ARTICLES

CRIMES OF VIOLENCE AND VIOLENT CRIME

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Why can't federal law define "violence"? Major federal statutes turn on whether someone was convicted of a violent crime. But judges and scholars widely agree that the law defining violence is "chaos." This Article treats the problem as one of statutory design and construction. What's violent is a fact-based judgment call—it's a standard meant to be interpreted case by case through factfinding and adjudication. But Supreme Court jurisprudence increasingly treats it like a rule, insisting that courts must define violence without the facts and discretion that would give that interpretation coherence across countless unique cases.

Chaos is not inevitable. Predicate statutes like the federal violence definitions have been ubiquitous in American law for centuries without doctrinal disaster. This Article learns from their example. They mostly do not, as some scholars and Justices have proposed, ask juries to judge predicates. Instead, most predicate laws list which crimes qualify, an approach federal violence law followed for thirty years before Congress quietly changed to defining violence abstractly in the 1980s. Congress should return to listing violent crimes and could further reduce confusion by adopting existing state laws that list which crimes in their jurisdiction are violent. In the meantime, the Supreme Court should loosen its rigid interpretive rules and give federal judges more flexibility to judge violence sensibly.

Leading scholars and Supreme Court textualists have assumed that criminal law's greatest problem is discretion—especially prosecutorial discretion—and have urged making crime definitions more rule-like, focused on the "real" conduct legislatures mean to prohibit. Federal violence doctrine offers an object lesson in why that

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approach fails. Crimes are standards, and discretion is necessary to interpret them across thousands of unpredictable fact patterns. Criminal procedure constrains that discretion by distributing it across many interpreters—law enforcement, prosecutors, defense attorneys, defendants, judges, and juries—within a broader network of laws, procedures, policies, and norms. Longstanding debates about rules versus standards have missed this sort of "distributed discretion," but it makes discretionary judgments like violence—and crimes—make sense.

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INTRODUCTION

> *We began with a seemingly simple question. Has [the defendant] been convicted of a crime of violence? Trying to answer that question then led us down several rabbit holes . . . . The result is a Rube Goldberg jurisprudence of abstractions piled on top of one another in a manner that renders doubtful anyone's confidence in predicting what will pop out at the end.*
>
> —*Judge William J. Kayatta,* United States v. Tavares[1]

Stokeling v. United States confronted a question that would have struck Congress, forty years ago, as absurd: Is robbery a violent crime?[2] The Armed Career Criminal Act (ACCA) increases penalties for felons convicted of possessing a firearm if they have three prior qualifying convictions.[3] Originally, just robbery and burglary convictions counted.[4] In 1986, Congress expanded ACCA to reach other crimes that involve "the use, attempted use, or threatened use of physical force against the person or property of another."[5]

But in 2019, the Supreme Court struggled to explain why robbery involves the use of "force." Florida—like most states—defines robbery as taking property with force sufficient to overcome the victim's resistance, and some robberies have included prying fingers off cash and struggling over a purse strap.[6] Because federal law classifies crimes like robbery as violent or not categorically, not case by case, the Justices were torn between holding that robbery nationwide is not violent or that prying fingers is.[7] (5–4, robbery qualified as violent.[8])

Federal criminal law is designed to focus on violence.[9] A violence conviction triggers severe consequences like longer sentences and deportation.[10] But observers widely agree that federal violence law is "chaos."[11] Its few defenders admit that it is "difficult to apply"

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1 United States v. Tavares, 843 F.3d 1, 19 (1st Cir. 2016).

2 Stokeling v. United States, 139 S. Ct. 544, 548 (2019).

3 18 U.S.C. § 924(e) (2018).

4 *See infra* note 172 and accompanying text.

5 Comprehensive Crime Control Act of 1984, Pub. L. No. 98-473, § 1001(a), 98 Stat. 1976, 2136 (codified at 18 U.S.C. § 16); Firearms Owners' Protection Act, Pub. L. No. 99-308, § 104(a)(2), 100 Stat. 449, 456–57 (1986) (codified at 18 U.S.C. § 924(c)).

6 *Stokeling*, 139 S. Ct. at 555.

7 *See id.*; *id.* at 565 (Sotomayor, J., dissenting).

8 *Id.* at 555 (majority opinion).

9 *See infra* Section II.A.

10 *See infra* Section I.A.

11 Rachel E. Barkow, *The Supreme Court 2018 Term — Comment: Categorical Mistakes: The Flawed Framework of the Armed Career Criminal Act and Mandatory Minimum Sentencing*, 133 HARV. L. REV. 200, 202 (2019).

and yields "counterintuitive results."[12] Critics less charitably have concluded that the whole thing has "crashed and burned."[13]

The Supreme Court has spent two decades trying to fix violence law and failing "spectacularly."[14] Over twenty-plus cases (and counting), the Court has redefined "force," "use," "against," and other terms; narrowed what information trial courts can consider; and eventually cut whole clauses from statutes.[15] Apparently undaunted, the Justices seem poised to redo violence doctrine yet again, with five Justices now urging to scrap landmark caselaw or rewrite statutory text.[16]

Defenders argue that at least the fiasco led to fewer crimes qualifying and therefore lower sentences and less deportation.[17] But federal criminal law is failing basic values like notice, fairness, predictability, and principled decisionmaking. Breaking into someone's garage to steal a lawnmower counts,[18] but murdering someone during a botched robbery attempt does not.[19] In the October 2024 Term, the Court will resolve a circuit split over whether second-degree murder is violent when people can violate it by starving their children to

12 United States v. Faust, 853 F.3d 39, 62, 66 (1st Cir. 2017) (Barron, J., concurring); *accord, e.g.*, Mathis v. United States, 579 U.S. 500, 510 (2016) (admitting that the categorical approach "can seem counterintuitive"); Amit Jain & Phillip Dane Warren, *An Ode to the Categorical Approach*, 67 UCLA L. REV. DISCOURSE 132, 138 (2019) (conceding that the categorial approach "may seem counterintuitive" but arguing that it has a "long history" and rests on "sound reasons"); Jennifer Lee Koh, *The Whole Better than the Sum: A Case for the Categorical Approach to Determining the Immigration Consequences of Crime*, 26 GEO. IMMIGR. L.J. 257, 262, 311 (2012) (agreeing that the categorical approach produces "idiosyncratic outcomes," is "imperfect" and "blunt," but is a "second-best solution" given alternatives).

13 United States v. Reyes-Contreras, 910 F.3d 169, 186 (5th Cir. 2018) (en banc); *see* Barkow, *supra* note 11, at 206–07 (noting criticism); *infra* notes 110–39 and accompanying text; *see also, e.g.*, Sheldon A. Evans, *Categorical Nonuniformity*, 120 COLUM. L. REV. 1771, 1772 (2020) (describing the "complex, muddled, and perplexing jurisprudence"); Doug Keller, *Causing Mischief for* Taylor*'s Categorical Approach: Applying "Legal Imagination" to* Duenas-Alvarez, 18 GEO. MASON L. REV. 625, 625 (2011) ("The categorical approach . . . has become the rule of perpetuities of criminal law.").

14 DAVID ALAN SKLANSKY, A PATTERN OF VIOLENCE: HOW THE LAW CLASSIFIES CRIMES AND WHAT IT MEANS FOR JUSTICE 231 (2021); *see infra* Sections II.B–C.

15 *See infra* note 109 and accompanying text; *infra* Sections II.B–C.

16 *See, e.g.*, Sessions v. Dimaya, 138 S. Ct. 1204, 1256–59 (2018) (Thomas, J., joined by Kennedy & Alito, JJ., dissenting); United States v. Davis, 139 S. Ct. 2319, 2351 (2019) (Kavanaugh, J., joined by Thomas & Alito, JJ., dissenting); Borden v. United States, 141 S. Ct. 1817, 1835 (2021) (Thomas, J., concurring in the judgment); *id.* at 1849 (Kavanaugh, J., joined by Roberts, C.J., and Alito & Barrett, JJ., dissenting).

17 *See* Jain & Warren, *supra* note 12, at 149; Koh, *supra* note 12, at 301.

18 *See* Taylor v. United States, 495 U.S. 575, 588 (1990); Quarles v. United States, 139 S. Ct. 1872, 1879 (2019).

19 United States v. Taylor, 142 S. Ct. 2015, 2021 (2022).

death.[20] The whole area is increasingly unpredictable and illogical, and what's a violent crime today bears little resemblance to the statute Congress thought it was enacting.

Why is this so hard? The idea of a violent crime is hardly unintelligible. Journalists, politicians, and voters discuss violent crime rationally.[21] Scholars study it; statisticians and criminologists track it.[22] Nor does violence necessarily defy legal definition. Scores of state and federal laws, today and historically, have focused on violent crime without anyone feeling like they are "taking crazy pills."[23]

This Article approaches that problem as one of statutory design and construction. Federal crimes of violence are a species of one of the most common kinds of statutes in American jurisprudence: predicates. For my purposes, a predicate law is a provision[24] that incorporates proving another crime or conviction. For example, ACCA increases sentences for three predicate convictions; [25] felon-in-possession laws require proving the predicate felony plus current firearm possession.[26]

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20 *See* Petition for a Writ of Certiorari at 14–16, Delligatti v. United States, 144 S. Ct. 2603 (2024) (mem.) (No. 23-825); *Delligatti*, 144 S. Ct. 2603 (mem.) (granting certiorari).

