims, the state laws at issue in [previous] cases set out ‘merely alternative means, not alternative elements’ of an offense, that is news to us.”¹¹³ Further, the Court stated that it could “see no real-world reason to worry” about such a distinction because whether a statute lists elements or means, the documents approved by the Court in *Taylor* and *Shepard* reflect the elements of the crime.¹¹⁴ The Court instructed that lower courts “need not parse state law . . . [but,] [w]hen a state law is drafted in the alternative, the court[s] merely resort[] to the approved documents and compare[] the elements revealed there to those of the generic offense.”¹¹⁵

The crucial issue the Court failed to address, however, was how to determine what is an element and what is a mean. For years, the Court—in both *Taylor* and *Shepard*—stated that statutes listing alternative places that could be burgled (a building or an automobile) were divisible and should be subject to the modified categorical approach. In footnote two, the Court manufactured doubt as to whether these statutes were truly divisible after twenty-five years of jurisprudence suggesting that they were. As a result, the courts of appeals quickly split on this very question.¹¹⁶

5. *The Circle Is Complete: Mathis Contradicts the Practical Concerns of Taylor*

In *Mathis*, the Court finally resolved the elements versus means question; in doing so, it also obviously contradicted its own decisions in *Taylor* and *Shepard*. The Court rightfully declared that for twenty-five years, its “decisions have held that [a] prior crime qualifies as an ACCA predicate if, but only if, its elements are the same as, or narrower than,

113. *Id.* (citing Justice Alito’s dissent).

114. *Id.*

115. *Id.*

116. See *United States v. Mathis*, 786 F.3d 1068, 1075 n.6 (2015) (comparing *United States v. Royal*, 731 F.3d 333, 341 (4th Cir. 2013) (“Rather than alternative elements, then, ‘offensive physical contact’ and ‘physical harm’ are merely alternative means of satisfying a single element of the Maryland offense.”), and *United States v. Howard*, 742 F.3d 1334, 1348–49 (11th Cir. 2014) (finding that a disjunctive “or” statement that listed alternative places that could be burgled were “illustrative examples” and not “alternative elements”), and *Rendon v. Holder*, 764 F.3d 1077, 1086 (9th Cir. 2014) (“To be clear, it is black-letter law that a statute is divisible only if it contains multiple alternative elements, as opposed to multiple alternative means. Thus, when a court encounters a statute that is written in the disjunctive (that is, with an ‘or’), that fact alone cannot end the divisibility inquiry.” (citation omitted)), with *United States v. Prater*, 766 F.3d 501, 510 (6th Cir. 2014) (finding a New York statute divisible when it listed several alternative places that could be burgled in a disjunctive “or” statement), *rev’d*, 136 S. Ct. 2243 (2016).

those of the generic offense.”¹¹⁷ Next, the Court somewhat mischaracterized this issue in the case as whether the Act “makes an exception to that rule when a defendant is convicted under a statute that lists multiple, alternative means of satisfying one (or more) of its elements.”¹¹⁸ Contrary to the issue the Court presented, however, the real issue that the courts of appeals faced was determining what indeed qualified as an element and what qualified as a mean. The lower courts did not contest the elements-based categorical approach, but were confused as to its application given the second footnote in *Descamps*.¹¹⁹

As discussed above,¹²⁰ the defendant in *Mathis* had been found guilty of being a felon in possession of a firearm and had a criminal history that included five separate second-degree burglary convictions in Iowa.¹²¹ The Iowa second-degree burglary statute punished the burgling of an “occupied structure,”¹²² which was elsewhere defined as “any building, structure, appurtenances to buildings and structures, land, water or air vehicle, or similar place adapted for overnight accommodation of persons, or occupied by persons for the purpose of carrying on business or other activity therein, or for the storage or safekeeping of anything of value.”¹²³ While this looked much like the statutes at issue in *Taylor* and *Shepard* and discussed in *Descamps*’s dicta, the Court ultimately disagreed, holding that this laundry list of places that can be burgled were not separate elements, but merely separate *means*.¹²⁴

The Court held that the elements of a crime are the pieces that a jury must agree upon beyond a reasonable doubt to return a conviction.¹²⁵ Thus, for a jury to convict an Iowan defendant of burglary, they need only agree that the person burgled an occupied structure.¹²⁶ They need not agree whether the structure was a boat, or a house, or an amalgam of the two; as long as the jurors all agree the place that was burgled was an “occupied

117. *Mathis*, 136 S. Ct. at 2247.

118. *Id.* at 2248.

119. *Id.* at 2248–49; *see also Mathis*, 786 F.3d at 1074–75 (citing *Descamps v. United States*, 133 S. Ct. 2276, 2285 n.2) (2013); *Prater*, 766 F.3d at 510; *Rendon*, 764 F.3d at 1085.

120. *See supra* notes 1–13 and accompanying text.

121. *Mathis*, 786 F.3d at 1070.

122. IOWA CODE §§ 713.1, 713.5 (2017).

123. *Id.* § 702.12.

124. *Mathis*, 136 S. Ct. at 2256.

125. *Id.* at 2248.

126. *State v. Rooney*, 862 N.W.2d 367, 376 (Iowa 2015) (discussing the single “broadly phrased . . . element of place” in Iowa’s burglary law).

structure,” they could convict the defendant. Therefore, the laundry list of different places capable of being burgled in the Iowa burglary statute, according to Iowa law, were not elements but were merely different means of fulfilling the “occupied structure” element.

Applying this rule to the case at hand, the Court found that the defendant’s five burglaries in Iowa—which were indeed burglaries of structures—did not qualify as ACCA predicates because the Iowa burglary statute was not divisible; instead, the statute had only one set of elements which criminalized conduct that was broader than generic burglary. As a result, the Court held that the lower court’s use of the modified categorical approach on an indivisible statute was inappropriate and overturned the defendant’s ACCA sentence.¹²⁷

The ACCA has taken many twists and turns in its thirty-year history. Originally intended to broadly punish habitual offenders, the Court has continually narrowed its application through the legal technicalities of the categorical approach. The ACCA’s own chief architect, Senator Specter, expressed his dissatisfaction that recent Supreme Court cases had “severely limited [the Act’s] reach” by narrowly interpreting what was meant to be a broad application of the term “violent crime.”¹²⁸ This narrowing has created a number of problems that continue to persist and must be remedied to steer the ACCA back onto the course for which it was intended.

III. Thematic Problems of the Categorical Approach

Needless to say, the Court’s categorical approach has created a host of inconsistencies. The legal fiction required by the categorical approach—punishing habitual offenders according to the statutory elements of their previous convictions rather than the offender’s criminal conduct—reached a boiling point in *Mathis* and justified years of judges’ and academic commentators’ concerns that the categorical approach cannot be sustained from either a pragmatic or ideological standpoint.¹²⁹ It should come as no surprise that when the Court tries to spin legal fiction based on truth, its

127. *Id.* at 2257.

128. Kupfer, *supra* note 24, at 165 n.85 (quoting 156 CONG. REC. S10, 516–17 (daily ed. Dec. 17, 2010)).

129. See Evan Tsen Lee, *Mathis v. U.S. and the Future of the Categorical Approach*, 101 MINN. L. REV. HEADNOTES 263, 265 (2016), <http://www.minnesotalawreview.org/wp-content/uploads/2016/11/Lee-1.pdf> (stating that the concurrences and dissents in *Mathis* addressed “two leading normative arguments for abolishing the categorical approach, one pragmatic and the other ideological”).

ever-branching webs of doctrine would eventually become tangled in themselves.

A. The Categorical Approach Produces Bizarre and Unintended Results

Again and again, lower courts have lodged their grievances against the categorical approach, believing that it fosters “an air of make-believe”¹³⁰ and even going as far as saying that it “produces nonsensical results.”¹³¹ Judge Hand may have captured the problem best when commenting on a similar categorical approach in the immigration context, stating that when judges “may not consider the particular conduct for which the [criminal] has been convicted,” criminals who have committed serious offenses may avoid the intended punishment.¹³²

Judge Hand’s timeless realization rings true even today because the categorical approach continues to narrow the ACCA to the point that the very type of habitual offenders meant to be captured by the Act escape its punishment due to legal technicalities. In *Taylor*, the Court overturned the ACCA sentence of a criminal with a long criminal history that included robbery, assault, and two second-degree burglaries.¹³³ In *Shepard*, the Court overturned the ACCA sentence of a criminal who had “dozens of prior state convictions, including eleven for breaking and entering.”¹³⁴ In *Descamps*, the Court overturned the ACCA sentence of a criminal who had “five previous felony convictions,” which included “robbery, burglary, and felony harassment.”¹³⁵ In *Mathis*, the Court overturned the ACCA sentence of a criminal who had “five [previous] burglary convictions” in addition to a previous conviction for “interference with official acts inflicting serious injury.”¹³⁶ Thus, not only does the categorical approach go “against the grain” of our common-sense understanding of criminal justice,¹³⁷ but it also contravenes Congress’s intent to incapacitate habitual offenders.¹³⁸

130. *United States v. Shepard*, 348 F.3d 308, 311 (1st Cir. 2003), *rev’d*, 544 U.S. 16 (2005).

131. *United States v. Martinez-Cortez*, 988 F.2d 1408, 1418 (5th Cir. 1993) (Jolly, J., concurring).

132. *United States ex rel. Guarino v. Uhl*, 107 F.2d 399, 400 (2d Cir. 1939).

133. *Taylor v. United States*, 495 U.S. 575, 577 (1990).

134. *Shepard*, 348 F.3d at 309.

135. *United States v. Descamps*, 466 Fed. Appx. 563, 564 (9th Cir. 2012), *rev’d*, 133 S. Ct. 2276 (2013).

136. *United States v. Mathis*, 786 F.3d 1068, 1071, *rev’d*, 136 S. Ct. 2243 (2016).

137. *Lee*, *supra* note 21, at 23.

138. *See* Norah M. Roth, Comment, *It’s Not Rape-Rape: Statutory Rape Classification Under the Armed Career Criminal Act*, 85 ST. JOHN L. REV. 1653, 1668 (2014) (“It is . . .

Congress made clear at every step of the way that the ACCA was designed to thwart repeat offenders in order to protect society against the disproportionate amount of crime they commit.¹³⁹ The Court began to realize that its doctrine was veering off this path as early as *Shepard*, in which dissenting members of the Court criticized the categorical approach by stating that the majority's ruling made "little sense as a practical matter, and . . . will substantially frustrate Congress's scheme for punishing repeat violent offenders who violate federal gun laws."¹⁴⁰ This criticism was joined by many lower courts, which characterized the categorical approach as "counterfactual and counterintuitive because it [forbade] adjudicators from weighing factual allegations."¹⁴¹

In *Descamps*, Justice Kagan herself, the eventual author of the majority decision, stated during oral argument that finding for the criminal offender would be "a little bit insane."¹⁴² During the same oral argument, Justice Breyer noted that many criminals who committed violent crimes will escape their intended ACCA sentence based on a technicality of legal fiction.¹⁴³ Justice Kennedy noted in his concurrence that the Court's decision would disqualify "an unspecified number . . . of state criminal statutes that[, similar to California,] are indivisible but that often do reach serious crimes otherwise subject to the ACCA's provisions."¹⁴⁴ Justice

apparent that strict application of the law as it has evolved may not always serve the purposes of the ACCA.").

139. See S. REP. NO. 98-190, 98th Cong. at 7 (1984); see also 134 CONG. REC. S88493 (daily ed. June 23, 1988) (statement of Sen. Arlen Specter).

140. *Shepard v. United States*, 544 U.S. 13, 28 (2005) (O'Connor, J., dissenting).

141. See Koh, *supra* note 19, at 1834 n.185 (citing *Johnson v. United States*, 559 U.S. 133, 151 (2010) (Alito, J., dissenting)) (criticizing possible "untoward consequences" of the categorical approach under the Armed Career Criminal Act); *Tijani v. Holder*, 628 F.3d 1071, 1075 (9th Cir. 2010) (acknowledging the categorical approach's "[c]ounterfactual and counterintuitive" nature); *Latu v. Mukasey*, 547 F.3d 1070, 1076 (9th Cir. 2008) (O'Scannlain, J., dissenting) (critiquing the majority's "counter-intuitive holding" that a hit-and-run statute does not involve a crime involving moral turpitude); Mary Holper, *The New Moral Turpitude Test: Failing Chevron Step Zero*, 76 BROOK. L. REV. 1241, 1301 (2011) ("Some courts have questioned the [categorical] approach as unduly formulaic, as [it] requires the immigration judge to put on blinders as to what 'really happened.'" (citing *Montero-Ubri v. INS*, 229 F.3d 319, 321 (1st Cir. 2000); *United States v. Miller*, 478 F.3d 48, 52 (1st Cir. 2007))).

