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In the Shadow of Shular: Conduct Can Unify the Disjointed Categorical Approaches

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I. Introduction

The Supreme Court's recent decision in *Shular v. United States*[1] gives new hope that after a generation of confusion, the categorical approach will be fixed. The categorical approach is a diverse bag of interpretive tools that federal courts use to "categorize" which state criminal convictions trigger federal sanctions. But such diversity in approaches—which lead to disparate sanctioning outcomes—has resulted in one of the most complex, confusing, and judicially taxing doctrines for both the federal judiciary and practitioners.

When Congress wrote statutes such as the Armed Career Criminals Act (ACCA)[2]—which imposes sentencing enhancements for those who have committed three previous crimes classified as either "serious drug offense[s]" or "violent felon[ies]"—it expressly allowed for certain state crimes to serve as predicates for this federal penalty. Courts utilize the categorical approach, for example, to determine if a defendant's prior state law conviction for crimes such as burglary qualifies under what Congress intended when it enumerated burglary as a "violent felony" in the ACCA. The categorical approach does this by com- paring elements: if the elements of the state crime match or criminalize narrower conduct than the elements of the federal crime, then the state criminal conviction can serve as a predicate for the federal sentencing enhancement.[3]

But the devil is in the details of state law. Because federal statutes like the ACCA incorporate state law, the imposition of its harsh fifteen-year mandatory minimum sentence rests on how more than fifty jurisdictions define various crimes in their criminal codes. Over the past thirty years, the Supreme Court has created a complicated web of variants of the categorical approach, all of which are triggered differently, based on parsing out the statutory differences between states' criminal laws. Put simply, different state laws trigger different variants of the categorical approach; and that means the federal courts impose disparate out- comes on otherwise similar offenders, but only based on the differences of state law.

But this is where the Court's holding in *Shular* can have a significant impact. While the elements-based categorical approach has been applied to the "violent felony" section of the ACCA, the Court held that a different approach was appropriate when determining if a state crime was a "serious drug offense." In *Shular*, the Court declined to rely on a comparison of state and federal elements of a crime, and instead focused on the underlying criminal conduct. In short, it asked whether the conduct that led to the state criminal conviction also fulfills the elements of the federal version of the crime.[4] Expanding the *Shular* decision and adopting a similar *conduct*-based approach across all the different ACCA provisions would remedy many of the disparate applications and outcomes caused by the current *elements*-based categorical approach. By excising reliance on state criminal elements, federal courts would impose federal sanctions according to a defendant's prior conduct, which mitigates the nonuniformity that comes with relying on differences between states' criminal laws.[5]

This essay proceeds in Part II by examining the elements-based categorical approach in practice, showing how it produces unwarranted sentencing disparities between otherwise similarly situated defendants who committed similar criminal conduct. Part III explains why these sentencing disparities are indeed unwarranted because *where* a defendant committed a crime is not nearly as relevant as *how* the crime was committed when used as a federal sentencing factor. Part IV proposes the solution found in *Shular*: a transition to a conduct-based categorical approach that would no longer turn on the differences of state law. This solution brings the ACCA closer to the goals of punishing similarly situated offenders who commit similar conduct similarly.

II. The Disparate Applications and Outcomes of the Current Elements-Based Categorical Approach

The categorical approach has a wide reach that has been applied across many different areas of law, including crimmigration,[6] federal sentencing enhancements,[7] and the application of the Federal Sentencing Guidelines.[8] With this wide reach comes staggering impact, affecting the liberty interests of tens of thousands of people every year facing federal criminal sentences.[9] For more than thirty years, courts have partly justified the continued use of the categorical approach on the basis of its ability to achieve nationwide uniformity across all jurisdictions, by avoiding reliance on the different "technical definitions and labels" or the "vagaries of state law."[10] But the categorical approach's reliance on statutory elements in state crimes has ironically produced the opposite.