21 *See, e.g.*, Sari Horwitz, *Obama Grants Final 330 Commutations to Nonviolent Drug Offenders*, WASH. POST (Jan. 19, 2017, 2:53 PM EST), https://www.washingtonpost.com/world/national-security/obama-grants-final-330-commutations-to-nonviolent-drug-offenders/2017/01/19/41506468-de5d-11e6-918c-99ede3c8cafa_story.html [https://perma.cc/RP94-2DVN]; Deborah Kim, Zach Fannin & Ivan Pereira, *Non-Citizen Veterans Fight Back Against Deportations over Non-Violent Crimes*, ABC NEWS (July 13, 2023, 6:48 PM), https://abcnews.go.com/US/citizen-veterans-fight-back-deportations-violent-crimes/story?id=101164277 [https://perma.cc/F95R-FQXK]; Michelle Lynch, *Addressing Violent Crime in Reading Is a Priority, Some City Council Members Say*, READING EAGLE (July 25, 2023), https://www.readingeagle.com/2023/07/25/addressing-violent-crime-in-reading-is-a-priority-some-city-council-members-say/ [https://perma.cc/5EPV-RBXF]; WSOCTV.com News Staff, *Anti-Violence Organization Holds Meeting to Tackle Rising Violence, Crime Rates in Charlotte*, YAHOO! NEWS (July 22, 2023, 7:33 PM EDT), https://news.yahoo.com/anti-violence-organization-holds-meeting-233304863.html [https://perma.cc/D7RT-JN3N].

22 *E.g.*, JOHN F. PFAFF, LOCKED IN: THE TRUE CAUSES OF MASS INCARCERATION—AND HOW TO ACHIEVE REAL REFORM 185–87 (2017); FRANKLIN E. ZIMRING & GORDON HAWKINS, CRIME IS NOT THE PROBLEM: LETHAL VIOLENCE IN AMERICA 8–13 (1997); *2019 Crime in the United States: Violent Crime*, FBI: UNIFORM CRIME REPORTING, https://ucr.fbi.gov/crime-in-the-u.s/2019/crime-in-the-u.s.-2019/topic-pages/violent-crime [https://perma.cc/VN8M-2TZV] (describing how the federal government defines and tracks violent crime).

23 United States v. Begay, 934 F.3d 1033, 1042 (9th Cir. 2019) (N.R. Smith, J., dissenting) (quoting ZOOLANDER (Paramount Pictures 2001)), *vacated pending reh'g en banc* 15 F.4th 1254 (9th Cir. 2021); *see infra* Section III.B.

24 I use "provision" because nonstatutes like regulations and sentencing guidelines can and do incorporate predicate crimes.

25 18 U.S.C. § 924(e)(1) (2018).

26 *E.g.*, *id.* § 922(g)(1).

Predicates are ubiquitous in American law—think about driving points—but they have received little scholarly attention beyond debating the fairness of increasing sentences, especially mandatory minimums, for past crimes.[27] But predicate laws present an unusual challenge for statutory interpretation, one that federal violence law has exposed. A statute is something courts and lawyers read and interpret textually. But courts ordinarily "interpret" a crime through adjudication: criminal prosecutions follow a procedurally complex factfinding process that can factor in the nuances of the case, the offender, and the context. Predicates don't repeat that process; they read its output much like a code.

This Article identifies two reasons that coding is broken. First, in the 1980s, facing a historic violent crime wave, Congress made a little-noticed but consequential change to federal violence definitions: it switched from listing qualifying violent crimes to describing them.[28] Congress aimed to make violence definitions broad and flexible to help federal enforcers and courts combat violence. Yet as scholars like Alice Ristroph and David Sklansky have demonstrated, what's violent is a factual, totality-of-the-circumstances judgment,[29] one courts ordinarily adjudicate. The new definitions put federal courts in the challenging position of judging violence.

Second, the Supreme Court made the process infinitely harder with its Sixth Amendment jurisprudence and its cousin, the much-maligned "categorical approach." The categorical approach is a doctrine of statutory construction that requires classifying crimes as violent or not without consulting case facts.[30] But the Court's unique version of the categorical approach—one, we shall see, that differs markedly from most states' versions[31]—radically stripped factfinding and judgment from violence interpretation. That put federal judges in the basically impossible position of judging crimes' essential violence without the usual tools—factfinding and procedure—that would make the project doable.

A historical fifty-state survey of habitual-offender laws like ACCA proves that better alternatives exist.[32] Most states follow Congress's original approach and simply list which crimes qualify, and they give their judges more room to consider basic case facts and judge vio-

27 *See generally, e.g.*, RICHARD S. FRASE & JULIAN V. ROBERTS, PAYING FOR THE PAST: THE CASE AGAINST PRIOR RECORD SENTENCE ENHANCEMENTS (2019).

28 *See infra* Section II.A.

29 *See generally* SKLANSKY, *supra* note 14; Alice Ristroph, *Criminal Law in the Shadow of Violence*, 62 ALA. L. REV. 571 (2011); *see infra* notes 184–86 and accompanying text.

30 *See infra* Section I.B.

31 *See infra* subsection III.B.2.

32 *See infra* Part III.

lence flexibly.[33] Federal law should follow suit. Congress should list violent crimes again. To avoid the challenge of defining crimes across fifty states, Congress should incorporate existing state statutes that list their jurisdiction's violent crimes for states' habitual-offender or other laws. And the Supreme Court should reform the categorical approach. Either it should divorce violence from the Sixth Amendment and simply eyeball "robbery" as violent or not, or it should stretch to the Sixth Amendment's boundaries and invite as much factfinding as constitutionally permissible.

Increasingly, scholars and judges have concluded that federal criminal law should solve this problem with juries relitigating prior convictions.[34] The Supreme Court took a step in that direction in *Erlinger v. United States*,[35] which held that juries, not judges, must decide whether the three ACCA predicates occurred on different occasions.[36] *Erlinger* claimed to follow a long tradition of juries deciding facts key to sentencing,[37] but *Erlinger*—and the caselaw it follows—has mistaken what early American juries were doing. American law has almost *no* tradition of juries relitigating the facts of past convictions. Then and now, most judges and juries have simply checked conviction paperwork and confirmed identity—that the defendant is the person named in the conviction.[38]

Many reasons favor not relitigating predicate convictions. It is, as Justice Jackson's *Erlinger* dissent explained, procedurally cumbersome and practically difficult.[39] It also cuts against American jurisprudence's strong preference for finality, raising the uncomfortable possibility of inconsistent results and dragging victims, witnesses, and defendants back through seemingly resolved cases. And it misses the goal of predicate statutes, which is to use the earlier litigation's results as an efficient, albeit imperfect signal that the current statute can

33 *See infra* Part III.

34 *E.g.*, Sessions v. Dimaya, 138 S. Ct. 1204, 1256–59 (2018) (Thomas, J., joined by Kennedy & Alito, JJ., dissenting); United States v. Davis, 139 S. Ct. 2319, 2343–49 (2019) (Kavanaugh, J., joined by Roberts, C.J., and Thomas & Alito, JJ., dissenting); Ovalles v. United States, 905 F.3d 1231, 1257–62 (11th Cir. 2018) (en banc) (W. Pryor, J., concurring); Sheldon A. Evans, *Punishing Criminals for Their Conduct: A Return to Reason for the Armed Career Criminal Act*, 70 OKLA. L. REV. 623, 626–27 (2018); Jennifer Lee Barrow, *The Return of the Jury: Conduct-Based Sentencing for Recidivism*, 2022 WIS. L. REV. 785, 807; *see also* United States v. Doctor, 842 F.3d 306, 316–17 (4th Cir. 2016) (Wilkinson, J., concurring) (urging district judges to consider underlying facts when exercising their discretion to sentence within the statutory range).

35 Erlinger v. United States, 144 S. Ct. 1840 (2024).

36 *Id.* at 1851–52.

37 *Id.* at 1856–59.

38 *See infra* Part III.

39 *Erlinger*, 144 S. Ct. at 1886–88 (Jackson, J., dissenting).

"read" for its new objective, like how long to sentence someone or whether someone should possess a firearm. The sheer ubiquity of modern and historical predicate laws suggests that it is possible to achieve workability and coherence.

The federal violence fiasco has also exposed a broader jurisprudential error that textualist Supreme Court Justices and, unusually, criminal law scholars share. William Stuntz famously argued that criminal law's "[p]athological [p]olitics" have yielded overly broad, flexible crime definitions that leave too much enforcement discretion to prosecutors.[40] Textualists like Justices Scalia and Gorsuch (who, not coincidentally, have written many leading categorical approach opinions) likewise complain that crime laws leave too much room for judges to decide matters best left to elected legislatures.[41] Both groups agree that crime definitions should be narrowed to target the "real" conduct the statute was intended to prohibit.[42]

The Supreme Court's violence caselaw offers a little-noticed experiment in that proposal. The results are not pretty. The problem is that crime definitions are not rules that can be narrowed crisply ex ante; they are standards for actors within the criminal justice system to apply across the infinite case facts that arise. If that's right, then prosecutorial discretion is not raw enforcement power; it's a form of *interpretive* discretion. And as H.L.A. Hart explained in a recently recovered essay, discretion is the gap filler that lets decisionmakers interpret statutory standards without lawless, arbitrary decisionmaking.[43] Discretion in interpreting criminal statutes is not, therefore, dysfunctional; it's essential to rationally applying crime definitions across thousands of unpredictable case facts.