142. Mark Middaugh, Comment, *Debriefing Descamps: A Comment on Burglary and the Armed Career Criminal Act*, 67 STAN. L. REV. 723, 729 (2015) (quoting Transcript of Oral Argument at 21, *Descamps v. United States*, 133 S. Ct. 2276 (2013) (No. 11-9540)).

143. *Id.* (citing Transcript of Oral Argument, *supra* note 142, at 11).

144. *Descamps*, 133 S. Ct. at 2293-94 (Kennedy, J., concurring). Further scholarship picked up where Justice Kennedy left off and confirmed that six states—Arizona, California,

Breyer voiced a similar concern in his dissent in *Mathis*, finding that the Court's decision would disqualify several other state burglary statutes that were fashioned similarly to the Iowa statute at issue from ever serving as ACCA predicates.¹⁴⁵ Finally, Justice Alito took a slightly different tack when dissenting to the *Mathis* decision, lamenting that the Court's journey over the past twenty-five years had gone woefully off course.¹⁴⁶ Doubling down on his dissent in *Descamps*,¹⁴⁷ Justice Alito decried the Court's jurisprudence as a path "that has increasingly led to results that Congress could not have intended."¹⁴⁸

These unintended consequences, which see habitual offenders escaping punishment under the ACCA, are a result of the contrived categorical approach. The bizarre results that it produces are hard to grasp partially because the doctrine is not based in reality, but rather relies on the legal fiction that crimes are actually comprised of a set of elements, as opposed to the underlying criminal conduct. Thus, this competition between elements and means continues to be one of the most fundamental issues plaguing the ACCA.

B. In the Elements vs. Means Debate, Everybody Loses

"[T]he dichotomy between divisible and indivisible state criminal statutes is not all that clear."

– Justice Kennedy, concurring, *Descamps v. United States*

Idaho, Illinois, Nevada, and Rhode Island—had burglary statutes similar to California, thus disqualifying burglaries in these states as qualifying as ACCA predicates. See Middaugh, *supra* note 142, at 727-28 n.30-35.

145. *Mathis*, 136 S. Ct. at 2263–64 (Breyer, J., dissenting) (citing COLO. REV. STAT. §§ 18–4–101, 18–4–202, 18–4–203 (2015); MONT. CODE ANN. §§ 45–2–101, 45–6–201, 45–6–204 (2015); N.H. REV. STAT. ANN. § 635:1 (2015); N.D. CENT. CODE ANN. §§ 12.1–22–02, 12.1–22–06 (West 2012); OHIO REV. CODE ANN. §§ 2909.01, 2911.11–2911.13 (LexisNexis 2014); 18 PA. STAT. AND CONS. STAT. ANN. §§ 3501, 3502 (West 2015); S.D. CODIFIED LAWS §§ 22–1–2, 22–32–1, 22–32–3, 22–32–8 (2006); WYO. STAT. ANN. §§ 6–1–104, 6–3–301 (2015); MODEL PENAL CODE §§ 221.0, 221.1 (AM. LAW INST. 1980)); see also *id.* at 2268 (Alito, J., dissenting) ("[T]he Court arrives at today's decision, the upshot of which is that all burglary convictions in a great many States may be disqualified from counting as predicate offenses under ACCA.").

146. *Id.* at 2266–67 (Alito, J., dissenting) (likening the Court's doctrine to a woman's real life two-day journey that took her hundreds of miles off course because of her blind trust in a malfunctioning GPS device).

147. See *Descamps*, 133 S. Ct. at 2295–2303 (Alito, J., dissenting).

148. *Mathis*, 136 S. Ct. at 2268 (Alito, J., dissenting).

From the beginning, Congress sought to fashion the ACCA to prevent “the possibility that culpable offenders might escape punishment on a technicality” based on the “wide variation among states and localities.”¹⁴⁹ Congress failed, and the Court exacerbated the problem by ensuring that a single technicality would indeed let a large number of habitual offenders off the hook. As mentioned above, the elements-means dichotomy highlighted in *Descamps* and *Mathis* has successfully disqualified the burglary statutes of several states based on the legal fiction that these state burglary statutes do not adequately conform to the generic definition of burglary. Further, while the Court in *Mathis* claimed it was preventing “inconsistency and arbitrariness” from polluting its past ACCA precedent,¹⁵⁰ the decision succeeded in doing the opposite by calling *Taylor* and *Shepard*—both dealing with similar burglary statutes to the one at issue in *Mathis*—into question.

The root of this inconsistency is found in *Taylor* itself and the Court’s original conception of the modified categorical approach. *Taylor* stated that a burglary statute that criminalized “entry of an automobile as well as a building” was divisible because it presented alternative elements and instructed that sentencing courts use the modified categorical approach.¹⁵¹

This instruction in *Taylor*, however, was complicated by future decisions in *Schad v. Arizona*¹⁵² and *Richardson v. United States*,¹⁵³ which established a different definition of the term “elements.” *Schad* touched on the elements-means distinction, holding that “[a]lthough a defendant is entitled to a unanimous jury verdict on whether the criminal act charged has been committed, the defendant is not entitled to a unanimous verdict on the precise manner in which the act was committed.”¹⁵⁴ *Schad* also recognized that while state legislatures “frequently enumerate alternative means of committing a crime without intending to define separate elements or separate crimes,”¹⁵⁵ the jury need only return a unanimous verdict on each element of the charged crime.¹⁵⁶

Richardson further clarified that “a jury in a federal criminal case cannot convict unless it unanimously finds that the Government has proved each

149. S. REP. NO. 98-190, at 20 (2013).

150. *Mathis*, 136 S. Ct. at 2257.

151. *Taylor v. United States*, 495 U.S. 575, 602 (2013).

152. 501 U.S. 624 (1991).

153. 526 U.S. 813 (1999).

154. *Schad*, 501 U.S. at 629, 648 (citation omitted).

155. *Id.* at 636.

156. *Richardson*, 526 U.S. at 817.

element.”¹⁵⁷ Thus, *Richardson* affirmed *Schad*, and offered an example of a robbery statute in which “an element of robbery is force or the threat of force.”¹⁵⁸ As the example goes, some jurors might disagree whether

the defendant used a knife to create the threat; others might conclude he used a gun. But that disagreement—a disagreement about means—would not matter as long as all 12 jurors unanimously concluded that the Government had proved the necessary related element, namely, that the defendant had threatened force.¹⁵⁹

This delineation between elements—the essential features of a crime that the jury must unanimously agree upon to convict the defendant—and means—the underlying brute facts that make up a particular element—was so clear, even the dissent stood on “common ground” in regards to these definitions.¹⁶⁰

Unfortunately, when the Court picked up the ACCA issue again in *Shepard*, decided after both *Schad* and *Richardson*, it did not correct or update the elements-means doctrine previously espoused in *Taylor*. Instead, the Court doubled down on this stale precedent. In *Shepard*, which dealt with a statute that criminalized the burgling of multiple places such as buildings and automobiles, the Court found that the “divisible nature of the Massachusetts burglary statute” at issue “authorized sentencing courts to scrutinize a restricted set of materials” by implementing the modified categorical approach.¹⁶¹ This definition did little to clarify the elements-means distinction; nevertheless, the Court found that the modified categorical approach—which can only be used when a state statute presents an alternative set of *elements*—was appropriate to use for Massachusetts’s burglary statute. In *Descamps*, the Court confounded the problem yet again by offering an example that misused the term “elements”:

157. *Id.*

158. *Id.*

159. *Id.*

160. *See id.* at 828 (Kennedy, J., dissenting) (“We begin on common ground, for, as the Court acknowledges, it is settled that jurors need not agree on all of the means the accused used to commit an offense.”).

161. *Descamps v. United States*, 133 S. Ct. 2276, 2284 (2013) (describing the Court’s analysis in *Shepard*); *see also* *Nijhawan v. Holder*, 557 U.S. 29, 35 (2009) (characterizing the burglary statute at issue in *Shepard*, MASS. GEN. LAWS ch. 266 § 16, as being subject to the modified categorical approach).

[A]ssume . . . that a statute criminalizes assault with any of eight specified weapons; and suppose further . . . that only assault with a gun counts as an ACCA offense. A later sentencing court need only [use the modified categorical approach to] check the charging documents and instructions . . . to determine whether in convicting a defendant under that *divisible statute*, the jury necessarily found that he committed the ACCA-qualifying crime.¹⁶²

Justice Alito put his finger on the issue when he argued that the definition of the term “elements” in *Richardson* is incompatible with the Court’s use of the term in *Taylor* and *Shepard*.¹⁶³ Whereas the Court sought to adopt an elements-based approach, the examples given in *Taylor*, *Shepard*, and *Descamps* were not “elements” at all; rather, the Court was playing fast and loose with the precise legal definition of the term “elements” and had mistakenly listed different means.¹⁶⁴ Thus, Alito came to the logical conclusion that the Court must have meant something different than “elements” when discussing divisibility in the context of its examples in *Taylor*, *Shepard*, and *Descamps*.¹⁶⁵

In other words, the Court confirmed in *Taylor* and *Shepard* that statutes listing alternative places that can be burgled were divisible and listed alternative elements. *Descamps* also used an example stating that a hypothetical assault statute that listed alternative weapons was also divisible, concluding that it listed alternative elements.¹⁶⁶ Thus, *Mathis* went against this string of precedent when it stated for the first time that a statute was *not* divisible and did *not* list alternative elements when listing places that could be burgled. The dissent was right to express its disbelief in such a circumstance.

The striking similarities between *Taylor* and *Mathis* were not lost on Justice Breyer: *Taylor* also involved a defendant convicted under a state’s seemingly overbroad second-degree burglary statute that included places like tents, booths, and railroad cars in its definition of places that could be burgled.¹⁶⁷ In *Taylor*, the Court held that in such situations, the modified categorical approach could be utilized “to determine what the state

162. *Descamps*, 133 S. Ct. at 2290 (emphasis added).

163. *Id.* at 2295-96 (Alito, J., dissenting).

164. *Id.* at 2296.

165. *Id.* at 2297-98.

166. *See id.* at 2290 (majority opinion).

167. *Mathis v. United States*, 136 S. Ct. 2243, 2260 (2016) (Breyer, J., dissenting).

conviction was actually for: building, tent, or railroad car.”¹⁶⁸ Yet in *Mathis*, after twenty-five years of muddling, the majority came to the opposite conclusion and defined these things as *means*, holding that the modified categorical approach was *now* inappropriate for such statutes.¹⁶⁹

Justice Alito, in a separate dissent, stated that the practical application of the elements vs. means test should have served as a “warning bell” that suggested the Court had “made a wrong turn at some point.”¹⁷⁰ Justice Alito’s conclusion was clear: the Court should endeavor to fix the troubled doctrine by amending the categorical and modified categorical approach to allow “a sentencing court to take a look at the record in the earlier case to see if the place that was burglarized was a building or something else. If the record is lost or inconclusive, the court could refuse to count the conviction.”¹⁷¹ Even Justice Kennedy, who had joined the dissent in *Shepard*¹⁷² and issued a cautious concurrence in *Descamps*,¹⁷³ found himself candidly wondering if the Court needed to take a new course to fix the current ACCA doctrine that seemed so contrary to its intent.¹⁷⁴

The enduring elements vs. means issue is largely the root cause of many of the ACCA’s problems. Comparing elements of predicate crimes to the federal generic version of the crime not only taxes judicial economy because of the difficult application of the rule, but also requires federal judges to rely on state law, which produces inconsistent results due to the various differences in the criminal codes of the fifty states.

C. Uniformity and Fairness Suffers when Federal Punishment Is Based Upon the Inconsistencies Between States’ Laws

“[A]bsent plain indication to the contrary, federal laws are not to be construed so that their application is dependent on state law.”

-- *Taylor v. United States*, 495 U.S. 575,
591 (1990).

168. *Id.*

169. *Id.* at 2257 (majority opinion).

170. *Id.* at 2268 (Alito, J., dissenting).

171. *Id.* at 2269–70; *see also* Lee, *supra* note 129, at 269 (proposing a new rule that “in any case where it is ambiguous which portion of a statute generated the conviction in question, the conviction simply does not qualify”).

172. *Shepard v. United States*, 544 U.S. 13, 28 (2005) (O’Connor, J., dissenting).

173. *Descamps v. United States*, 133 S. Ct. 2276, 2293 (2013) (Kennedy, J., concurring).

174. *Mathis*, 136 S. Ct. at 2258 (Kennedy, J., concurring).