The elements-based categorical approach does so in three steps. First, when dealing with a crime that Congress has enumerated, courts must determine the federal elements of that crime. In *Taylor v. United States*, the Court was faced with a crime that Congress enumerated as a "violent felony"—namely, *burglary*—but did not otherwise define in the ACCA. Because burglary was a qualifying predicate crime, the Court crafted a federal "generic definition" of burglary as "an unlawful or unprivileged entry into, or remaining in, a building or other structure, with intent to commit a crime."[11]

Second, a federal court must determine the elements of the state-law version of *burglary* at issue. This often involves an intricate reading of the state's criminal statute, as well as detailed analyses of state court decisions to determine which statutory terms encompass the elements of the state crime. This analysis of state law was further complicated by the Court's holding in *Mathis v. United States*,[12] distinguishing between a state statute listing elements versus mere facts. Elements are the "'constituent parts' of a crime's legal definition"—the things the "prosecution must prove to sustain a conviction." Facts, on the other hand, sometimes referred to as the mere *means* to fulfill these elements, are "real-world things—extraneous to the crime's legal requirements."[13] And if this deep research and consultation of state law does not reveal the elements/means distinction, the Court prescribed a sub-step variant of the categorical approach. Referred to as a modified peek, this variation allows a court to go one step past merely comparing elements and to "peek at the [record] documents" of the underlying state conviction (often referred to as *Shepard* documents).[14] Such a "peek" cannot be used to consider the factual criminal conduct committed by the offender, but only to determine the necessary elements of the state crime.[15]

Once a court has determined the federal and state elements of a crime, the last step requires a court to compare and match these two sets of elements. If the state criminal elements for burglary match or criminalize narrower con- duct than the federal criminal elements for burglary, then a defendant's state criminal conviction for burglary serves as one out of the three "violent felonies" necessary to trigger the ACCA's fifteen-year mandatory minimum sentencing enhancement. If, however, the state criminal elements do not match or criminalize broader conduct than the federal criminal elements, then the state conviction cannot serve as a predicate.[16] But there are further complications if a state criminal statute is divisible, meaning that it lists alternative sets of elements. Similar to how a statute may list *means* as opposed to *elements*, a state statute may list alternative elements that would also render a conviction for the state crime. If one set of these state criminal elements matches with the federal criminal elements, but another set of alternative state criminal elements does not, another "variant" of the categorical approach—the "modified categorical approach"[17]—applies. While this sub-step was originally contemplated in *Taylor*, it was further developed in *Shepard v. United States*[18] and *Descamps v. United States*.[19] Similar to the modified peek, the modified categorical approach allows a court to examine the same set of *Shepard* records of the state criminal conviction to determine under which set of state criminal elements—the qualifying or nonqualifying set—the offender was convicted. After the correct set of convicting elements is determined, the court continues the categorical analysis to match that set of elements to the federal criminal elements.

If the categorical approach sounds complicated, it is. Some state laws trigger the regular categorical approach, others application of the modified peek approach, and yet others trigger a modified categorical approach. And trying to correctly apply these different varieties has exorbitantly taxed both judicial[20] and practitioner economy,[21] increasing transaction costs.

But even more important is the impact on those whose liberty is at the mercy of this doctrinal morass. The differences in state law (however slight) have material impacts on otherwise similar defendants who are being treated differently by the federal judiciary when they impose ACCA sentencing enhancements.

Consider the cases of Arthur Taylor and Richard Mathis. Both offenders were convicted of second-degree burglary, but Taylor was convicted under Missouri law and Mathis under Iowa law.[22] Both men admitted to similar conduct surrounding the burglaries.[23] Some years later, both Taylor and Mathis emerged on the radar of federal law enforcement because they, as convicted felons, illegally possessed a firearm. In the subsequent prosecutions, federal prosecutors pursued sentencing enhancements under the ACCA based on the defendants' previous state burglary convictions. But despite the similar criminal conduct, the Supreme Court came to different conclusions under the elements-based categorical approach. Whereas the Court held that Taylor's conviction under Missouri's burglary statute can trigger the ACCA's sentencing enhancement, it separately held that Iowa's burglary statute cannot.[24] The Court applied the categorical approach differently to accommodate minor differences in the sister states' laws. In Taylor's case, the Court sanctioned use of the modified categorical approach because of how Missouri crafted its burglary statute. In Mathis's case, however, the Court held that the regular categorical approach must be applied because of the nuanced differences in how Iowa crafted its burglary statute. The different applications of the categorical approach—based on the differences of the underlying state laws—led to drastically different sentencing out- comes. Taylor received the mandatory minimum sentence of 180 months, while Mathis was sentenced to 80 months' imprisonment.