The question for criminal statutory drafting and interpretation is not how to eliminate discretion but how to apply it fairly. In a process I call "distributed discretion," criminal procedure forces many people—police, prosecutors, defense attorneys, defendants, grand jurors, judges, juries, and probation officers—to repeatedly apply crime definitions to case facts.[44] They operate within an underappreciated framework of other criminal laws, procedures, and norms that guide and constrain them.[45] Criminal adjudication surely is not perfect, but it provides a much richer and more workable way to con-

40 William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 MICH. L. REV. 505, 529–33 (2001).

41 *See infra* Section V.A.

42 *See infra* Section V.A.

43 *See* H.L.A. Hart, *Discretion*, 127 HARV. L. REV. 652, 664 (2013).

44 *See infra* Section V.C.

45 *See infra* Section V.C.

strain criminal enforcers than fruitlessly trying to pinpoint what robbery "really" is.

Federal violence law is fixable. But it requires understanding that the goal is neither to redo nor to ignore the adjudicative process, but instead to harness it, workably, to achieve Congress's objective: identify and reduce violence.[46] Part I describes federal violence definitions and the Supreme Court's categorical approach. Part II shows how Congress and the Supreme Court, together, transformed violent crime into an impossibly abstract concept. Part III explores how effective predicate statutes operate, and Part IV applies that experience to fix federal violence law. Part V, finally, shows why the federal experience exposes the error in scholars' and the Justices' attempts to limit discretion in criminal statutory interpretation. Discretion is the lifeblood that makes criminal statutes coherent. The question is how to harness it wisely.

I. FEDERAL VIOLENT PREDICATES

Buckle up, folks, and welcome to federal criminal law's biggest doctrinal debacle. This Part describes federal law's core violence definitions and the Supreme Court's much-derided categorical approach to interpreting them. The initiated can probably skim it; other readers, unfortunately, need this foundation to understand what went wrong and how to fix it.

A. The Core Federal Violence Definitions

Which crimes are violent matters enormously in federal law. The three most common federal crimes—immigration, drug, and weapons offenses[47]—use the violence definitions to define crimes or, most often, increase penalties.[48] Designating a crime as violent often carries severe, life-changing consequences, including greater, often-mandatory criminal sentences and deportation.[49] Those provisions

46 *See infra* Section II.A.

47 *See* U.S. SENT'G COMM'N, FISCAL YEAR 2021: OVERVIEW OF FEDERAL CRIMINAL CASES 4–5 (2022).

48 *See infra* notes 49–70 and accompanying text.

49 Section 16's violence definition affects immigration law. *See* Sessions v. Dimaya, 138 S. Ct. 1204, 1210–11 (2018). ACCA mandates fifteen years for a crime otherwise capped at fifteen. 18 U.S.C. § 924(e)(1) (2018). Section 924(c) mandates five, seven, or ten years consecutive to any other sentence. § 924(c)(1)(A). And the U.S. Sentencing Guidelines increase recommended ranges for prior violent convictions. *E.g.*, U.S. SENT'G GUIDELINES MANUAL § 2K2.1(a) (U.S. SENT'G COMM'N 2023) [hereinafter SENT'G GUIDELINES 2023].

tend to disproportionately affect disadvantaged groups, especially Black Americans[50] and immigrants.[51]

Four definitions have largely shaped federal violence doctrine.[52] They are the following.

First, § 16 defines "crime of violence" generically for the federal criminal code.[53] A "crime of violence" is

> (a) an offense that has as an element the use, attempted use, or threatened use of physical force against the person or property of another, or (b) any other offense that is a felony and that, by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense.[54]

Many noncriminal statutes also use § 16's definition,[55] most importantly immigration law.[56]

Second, § 924(c) prohibits using a firearm during a "crime of violence" or drug trafficking offense.[57] Section 924(c) tracks § 16 except that only felonies qualify.[58] Federal prosecutors most commonly charge § 924(c) when a defendant had a firearm during a drug crime or robbery.[59] A smattering of other provisions, criminal and civil, use § 924(c)'s definition.[60]

Third, ACCA enhances penalties for felons in possession of a firearm who have committed three prior "violent felon[ies]" or seri-

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50 *See* U.S. SENT'G COMM'N, DEMOGRAPHIC DIFFERENCES IN FEDERAL SENTENCING 11–16 (2023).

51 *See* Koh, *supra* note 12, at 272–73.

52 These four definitions have generated the most caselaw because they define crimes and shape sentencing in three of the most-charged federal offenses: immigration, drugs, and weapons, *see* U.S. SENT'G COMM'N, *supra* note 47, at 4–5, plus all federal sentencing guidelines, SENT'G GUIDELINES 2023, *supra* note 49, § 4B1.2.

53 18 U.S.C. § 16 (2018); *see* United States v. Gonzalez-Longoria, 831 F.3d 670, 676 n.6 (5th Cir. 2016) (listing some federal criminal statutes that use § 16's definition), *vacated on other grounds*, 138 S. Ct. 2668 (2018) (mem.).

54 § 16.

55 *E.g.*, 11 U.S.C. § 707(c)(1)(A) (2018) (bankruptcy discharge); 20 U.S.C. § 1094(a)(26) (2018) (education grants); *id.* § 1161w(f)(3)(A)(ii) (education assistance for high-risk youths); *id.* § 1232g(b)(6)(B) (rights for victims in university investigations); 28 U.S.C. § 1442(d)(2) (2018) (law enforcement civil liability); 34 U.S.C. §§ 30502(1), 30503(a)(1)(A) (2018) (assistance to local agencies investigating hate crimes); *id.* § 12361(d)(2) (right to be free from gendered violence); 42 U.S.C. § 1437f(o)(6)(A)(i) (2018) (low-income housing).

56 *E.g.*, 8 U.S.C. §§ 1101(a)(43)(F), 1227(a)(2)(E)(i) (2018).

57 18 U.S.C. § 924(c)(1)(A) (2018).

58 § 924(c)(3).

59 U.S. SENT'G COMM'N, MANDATORY MINIMUM PENALTIES FOR FIREARMS OFFENSES IN THE FEDERAL CRIMINAL JUSTICE SYSTEM 23 (2018).

60 *E.g.*, 18 U.S.C. § 1028(b)(3)(B) (2018) (identity fraud); *id.* § 4042(b)(3) (Bureau of Prisons regulations); 34 U.S.C. § 60102(1) (2018) (private prisoner transportation).

ous drug offenses.[61] As enacted, ACCA defines "violent felony" to include

> any crime punishable by imprisonment for a term exceeding one year . . . that . . . (i) has as an element the use, attempted use, or threatened use of physical force against the person of another; or (ii) is burglary, arson, or extortion, involves the use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another . . . .[62]

No other federal statute adopts this definition.

Fourth, for thirty years, the U.S. Sentencing Guidelines (in section 4B1.2(a)) defined "crime of violence" using ACCA's definition but added aiding and abetting, conspiracy, and attempts.[63] In 2016, the Sentencing Commission eliminated the "otherwise" clause (known as the residual clause) and beefed up the listed offenses to "murder, voluntary manslaughter, kidnapping, aggravated assault, a forcible sex offense, robbery, arson, extortion, or the use or unlawful possession of a firearm described in 26 U.S.C. § 5845(a) or explosive material as defined in 18 U.S.C. § 841(c)."[64] The Sentencing Commission also began defining some enumerated crimes, most recently adding a robbery definition in 2024.[65]

Together, the four definitions contain three kinds of clauses, which cases and practitioners discuss using standard terminology. All four start with a *use-of-force clause*, offenses that have "as an element the use, attempted use, or threatened use of physical force against the person of another."[66] Sections 16 and 924(c) add "against the person or property of another."[67] Next, ACCA and the Guidelines—but not §§ 924(c) and 16—include *enumerated offenses*. Originally

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61 § 924(e).

62 § 924(e)(2)(B).

63 The U.S. Sentencing Guidelines, first promulgated in 1987, adopted the definition in 18 U.S.C. § 16 but switched to ACCA's definition in 1989. *See* U.S. SENT'G GUIDELINES MANUAL § 4B1.2(1) (U.S. SENT'G COMM'N 1987) [hereinafter SENT'G GUIDELINES 1987]; U.S. SENT'G GUIDELINES MANUAL app. C at 138–39 (U.S. SENT'G COMM'N 1989) [hereinafter SENT'G GUIDELINES 1989]. The two diverged starting August 1, 2016, after the Supreme Court invalidated ACCA's residual clause. *See* U.S. SENT'G GUIDELINES MANUAL supp. to 2015 supp. to app. C at 7–8 (U.S. SENT'G COMM'N 2016).

64 U.S. SENT'G GUIDELINES MANUAL § 4B1.2(a)(2) (U.S. SENT'G COMM'N 2016).

65 *See* U.S. SENT'G GUIDELINES MANUAL § 4B1.2 cmt. n.1 (U.S. SENT'G COMM'N 2018); U.S. SENT'G GUIDELINES MANUAL § 4B1.2(e) (U.S. SENT'G COMM'N 2024) [hereinafter SENT'G GUIDELINES 2024].

66 § 924(e)(2)(B)(i); U.S. SENT'G GUIDELINES MANUAL § 4B1.2(a)(1) (U.S. SENT'G COMM'N 2021).

67 18 U.S.C. §§ 16, 924(c)(3) (2018).

both included burglary, arson, extortion, and offenses involving the use of explosives;[68] today's Guidelines list is much longer.[69]

Finally, all four originally concluded with a *residual clause*, offenses that risk "physical force against the person or property of another"[70] or "physical injury to another."[71] Between 2015 and 2019, the U.S. Supreme Court struck down the three statutory residual clauses as unconstitutionally vague,[72] prompting the Sentencing Commission to eliminate the Guidelines' residual clause and expand the enumerated offenses list.