The categorical approach also manages to contravene legislative intent by ushering in a federal sentencing doctrine that is unevenly applied based upon the various differences between states' criminal codes. The legislative history clearly shows that Congress sought to create a sentencing enhancement that would punish habitual offenders equally, regardless of the jurisdiction in which they committed their predicate offenses. Instead, after a quarter-century of muddling, the Court in *Mathis* did exactly what *Taylor*¹⁷⁵ and *Descamps*¹⁷⁶ had warned against: it "parse[d] state law"¹⁷⁷ and relied upon the differing definitions and precedents of the Iowa courts to determine the application of a federal sentencing enhancement.

Once again, the root of this inconsistency can be traced back to *Taylor*, which presented a unique problem that the Court purported to solve, albeit through contradiction. While the Court acknowledged congressional intent to treat similar habitual offenders similarly based on "fundamental fairness,"¹⁷⁸ it nevertheless instituted an elements-based categorical approach which required the consideration of *state* burglary statutes. As the Court itself has admitted, substantial variation exists among the states' criminal codes because state supreme courts, not federal courts, have "substantial leeway in deciding what facts shall be essential elements of a statutory offense"¹⁷⁹ and "are the ultimate expositors of state law."¹⁸⁰ Thus, in one inconsistent opinion, Congress's ultimate intent was thrown to the wayside and state law has since been considered in the application of the ACCA.¹⁸¹

Ever since *Taylor*, state law has played a major role in applying the ACCA. In other words, the ACCA's application largely depends on how a state defines burglary and whether these state-law elements comported with the generic definition of burglary. *Descamps* doubled down on this logic to the derision of the dissent, which stated that "[t]he Court's holding will hamper the achievement of [Congress's] objectives by artificially limiting

175. *Taylor v. United States*, 495 U.S. 475, 590–91 (1990).

176. *Descamps*, 133 S. Ct. at 2285 n.2.

177. *Id.*

178. *Taylor*, 495 U.S. at 581–82.

179. Lee, *supra* note 21, at 64 (citing *Patterson v. New York*, 432 U.S. 197 (1977) (noting that states have discretion to allocate essential elements in relation to affirmative defenses)); *cf.* *McMillian v. Pennsylvania*, 477 U.S. 79 (1986) (discussing how the applicability of the reasonable-doubt standard is generally dependent on how state defines the offense in terms of essential elements).

180. Lee, *supra* note 21, at 64 (citing *Murdock v. City of Memphis*, 87 U.S. (20 Wall.) 590 (1874); *R.R. Comm'n of Texas v. Pullman*, 312 U.S. 496 (1941)).

181. See *supra* notes 44–49 and accompanying text.

[the] ACCA's reach and treating similar convictions differently based solely on the vagaries of state law."¹⁸² In *Mathis*, the Court's disregard for federal uniformity reached its height, disregarding *Taylor* and *Descamps* by directly relying on a state supreme court case to apply federal law.¹⁸³ Justice Kennedy's concurrence succinctly captured the problem in noting the "vast sentencing disparities for defendants convicted of identical criminal conduct in different jurisdictions."¹⁸⁴

As the Court has recognized in other contexts, "[b]ecause the application of federal legislation is nationwide . . . the federal program would be impaired if state law were to control."¹⁸⁵ These inconsistencies are not merely problematic because they contravene congressional intent; they also produce disproportionate sentences,¹⁸⁶ result in false positives in which non-violent non-habitual defendants are sentenced as "career criminals,"¹⁸⁷ and even reduce the deterrent effect of the ACCA.¹⁸⁸

Trying to come to grips with this inherent inconsistency, courts have in vain attempted to explain this reliance on state law by arguing that Congress was aware that such inconsistencies would arise but nevertheless forged ahead with the ACCA because federalism concerns outweighed these inconsistencies.¹⁸⁹ This logic, however, completely ignores actual congressional intent and basic tenets of federal interpretation of nationwide

182. *Descamps*, 133 S. Ct. at 2302 (Alito, J., dissenting).

183. *Mathis v. United States*, 136 S. Ct. 2243, 2257 (2016).

184. *Id.* at 2258 (Kennedy, J., concurring).

185. *Dickerson v. New Banner Inst., Inc.*, 460 U.S. 103, 119–120 (1983).

186. *See* *Lamprecht*, *supra* note 27, at 1408 (citing *Ewing v. California*, 538 U.S. 11, 19 (2003) (affirming a sentence of twenty-five-years-to-life imprisonment for theft of golf clubs)).

187. *Id.* (citing *United States v. Sperberg*, 432 F.3d 706 (7th Cir. 2005) (finding defendant to have a criminal "career" consisting of theft of lobster tails from a grocery store, verbal threat to a security guard, and convictions for drunk driving); *see also* Beverly G. Dyer, *Revising Criminal History: Model Sentencing Guidelines §§ 4.1-4.2*, 18 FED. SENT'G REP. 373, 376 (2006) ("[ACCA] has been used to sweep in far too many crimes that present a relatively remote risk of the use of physical force or physical injury.")).

188. *See* *Lamprecht*, *supra* note 27, at 1408 (citing Stephen R. Sady, *ACCA Lessons: The Armed Career Criminal Act-What's Wrong with "Three Strikes, You're Out"?*, 7 FED. SENT'G REP. 69, 70 (1994) ("The [ACCA] can strike like a lightning bolt, rather than serve as a rational deterrent.")).

189. *See* *United States v. Duval*, 496 F.3d 64, 83 (1st Cir. 2007) ("Congress implicitly accepted such inconsistencies in the application of the ACCA because it was concerned about federalism and wanted to preserve the state's role in defining, enforcing, and prosecuting essentially local crimes . . .").

statutory schemes, which provide uniformity in the midst of the different laws of the states and territories.¹⁹⁰

Allowing states dispositive influence over federal sentencing contravenes the intent of Congress and conflicts with basic notions of fairness and justice. Instead of punishing like offenders and offenses alike, habitual offenders under the ACCA can be punished differently based on where they grew up and where they committed their first crimes. The Court must address these problems and must start the difficult job of extricating ACCA doctrine from the deep, Court-created hole in which it currently sits.

*IV. Solving the Federal Problem with an Analysis of Approaches
Taken by the States*

The shortcomings of the categorical approach are legion, and many judicial and academic commentators have not only suggested a change in course,¹⁹¹ but also have devised various methods to fix the failing doctrine.¹⁹² This Article proposes a simple yet novel solution to fix the ACCA's problems: consider how the states deal with the same problem in their habitual-offender statutes. This may seem like an odd solution given that the previous section highlighted the problem of relying on state law, but this proposed solution is actually quite different in kind. Whereas the current ACCA doctrine is applied differently based on the state in which the defendant committed a predicate offense, this Article instead seeks to learn from how states apply their own habitual-offender laws uniformly when they encounter criminals who have committed predicate offenses in other jurisdictions. By learning from these states, the Court can employ one uniform application that is immune to the faults of the categorical approach.

Habitual-offender statutes exist in almost all fifty states,¹⁹³ which have been applying these criminal statutes since colonial times.¹⁹⁴ The states'

190. See Lamprecht, *supra* note 27, at 1430 n.124 (“One of the rationales for ACCA-type sanctions was the alleviation of the difficulties ‘encountered by Federal courts in applying State robbery and burglary laws in Federal prosecutions.’” (citing H.R. REP. NO. 98-1073, at 5 (1984))).

191. See *Mathis v. United States*, 136 S. Ct. 2243, 2258 (2016) (Kennedy, J., concurring); *id.* at 2262 (Breyer, J., dissenting); Lee, *supra* note 129, at 269.

192. Some commentators have suggested having a comprehensive list of all state crimes that qualify as “violent felonies” under the ACCA to clear up any potential confusion. See, e.g., Kupfer, *supra* note 24, at 154-55; Lee, *supra* note 21, at 7; Hayley A. Montgomery, Comment, *Remedying the Armed Career Criminal Act’s Ailing Residual Provision*, 33 SEATTLE U. L. REV. 715, 736 (2010).

193. See *Parke v. Raley*, 506 U.S. 20, 26 (1992).

194. See *supra* note 27 and accompanying text.

habitual-offender statutes come in all shapes and sizes, punish for different conduct, and impose different penalties for repeat offenders. One of the few things that the state laws have in common with the ACCA, however, is that they seek to punish repeat offenders who are a harm to society by counting felony convictions from other states toward the habitual-offender statutes' required number of predicate offenses.¹⁹⁵ One might even argue that the ACCA was inspired by these state laws, many of which were on the books long before the 1980s. Thus, in an era of cooperative federalism, ACCA doctrine has much to gain by considering different state approaches to determining whether felonies committed in other jurisdictions qualify as predicate offenses.

The federal government and the states have a long history of fashioning laws after one another. States fashion laws after successful federal statutes,¹⁹⁶ and the federal government has been known to do the same when vanguard states provide useful models that could further federal policy.¹⁹⁷ In other controversial public policy initiatives, the federal

195. The only exception may be Arkansas' habitual-offender statute, but there is split authority on this issue. An Eighth Circuit case, *Prichard v. Lockhart*, 990 F.2d 352 (8th Cir. 1993), suggests that Arkansas's habitual-offender statute may not count out-of-state convictions as predicates. "Under the plain language of [ARK. CODE ANN. §] 5-64-401(c), a defendant's previous out-of-state conviction is not a violation of 'this subsection' of the statute and therefore could not be used to increase Prichard's offense level under the statute." *Id.* at 354. But, the Arkansas Supreme Court's own interpretation has included out-of-state convictions under its habitual offender laws. See *Green v. State*, 852 S.W.2d 110,113 (Ark. Ct. App. 1993) (finding that convictions from other states can be used to increase sentences under habitual-offender laws); *McGirt v. State*, 708 S.W.2d 620, 622 (Ark. 1986) (finding similarly to *Green*).

196. See, e.g., *Mendoza v. Town of Ross*, 27 Cal. Rptr. 3d 352, 459 (Ct. App. 2005) (relying on federal law interpreting Title VII of the Civil Rights Act of 1964 in order to interpret California's own Fair Employment and Housing Act because "the antidiscrimination objectives and relevant wording of title VII . . . [and other federal antidiscrimination statutes] are similar to those of the FEHA").

197. See, e.g., 140 CONG. REC. No. 1905 (1994) (statement of Rep. Myron Kreideler) ("I'm glad we are enacting in Federal law the principle Washington State voters approved last year by a 3 to 1 majority: Anyone who commits three violent felonies, anywhere, gets locked up for good."); Nick Glass, *Romney: Without Romneycare, No Obamacare*, POLITICO (Oct. 23, 2015, 3:13 P.M.), <http://www.politico.com/story/2015/10/mitt-romney-romneycare-obamacare-boston-globe-215112> (detailing how former Massachusetts Governor Mitt Romney's state-based medical coverage plan paved the way for the larger federal health coverage plan).

government has taken a conservative wait-and-see approach, content to study the results from state experiments.¹⁹⁸

Federal courts have also relied upon state court interpretations to assist deciphering complex federal legislative schemes. For example, when defining what constituted “elements” in *Richardson*, the Court was informed by various state laws that did not require juror unanimity on underlying criminal acts.¹⁹⁹ The dissent too relied upon state court precedent to argue for a certain interpretation, since these state criminal statutes “provide an analog” to the federal statute at issue in that case.²⁰⁰ In *Nijhawan v. Holder*,²⁰¹ the Court conducted what amounted to a nearly fifty-state survey to inform its interpretation of a federal criminal sentencing statute.²⁰² The Court subsequently based its interpretation of the

198. See, e.g., Beau Kilmer, *The Legal Marijuana Middle Ground: Column*, USA TODAY (Nov. 30, 2016, 6:00 A.M.), <https://www.usatoday.com/story/opinion/2016/11/30/marijuana-legalize-states-medical-recreational-column/94553192/> (recognizing that “[s]tates are the laboratories of democracy, so let them experiment” and postulating on different models that would allow the federal government to legalize the states’ regulation of marijuana).

199. *Richardson v. United States*, 526 U.S. 813, 821 (1999) (ultimately disagreeing with state statutes, in part, because jury unanimity was not a constitutional requirement in these states) (citing *People v. Gear*, 23 Cal. Rptr. 2d 261, 263–66 (Ct. App. 1993) (regarding crime for continuous sexual abuse of a child); *People v. Reynolds*, 689 N.E. 2d 375, 343–44 (Ill. App. Ct. 1997) (regarding criminal sexual assault of a minor and aggravated sexual abuse of a minor); *State v. Spigarolo*, 556 A.2d 112, 127–29 (Conn. App. Ct. 1989) (regarding crime for committing an act likely to impair the health or morals of a child); *Soper v. State*, 731 P.2d 587, 592 (Alaska Ct. App. 1987) (regarding crime for sexual assault in the first degree)).