In summary, two offenders who admitted to committing nearly identical criminal conduct were treated differently by federal courts imposing a downstream ACCA sentencing enhancement because of the differences in Missouri and Iowa state law. And the disparate impact was monumental. This illustrates that an elements-based categorical approach cannot eliminate

unwarranted sentencing disparities. Any state-to-federal sanctioning regime that relies so heavily on state criminal elements will struggle to mitigate these disparities because of the natural differences in state law.

III. The Categorical Approach Produces Unwarranted Disparities

Ensuring that similarly situated defendants receive similar sentences was of paramount importance to sentencing reformers and is one of the ideological backbones of the Sentencing Guidelines. This pursuit of eliminating unwarranted disparities served as a guiding principle of the Sentencing Reform Act of 1984.[25] Congress unequivocally made this a part of the law's mandate and required sentencing courts to consider uniformity in sentencing decisions. And while we do accept sentencing disparities in a number of different contexts—such as those produced by different judges, different prosecutors, and a host of other uncontrollable variables[26]—the reality is that such disparities are *warranted* as a necessary ill of any practically functioning justice system.

This is the context by which we must judge the sentencing disparities when applying the ACCA according to the categorical approach's heavy reliance on the differences of state law. As one judge noted, the current elements-based categorical approach is actually "an impediment to uniformity" since "two defendants who ... committed identical criminal acts in two different states and have essentially the same criminal history" may receive different sanctioning outcomes, which "depends not on their past criminal con- duct but on the phrasing of the different state criminal statutes."[27] Recall Taylor and Mathis. Should the difference between committing a burglary in Iowa, compared to driving a few minutes south to commit a similar burglary in Missouri, justify one of them receiving a sentence 125% longer than the other received? These differences in state criminal codes do not confer greater moral blameworthiness, denote greater dangerousness, or reflect on recidivism as other warranted sentencing factors typically do.[28] *Where* an offender committed a prior crime is simply not as relevant to punishment as *how* the offender committed that crime.

IV. A New Hope for Consistency: *Shular* and a Conduct- Based Categorical Approach

This essay proposes transitioning to a conduct-based categorical approach to fix the confusing and unwarranted sentencing disparities created by the elements-based categorical approach. Not only does this approach mitigate the judicially created unwarranted disparities, but it also finds support in *Shular*.

Shular interpreted a provision of the ACCA that imposed its fifteen-year mandatory minimum sentence if a state crime qualifies as a "serious drug offense," meaning that it "involv[ed] manufacturing, distributing, or possessing with intent to manufacture or distribute, a controlled substance." The Court unanimously held that because of how that provision of the ACCA was drafted by Congress—placing particular emphasis on the word *involving*, which signaled a preference for considering conduct—that a conduct-based categorical approach was appropriate. Even though *Shular* dealt with a different subsection of the ACCA than the "violent felony" subsection that enumerates crimes like burglary, it validates that a conduct-based categorical approach is possible, as it is now the law in a fraternal provision of the ACCA.

To illustrate how a conduct-based categorical approach would work, we can revisit the cases of Taylor and Mathis. The first step of the categorical approach would stay the same, and federal courts would continue to apply "*uniform*, [federal generic] definitions . . . regardless of technical definitions and labels under state law." For burglary, this would remain as "an unlawful or unprivileged entry into, or remaining in, a building or other structure, with intent to commit a crime."