Thus, today, the definitions are as follows:

- *Section 16*: Felony or misdemeanor involving the use of force against the person or property of another.[73]
- *Section 924(c)*: Felony involving the use of force against the person or property of another.[74]
- *ACCA*: Felony involving the use of force against the person plus "burglary, arson, or extortion, or [an offense that] involves the use of explosives."[75]
- *Sentencing Guidelines*: Felony involving the use of force against the person plus "murder, voluntary manslaughter, kidnapping, aggravated assault, a forcible sex offense, robbery, arson, extortion, or the use or unlawful possession of a firearm described in 26 U.S.C. § 5845(a) or explosive material as defined in 18 U.S.C. § 841(c)," including attempt, conspiracy, and aiding and abetting.[76]

This Article mainly focuses on ACCA because, as we shall see, it creates the most interpretive difficulties and has generated the most litigation. But it is worth understanding ACCA's context in broader federal law.

Across the board, the essential problem is that those definitions do not directly answer whether a given crime—say, Florida robbery—is violent. They *describe* which crimes should qualify and leave federal judges the job of sifting through the criminal codes of the federal government, fifty states, several territories, and the District of Columbia. Compounding the challenge, each jurisdiction's code contains hundreds of offenses, labeled and defined countless different ways.

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68 § 924(e); SENT'G GUIDELINES 1989, *supra* note 63, § 4B1.2(1)(ii).

69 SENT'G GUIDELINES 2024, *supra* note 65, § 4B1.2.

70 §§ 16, 924(c)(3).

71 SENT'G GUIDELINES 1989, *supra* note 63, § 4B1.2(1)(ii); § 924(e)(2)(B)(ii).

72 *See infra* notes 200, 223–24 and accompanying text.

73 § 16.

74 § 924(c).

75 § 924(e)(2)(B)(ii).

76 SENT'G GUIDELINES 2024, *supra* note 65, § 4B1.2(a), (d).

Legislatures sometimes revise those laws, and caselaw interpreting them constantly shifts. That task alone is daunting.

B. The Categorical Approach

Taylor v. United States (*Taylor*) adopted the categorical approach to perform that job.[77] Essentially, federal courts must classify crimes as violent or nonviolent categorically, not case by case depending on the facts.[78] To assess crimes categorically, courts consult the "statute defining the crime of conviction" and caselaw interpreting it.[79] Only if the offense elements "'necessarily' involve[] . . . facts equating to" the federal violence definition does the crime qualify.[80]

Taylor illustrates. Mr. Taylor received an ACCA enhancement based, in part, on a prior Missouri conviction for second-degree burglary.[81] "Burglary" is an enumerated offense, but ACCA does not define it,[82] and state definitions vary widely. For example, the common law limited burglaries to dwellings; most states today include other buildings, and some include boats, cars, and similar nonbuildings.[83] Missouri alone had seven burglary crimes.[84]

Taylor first considered which "burglary" definition governs ACCA: Federal law? State law? Common law? It held that federal law, not underlying state law, defines "burglary" and other terms in the violence definitions.[85] For enumerated offenses, courts must develop a "generic" definition based on the national majority practice, then compare it to the state statute at issue.[86] If the state crime is broader than the generic definition, it does not qualify.[87] Thus, because "generic burglary," required entry into "a building or structure," a Missouri burglary offense that prohibited breaking into railroad cars was not violent.[88]

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77 Taylor v. United States, 495 U.S. 575, 602 (1990).

78 Moncrieffe v. Holder, 569 U.S. 184, 190 (2013).

79 *Id.* (quoting Gonzales v. Duenas-Alvarez, 549 U.S. 183, 186 (2007)).

80 *Id.* (alteration added) (omission in original) (quoting Shepard v. United States, 544 U.S. 13, 24 (2005) (plurality opinion)).

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

82 ACCA originally defined burglary and robbery, but Congress dropped both definitions when it broadened the statute in 1986. *See id.* at 581–82; 18 U.S.C. app. § 1202(c) (Supp. III 1985); 18 U.S.C. app. §§ 1201–1203 (Supp. IV 1986).

83 *Taylor*, 495 U.S. at 592–93, 599.

84 *Id.* at 578 n.1.

85 *Id.* at 598–99.

86 *Id.* Generic burglary is "unlawful or unprivileged entry into, or remaining in, a building or other structure, with intent to commit a crime." *Id.* at 598.

87 *See id.* at 602.

88 *See id.* at 599 (citing MO. REV. STAT. § 560.070 (1969) (repealed 1979)).

Unfortunately, Mr. Taylor's judgment did not clarify which of Missouri's seven burglary crimes he was convicted of violating.[89] *Taylor* authorized what came to be known as the "modified categorical approach." Courts can check underlying conviction records—limited, later, to a handful known as *Shepard* documents[90]—to identify the offense of conviction.[91] Still later cases limited the use of *Shepard* documents to identifying the statute of conviction; courts thereafter must apply the categorical approach and ignore, for example, if an indictment proves the defendant entered a building (which counts), not a boat (which doesn't).[92]

For all critics' loathing,[93] *Taylor* was neither controversial nor surprising at the time. Decided 9–0, federal courts had long interpreted predicates categorically, including lower courts interpreting ACCA.[94] ACCA's text seemed to support it. The statute focuses on "convictions" and "elements," not facts like whether someone displayed a firearm.[95] And practically, classifying crimes categorically avoids minitrials on stale cases, holding defendants to facts they had no incentive to contest earlier or letting outcomes turn on jurisdictions' record-preservation practices.[96]

The Court cited all those reasons to justify the categorical approach. But its biggest reason seemed to be the Sixth Amendment.[97] *Taylor* anticipated *Apprendi v. New Jersey*[98] and its progeny, which held that juries, not judges, must find any facts that increase statutory maximums[99] and minimums.[100] *Apprendi* and later cases declined to overrule *Almendarez-Torres v. United States*,[101] which held that judges can

89 *Id.* at 579 n.1.

90 Shepard v. United States, 544 U.S. 13 (2005). They are "the statutory definition, charging document, written plea agreement, transcript of plea colloquy, and any explicit factual finding by the trial judge to which the defendant assented." *Id.* at 16.

91 *See Taylor*, 495 U.S. at 602.

92 Descamps v. United States, 570 U.S. 254, 265 (2013).

93 I am not exaggerating. *See, e.g.*, United States v. Brown, 879 F.3d 1043, 1051 (9th Cir. 2018) (Owens, J., concurring) ("All good things must come to an end. But apparently bad legal doctrine can last forever, despite countless judges and justices urging an end to the so-called *Taylor* categorical approach." (citing United States v. Valdivia-Flores, 876 F.3d 1201, 1210–11 (9th Cir. 2017) (O'Scannlain, J., specially concurring))).

94 *See Taylor*, 495 U.S. at 600.

95 *Id.* at 600–01.

96 *Id.* at 601–02.

97 *See, e.g.*, Erlinger v. United States, 144 S. Ct. 1840, 1854–55 (2024).

98 Apprendi v. New Jersey, 530 U.S. 466 (2000).

99 *Id.* at 490.

100 Alleyne v. United States, 570 U.S. 99, 103 (2013).

101 Almendarez-Torres v. United States, 523 U.S. 224 (1998). Whether *Apprendi* or *Almendarez-Torres* makes sense is contested. *See, e.g.*, Stephanos Bibas & Susan Klein, *The Sixth Amendment and Criminal Sentencing*, 30 CARDOZO L. REV. 775, 777–88 (2008) (summa-

increase sentences based on prior convictions as long as they consider only the conviction itself.[102] So judges can constitutionally increase sentences for prior convictions—including under ACCA—as long as they don't find underlying case facts. *Erlinger v. United States*[103] suggests the Court will interpret "fact" broadly, however, holding that a jury must find whether ACCA's three predicates occurred on separate occasions,[104] even when conviction records showed the crimes occurred days apart.[105]

The categorical approach is best understood as a broad rule of statutory construction born from constitutional avoidance. It applies in situations where the Sixth Amendment does not govern, such as judges applying the Sentencing Guidelines or juries deciding § 924(c) cases.[106] That sometimes creates bizarre situations like *United States v. Taylor* (*Justin Taylor*), in which the Court held that attempted robbery is not violent categorically even though the trial proved that the defendants murdered the victim before taking his money.[107]

Taylor was not immediately disastrous. The Supreme Court did not decide another crime-of-violence case for fourteen years.[108] Since 2004, however, it has decided over twenty, with cert grants accelerating.[109] Three problems emerged.

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rizing the doctrine, its contestable logic, and disagreement in courts); Jonathan F. Mitchell, Apprendi*'s Domain*, 2006 SUP. CT. REV. 297, 315–29 (criticizing *Apprendi*). But they have endured for twenty years, and this Article takes both as a given.

102 *See Alleyne*, 570 U.S. at 111 n.1.

103 Erlinger v. United States, 144 S. Ct. 1840 (2024).

104 *Id.* at 1855–56.

105 *Id.* at 1866 (Kavanaugh, J., dissenting).

106 *See* United States v. Taylor, 142 S. Ct. 2015, 2033 n.1 (2022) (Alito, J., dissenting).

107 *Id.* at 2026 (Thomas, J., dissenting).