200. *Id.* at 833 (Kennedy, J., dissenting) (citing *People v. Adames*, 62 Cal Rptr. 2d 631 (Ct. App. 1997) (regarding crime of continuous sexual abuse of a child)); *People v. Reynolds*, 689 N.E. 2d 335 (Ill. App. Ct. 1997) (regarding criminal sexual assault and aggravated sexual abuse of a minor); *State v. Molitor*, 565 N.W. 2d 248 (Wis. Ct. App. 1997) (regarding crime of repeated sexual intercourse with underage partner); *State v. Doogan*, 917 P.2d 155 (Wash. Ct. App. 1996) (regarding crime of advancing prostitution and profiting from prostitution)).

201. 557 U.S. 29 (2009).

202. *Id.* at 40. Attempting to interpret Congress’s intent regarding the monetary threshold for certain acts of fraud and deceit, the Court found that

29 States had no major fraud or deceit statute with any relevant monetary threshold. In 13 of the remaining 21 States, fraud and deceit statutes contain relevant monetary thresholds but with amounts significantly higher than \$10,000, leaving only 8 States with statutes in respect to which subparagraph (M)(i)’s \$10,000 threshold, as categorically interpreted, would have full effect.

Id.

federal statute on its findings from the states.²⁰³ *Taylor* itself, the root of the problem, attempted to rely on state laws to employ one uniform definition for generic burglary. The Court reasoned that what “Congress meant by ‘burglary’” in the ACCA was “the generic sense in which the term is now used in the criminal codes of most States.”²⁰⁴ Thus, this methodology—which asks federal courts to glean from the wisdom of state courts that address similar problems—has many sources of precedent.

Among the many types of different state habitual-offender statutes this Article considers, “three strikes” laws are particularly interesting.²⁰⁵ While the state and federal versions of the three strikes law vary in significant ways from the ACCA,²⁰⁶ there are similarities in both intent and

203. *Id.* (“We do not believe Congress would have intended (M)(i) to apply in so limited and so haphazard a manner.”); *see also* *United States v. Hayes*, 555 U.S. 415, 427–28 (2009). In *Hayes* the Court undertook a similar state survey to interpret a federal *domestic* violence statute, finding that

only about one-third of the States had criminal statutes that specifically proscribed domestic violence. . . . Given the paucity of state and federal statutes targeting domestic violence, we find it highly improbable that Congress meant to extend § 922(g)(9)’s firearm possession ban only to the relatively few domestic abusers prosecuted under laws rendering a domestic relationship an element of the offense.

Id.

204. *Taylor v. United States*, 495 U.S. 575, 598 (1990) (citing *Perrin v. United States*, 444 U.S. 37, 45 (1979) (using state law to define the bounds for the undefined term “bribery” in 18 U.S.C. § 1952 (1976)); *United States v. Nardello*, 393 U.S. 286, 289 (1969) (using state law to define the bounds of the undefined term “extortion” in 18 U.S.C. § 1952 (1976)).

205. This Article does not take a position on the efficacy of three strikes laws, which has been explored in great depth by criminologist scholars and practitioners. Compare Walter L. Gordon III, *California’s Three Strikes Law: Tyranny of the Majority*, 20 WHITTIER L. REV. 577, 580 (1999) (arguing that empirical data shows that California’s Three Strikes law has been ineffective because the decline in crime after passage of these laws corresponds with an already declining crime rate), with Bill Jones, *Why the Three Strikes Law Is Working in California*, 11 STAN. L. & POL’Y REV. 23 (1999) (arguing that the empirical data on the California Three Strikes law shows that it is working by lowering the crime rate). Rather, three strikes laws are merely one source to which the federal courts can look to find a uniform rule to ensure that habitual offenders are punished equally regardless of which jurisdiction they committed their predicate criminal acts.

It is outside the scope of this Article to comment on the moral or philosophical strengths and weaknesses of mandatory minimum life sentences, or even the efficacy of these sentencing schemes. Instead, this Article focuses on statutory interpretation and practical application of the ACCA and other statute habitual-offender statutes.

206. For example, three strikes laws often require mandatory life imprisonment upon conviction of a serious felony, usually one that includes violence. *See, e.g.*, 18 U.S.C.

draftsmanship that make a comparison relevant. Both, for example, are recidivist statutes premised on the public policy that a small number of criminals commit a stunning amount of the crime in society.²⁰⁷ Both are triggered when the defendant has committed a certain number of qualifying crimes.²⁰⁸ Most importantly, both consider qualifying crimes from other sovereigns as predicates to enhanced sentences.²⁰⁹ Thus, it can be argued that the “terms and penalties of the ACCA” served as “a prelude to the increasingly popular ‘three strikes’ legislation”²¹⁰ that swept the country in the mid-1990s. It could even be argued that the straightforward drafting of the federal three strikes statute—the statutory language of which has never required Supreme Court interpretation²¹¹—was a result of Congress’s hard-learned lessons from the draftsmanship failure of the ACCA nearly a decade before.²¹²

§ 3559(c) (2012). See generally Thomas W. Hillier, *Comparing Three Strikes and the ACCA—Lessons to Learn*, 7 FED. SENT’G REP. 78 (1995). In addition, due to the potential punishment, most three strikes laws drastically limit the number and types of crimes that can count as “strikes.” *Id.*

207. See *supra* note 30 and accompanying text; 140 CONG. REC. No. 34 (1994), <https://www.gpo.gov/fdsys/pkg/CREC-1994-03-23/html/CREC-1994-03-23-pt1-PgH36.htm> (statement of Rep. Myron Kreidler) (expressing his happiness that Congress was adopting a federal “three strikes” provision through the Violent Crime Control and Law Enforcement Act of 1994 because “[t]hat’s how to protect society from the small group of criminals who do the most harm, over and over again.”); Ilene M. Shinbein, Comment, “*Three-Strikes and You’re Out*”: A Good Political Slogan to Reduce Crime, but a Failure in Its Application, 22 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 175, 189 (1996) (“Senator Trent Lott, sponsor of the federal crime bill, noted in support of the ‘three-strikes’ measure that only 6 percent of all violent offenders commit 70 percent of all violent crimes and that 76 percent of those with three or more incarcerations tend to commit crimes again when they get out of prison.”).

208. Compare 18 U.S.C. § 924(e)(1) (2012), with 18 U.S.C. § 3559(c)(1)(A) (2012), and CAL. PENAL CODE § 667(e)(2)(A) (2012).

209. Compare 18 U.S.C. §§ 924(e)(2)(A)(ii), (e)(2)(B), with 18 U.S.C. §§ 3559(c)(1)(A), (c)(2), and CAL. PENAL CODE § 667(a)(1).

210. See Hillier, *supra* note 206, at 78.

211. *Torres v. Lynch*, 136 S. Ct. 1619, 1640 (2016) (recognizing that the Court has never “construed the [Three Strikes federal] statute”).

212. The ACCA was originally passed in 1984. See Comprehensive Crime Control Act of 1984, Pub. L. No. 98-473, 98 Stat. 1976 (codified as 18 U.S.C. § 924 (e) (2012)). The three strikes laws were passed all within a few years of each other starting with Washington in 1993, and ending with Indiana in 1996. See Ronald F. Wright, *Three Strikes Legislation and Sentencing Commission Objectives*, 20 LAW & POL’Y 429, 444–47 tbl. 2 (1998) (listing all jurisdictions that enacted three strikes laws and their dates of passage); see also Nolan E. Jones, *Three Strikes and You’re Out: A Symbolic Crime Policy?*, in CRIME CONTROL AND SOCIAL JUSTICE: THE DELICATE BALANCE 53, 56 (Darnell F. Hawkins et al. eds., Greenwood

By studying and categorizing the way that states deal with the problem of applying their own habitual-offender laws to criminals who have committed offenses in other jurisdictions, the federal courts stand to learn and, as a result, may be able to fashion an appropriate substitute for the failing categorical approach.

*V. When in Rhode Island: Analysis of State Approaches
to Predicate Crimes*

The states have taken several different approaches to determining which prior crimes should count toward sentencing a criminal as a habitual offender. These variations stem from the fact that each state enjoys sovereignty to dictate its own system of criminal laws and procedures, as long as these laws do not violate the federal Constitution.²¹³ While these variations differ as to form, structure, and even what crimes can serve as predicates,²¹⁴ there are still many common lessons that the federal courts can glean.

A. Developing an Exhaustive List of Predicate Offenses

Like the ACCA, most states specifically list crimes, or classes of crimes, that qualify as predicates for habitual-offender sentencing enhancement. The states have taken the time, however, to specify and define these enumerated crimes to ensure minimal judicial confusion when applied.

For example, states like Alabama categorize crimes in terms of their level of offense.²¹⁵ Alabama determines predicate offenses and the habitual-sentencing enhancements they garner based on Class A, B, and C felonies. Thus, in Alabama, when a habitual offender is convicted of a Class A felony, but already has, say, a Class C felony on his or her record, “he or she must be punished by imprisonment for life or for any term of not more than 99 years but not less than 15 years.”²¹⁶ The punishments range on a sliding scale based on the class of the current conviction and the class of the

Press 2003) (“Between 1993 and 1995, some twenty-four states and the federal government enacted laws around the style of ‘three strikes.’”).

213. See *supra* notes 179–180 and accompanying text.

214. See, e.g., Thomas B. Marvell & Carlisle E. Moody, *The Lethal Effects of Three-Strikes Laws*, 30 J. LEGAL STUD. 89, 101–02 (2001) (highlighting the differences between the three strikes laws in California, Georgia, Louisiana, Maryland, North Dakota, South Carolina, Connecticut, Florida, Indiana, Kansas, Nevada, North Carolina, Vermont, and Utah).

215. ALA. CODE § 13A-5-9 (2015).

216. *Id.* § 13A-5-9 (a)(3).

previous conviction(s), with Class A being the most serious and Class C being the least serious.²¹⁷ Other states, such as New Jersey and Hawaii, also take a similar approach.²¹⁸

Just under half the states are even more specific and list distinct felony crimes that serve as predicates; these habitual-offender statutes also cross-reference the definitions of these enumerated crimes by citing the definitions from states' respective criminal codes. Montana, for example, lists crimes such as homicide, aggravated kidnapping, aggravated assault, robbery, and sex crimes in its three strikes statute, all while citing the criminal code statute that defines these crimes.²¹⁹ Such an approach cuts down on any potential confusion as to which crimes the habitual-offender statute refers. Under such an approach, a sentencing judge would need only look to an offender's prior criminal record to see if any of his or her prior crimes matched with the exhaustive list of predicate offenses outlined in the statute.²²⁰

The advantages of this approach are obvious—federal judges would be relieved of the confusing task of determining divisibility and parsing state law, and would instead need only refer to an exhaustive list of predicate state law offenses qualifying as ACCA predicates. In the context of the *Taylor-Mathis* divide, this inventoried list of predicate crimes would enumerate each and every burglary offense from each jurisdiction that

217. *Id.* § 13A-5-9(a)–(c).

218. See ARK. CODE ANN. § 5-4-501 (2015); COLO. REV. STAT. § 18-1.3-801 (2017); HAW. REV. STAT. § 706-606.5 (2016); IND. CODE ANN. § 35-50-2-8 (West 2017); IOWA CODE § 902.8 (1976); KY. REV. STAT. ANN. § 532.080(6)–(7) (West 1974); MO. ANN. STAT. § 558.016 (West 2017); N.J. STAT. ANN. § 2C:43-7.1 (West 2003); N.Y. PENAL LAW § 70.10 (McKinney 2007); TENN. CODE ANN. § 40-35-106 (2010).