Second, instead of relying on the elements outlined in a state's criminal code, courts would determine the under- lying criminal conduct of a defendant's state conviction. The availability of state records outlining such prior criminal conduct might be sparse,[29] but this would only serve to protect a defendant's liberty rights if a federal prosecutor could not meet their burden of proving up such underlying criminal conduct. But since nearly 95% of state criminal cases are resolved through plea deals that include colloquies and allocutions on the record,[30] there seems to be ample opportunity for federal prosecutors to meet their burden to present a reliable record of admitted or otherwise proven criminal conduct. Based on Taylor's and Mathis's plea agreements, their criminal conduct in burglarizing buildings was virtually the same.

Third, courts would adjudicate whether the criminal conduct at the state court level satisfies each federal generic element for the enumerated crime. If the state criminal conduct fit within the federal generic elements, the state criminal conviction could serve as a predicate to trigger the ACCA's enhanced sentence; if the facts did not fit the elements, the enhanced sentence would not be triggered.

Looking at these two cases, it is likely that the conduct of both Taylor and Mathis would trigger the enhanced ACCA sentence. While the imposition of harsher sentences may admittedly be a troubling result, it nevertheless treats these similarly situated defendants the same for sentencing purposes. And in many other cases, the opposite would be true when comparable criminal conduct committed in different states would *not* trigger the enhanced ACCA sentence.

As this example shows, a conduct-based categorical approach can offer a pragmatic solution that serves the goal of mitigating unwarranted sentencing disparities, a goal that has thus far evaded the elements-based categorical approach. By focusing on similar conduct, as opposed to different state elements, a conduct-based categorical approach would bring the ACCA that much closer to treating similarly situated defendants similarly.

Notes

[1] 140 S. Ct. 779 (2020).

[2] 18 U.S.C. § 924(e) (imposing fifteen-year mandatory minimum sentences for qualifying prior state criminal convictions).

[3] U.S. v. Mathis, 136 S. Ct. 2243, 2248–49 (2016).

[4] *Shular*, 140 S. Ct. at 782.

[5] *See* Sheldon A. Evans, *Punishing Criminals for Their Conduct: A Return to Reason for the Armed Career Criminals Act*, 70 Okla. L. Rev. 623, 666–67 (2018) (arguing that a conduct-based approach would solve nonuniformity between jurisdictions).

[6] *See, e.g.*, Moncrieffe v. Holder, 569 U.S. 184, 191 (2013) ("This categorical approach has a long pedigree in our Nation's immigration law.").

[7] *See, e.g.*, U.S. v. Leaverton, 895 F.3d 1251 (10th Cir. 2018) (applying categorical approach in 18 U.S.C. § 3559(c) analysis in federal three-strikes statute); U.S. v. Davis, 139 S. Ct. 2319, 2327 (2019) (discussing the role of the categorical approach in the constitutionality of the residual clause of 18 U.S.C. § 924(c)).

[8] U.S. v. Mayer, 560 F.3d 948, 952 (9th Cir. 2009) (Kozinski, J., dissenting) (explaining the virtues of uniform application of the categorical approach across ACCA, immigration, and Sentencing Guidelines jurisprudence).

[9] *See* Sentencing Law and Policy, *How Many Hundreds (or Thousands?) of ACCA Prisoners Could Be Impacted by a Big Ruling in* Johnson*?* (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 (estimating that over seven thousand people are currently serving enhanced ACCA sentences).

[10] Taylor v. U.S., 495 U.S. 575, 588, 590 (1990).

[11] *Id.* at 598.

[12] 136 S. Ct. 2243 (2016).

[13] *Id.* at 2248 (citing Black's Law Dictionary 634 (10th ed. 2014); Richardson v. U.S., 526 U.S. 813, 817 (1999)).

[14] *Id.* at 2256; *see* Shepard v. U.S., 544 U.S. 13, 17–21 (2005).