108 The next case was *Leocal v. Ashcroft*, 543 U.S. 1 (2004).

109 Decided cases have addressed

- what mens rea the definitions require, *id.*; Borden v. United States, 141 S. Ct. 1817 (2021) (plurality opinion);
- how to apply the modified categorical approach, Shepard v. United States, 544 U.S. 13 (2005); Descamps v. United States, 570 U.S. 254 (2013); Mathis v. United States, 579 U.S. 500 (2016);
- which offenses fall within the residual clauses, James v. United States, 550 U.S. 192 (2007), *abrogated by* Johnson v. United States, 576 U.S. 591 (2015); Begay v. United States, 553 U.S. 137 (2008), *abrogated by Johnson*, 576 U.S. 591; Chambers v. United States, 555 U.S. 122 (2009), *abrogated by Johnson*, 576 U.S. 591; Sykes v. United States, 564 U.S. 1 (2011), *abrogated by Johnson*, 576 U.S. 591;
- whether the residual clauses are unconstitutionally vague, *Johnson*, 576 U.S. 591; Beckles v. United States, 137 S. Ct. 886 (2017); Sessions v. Dimaya, 138 S. Ct. 1204 (2018); United States v. Davis, 139 S. Ct. 2319 (2019);

First, the categorical approach raises "an endless gauntlet of abstract legal questions."[110] Federal courts must define every term and clause, like "force" or "risk," all without statutory definitions. Then they must identify the state conviction, if necessary by using the modified categorical approach—but only when crimes are "divisible," its own genre of litigation.[111] Next, they determine the offense elements and the least serious conduct that qualifies. Since court opinions rarely spell out what offenses mean in all fact scenarios, practitioners hunt for the silliest facts ever to survive on appeal while federal judges wrangle picayune state law issues.[112]

Then, the parties fight over whether the predicate and the federal definition match.[113] And because so many state crimes potentially qualify, federal judges perform this "tedious, imperfect, confusing, and at times conflicting analysis" for "thousands of crimes and subcrimes."[114] Each time "the Supreme Court issues a 'new' decision

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- what "force" federal law requires, Johnson v. United States, 559 U.S. 133 (2010); United States v. Castleman, 572 U.S. 157 (2014); Stokeling v. United States, 139 S. Ct. 544 (2019);
- the precise elements of generic burglary, United States v. Stitt, 139 S. Ct. 399 (2018); Quarles v. United States, 139 S. Ct. 1872 (2019);
- how to treat attempt offenses, *James*, 550 U.S. 192; *Taylor*, 142 S. Ct. 2015; and
- how separate in time offenses must be, Wooden v. United States, 142 S. Ct. 1063 (2022); *Erlinger*, 144 S. Ct. 1840.

The tally does not count opinions addressing the categorial approach for other predicate crimes, which often affect federal violence definitions. *E.g.*, Gonzales v. Duenas-Alvarez, 549 U.S. 183 (2007); United States v. Hayes, 555 U.S. 415 (2009); Nijhawan v. Holder, 557 U.S. 29 (2009); Moncrieffe v. Holder, 569 U.S. 184 (2013); Shular v. United States, 140 S. Ct. 779 (2020).

110 United States v. Doctor, 842 F.3d 306, 313 (4th Cir. 2016) (Wilkinson, J., concurring).

111 *See, e.g.*, Cintron v. U.S. Att'y Gen., 882 F.3d 1380, 1384–88 (11th Cir. 2018) (wrangling over divisibility); United States v. Franklin, 895 F.3d 954, 958–62 (7th Cir. 2018) (concluding that divisibility raised too many issues of state law and certifying the question to the Wisconsin Supreme Court); United States v. Goodson, 700 F. App'x 417, 422 & n.5 (6th Cir. 2017) (deciding a Michigan statute is divisible based on pattern jury instructions but noting that some Michigan cases' wording suggests otherwise).

112 *See, e.g.*, United States v. Battle, 927 F.3d 160, 167–68 (4th Cir. 2019) (struggling with how Maryland interprets its assault-with-intent-to-murder statute).

113 *Compare, e.g.*, United States v. Rice, 36 F.4th 578, 581–87 (4th Cir. 2022) (accepting that North Carolina's assault-by-strangulation offense applies only to intentional acts), *with id.* at 588–90 (King, J., dissenting) (arguing that caselaw suggesting a lesser mens rea theoretically could suffice to make assault by strangulation broader than the use-of-force clause).

114 United States v. Ross, 977 F.3d 1295, 1296 (8th Cir. 2020) (mem.) (Erickson, J., dissenting from denial of rehearing en banc).

with slightly different language," everybody "hit[s] the reset button once again."[115]

Second, judges resent "ignor[ing] the actual facts before them and instead . . . theoriz[ing] about whether certain crimes could be committed without using violent force."[116] Assuming defendants committed the offense in the least serious way possible often means ruling that obviously violent behavior was nonviolent[117] and vice versa.[118] Either way, the whole thing seems bizarre.

For example, in *Quarles v. United States*,[119] whether Michigan's third-degree home invasion offense was violent turned on the "exceedingly narrow question" of

> whether remaining-in burglary (i) occurs only if a person has the intent to commit a crime *at the exact moment* when he or she *first* unlawfully remains in a building or structure, or (ii) more broadly, occurs when a person forms the intent to commit a crime *at any time* while unlawfully remaining in a building or structure.[120]

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115 Almanza-Arenas v. Lynch, 815 F.3d 469, 483 (9th Cir. 2016) (en banc) (Owens, J., concurring).

116 United States v. Scott, 990 F.3d 94, 125–26 (2d Cir. 2021) (en banc) (Park, J., concurring) ("The en banc court convened to decide whether Mr. Scott's two convictions for first-degree manslaughter—one for shooting a man in the face and the other for stabbing a man to death—count as 'violent felonies' . . . . The question answers itself to any layperson with common sense." *Id.* at 125.); *accord, e.g.*, United States v. Davis, 875 F.3d 592, 595 (11th Cir. 2017) (E. Carnes, C.J.) ("So here we go down the rabbit hole again to a realm where we must close our eyes as judges to what we know as men and women.").

117 "How did we ever reach the point where this Court, sitting en banc, must debate whether a carjacking in which an assailant struck a 13-year-old girl in the mouth with a baseball bat and a cohort fired an AK-47 at her family is a crime of violence? It's nuts." Ovalles v. United States, 905 F.3d 1231, 1253 (11th Cir. 2018) (en banc) (W. Pryor, J., concurring).

Another case complained,

> Through the *Alice in Wonderland* path known as the "categorical approach," we must consider whether Battle's assault of a person with the intent to murder is a crime of violence. While the answer to that question might seem to be obviously yes, it is not so simple after almost 30 years of jurisprudence beginning with *Taylor*. We must look not to what Battle actually did. Instead, we must turn away from the facts of this case and consider how assault with intent to murder could realistically be committed in situations that have nothing to do with Battle. As absurd as this sounds, it is what we are bound to do under current precedent.

Battle, 927 F.3d at 163 n.2 (Quattlebaum, J.).

118 *E.g.*, Stokeling v. United States, 139 S. Ct. 544, 549–50 (2019) (ignoring, under the categorical approach, the trial judge's finding that Mr. Stokeling's conduct was not violent); *see also generally, e.g.*, Alfred v. Garland, 64 F.4th 1025 (9th Cir. 2023) (en banc) (rejecting, in a fractured and divided decision, a petition for review from the Board of Immigration Appeals based on the relationship between the categorical approach and accomplice liability).

119 Quarles v. United States, 139 S. Ct. 1872 (2019).

120 *Id.* at 1875.

That has little to do with violence and even less to do with Mr. Quarles, who was convicted of home invasion after he "attempted to climb through an apartment window to attack his ex-girlfriend,"[121] one of several convictions for using guns to terrorize women.[122]

Third, results can seem "counterintuitive,"[123] "arbitrary[,] and inequitable."[124] Identical conduct cashes out as violent or not depending on state law quirks.[125] Petty burglars face ACCA enhancements[126] while offenders convicted of aggravated assault or manslaughter do not.[127] And offenses Congress almost certainly envisioned being violent fall away.[128]

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121 *Id.* at 1880 (Thomas, J., concurring).

122 Mr. Quarles's other two assault predicates involved girlfriends at gunpoint and, once, shooting at one's suspected lover. *Id.* at 1876 (majority opinion). His federal firearms conviction arose after another girlfriend called 911 because he was threatening her with a gun and hitting her. *Id.* at 1875–76.

123 United States v. Faust, 853 F.3d 39, 61, 60–61 (1st Cir. 2017) (Lynch, J., concurring).

124 Mathis v. United States, 579 U.S. 500, 521 (2016) (Kennedy, J., concurring); *accord, e.g.*, United States v. Ross, 977 F.3d 1295, 1296 (8th Cir. 2020) (mem.) (Erickson, J., dissenting from denial of rehearing en banc) ("completely unsatisfactory and nonsensical"); United States v. Garcia-Lopez, 903 F.3d 887, 896 (9th Cir. 2018) (Tallman, J., concurring) ("inconsistent"); United States v. Mayo, 901 F.3d 218, 230 (3d Cir. 2018) ("wholly unsatisfying and counterintuitive"); Alfred v. Garland, 13 F.4th 980, 987–88 (9th Cir. 2021) (England, J., specially concurring) ("So what we have done today is rely on a theory of liability that assumes a crime was committed by someone else when it is undisputed that Petitioner himself—and himself *alone*—committed the offense." *Id.* at 988.), *rev'd en banc*, 64 F.4th 1025 (9th Cir. 2023).