219. MONT. CODE ANN. § 46-18-219 (2015).

220. Over twenty states have structured their habitual-offender statutes under such a model to remove confusion and ensure that those meant to be sentenced as habitual offenders do not escape just desserts through a legal technicality. See ARIZ. REV. STAT. ANN. §§ 13-105, 13-701 (2015); CAL. PENAL CODE §§ 667, 1192.7(c)(1) (West 2012); CONN. GEN. STAT. § 53a-40 (2015); D.C. CODE ANN. §§ 22-1804a, 23-1331(4) (West 2013); FLA. STAT. ANN. § 775.084 (West 2016); HAW. REV. STAT. § 706-606.5(1)(a)–(ee) (2016); MD. CODE ANN. CRIM. LAW § 14-101 (West 2017); MASS. GEN. LAWS ANN. 279 § 25 (West 2012); MICH. COMP. LAWS § 769.12(6) (2012); MINN. STAT. § 609.1095 (2014); MISS. CODE ANN. §§ 99-19-83, 97-3-2 (2014); NEB. REV. STAT. § 29-2221 (2006); NEV. REV. STAT. § 207.012 (2014); N.H. REV. STAT. ANN. § 651:6 (2013); N.M. STAT. ANN. § 31-18-23 (2004); N.D. CENT. CODE § 12.1-32-09.1 (2017); 42 PA CONS. STAT. § 9714(g) (2012); S.D. CODIFIED LAWS §§ 22-7-8.1, 22-1-2(9) (2006); TENN. CODE ANN. § 40-35-120 (1995); TEX. PENAL CODE ANN. § 12.42 (West 2015); UTAH CODE ANN. § 76-3-203.5 (West 2013); VA. CODE ANN. § 19.2-297.1 (2000); W.VA. CODE § 61-11-18(b) (2000); WIS. STAT. § 939.62 (2016).

qualified as a predicate. Practically, federal judges would only need to confirm that the defendant was convicted of a particular statute from a particular state, and the job would be done. Applying this approach would be even simpler in a majority of cases in which habitual offenders concede their past convictions. The benefits of this listing approach are many and have been recognized by jurists and commentators alike as a way to simplify the Act's application.²²¹

While the practical application of a listing approach has appeal, one of the primary problems with such an approach is the extensive research into the voluminous criminal codes of all the states and other jurisdictions that would be required to compile an exhaustive list. Such a herculean task would cost tremendous amounts of time and resources. Such a task could be completed, however, under the familiar committee approach we have seen in other large judicial endeavors. Committees of judges, academics, and policy makers have come together before to gift the legal community with accomplishments such as the Rules of Civil,²²² Criminal,²²³ and Appellate Procedure,²²⁴ and the comprehensive Sentencing Guidelines.²²⁵ Still today,

221. See, e.g., *Chambers v. United States*, 555 U.S. 122, 134 (Alito, J., concurring) (“[T]he only tenable, long-term solution is for Congress to formulate a specific list of expressly defined crimes that are deemed to be worthy of ACCA’s sentencing enhancement.”), *abrogated by Johnson v. United States*, 135 S. Ct. 2551 (2015); Lee, *supra* note 21, at 7–8; Kupfer, *supra* note 24, at 155; Montgomery, *supra* note 192, at 736.

222. The Federal Rules of Civil Procedure were created and maintained through a joint effort of the Supreme Court, the House Committee on the Judiciary, and a Committee on Rules and Practice and Procedure, the Advisory Committee on the Federal Rules of Civil Procedure, and the Judicial Conference of the United States. See Bob Goodlatte, *Foreword to FEDERAL RULES OF CIVIL PROCEDURE* iii (2011).

223. The Federal Rules of Criminal Procedure are very similar in terms of origin and maintenance to the Federal Rules of Civil Procedure. The Rules were created and are maintained through a joint effort of the Supreme Court, the House Committee on the Judiciary, and a Committee on Rules and Practice and Procedure, the Advisory Committee on the Federal Rules of Criminal Procedure, and the Judicial Conference of the United States. See *id.*

224. The Federal Rules of Appellate Procedure are again very similar in terms of origin and maintenance to the Federal Rules of Civil Procedure. The Rules were created and are maintained through a joint effort of the Supreme Court, the House Committee on the Judiciary, and a Committee on Rules and Practice and Procedure, the Advisory Committee on the Federal Rules of Appellate Procedure, and the Judicial Conference of the United States. See *id.*

225. The United States Sentencing Commission, “an independent agency in the judicial branch composed of seven voting and two non-voting, ex officio members,” compiles the United States Sentencing Guidelines and submits amendments every year. U.S. SENTENCING GUIDELINES MANUAL ch. 1 pt. A (U.S. SENTENCING COMM’N 2016).

committees continue to work perennially to update these large bodies of work as they see fit. What distinguishes large-scale projects like the Codes of Procedure and the suggested inventoried list of ACCA predicates is scope. While the former is used and referred to by millions in the legal community, the ACCA does not have that kind of reach. Thus, the judicial community may not view the use of the committee system to create a list of ACCA predicates as a benefit commensurate with the needs of the judicial system. Nevertheless, given the sum of judicial resources being spent on ACCA litigation,²²⁶ it is quite possible that the resources saved by the judiciary and the value of a much-needed clarification for practitioners would outweigh the costs of such a committee.

The time and resources necessary to complete this task, however, may not be as problematic as the potential political fallout if Congress were to get such a comprehensive list wrong. Congress might be wary of compiling such a list because they may be blamed by the public when habitual offenders slip through the cracks as a result of the non-inclusion of various predicate felonies on the so-called exhaustive list.²²⁷ While lists are often a source of easy application, they are also a source of potential problems if the list is not exhaustive enough. Thus, laws like the ACCA that enumerate crimes usually leave the heavy lifting (and potential blame) to the courts to determine if an unenumerated crime is enough like the enumerated crimes to be encompassed by the Act. Unfortunately, it was this discretion of the courts that has gotten us into this current predicament in the first place, evidence that a new, exhaustive list approach may be worth the resources required to bring it about.

B. Proving Predicate Offenses by Looking at the Punishment and Classification of the Convicting State

The most widespread approach among the states offers yet another simple solution: determining predicate felonies based solely on the punishment they garner in the state of conviction. While this straightforward approach has appeal due to its elementary nature and ease of application, it is unlikely to be a solution for the federal courts because, like the categorical approach, this solution would mandate that federal courts rely heavily on state law to apply the ACCA.

226. See *supra* notes 22-23 and accompanying text.

227. Lee, *supra* note 21, at 8 (“Probably the biggest obstacle to the inventory approach, however, is political. For Congress to create such exhaustive lists is for Congress to invite blame when individual recidivists fall through the cracks.”).

Arizona, along with states like Hawaii and Oregon, follows this approach,²²⁸ determining predicates in part by determining whether the crime “was punishable by [the other] jurisdiction as a felony.”²²⁹ Mississippi has gone even further by explicitly stating that the “plain language” of its habitual-offender statute “does not require that the prior convictions must also be felonies in Mississippi; rather, they must be felonies in the state where the conviction occurred.”²³⁰ Thus, these habitual-offender statutes truly give full faith and credit to the laws of other states, at times counting predicate felonies from these convicting states that may not be classified as felonies in the current forum.

Massachusetts’s doctrine differs slightly because it determines predicate felonies based partly on the actual sentence and partly on time served in prison for the predicate offense.²³¹ Kentucky employs a similar approach, requiring that predicate felony convictions be “accompanied by a sentence of imprisonment for one year.”²³² These habitual-offender statutes not only refer to the *potential* punishment of predicate crimes in other jurisdictions; instead, these statutes also rely on the *actual* punishment that was meted out by the convicting state.²³³ In other words, these states place more importance on the actual *punishment* that an offender received for his prior crime as opposed to whether the prior crime was merely *punishable* as a

228. HAW. REV. STAT. § 706-606.5 (2016); OR. REV. STAT. § 161.725(2)(c) (2008); *see also* ARK. CODE ANN. §§ 5-4-501 (2017), 5-4-503 (1977); N.M. STAT. ANN. § 31-18-17(d)(2)(c) (2003); N.D. CENT. CODE § 12.1-32-09.1.c (2017); *Iowa v. Gillison*, 766 N.W.2d 649 (Iowa Ct. App. 2009).

229. ARIZ. REV. STAT. ANN. § 13-105(e) (2015).

230. *Logan v. State*, 2012-KA-01963-COA, 192 So. 3d 1012, 1021 (Miss. Ct. App. 2015) (finding that Kentucky conviction qualified as predicate offense because it was considered a felony in that jurisdiction); *see also* *State v. Allen*, 2001 MT 266, ¶ 20, 37 P.3d 655, 659 (Mont. 2001) (finding that prior California crime could serve as predicate offense because of its status as a felony as defined by the California Code); *Gunderson v. State*, 925 P.2d 1300, 1305 (Wyo. 1996) (“The fact that the previous convictions were felonies in the rendering states but may not have been felonies in Wyoming is immaterial. The convictions were still felony convictions.”).

231. MASS. GEN. LAWS ANN. ch. 279, § 25(a) (West 2012) (In 2012, Massachusetts amended its habitual-offender statute to apply to predicate offenses in other jurisdictions in which the defendant was “sentenced to state prison or state correctional facility . . . for a term not less than 3 years by . . . another state, or the United States.”).

232. KY. REV. STAT. ANN. § 532.080 (commentary) (West 2012).

233. *See also* *State v. King*, 724 N.W. 2d 80, 84 (Neb. 2006) (finding that the state must show, among other things, that the offender was “sentenced and committed to prison for not less than 1 year” for a crime from another jurisdiction to qualify as a predicate); *State v. Russo*, 62 A.3d 798, 808 (N.H. 2013) (finding similarly to *King*).

felony. Perhaps the logic behind such a distinction is based on a premise that those who are actually sentenced to over a year in prison (as opposed to those who *could have* been sentenced to such a term, but were not) are the hardened criminals who actually deserved such a sentence.

The states justify this punishment approach as a way to “achieve a uniform standard for grading foreign convictions.”²³⁴ While this approach indeed establishes a uniform application, it threatens fundamental fairness by treating offenders differently based on the differences in state criminal codes. Thus, two offenders who committed the same crime in two different states, say California and Arizona, could be treated differently if they were to go on to each commit a felony in Nevada. If the Nevada courts used the punishment approach, the California offender may be sentenced under Nevada’s habitual-offender statute because California treated the prior offense as a felony; in contrast, the Arizona offender would not receive the harsher sentence of the habitual-offender statute because the same conduct committed in Arizona was not considered a felony by Arizona law.

Much like the current ACCA doctrine, federal judges would find themselves parsing state law²³⁵ and basing their determinations of predicate felonies on the different ways the fifty states utilize their police powers in their respective criminal codes. This is exactly the type of disparate treatment based on state law variances that the current categorical approach suffers from and that federal lawmakers sought to avoid when they crafted the ACCA.²³⁶

C. Determining Predicate Offenses with a Conduct-Based Approach

While the listing- and punishment-based approaches are both problematic, a promising paradigm shift may be found in a conduct-based approach. Such an approach—as opposed to the current elements-based categorical approach—would greatly simplify current ACCA doctrine. Several states successfully rely on a conduct-based approach, which considers the criminal conduct of habitual offenders’ past crimes when determining if the past crimes should count as predicates.

In Michigan, for example, a court was tasked with deciding whether an offender’s prior conviction for aggravated assault in Ohio should be counted as a predicate under Michigan’s habitual-offender statute.²³⁷ Rather than trudging through a comparison of the elements of the offenses, the

234. HAW. REV. STAT. ANN. § 706-655 (commentary) (West 1986).

235. *See supra* notes 175–177 and accompanying text.

236. *See supra* note 49 and accompanying text.

237. *People v. Quintanilla*, 571 N.W.2d 228, 288 (Mich. Ct. App. 1997).

court held that “the facts of the out-of-state crime, rather than the words or title of the out-of-state statute under which the conviction arose, are determinative.”²³⁸ Alabama courts have echoed this logic, holding that “[i]n determining whether an out-of-state conviction will be used to enhance punishment pursuant to the [habitual-offender statute], the conduct upon which the foreign conviction is based must be considered and not the foreign jurisdiction’s treatment of that conduct.”²³⁹ Thus, Alabama courts bypass an examination of the similar elements of the out-of-state crime and the generic or Alabama parallel offense and look instead to the conduct. In other words, if the conduct in the other state would have been a predicate offense if committed in the sentencing state, the out-of-state conviction counts as a predicate.

Several other states have followed suit. Indiana, for example, analyzes “out-of-state convictions as if they had been committed in Indiana.”²⁴⁰ Thus, in cases like *Lampitok v. State*,²⁴¹ the court examined the offender’s conduct in a prior Illinois conviction for “delivery of a controlled substance and criminal drug conspiracy,” and found that, under Indiana law, the conduct did not constitute any of the predicate offenses listed in Indiana’s habitual-offender statute.²⁴² Delaware²⁴³ and the District of Columbia²⁴⁴ have also hinted at examining conduct, as opposed to elements, to determine whether out-of-state convictions should be considered predicate offenses under their respective habitual-offender statutes.

Louisiana goes even further—its habitual-offender statute memorializes the understanding that out-of-state crimes can serve as predicates for Louisiana’s habitual-offender statute if the crime, “if committed in this

238. *Id.*

239. *Skinner v. State*, 987 So. 2d 1172, 1175 (Ala. Crim. App. 2006) (quoting *Daniels v. State*, 621 So. 2d 335, 342 (Ala. Crim. App. 1992)).

240. *Weiss v. State*, 903 N.E.2d 557, 561 (Ind. Ct. App. 2009).

241. 817 N.E.2d 630 (Ind. Ct. App. 2004).

242. *Id.* at 644.