[15] *See* U.S. v. Pam, 867 F.3d 1191, 1206 n. 14 (10th Cir. 2017) (recognizing modified peek as different from modified categorical approach); U.S. v. Powell, No. 6:03-CR-60122-AA, 2016 WL 8732306, at *1 (D. Or. Feb. 5, 2016) (classifying modified peek approach as a "minor variant of the modified categorical approach").

[16] *See, e.g.*, Descamps v. U.S., 570 U.S. 254, 264–65 (2013) (holding that California burglary was broader than generic burglary); *Mathis*, 136 S. Ct. at 2256–57 (holding that Iowa burglary was broader than generic burglary).

[17] *Descamps* at 257.

[18] 544 U.S. at 17.

[19] 570 U.S. at 261–63 (2013).

[20] *See, e.g.*, U.S. v. Vann, 660 F.3d 771, 787 (4th Cir. 2011) (Agee, J., concurring) (complaining that "[t]he dockets of … all federal courts are now clogged with [ACCA] cases"); De Lima v. Sessions, 867 F.3d 260, 268 (1st Cir. 2017) (noting that "[e]ven a single such categorical analysis is an arduous task" that "is often difficult and time consuming"); U. S. v. Mayer, 162 F.Supp.3d 1080, 1095 (D. Or. 2016) (labeling categorical approach "a Byzantine analytical framework").

[21] *See, e.g.*, Letter from Lanny A. Breuer, Assistant Att'y Gen., Dep't of Justice, and Jonathan J. Wroblewski, Dir., Office of Policy and Legislation, Dep't of Justice, to Patti Saris, Judge, Chair, U.S. Sentencing Comm'n (July 23, 2012), http://www.ussc.gov/MeetingsandRulemaking/PublicComment/20120815/DOJAnnual%20Letter-prioritiescomment.pdf (disclosing the resources that U.S. attorney's offices expend litigating a categorical approach under ACCA).

[22] *Compare* Mo. Rev. Stat. § 560.045 (1969) (breaking and entering dwelling house), *with* Iowa Code § 713.1 (burgling occupied structure).

[23] U.S. v. Taylor, 932 F.2d 703, 707 (8th Cir. 1991); U.S. v. Mathis, 786 F.3d 1068, 1075 (8th Cir. 2015), *rev'd*, 136 S. Ct. 2243 (2016).

[24] *Taylor*, 495 U.S. at 575, 601–02; *Mathis*, 136 S. Ct. at 2246, 2250, 2257.

[25] S. Rep. No. 98-225, at 52 (1984), reprinted in 1984 U.S.C.C.A.N. 3183, 322–29; S. Rep. No. 98-225 (1983), reprinted in 1984 U.S.C.C.A.N. 3182, 3182-3565, at 45–46 (finding that "[s]entencing disparities that are not justified by differences among offenses or offenders are unfair both to offenders and to the public"); *see also* 28 U.S.C. § 991(b)(1)(B) (specifying goal of providing certainty and fairness in sentencing and avoiding sentencing disparities).

[26] *See, e.g.*, U.S. Sentencing Comm'n, Substantial Assistance Staff Working Group, Federal Court Practices: Sentence Reductions Based on Defendants' Substantial Assistance to the Government 42–52 (1997) (discussing widely varied substantial assistance practices in eight different districts based on interviews of judges, prosecutors, defense attorneys and probation officers).

[27] U.S. v. Chapman, 866 F.3d 129, 137 (2017) (Jordan, J., concurring).

[28] *See* 18 U.S.C. § 3559(a) (outlining factors of deterrence, recidivism, and public safety among relevant factors to fashioning an appropriate sentence).

[29] *See* Eric S. Fish, *The Paradox of Criminal History* 21 (April 2, 2020), https://ssrn.com/abstract¼3441458 or http://dx.doi.org/10.2139/ssrn.3441458 (noting that the standard criminal case does not always record a "factually rich narrative account of what the defendant actually did," and sometimes state court documents will either be unavailable or scant).

[30] *See* Mo. v. Frye, 566 U.S. 134, 143 (2012).