125 *See, e.g.*, United States v. Burris, 912 F.3d 386, 408 (6th Cir. 2019) (Thapar, J., concurring) ("[I]f you are in Cincinnati, Ohio, and you 'cause serious physical harm to another,' it is not a crime of violence. But if you drive one mile across the Ohio River and commit the very same crime in Kentucky, it *is* a crime of violence—all because the analogous statute in Kentucky defined serious physical harm a little differently." (first citing KY. REV. STAT. ANN. § 508.040; then citing United States v. Maynard, 894 F.3d 773, 775 (6th Cir. 2018); and then citing United States v. Colbert, 525 F. App'x 364, 369–70 (6th Cir. 2013))).

126 18 U.S.C. § 924(e)(2)(B) (2018); *see, e.g.*, United States v. Thompson, 421 F.3d 278, 284 (4th Cir. 2005) (declaring that North Carolina's basic burglary offense, breaking and entering, is a crime of violence because it categorically matches generic burglary).

127 *See, e.g.*, United States v. Benally, 19 F.4th 1250, 1258 (10th Cir. 2021) (involuntary manslaughter in Indian Country and assault resulting in bodily injury); Dunlap v. United States, 784 F. App'x 379, 381, 386–89 (6th Cir. 2019) (convictions for voluntary manslaughter after shooting and killing someone and aggravated assault after shoving a crack pipe up a woman's vagina); *see* Borden v. United States, 141 S. Ct. 1817, 1855–56 (2021) (Kavanaugh, J., dissenting) (describing reckless homicides and assaults that do not qualify).

128 *See, e.g.*, United States v. White, 58 F.4th 889, 899 (6th Cir. 2023) (aggravated robbery); United States v. Parral-Dominguez, 794 F.3d 440, 445 (4th Cir. 2015) (discharging a firearm into an occupied dwelling); United States v. Al-Muwwakkil, 983 F.3d 748, 759–64 (4th Cir. 2020) (attempted rape and burglary with the intent to murder); United

For example, the Supreme Court has granted certiorari to decide whether second-degree murder is violent when caregivers can be convicted after grossly neglected children die.[129] The issue is not academic; *United States v. Mayo* held that aggravated assault was not violent because two parents had been convicted of starving their children nearly to death, which technically does not involve "force."[130] But Mr. Mayo beat someone's head with a brick.[131] The *Mayo* court sighed, "It is hard to imagine that Congress meant for the kinds of crimes typically prosecuted as aggravated assault under state law to fall outside of the definition of 'violent felony' in the ACCA. But that's the categorical approach for you."[132]

Frustration sometimes boils over colorfully. "In the nearly three decades since its inception, the categorical approach has developed a reputation for crushing common sense in any area of the law in which its tentacles find an inroad."[133] "And this, finally, is what we have come to: plotting to murder one's fellow human beings is not a crime of violence. Heaven help us."[134] "Sometimes the logic of the categorical approach is so counterintuitive it would vex even Wittgenstein."[135] "[T]he categorical approach can serve as a protracted ruse for paradoxically finding even the worst and most violent offenses not to constitute crimes of violence."[136] "In addition to all the freakshow oddities this misguided approach has wrought, you can now add this case, where [the defendant] loses, but our court isn't really sure as to why."[137] "[T]he categorical approach 'push[es] us into a catechism

States v. Carter, 7 F.4th 1039, 1043–45 (11th Cir. 2021) (aggravated assault); United States v. Chappelle, 41 F.4th 102, 111 (2d Cir. 2022) (Hobbs Act robbery); United States v. Gillis, 938 F.3d 1181, 1206–10 (11th Cir. 2019) (federal kidnapping).

129 *See* Petition for a Writ of Certiorari, *supra* note 20, at 14–16; Delligatti v. United States, 144 S. Ct. 2603 (2024) (mem.) (granting certiorari).

130 United States v. Mayo, 901 F.3d 218, 227–30 (3d Cir. 2018) (first citing Commonwealth v. Thomas, 867 A.2d 594 (Pa. Super. Ct. 2005); and then citing Commonwealth v. Taylor, No. 1641 WDA 2013, 2015 WL 7576457 (Pa. Super. Ct. Feb. 9, 2015)).

131 *Id.* at 222.

132 *Id.* at 230 (citing United States v. Ramos, 892 F.3d 599, 613 (3d Cir. 2018)).

133 United States v. Escalante, 933 F.3d 395, 406 (5th Cir. 2019) (Elrod, J.) (footnote omitted).

134 United States v. McCollum, 885 F.3d 300, 314 (4th Cir. 2018) (Wilkinson, J., dissenting) ("True, there may be some beings in some other planetary system who can make sense of it all, but for earthlings, not so much." *Id.* at 310.).

135 Nunez v. Att'y Gen., 35 F.4th 134, 142 (3d Cir. 2022) (Ambro, J., dissenting).

136 United States v. Doctor, 842 F.3d 306, 313 (4th Cir. 2016) (Wilkinson, J., concurring).

137 Alfred v. Garland, 64 F.4th 1025, 1072 n.1 (9th Cir. 2023) (en banc) (VanDyke, J., dissenting).

of inquiry that renders these approaches ludicrous.'"[138] "I guess when it comes to application of the Supreme Court's contrived categorical approach, in the words of my dearly departed Mama Louise: common sense ain't all that common."[139]

II. JUDGING VIOLENCE

When you've lost Mama Louise, it's time to figure out what went wrong. The answer begins with a little-noticed statutory change in the 1980s, when Congress shifted from listing violent crimes to describing them abstractly and universally across federal law. But violence is not a universal concept; it is a judgment grounded in facts and context. Rather than develop interpretive rules that facilitated that judgment, the Supreme Court ruthlessly excised any factual or interpretive flexibility. The result was federal courts judging violence without using their judgment.

A. The New Violence Definitions

The first federal violence predicates were enacted, not in the late twentieth century as some scholars claim,[140] but in the 1930s. In 1938, Congress prohibited firearms transfers to or receipts by people who had fled "to avoid prosecution for a crime of violence" or were under indictment for or had been convicted of a "crime of violence."[141] Federal law defined "crime of violence" by listing qualifying crimes: "murder, manslaughter, rape, mayhem, kidnaping, burglary, housebreaking; assault with intent to kill, commit rape, or rob; assault with a dangerous weapon, or assault with intent to commit any offense punishable by imprisonment for more than one year."[142] That definition remained until 1968,[143] when Congress expanded the

138 *Id.* at 1067 (McKeown, J., dissenting) (second alteration in original) (quoting United States v. Williams, 898 F.3d 323, 337 (3d Cir. 2018) (Roth, J., concurring)).

139 Alfred v. Garland, 13 F.4th 980, 990 (9th Cir. 2021) (Rawlinson, J., concurring in the result) ("[T]he conclusion that convictions for second degree robbery do not constitute aggravated felonies makes no sense legally or factually." *Id.* at 989–90.), *rev'd en banc*, 64 F.4th 1025 (9th Cir. 2023).

140 *See, e.g.*, SKLANSKY, *supra* note 14, at 86–87.

141 Federal Firearms Act of 1938, ch. 850, §§ 1(7), 2(d)–(f), 52 Stat. 1250, 1250–51; *see also* Jacob D. Charles & Brandon L. Garrett, *The Trajectory of Federal Gun Crimes*, 170 U. PA. L. REV. 637, 650 & n.69, 651 & n.74 (2021).

142 Federal Firearms Act of 1938 § 1(6). In 1932, Congress had adopted a similar "crime of violence" definition when it enacted the American Bar Association's Uniform Firearms Act in the District of Columbia. Act of July 8, 1932, ch. 465, §§ 2–3, 47 Stat. 650, 650–51; *see infra* note 341.

143 In the meantime, Congress added two violent-offender laws: the Travel Act (1961), which did not define "crime of violence," *see* Travel Act, Pub. L. No. 87-228, 75

offense to all felons, eliminating the violence definition.[144] (In 1968, Congress also added the first version of § 924(c), but it too reached all felonies, not just violent ones.[145])

The Comprehensive Crime Control Act of 1984[146] resurrected violence definitions as part of a broad antiviolence initiative. It enacted a slew of violence-based statutes;[147] directed federal sentencing, including the new U.S. Sentencing Commission, toward violent crime;[148] and appropriated funds to help states combat violence.[149] But the U.S. Code had no working violence definition.[150] So Congress enacted federal law's first general violence definition,[151] 18 U.S.C. § 16.[152]

Section 16 differed from its predecessors. Rather than listing offenses, it described violent crime abstractly, with the now-familiar use-of-force and residual clauses.[153] Its formula quickly became the federal template. Within three years, ACCA, § 924(c), and the Sentenc-

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Stat. 498 (1961) (codified as amended at 18 U.S.C. § 1952 (Supp. III 1962)), and a narcotics-treatment law that listed qualifying violent crimes, *see* Narcotic Addict Rehabilitation Act of 1966, Pub. L. No. 89-793, § 201, 80 Stat. 1438, 1442, *repealed in relevant part by* Comprehensive Crime Control Act of 1984, Pub. L. No. 98-473, § 218(a)(6), 98 Stat. 1976, 2027. In 1970, Congress also reformed the District of Columbia's pretrial-release standards to favor detaining people charged with a "crime of violence." District of Columbia Court Reform and Criminal Procedure Act of 1970, Pub. L. No. 91-358, § 210, 84 Stat. 473, 644, 650.

144 Omnibus Crime Control and Safe Streets Act of 1968, Pub. L. No. 90-351, § 902, 82 Stat. 197, 226; Gun Control Act of 1968, Pub. L. No. 90-618, § 102, 82 Stat. 1213, 1220–21.