243. Delaware considers the underlying conduct of out-of-state convictions if there is ambiguous language in the out-of-state law. *See, e.g.*, *Sammons v. State*, 68 A.3d 192, 195-96 (Del. 2013); *Hall v. Delaware*, 788 A.2d 118, 128 (Del. 2001) (“Delaware courts have said that in order to qualify as a predicate offense, the conduct leading to an out-of-state judgment must be such that it would have supported a conviction for the appropriate predicate offense in Delaware.”).

244. *See Brake v. United States*, 494 A.2d 646, 650 (1985) (“We hold that, as to the assault and sodomy crimes at issue here, the phrase “‘necessarily includes’ may be construed by reference to the facts of the previous crime, not merely to the statutory elements of that crime.”).

State would be a felony.”²⁴⁵ Following this statutory instruction, a Louisiana court looked to an offender’s conduct in *State v. Grimes* to find the offender “fired six shots at a uniformed Alabama State Trooper,”²⁴⁶ and “[i]n connection with that Alabama offense, defendant pled guilty to the attempted murder of a police officer which is a felony in Louisiana.”²⁴⁷

Georgia, however, has gone the furthest, suggesting that merely analyzing the elements of a prior offense is not enough. In *Lewis v. State*, the court examined a prior Tennessee conviction for aggravated assault, but found that merely examining the elements of that crime did not suffice because “[i]t is possible that Lewis was convicted under this provision, and this conduct may not constitute a felony in Georgia.”²⁴⁸ Accordingly, the defendant’s habitual-offender sentence was overturned and the matter was remanded to the sentencing court to either find information regarding the underlying conduct of the Tennessee conviction or resentence the offender without applying the habitual-offender statute.²⁴⁹

California, along with states like Pennsylvania²⁵⁰ and Washington,²⁵¹ have adopted somewhat of a hybrid approach that considers the underlying

245. LA. STAT. ANN. § 15:529.1(a) (2010).

246. 16 So. 3d 418, 427 (La. Ct. App. 2009); *see also* *State v. Uloho*, 875 So. 2d 918, 928–29 (La. Ct. App. 2004) (“For a conviction from another state to serve as a predicate felony for purposes for enhancement, the conviction must be for a ‘crime which, if committed in this state would be a felony’”) (alteration in original) (quoting LA. STAT. ANN. § 15:529.1(a)(1) (2010)).

247. *Grimes*, 16 So. 3d at 427.

248. 587 S.E.2d 245, 246–47 (Ga. Ct. App. 2003); *see also* *Walker v. Hale*, 657 S.E.2d 227, 230 (Ga. 2008) (“Although the language of the indictment does not directly track the language found in Georgia’s murder statute, OCGA § 16-5-1, it is sufficient to show that the same offense, if committed in this State, would constitute a serious violent felony as defined in OCGA § 17-10-6.1(a).”); *Smith v. State*, 527 S.E.2d 609, 609 (Ga. Ct. App. 2000) (finding that Florida indictment was “sufficient to prove that defendant was convicted of two offenses in Florida which would have each been the serious violent felony of armed robbery had the offenses been committed in Georgia”).

249. *Lewis*, 587 S.E.2d at 246–47.

250. *See Commonwealth v. Spenny*, 128 A.3d 234, 250 (Pa. Super. Ct. 2015) (looking to “facts underlying the prior conviction” once the court compares the elements of the two crimes “for grading purposes”).

251. *See In re Pers. Restraint of Lavery*, 111 P.3d 837, 841 (Wash. 2005) (looking first to whether the “elements of the Washington crime and the foreign crime” are substantially similar, then looking “at the defendant’s conduct, as evidenced by the indictment or information, to determine if the conduct itself would have violated a comparable Washington statute”). West Virginia follows a similar procedure. *See State v. Hulbert*, 544 S.E.2d 919, 926 (W. Va. 2001) (“Given these statutory variances, the factual predicates upon which the convictions in Michigan rested must be shown in order to bring the Michigan

facts of an offender's past convictions along with the elements of the crime. In *People v. McGee*,²⁵² the California Supreme Court articulated that, in order for an out-of-state offense to qualify as a predicate crime, it "must involve conduct that would qualify as a serious felony in California."²⁵³ Accordingly, courts are allowed to examine the entire record "to determine the nature or basis of the crime of which the defendant was convicted."²⁵⁴

The California Supreme Court also rejected a strictly elements-based approach in *People v. Avery*.²⁵⁵ In a case that is particularly applicable to the *Taylor-Mathis* jurisprudence, the California court had to decide whether a defendant's prior conviction in Texas for "burglary of a habitation with intent to commit theft" qualified as a predicate offense for California's habitual-offender statute.²⁵⁶ When analyzing the record of conviction, the court held that it did not have enough information because "[o]n this record . . . we know nothing about the nature of the Texas crime beyond its statutory requirements and the fact that the underlying intent was to commit theft."²⁵⁷ Somewhat like *Georgia*,²⁵⁸ the Court found that the bare elements alone, without any underlying facts, were not enough to determine whether the Texas offense should be considered a California predicate because "the question is whether a Texas conviction . . . under Texas law necessarily involves conduct that would qualify as [the parallel felony] under California law."²⁵⁹ In *People v. Jones*,²⁶⁰ the California Court of Appeal similarly held that when a comparison of elements left ambiguity, the habitual-offender statute did not apply because the record of the previous crime of bank robbery did not contain the underlying facts of that conviction.²⁶¹

This "California Rule," which places heavy emphasis on a criminal's underlying conduct in tandem with the elements of the prior crime, has been followed for over twenty-five years. The rule is driven by common sense and "promotes the efficient administration of justice and, specifically,

convictions within the ambit of the West Virginia statute for enhanced punishment of subsequent domestic violence offenses.").

252. 133 P.3d 1054 (Cal. 2006).

253. *Id.* at 1059 (quoting *People v. Avery*, 38 P.3d 1, 2 (Cal. 2002)).

254. *Id.* (citing *People v. Woodell*, 950 P.2d 85, 89-93 (Cal. 1998)).

255. 38 P.3d 1 (Cal. 2002).

256. *Id.* at 3.

257. *Id.* at 2.

258. *See supra* note 248 and accompanying text.

259. *Avery*, 38 P.3d at 3.

260. 89 Cal. Rptr. 2d 485 (Ct. App. 1999).

261. *Id.* at 497-98.

further the evident intent of the people in establishing an enhancement . . . that refers to *conduct*, not a specific *crime*.”²⁶²

Of all the state-based approaches, the conduct-based approach is the most promising and perhaps the most obvious. As one commentator put it, the problems of the categorical approach “seem to be eas[ily] resolve[d] if courts could simply look at the facts and determine whether the defendants actually engaged in any violent or risky activity.”²⁶³ Were federal courts to follow a conduct-based approach when interpreting the ACCA, this straightforward and intuitive approach would not only lead to consistent results, but would also save judicial economy.

In practice, federal judges would no longer have to parse through state law and compare the elements of the predicate offense to the generic version of the offense, embarking on a complicated procedural journey if the elements did not line up perfectly (as they so rarely do). Instead, the sentencing judge would merely look to *Shepard* documents—such as an indictment or plea colloquy—to find the conduct on which the defendant’s predicate offense was based. Based on this conduct, the judge would be able to determine whether the defendant actually committed what would be considered a predicate felony under the generic version of a crime, such as burglary. For example, in *Mathis*, if the defendant admitted in his prior plea that he in fact burgled a building, and not a boat or airplane, then the conduct he committed in Iowa would qualify because it comports with generic burglary. In cases where the *Shepard* documents do not delineate the criminal conduct, the government would not be able to meet its burden of proof and the ACCA could not apply. This simple and intuitive conduct-based approach would no doubt streamline ACCA sentencing and cut down on the litigation that floods federal criminal dockets.²⁶⁴

The conduct-based approach would also solve the ideological problems that plague the current doctrine by ensuring that offenders are punished for their conduct and that they do not escape their intended punishment because of a legal technicality. At its root, the conduct-based approach comports with the justice system’s theory of just deserts, which includes punishing offenders for their criminal actions. Thus, the bizarre and nonsensical results often bemoaned by judges would decline. No longer would habitual

262. *People v. Guerrero*, 748 P.2d 1150, 1157 (Cal. 1988).

263. Powell, *supra* note 37, at 8; see also Timothy W. Castor, Note, *Escaping a Rigid Analysis: The Shift to a Fact-Based Approach for Crime of Violence Inquiries Involving Escape Offenses*, 46 WM. & MARY L. REV. 345, 362–71 (2004) (proposing that courts employ a fact-based approach to analyze escape cases).

264. See *supra* notes 24–25 and accompanying text.

offenders—like the burglar and sex-offender in *Mathis*—escape just punishment based on state law not comporting with a generic definition of burglary.

Finally, the conduct-based approach does not result in differentiated application based on jurisdiction. Whether a criminal commits an offense in Montana or Maine, California or Kentucky, on the West Coast or the East Coast, he or she will be judged by his or her actions. If a person burgles a building in Kentucky, he or she will be treated the same under the ACCA as the offender who burgles a building in California. Even though Kentucky's burglary statute may define and punish burglary differently than in California, the technical differences in these states' penal codes would have no bearing on punishment under the ACCA. The conduct-based approach does not spend its time in the ivory tower comparing elements, but punishes offenders practically based on actual conduct. Thus, no matter the state in which the offender committed a predicate offense, the conduct-based approach would look at the offender's conduct alone and determine whether it would fulfill the elements of the generic version of the crime.

Lending further support to this doctrinal change is the fact that the modified categorical approach already veers awfully close to a conduct-based approach. When sentencing courts are instructed to look at charging documents and plea colloquies, these courts are necessarily looking at the conduct described in these documents in order to discern the set of alternative elements under which the defendant was convicted. In *Taylor*, for example, the Court remanded the case to the Eighth Circuit, which looked to the charging documents and ultimately found that the defendant burgled a house.²⁶⁵ The Court must be able to admit that, for all practical purposes, the underlying conduct of a defendant's past crimes is inextricably tied to the elements that the prosecuting authority charges the defendant with. The conduct determines the crime that the defendant is charged with, and thus the modified categorical approach—which supposedly looks only at *Shepard* documents to determine elements—necessarily takes conduct into account.²⁶⁶

265. *United States v. Taylor*, 932 F.2d 703, 707 (8th Cir. 1991).

266. Further, some federal courts have already adopted a conduct-based approach when applying other federal habitual-offender statutes. *See United States v. Johnson*, 479 F. App'x 811, 819 (10th Cir. 2012) (holding that federal three strikes law, 18 U.S.C. § 3559 (2012), “unmistakably requires courts to look to the specific facts underlying the prior offense, not to the elements of the statute under which the defendant was convicted”) (quoting *United States v. Mackovich*, 209 F.3d 1227, 1240 (10th Cir. 2000)); *see also United States v. Sanchez*, 586 F.3d 918, 930 (11th Cir. 2009) (finding that “[a] state drug offense qualifies as

1. Apprendi and the Sixth Amendment Do Not Foreclose a Conduct-Based Approach

The biggest potential precedential hurdle for the conduct-based approach, as the Supreme Court has contemplated, is that it may run afoul of *Apprendi v. New Jersey*,²⁶⁷ a case holding that “only a jury, not a judge, may find facts that increase a maximum penalty [called for in a statute].”²⁶⁸ Consequently, any fact that can be used to enhance the offender’s sentence beyond the statutory maximum must be presented to a jury and proven beyond a reasonable doubt pursuant to the offender’s Sixth Amendment right to a jury trial.²⁶⁹ Thus, the Court²⁷⁰ and commentators²⁷¹ alike have shied away from using a conduct-based approach because it would require sentencing judges to “find facts” about a habitual offender’s prior criminal conduct that could boost his sentence above the statutory maximum.

Others on the Court, however, have expressed doubt that *Apprendi* “compel[s] the elements based approach.”²⁷² In fact, in Justice Breyer’s dissent in *Mathis*, which was joined by Justice Ginsburg, he specifically stated his position that *Apprendi* did not “require the majority’s result” because of the practical synonymy of the elements and means of a crime when presented to a jury.²⁷³ When combined with Justices Kennedy and Thomas,²⁷⁴ at least four of the justices agree that *Apprendi* either does not control in ACCA litigation or otherwise does not preclude a conduct-based

a ‘serious drug offense’ under § 3559(c) only if the offense, if prosecuted in federal court, would have been punishable under [21 U.S.C. § 841(b)(1)(A)] or [21 U.S.C. § 960(b)(1)(A)]”).

267. 530 U.S. 466 (2000).

268. *Mathis v. United States*, 136 S. Ct. 2243, 2252 (2016) (citing *Apprendi*, 530 U.S. at 490); see also *Taylor v. United States*, 495 U.S. 575, 601–02 (1990) (anticipating potential Sixth Amendment issues presented in *Apprendi*, and finding that an elements-based approach would be safest to prevent potential Sixth Amendment violations).