145 Gun Control Act of 1968 § 102.

146 Comprehensive Crime Control Act of 1984, Pub. L. 98-473, 98 Stat. 1976.

147 *Id.* §§ 1002–1005, 98 Stat. at 2136–39.

148 *See, e.g.*, *id.* § 217, 98 Stat. at 2017–26 (creating the U.S. Sentencing Commission and directing it to prioritize imprisoning people who committed crimes of violence); *id.* § 239, 98 Stat. at 2039 ("[S]entencing decisions should be designed to ensure that prison resources are, first and foremost, reserved for those violent and serious criminal offenders who pose the most dangerous threat to society . . . .").

149 *E.g.*, *id.* § 606, 98 Stat. at 2081 (prioritizing federal block grants to help state and local programs address "violent crime and serious offenders").

150 HILLEL R. SMITH, CONG. RSCH. SERV., R45220, THE FEDERAL "CRIME OF VIOLENCE" DEFINITION: OVERVIEW AND JUDICIAL DEVELOPMENTS 2–3 (2018). Earlier definitions governed only individual statutes. *Id.*

151 *Id.* at 3; *see* S. REP. NO. 98-225, at 307 (1983) ("Although the term is occasionally used in present law, it is not defined, and no body of case law has arisen with respect to it. However, the phrase is commonly used throughout the bill, and accordingly the Committee has chosen to define it for general application in title 18." (footnotes omitted)).

152 Comprehensive Crime Control Act of 1984 § 1001, 98 Stat. at 2136.

153 *Id.*

ing Guidelines' section 4B1.1 adopted similar text.[154] Only a few federal laws continued listing violent crimes.[155]

Why the change from lists to abstraction? The legislative history does not directly answer.[156] But text, context, and statutory evolution suggest an explanation. I have argued elsewhere that the federal system operates like a small, roving backstop, reinforcing whichever crime problems are causing local enforcement problems.[157] The United States experienced two historic crime waves during the twentieth century: a smaller one during the 1920s and '30s and a second, greater one from about 1960 until the mid-'90s.[158] It is no coincidence that Congress enacted a few violent-offender laws during the 1930s and many more during the longer, more intense wave in the 1980s.[159]

So in the 1980s, Congress set out to combat historic violence, and it needed a flexible definition that could direct that initiative across many policy areas. The violence definitions' principal objective was not, as scholars sometimes claim, a sentencing "[r]evolution"

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154 Section 924(c) initially relied on § 16's violence definition, but in 1986, Congress added its current definition and expanded ACCA to its current form. *See* Firearms Owners' Protection Act, Pub. L. No. 99-308, § 104(a), 100 Stat. 449, 456–59 (1986). In 1987, the U.S. Sentencing Commission adopted § 16's definition of "crime of violence" but switched to ACCA's definition two years later. *See* SENT'G GUIDELINES 1987, *supra* note 63, § 4B1.2; SENT'G GUIDELINES 1989, *supra* note 63, app. C at 138–39.

155 The Violent Crimes in Aid of Racketeering Activity (VICAR) statute, also enacted in the Comprehensive Crime Control Act of 1984, listed qualifying violent crimes. Comprehensive Crime Control Act of 1984 § 1002. It still does today. *See* 18 U.S.C. § 1959(a) (2018).

156 The language first appeared in a federal criminal reform bill introduced in 1973, Criminal Code Reform Act of 1973, S. 1400, 93d Cong. § 111 (1973), and percolated in federal and District of Columbia criminal reform legislation for another decade, *e.g.*, Criminal Code Reform Act of 1977, S. 1437, 95th Cong. § 111 (1977); *D.C. Criminal Code Revisions: Hearings Before the Subcomm. on Judiciary of the Comm. on the D.C. H.R.*, 95th Cong. 348 (1978) (describing proposed § 22-103(7)'s definition for "crime of violence"). None of the history directly explains the change, though the D.C. City Council did presciently object that the new language, "especially subsection (b) [the residual clause], is unnecessarily vague" and urged returning to the list of qualifying predicates. *Id.*

157 Erin C. Blondel, *The Structure of Criminal Federalism*, 98 NOTRE DAME L. REV. 1037, 1039–40 (2023).

158 *See* Jeffrey Fagan & Daniel Richman, *Understanding Recent Spikes and Longer Trends in American Murders*, 117 COLUM. L. REV. 1235, 1260–61 (2017); Lawrence M. Friedman, *Some Remarks on Crime, Violence, History, and Culture*, 69 U. COLO. L. REV. 1121, 1122 (1998); Robert J. Kaminski & Thomas B. Marvell, *A Comparison of Changes in Police and General Homicides: 1930–1998*, 40 CRIMINOLOGY 171, 173–74 (2002) (documenting increases in police homicides during the 1920s and again in the 1960s to 1980s).

159 *See, e.g.*, Karen M. Gütter, *Will the Supreme Court Learn from Its Mistake?:* Deal v. United States, 27 COLUM. J.L. & SOC. PROBS. 375, 386–87 (1994) (collecting legislators' remarks about rising violence and federal gun enactments).

toward harsh punishment.[160] Indeed, § 16 is not a sentencing statute at all—it is a standalone definition that Congress has applied widely. Today, it affects victims' financial and procedural rights,[161] witness protection,[162] extradition,[163] and federal law enforcement authority;[164] it regulates private prisoner transport companies[165] and protects U.S. officers.[166] It governs federal civil rights laws.[167] One grant program even increases funding for community colleges that prioritize educating youth convicted of violent crime.[168]

Thus, Congress meant the violence statutes to apply expansively and flexibly across federal programs to help fight violence. Statutory text and history support that conclusion. All four are remarkably broad. The use-of-force clauses reach attempts or even threats; the now-defunct residual clauses read like catch-alls, covering offenses that even *risk* force or injury. Sections 16 and 924(c) cover property crimes;[169] ACCA enumerates some property crimes.[170] Section 16

160 Barkow, *supra* note 11, at 209; *see, e.g.*, *id.* at 201 ("[I]nstead of creating a precision regime that pinpointed and targeted the small number of people who repeatedly exhibited a propensity for violence, Congress enacted a sweeping law . . . ."); Charles & Garrett, *supra* note 141, at 656–57, 659–60; *see also* SKLANSKY, *supra* note 14, at 81, 86–87 (arguing that Congress set "the bar" for qualifying crimes as violent "very low" because it assumed that "when it came to punishment, more was better," *id.* at 81).

161 *E.g.*, 11 U.S.C. § 707(c) (2018) (victims' rights in bankruptcy proceedings); 18 U.S.C. § 3663A(c)(1)(A)(i) (2018) (victims' access to restitution); 20 U.S.C. §§ 1094(a)(26), 1232g(b)(6)(A)–(B) (2018) (victims' rights in university disciplinary proceedings); 42 U.S.C. § 1437f(o)(6)(A)(i), (o)(16)(B) (2018) (public housing assistance).

162 18 U.S.C. § 3521(a) (2018).

163 18 U.S.C. § 3181(b) (2018) (identifying which crimes merit extraditing defendants who attacked U.S. nationals abroad).

164 *E.g.*, 2 U.S.C. § 1967(a)(1)–(2), (d) (2018) (authorizing Capitol Police officers to arrest someone for "any crime of violence," § 1967(a)(1), committed on Capitol grounds or in the officer's presence and relying on the definition in 18 U.S.C. § 16); 28 U.S.C. § 540A(c)(1) (2018) (FBI's authority to investigate crimes involving foreign travelers); 34 U.S.C. §§ 30502(1), 30503(a)(1)(A) (2018) (federal agents' authority to help local hate crime investigations). The January 6, 2021, Capitol riot vividly illustrates the downsides of hindering the Capitol Police.

165 *See* 34 U.S.C. §§ 60102(1), 60103 (2018) (imposing quality requirements on prisoner transportation companies that states use to transport violent offenders).

166 *E.g.*, 28 U.S.C. § 1442(c)–(d) (2018) (federal officers' removal rights in state proceedings); 50 U.S.C. § 3609(d) (2018) (limiting tort liability for national security personnel who intervene to stop violence).

167 *E.g.*, 34 U.S.C. §§ 30502(1), 30503(a)(1) (2018) (assistance to local agencies investigating hate crimes); *id.* § 12361(d) (right to be free from gendered violence).

168 *See* 20 U.S.C. § 1161w(b)(4), (f)(3)–(4) (2018) (defining a "crime of violence" as one that "has as an element the use or attempted use of physical force against the person of another for which the maximum penalty is not less than six months," § 1161w(f)(3)(A)(ii)).

169 18 U.S.C. §§ 16, 924(c)(3) (2018).

170 SKLANSKY, *supra* note 14, at 80–81.

even reaches misdemeanors. That was no oversight; drafters noted that § 16 would reach small-time crimes like simple assault, battery, and burglary.[171]

Then, Congress repeatedly expanded those definitions to ensure crimes would not fall through the cracks. ACCA originally covered robbery and burglary,[172] but two years later, Congress eagerly added many drug and violent felonies.[173] The only real debate was how to make clear burglary was covered.[174] Congress aimed "to cover more repeat offenders because Congress believed that the law was successfully carrying out its objective and wanted to expand its reach."[175] Congress also expanded § 924(c)—four times[176]—including to legislatively overrule the Supreme Court's repeated attempts to narrow it.[177] After one such instance, in which the Court had held that § 924(c) did not cover bank robbery or assault on a federal officer, legislators groused that those crimes were "precisely the type of extremely dangerous offenses for which" § 924(c) was "the most appropriate."[178]

Scholars and the Supreme Court have misunderstood the violence definitions' history and purpose. Scholars have claimed that the violence definitions were drafted to "change[] the punishment of federal crimes"[179] as part of a "revolution" favoring harsh punishment over rehabilitation in criminal sentencing.[180] Broadly defining violence was a no-brainer because "when it came to punishment, more was better."[181]

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171 S. REP. NO. 98-225, at 307 (1983). Burglary rarely results in violence. *See* SKLANSKY, *supra* note 14, at 80. Simple assault and battery include offensive touching. *See infra* note 212–13 and accompanying text.