269. *Apprendi*, 530 U.S. at 490.

270. See *Mathis*, 136 S. Ct. at 2252; *Descamps v. United States*, 133 S. Ct. 2276, 2288–89 (2013); *Taylor*, 495 U.S. at 601–02.

271. Rebecca Sharpless, *Finally, a True Elements Test: Mathis v. United States and the Categorical Approach*, 82 BROOK. L. REV. 1275, 1295–98 (2012) (arguing that *Apprendi* prevents a purely conduct-based approach).

272. *Mathis*, 136 S. Ct. at 2258 (Kennedy, J., concurring); see also *id.* at 2259 (Thomas, J., concurring) (acknowledging that “*Apprendi* recognized an exception for the ‘fact of a prior conviction,’” and stating the position that *Apprendi* was wrongly decided).

273. *Id.* at 2265 (Breyer, J., dissenting).

274. See *supra* note 272.

approach; given the current composition of the Court, this position may soon become the majority.²⁷⁵

The states have also interpreted *Apprendi*, many finding that its holding does not apply to their habitual-offender statutes because *Apprendi* “expressly carved out an exception for prior convictions.”²⁷⁶ In other words, *Apprendi* itself stated that prior convictions can be presented to sentencing judges to enhance sentences beyond the statutory maximum, and need not be presented to a jury and proved beyond a reasonable doubt.²⁷⁷

In particular, *Apprendi* carved out this exception for facts of prior convictions because “[b]oth the certainty that procedural safeguards attached to any ‘fact’ of prior conviction . . . mitigated the due process and Sixth Amendment concerns otherwise implicated in allowing a judge to determine a ‘fact’ increasing punishment beyond the maximum of the statutory range.”²⁷⁸ Said another way, the due process that was afforded to the offender during the proceedings related to his or her prior offense minimizes the possibility of a judge’s erroneous fact-finding during sentencing for a subsequent crime. After all, the judge is simply relying on the fact of a prior conviction that was adequately protected by the procedural safeguards in that prior case.²⁷⁹ In addition, the Court has

275. Lee, *supra* note 129, at 270 (positing that the categorical approach’s fate depends largely on who was selected to fill the vacancy of the late Justice Antonin Scalia). Justice Scalia has been succeeded by Justice Neal Gorsuch, and the ultimate fate of *Apprendi*’s application and the categorical based approach remains to be seen, as these matters have not come before the Court during his short tenure.

276. *Redd v. State*, 635 S.E.2d 870, 871 (Ga. Ct. App. 2006); *see also Reed v. State*, 121 A.3d 1234 (Table), 2015 WL 667525 (Del. 2015) (finding that *Allelyne v. United States*, 133 S. Ct. 2151 (2013) did not require the fact of a defendant’s prior conviction to be submitted to a jury to find beyond a reasonable doubt); *Louisiana v. Juengain*, 41 So. 3d 499, 506–07 (La. Ct. App. 2010) (finding that *Apprendi* did not require the fact of a defendant’s prior convictions to be submitted to a jury to find beyond a reasonable doubt). *But see State v. Auld*, 361 P.3d 471, 475 (Haw. 2015) (finding that because Hawaii’s habitual-offender statute required more than merely proving the facts of prior convictions to enhance a defendant’s sentence, that *Apprendi* did apply and that these additional facts must be presented to a jury to be found beyond a reasonable doubt before a defendant can be sentenced as a habitual offender).

277. *Apprendi v. New Jersey*, 530 U.S. 466, 489–90 (2000) (addressing and declining to overturn *Jones v. United States*, 526 U.S. 227 (1999) and *Almandarez-Torres v. United States*, 523 U.S. 224 (1998)).

278. *Id.* at 488.

279. *See In re Pers. Restraint of Lavery*, 111 P.3d 837, 842 (Wash. 2005) (holding that “[n]o additional safeguards are required” when a judge is basing a sentence on a prior conviction “because a certified copy of a prior judgment and sentence is highly reliable evidence”).

expressed particular concern with regard to allowing a sentencing court to “make a disputed determination” about the facts of what the “state judge must have understood as the factual basis of the prior plea.”²⁸⁰ But such a concern is unwarranted in a majority of cases, such as in *Mathis*, where the facts underlying the prior conviction are uncontested and when the plea colloquy or sentencing documents contain a clear recitation of stipulated facts.

In *McGee*, the California Supreme Court wrestled with this issue, ultimately finding that *Apprendi* did not foreclose its conduct-based approach to determining predicate offenses.²⁸¹ The court found that there was a distinction to be made between “sentence enhancements that require fact finding related to the circumstance of the current offense, such as whether a defendant acted with the intent necessary to establish a ‘hate crime’—a task identified by *Apprendi* as one for the jury” and the distinguishable scenario where a court simply examines “*court records* pertaining to a defendant’s *prior conviction* to determine the nature or basis of the conviction—a task to which *Apprendi* did not speak and the ‘type of inquiry that judges traditionally perform as part of the sentencing function.’”²⁸² In so holding, the court outlined several cases from other states similarly holding that *Apprendi* did not foreclose a judge from accepting facts about an offender’s prior convictions in connection with habitual-offender statutes.²⁸³

280. *Descamps v. United States*, 133 S. Ct. 2276, 2288 (2013); *Shepard v. United States*, 544 U.S. 13, 25 (2005).

281. *People v. McGee*, 133 P.3d 1054, 1071 (Cal. 2006).

282. *Id.* (emphasis added) (quoting *People v. Kelii*, 981 P.2d 518, 520 (Cal. 1999)).

283. *See id.* at 1067-69 (citing *Wright v. State*, 780 So. 2d 216, 217 (Fla. Ct. App. 2001) (holding that defendant did not have a right to a jury trial to determine the fact of a prior conviction); *People v. Hill*, 803 N.E.2d 138, 150 (Ill. App. Ct. 2003) (holding that there is no right to a jury trial on facts relating to recidivism, including “the fact of the timing, degree, number and sequence of defendant’s prior convictions,” or “on his age for purpose of enhancement under the recidivist sentencing statute”); *State v. Stewart*, 791 A.2d 143, 151-52 (Md. 2002) (“[I]n light of the language in *Apprendi* suggesting that sentencing courts traditionally consider matters related to recidivism, courts have found that the *Almendarez-Torres* exception to the right to a jury trial is not limited solely to prior convictions.”); *State v. Dixon* 787 A.2d 211, 221 (N.J. 2001) (holding there is no right to a jury trial where “[t]he required *fact-finding does not relate to the present offense* or its elements”) (emphasis added); *People v. Rosen*, 752 N.E.2d 844, 847 (N.Y. 2001) (holding that the “[d]efendant had no constitutional right to a jury trial to establish the facts of his prior felony convictions” including “matters pertaining to the defendant’s history and character and the nature and circumstances of his criminal conduct”).

Michigan's approach is particularly interesting, holding that *Apprendi* does not apply because the statutory maximum penalty for a habitual offender is based on the habitual-offender statute, not on the statute under which the actual crime was committed.²⁸⁴ Thus, *Apprendi*'s holding would never be triggered since the habitual offender's sentence would never go over the statutory maximum of the habitual-offender statute.

In short, the Supreme Court's apprehension that *Apprendi* requires an elements-based approach—and forecloses a conduct-based approach—is not justified. *Apprendi* specifically allows an exception for judges to find facts of prior convictions pursuant to habitual-offender statutes. Thus, a court need not submit facts of the defendant's conduct in a prior conviction to a jury to find beyond a reasonable doubt; rather, a judge can rely on uncontested evidence in the record of these prior convictions to enhance a defendant's sentence. Therefore, given the unlikely application of *Apprendi* to the ACCA, there is little standing in the way of instituting a conduct-based approach.

2. *Even if Apprendi Applies, Federal Courts Could Amend Their Sentencing Practices to Overcome Any Sixth Amendment Hurdles*

Even if *Apprendi* or other related cases did present an impediment to the conduct-based approach,²⁸⁵ many states have circumvented any issues by adopting criminal procedures to ensure that a criminal's status as a habitual offender is presented to the jury and proven beyond a reasonable doubt. By combining the conduct-based approach with the procedural method of proving past criminal conduct beyond a reasonable doubt—perhaps in a separate proceeding—any *Apprendi* problem would be avoided because the very facts that would enhance a habitual offender's sentence beyond the statutory maximum would be presented to a jury, which would be required to confirm these facts beyond a reasonable doubt before the defendant could be sentenced as a habitual offender.

284. *People v. Drohan*, 715 N.W.2d 778, 790 (Mich. 2006) (“[T]he statutory maximum sentence of a defendant who is convicted of being an habitual offender is as provided in the habitual-offender statute, rather than the statute he or she was convicted of offending. *Apprendi* and *Blakely* specifically allow for an increase in a defendant's maximum sentence on the basis of ‘the fact of a prior conviction’”) (quoting *Apprendi v. New Jersey*, 530 U.S. 466, 490 (2000)).

285. *See also Alleyne v. United States*, 133 S. Ct. 2151, 2155 (2013) (holding that facts that increase a mandatory minimum sentence of a crime should be considered and that the “element” of the crime must be proven to a jury beyond a reasonable doubt).

In Indiana, for example (a conduct-based jurisdiction), “habitual offender proceedings are treated as substantive criminal trials. The State must prove the allegations beyond a reasonable doubt.”²⁸⁶ While many states treat their habitual-offender statutes merely as sentencing enhancements subject to the purview of the sentencing judge,²⁸⁷ the states that submit these matters to a jury extend protections to habitual offenders based on the notion that such protections “reflect[] the serious consequences of such a determination.”²⁸⁸ Therefore, “[t]he State is required to prove beyond a reasonable doubt prior convictions alleged for enhancement.”²⁸⁹

While this approach would cure any potential Sixth Amendment issues concerning sentence-enhancing facts and their presentation to a jury,²⁹⁰ it may also prejudice the defendant with regard to his or her current charge.

286. *Moore v. State*, 769 N.E.2d 1141, 1146 (Ind. Ct. App. 2002).

287. *See, e.g.*, D.C. CODE ANN. § 22-1804(a) (West 2013); *Smith v. United States*, 304 A.2d 28, 32 (D.C. Cir. 1973) (finding that habitual-offender statute only came into play after defendant had been found guilty, and habitual-offender status need not be charged in indictment).

288. *Moore*, 769 N.E.2d at 1146.

289. *Reynolds v. State*, 227 S.W.3d 355, 359 (Tex. App. 2007); *see also* *Conner v. State*, 138 So. 3d 143, 151 (Miss. 2014) (“At [the habitual sentencing] hearing, the elements in the applicable habitual-offender statute must be proven beyond a reasonable doubt.”); *State v. McClain*, 302 P.3d 367, 372 (Idaho Ct. App. 2012) (“The former convictions relied upon to invoke the persistent violator enhancement must be alleged in the indictment or information and be proved at trial beyond a reasonable doubt.”); *State v. Cooper*, 321 S.W.3d 501, 505 (Tenn. 2010) (“[T]he court must find ‘beyond a reasonable doubt that the defendant is a repeat violent offender’ for purpose of sentencing.” (citation omitted)); *People v. Nunn*, 148 P.3d 222, 225 (Colo. App. 2006) (“In habitual criminal proceedings, the prosecution bears the burden of proving beyond a reasonable doubt that the defendant has been previously convicted as alleged.”); *State ex rel. Appleby v. Recht*, 583 S.E.2d 800, 808 (W. Va. 2002) (holding that the state must prove to a jury beyond a reasonable doubt that defendant’s prior predicates were “committed subsequent to each preceding conviction” and that the defendant is the person who committed them); *Martin v. Commonwealth*, 13 S.W.3d 232, 235 (Ky. 2000) (“[T]he Commonwealth must prove beyond a reasonable doubt, and could not by inference or guess work, confer persistent felony status on anyone.”); *State v. Sinclair*, 439 A.2d 945, 946 (Conn. 1981) (“The state has the burden of proving beyond a reasonable doubt the elements essential to establish that the defendant is a persistent felony offender.”); *State v. Cameron*, 227 A.2d 276, 279 (Vt. 1967) (“[I]t becomes the duty of the prosecuting officer to prove beyond a reasonable doubt the fact or facts denied. But the guilt or innocence of the respondent respecting any former conviction is not an issue.”).

290. *But see* *Almendarez-Torres v. United States*, 523 U.S. 224, 239–47 (1998) (holding that 8 U.S.C. § 1326, a statute that punished recidivists more harshly in the immigration context, did *not* require the government to charge the offender as a recidivist, and that the offender’s prior crimes were merely sentencing enhancing factors that were not elements that needed to be proven beyond a reasonable doubt).

At least one state, Michigan, specifically prohibits information of an offender's past crimes from being contained in the indictment and from being presented to a jury to prevent these past acts from tainting the jury's finding of guilt on the current charge.²⁹¹ For this same reason, the Federal Rules of Evidence prohibit presenting evidence to a jury of a defendant's criminal history in order to prove propensity that he also committed the current offense.²⁹²

In an effort to prevent such prejudice, many states that require the fact of a prior conviction to be presented to a jury have also adopted a bifurcated criminal trial, in which information of the defendant's past crimes are only presented to a jury after the jury has already found the defendant guilty of the instant offense.²⁹³ This bifurcated trial procedure affords defendants additional due process and prevents any prejudice that may arise from presenting the offender's prior criminal history during the guilt phase of the proceedings. This added process, however, comes at the expense of the time of the jury and of judicial resources.

Adoption of this approach in the federal system may also take on a bifurcated trial approach, which would tax judicial economy in the relatively small percentage of criminal cases actually go to trial.²⁹⁴ In most cases under this potential practice, however, a defendant would be presented with an indictment that would note their prior convictions and the government's intent to prove that the offender is an armed career criminal under the ACCA. This additional charge would then be a part of the plea bargaining process, and many defendants may concede such charge, while others may negotiate this charge away through the bargaining process. Thus, judicial economy would not be unnecessarily taxed, since so few federal criminal cases actually go to trial,²⁹⁵ however, the approach would save enormous amounts of time and judicial resources by ensuring a simple

291. *People v. Everson*, 168 N.W.2d 660, 662 (Mich. Ct. App. 1969).

292. *See* FED. R. EVID. 404(b).

293. *See, e.g., Davis v. State*, 680 So. 2d 843, 851 (Miss. 1996) (holding that a sentencing hearing must be separate from trial on the principle charge, but the facts at the sentencing hearing still must be proven beyond a reasonable doubt). Indiana also separates the indictment into separate documents. *Lawrence v. State*, 286 N.E.2d 830, 835 (Ind. 1972) ("In the first the particular offense with which the accused is charged should be set forth, and this should be upon the first page of the information and signed by the prosecuting officer. In the second part former convictions should be alleged, and this should be upon the second page of the information, separable from the first page and signed by the prosecuting officer.").

294. *See supra* note 22–24.

295. *Id.*

conduct-based approach that protects offenders' Sixth Amendment rights by presenting facts of prior convictions to a jury if necessary.

3. Other Potential Roadblocks of Judicial Fact-finding and Plea Agreements Are Easily Overcome

Apart from potential Sixth Amendment issues, the Court has also forwarded other supposed hurdles to adopting a conduct-based approach that, upon further examination, are not significant enough to outweigh the substantial benefits of the conduct-based approach.

One interesting argument the Court has returned to several times is the “daunting difficulties” of applying a conduct-based approach, including the taxation of judicial economy and difficulty for the government to “expend resources examining (often aged) documents for evidence that a defendant admitted in a plea colloquy, or a prosecutor showed at trial, facts that, although unnecessary to the crime of conviction, satisfy an element of the relevant generic offense.”²⁹⁶ The Court's concerns over judicial economy are simply unfounded. If current experience is any indication, it seems like any change to the categorical approach would reap benefits for the courts' resources.²⁹⁷ The judicial fact-finding required by the conduct-based approach would not require extensive mini-trials or significant digging into antiquated records but would merely be an extension of the modified categorical approach. Plea colloquies, jury instructions, jury forms, and other approved documents that show uncontested facts or facts found beyond a reasonable doubt would suffice. If the government could not meet its burden to produce such records sufficient for the court to make such a factual determination of the conduct of the predicate offenses, the ACCA would not apply. This logical repurposing of the modified categorical approach is painless and is already in line with what many courts, in practice, are currently doing.²⁹⁸

Along a similar vein, the Court has also argued against a conduct-based approach by noting it would be unfair to habitual offenders if their prior predicate offenses were the result of plea deals for which they pleaded to a lower offense. For example, “if a guilty plea to a lesser, nonburglary offense was the result of a plea bargain, it would seem unfair to impose a sentence enhancement as if the defendant had pleaded guilty to burglary” based on the underlying facts of the actual burglary that was committed.²⁹⁹

296. *Descamps v. United States*, 133 S. Ct. 2276, 2289 (2013).

297. *See supra* notes 24-25 and accompanying text.

298. *See supra* note 266 and accompanying text.

299. *Taylor v. United States*, 495 U.S. 575, 601-02 (1990).

Thus, as the Court reasoned, “a later sentencing court could still treat the defendant as though he had pleaded to an ACCA predicate, based on legally extraneous statements found in the old record.”³⁰⁰ While this concern has merit due to the incredibly high percentage of criminal cases that are resolved through plea deals,³⁰¹ it nevertheless flouts the spirit of the ACCA, which is to increase punishment for habitual offenders.

From an ideological standpoint, if the goal of habitual-offender laws is to protect the public by incapacitating offenders who have failed multiple attempts at rehabilitation, sentencing courts should indeed be able to look to the past conduct of the predicate crimes. Courts should not be hamstrung by yet another legal technicality such as the deal struck by the government to punish the offender for a lesser crime.

From a practical standpoint, this supposed plea-bargaining problem is easily remedied. For one, state and federal sentencing courts can advise defendants who are entering pleas of the potential consequences that the facts admitted in the plea colloquy *could* be used at a future date to serve as a predicate to a state or federal habitual-offender statute. It is already common practice for sentencing judges to thoroughly examine defendants entering pleas on the record and inform them of their rights,³⁰² an added practice of informing defendants of potential sentencing consequences down the road is already in line with current practice.

Second, state and federal prosecutors should be incentivized to notify defendants of the potential future sentencing ramifications to admitting certain facts in their plea deal. As part of the plea deal contract,³⁰³ defendants should be able to negotiate and admit the appropriate facts if the plea deal contains notice that these facts could be used against them in the future if they are deemed to be habitual offenders.

Last, criminal defense attorneys should advise their clients of the potential future ramifications. The Court has already required defense attorneys to advise defendants entering pleas of potential future

300. *Descamps*, 133 S. Ct. at 2289.

301. Jed S. Rakoff, *Why Innocent People Plead Guilty*, N.Y. REVIEW BOOKS (Nov. 20, 2014), <http://www.nybooks.com/articles/2014/11/20/why-innocent-people-plead-guilty/> (finding that in 2013, ninety-seven percent of federal criminal cases were resolved through plea bargains).

302. *See Brady v. United States*, 397 U.S. 742, 748 (1970) (holding that a guilty plea operates as a waiver of important rights, and is valid only if done voluntarily, knowingly, and intelligently, “with sufficient awareness of the relevant circumstances and likely consequences”).

303. *See generally* Robert E. Scott & William J. Stuntz, *Plea Bargaining as Contract*, 101 YALE L.J. 1909 (1992).

immigration consequences (such as pleading to a crime that could later be considered a crime of moral turpitude that would disqualify the immigrant from various forms of relief from deportation),³⁰⁴ so extending this rule to the potential future habitual sentencing consequences is not an unwarranted or cumbersome expansion of current doctrine. It is possible that these notification safeguards—by the judge, prosecutor, and defense counsel—may also have the unintended consequence of decreasing the willingness of defendants to take a plea deal and plead guilty if such a plea could entail such serious consequences. This is unlikely, though, since many repeat offenders will likely be overconfident that they will either not commit a crime again, or at least not be caught again.

VI. Conclusion

“It has been said that the life of the law is experience.”

-- *Johnson v. United States*, 135 S. Ct. 2551, 2560 (2015).

Based on the experience of the past twenty-five years of applying the categorical approach, the life of the ACCA has been a disappointment. The categorical approach as has proved to be a failed experiment in legal fiction that nonsensically punishes habitual offenders based on the statutory elements of prior offenses rather than the conduct of their those offenses. The problem with such legal fiction is that the further down the rabbit hole you go, the further divorced the fiction becomes from reality. With Congress sitting on the sideline and with little indication of future action,³⁰⁵ the judiciary must act to solve the practical, ideological, and organizational problems of the current doctrine.

The states have addressed this problem with much more success by instituting simpler and more efficient approaches based on the practical realities of criminal sentencing. Foremost among these approaches is a clear, conduct-based approach that returns to reality by punishing habitual offenders based on the consideration of the criminal conduct of their prior

304. See *Padilla v. Kentucky*, 559 U.S. 356, 374 (2010) (finding that defendant’s counsel was constitutionally ineffective when he did not properly advise defendant, who was a lawful permanent resident, of the potential deportation risk for pleading guilty to a drug-distribution charge).

305. Kupfer, *supra* note 24, at 165 (“Congress has not indicated any intention to restrict the scope of this tough-on-crime statute or more clearly define its language.” (citing David B. Spence & Frank Cross, *A Public Choice for the Administrative State*, 89 GEO. L.J. 97, 135–38 (2000) (explaining that it is difficult for Congress to legislate with specificity due to its political cost))).

crimes. This solution comports with the federal goals of treating like offenders alike no matter where they committed their predicate crime because; unlike the current elements-based categorical approach, conduct is not dependent on state statutes. The conduct-based approach would also be far more efficient than the current doctrine because sentencing judges would not have to spend time parsing through state law; rather, they would need only rely on *Shepard* documents that convey the criminal conduct of the prior crime to determine if such conduct fits within the generic definition of the enumerated crimes in the ACCA. Unfortunately, the current Court seems determined to keep facts out of the equation and continues to cling to the unworkable categorical approach.

The future of the ACCA is impossible to predict, but its current path is precarious. The Court recently declared the ACCA's residual clause—which applied the ACCA to any crime that “otherwise involves conduct that presents a serious potential risk of physical injury to another”³⁰⁶—unconstitutionally vague in *Johnson v. United States* after wrestling with inconsistent applications after only nine years and a handful of cases.³⁰⁷ During this short time period, justices bemoaned that the Court's approach to deciphering the residual clause was unworkable due to inconsistencies³⁰⁸ and the lack of any definite standards to determine predicate crimes in light of the clause's broad strokes.³⁰⁹ This resulted in years of circuit splits, plaguing the residual clause's application in the courts of appeals.³¹⁰ Finally, the Court abandoned nearly a decade of precedent and found its attempts to decipher the confusing language so devoid of applicable standards that the clause was ultimately unconstitutionally vague.³¹¹ After twenty-five years of circuit splits and inconsistent application of the categorical approach as it applies to enumerated crimes like burglary, the Court may be willing to pull the trigger and declare this portion of the

306. 18 U.S.C. § 924(e)(2)(B)(ii) (2012).

307. *Johnson v. United States*, 135 S. Ct. 2551, 2560 (2015).

308. *Chambers v. United States*, 555 U.S. 122, 133 (2009) (Alito, J., concurring) (“After almost two decades with *Taylor*'s ‘categorical approach,’ only one thing is clear: ACCA's residual clause is nearly impossible to apply consistently.”), *abrogated by Johnson*, 135 S. Ct. 2551.

309. *See James v. United States*, 550 U.S. 192, 215 (2015) (Scalia, J., dissenting), *overruled by Johnson*, 135 S. Ct. 2551.

310. *Chambers*, 555 U.S. at 133 (Alito, J., concurring) (stating that the residual clause “created numerous splits among the lower federal courts”).

311. *Johnson*, 135 S. Ct. at 2562 (overturning its position in *James* and finding the residual clause unconstitutional because “[t]he doctrine of *stare decisis* allows us to revisit an earlier decision where experience with its application reveals that it is unworkable”).

ACCA unconstitutionally vague as well given the continued inconsistency and unworkability of the categorical approach.³¹²

Given Congress's inaction over the past quarter century, even when the architect of the ACCA himself lamented the Court's approach,³¹³ the Court is likely embarking on its own policy-making venture. This muddled doctrine may indeed be the Court's way of acting consistently with Congress's *current* intent to start dismantling the injurious vestiges of mass incarceration and mete out a measured justice that has been missing from federal sentencing for many decades. Such is the extent of the damage to the categorical approach—it has become so unsound that the only thing that makes sense any more is that the Court is maneuvering to dismantle it piece by piece. Whatever the case may be, the categorical approach is unsustainable from a doctrinal standpoint, and the Court must move to remedy the problems of the doctrine if it seeks to institute a morally responsible, efficient, and efficacious approach to punishing habitual offenders.

312. Thus, the premium that the Court placed on precedent in *Mathis* could easily be overridden given the continued practical difficulties of the categorical approach. *See Mathis v. United States*, 136 S. Ct. 2243, 2257 (2016).

313. *See supra* note 24 and accompanying text.