172 Armed Career Criminal Act of 1984, Pub. L. No. 98-473, §§ 1801–1803, 98 Stat. 2185, 2185.

173 Anti-Drug Abuse Act of 1986, Pub. L. No. 99-570, § 1402, 100 Stat. 3207, 3207-39 to -40; *see also* SKLANSKY, *supra* note 14, at 81; Charles & Garrett, *supra* note 141, at 657.

174 Taylor v. United States, 495 U.S. 575, 581–90 (1990); SKLANSKY, *supra* note 14, at 75–82.

175 Barkow, *supra* note 11, at 212.

176 Charles & Garrett, *supra* note 141, at 656.

177 *See* United States v. O'Brien, 560 U.S. 218, 232–33 (2010).

178 S. REP. NO. 98-225, at 312 (1983). Ironically, *United States v. Davis* cited that revision as evidence that Congress "*narrowed* § 924(c)." 139 S. Ct. 2319, 2331 (2019). That revision did shift from covering all felonies to focusing on drugs and violent predicates, but its primary goal was to make § 924(c) more enforceable, including in robbery cases like *Davis*, after Court decisions had made it toothless. *See* S. REP. NO. 98-225, at 313; *see also* United States v. Gonzales, 520 U.S. 1, 10 (1997).

179 Barkow, *supra* note 11, at 200.

180 *See supra* note 160 and accompanying text.

181 SKLANSKY, *supra* note 14, at 81.

Meanwhile, the Supreme Court has begun claiming that Congress intended the violence definitions to reach a "narrow 'category of violent, active crimes'"[182] to "address 'the special danger created when a particular type of offender—a violent criminal[]—possesses a gun.'"[183] As we shall see, the Court has spent two decades fruitlessly trying to pinpoint those particular offenders and crimes without realizing that the premise is false.

Scholars are closer, but both camps miss the mark. Congress wanted to combat an unprecedented crime wave, so it defined violence broadly and flexibly to give federal actors pliant tools to address the situation on the ground. To be sure, Congress saw punishing violence harshly as one important instrument. But it was a subsidiary goal serving an overarching objective. The violence definitions weren't drafted as sentencing laws, and they certainly weren't narrowly targeted: they were systemic, designed to guide federal antiviolence policy. Consequently, Congress was far more worried about gaps than precision. The crimes that are not violent today would have stunned the violence definitions' drafters.

B. The Problem with Defining Violence Legally

Whatever its virtues, Congress's flexible approach seeded the definitions with a problem: violence is not a universal, well-defined legal concept. Scholars, especially Alice Ristroph[184] and David Sklansky,[185] have demonstrated that violence is a fact-based, morally laden, contestable judgment call.[186] Congress was asking courts not so much to interpret text as to interpret *crimes*, to judge them as violent or not.

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182 Borden v. United States, 141 S. Ct. 1817, 1830 (2021) (plurality opinion) (quoting Johnson v. United States, 559 U.S. 133, 140 (2010)); *accord, e.g.*, *Davis*, 139 S. Ct. at 2333, 2335 (asserting that whether Congress drafted § 924(c)'s residual clause to reach armed robbery was merely "*possible*" and "speculative").

183 *Borden*, 141 S. Ct. at 1830 (plurality opinion) (alteration in original) (quoting Begay v. United States, 553 U.S. 137, 146 (2008)); *accord, e.g.*, *Davis*, 139 S. Ct. at 2333, 2335.

184 *See generally* Ristroph, *supra* note 29.

185 *See generally* SKLANSKY, *supra* note 14.

186 For Ristroph, "[v]iolence is . . . a dual concept, used to describe both the overwhelming of the human body and the transgression of social and cultural norms." Ristroph, *supra* note 29, at 574. Sklansky illustrates how slippery violence is as a concept, often expanding beyond physical force to contestable areas like police violence, property crime, and emotional trauma and raising potentially thorny value judgments. SKLANSKY, *supra* note 14, at 15–20. Other scholars have recognized that violence is difficult to pin down, most famously Robert Cover. Robert M. Cover, *Violence and the Word*, 95 YALE L.J. 1601, 1629 (1986); *see also, e.g.*, Friedman, *supra* note 158, at 1123–28.

Instead of embracing the assignment,[187] the Court spent two decades struggling to define violence better, mangling the text, creating confusion, and upending Congress's intent—all without ever finding the magic words.

Two lines of cases illustrate the larger fiasco. The first involves driving crimes. Reflexively, driving doesn't seem like a violent act. But two early opinions, *Leocal v. Ashcroft*[188] and *Begay v. United States*,[189] struggled to textually justify why driving crimes aren't violent. *Leocal*'s underlying offense was driving under the influence and causing "serious bodily injury,"[190] which state law defined as disfiguring or life-threatening.[191] *Leocal* was a § 16 case, and, taken literally, plowing a car into two people and nearly killing them involves "the use . . . of physical force against the person"[192] and "risk[s] that physical force" would be "used" against a person.[193] *Begay* was an ACCA residual-clause case, but ACCA's text was no more helpful; it was hard to dispute that the underlying crime—ordinary drunk driving[194]—"involves conduct that presents a serious potential risk of physical injury."[195]

Leocal held that "use" adopted a mens rea above "accidental or negligent conduct."[196] Since the *Leocal* offense required no mens rea, problem solved—until the *Begay* Court realized that ACCA's residual clause covers any crime that "involves conduct that presents a serious potential risk of physical injury,"[197] no "use" required. This time, the Court decided that ACCA's enumerated offenses somehow meant that the residual clause really reached only "purposeful, 'violent,' and

187 Justice Scalia complained, "Fuzzy, leave-the-details-to-be-sorted-out-by-the-courts legislation is attractive to the Congressman who wants credit for addressing a national problem but does not have the time (or perhaps the votes) to grapple with the nitty-gritty." Sykes v. United States, 564 U.S. 1, 35 (2011) (Scalia, J., dissenting), *abrogated by* Johnson v. United States, 576 U.S. 591 (2015).

188 Leocal v. Ashcroft, 543 U.S. 1 (2004).

189 Begay v. United States, 553 U.S. 137 (2008), *abrogated by Johnson*, 576 U.S. 591.

190 *Leocal*, 543 U.S. at 4.

191 Specifically, "a substantial risk of death, serious personal disfigurement, or protracted loss or impairment of the function of any bodily member or organ." FLA. STAT. § 316.1933(1)(b) (2024).

192 18 U.S.C. § 16(a) (2018).

193 § 16(b). The risk was 100 percent: the offense required it.

194 *Begay*, 553 U.S. at 139.

195 18 U.S.C. § 924(e)(2)(B)(ii) (2018). Even the majority conceded that "[d]runk driving is an extremely dangerous crime" that kills thousands annually. *Begay*, 553 U.S. at 141.

196 Leocal v. Ashcroft, 543 U.S. 1, 11 (2004).

197 § 924(e)(2)(B)(ii).

'aggressive' conduct."[198] The text reading was dubious,[199] but DUIs were out.

Unfortunately, *Begay*'s "purposeful, violent, and aggressive" standard triggered so many circuit splits and cert petitions that, within seven years, three Justices switched positions and invalidated the residual clause for vagueness.[200] Excising the residual clause, if anything, merely accelerated cert petitions.[201]

It did not even solve the driving problem. *Borden v. United States* confronted the question *Leocal* left open: Are reckless mens rea crimes violent?[202] *Borden* was not actually a driving case—Mr. Borden had three prior assault convictions, two for intentional and one for reckless assault.[203] But Justice Kagan's plurality opinion ignored Mr. Borden's actual convictions, reasoning instead that "drunk driving and other crimes of recklessness, though 'moral[ly] culpab[le],' do not fit within 'the ordinary meaning of the term "violent" crime.'"[204]

Seventeen years after *Leocal*, the *Borden* plurality still could not find a principled, textual line that excluded driving crimes. If anything, intervening decisions had made the project harder. A domestic violence case had already held that the word "use" includes recklessness, eliminating *Leocal*'s "use"-as-mens-rea solution.[205] So the *Borden* plurality discovered that the phrase "against the person of another" *also* includes a mens rea standard.[206] In a parody of technical lawyering, the plurality and dissent then debated whether the word

198 *Begay*, 553 U.S. at 144–45 (quoting United States v. Begay, 470 F.3d 964, 980 (10th Cir. 2006) (McConnell, J., dissenting in part)).

199 *Begay* reasoned that the residual clause had to be read with its enumerated offenses, which, it claimed, "typically involve purposeful, 'violent,' and 'aggressive' conduct." *Id.* (quoting *Begay*, 470 F.3d at 980 (McConnell, J., dissenting in part)). Yet burglary can include breaking into a neighbor's garage while nobody is home, and extortion can include mailing a letter threatening to reveal a sexual indiscretion. And ACCA's residual clause followed the enumerated offenses with the word "otherwise," which suggests Congress wanted to *expand* qualifying offenses rather than use the enumerated crimes as limits. *See* § 924(e)(2)(B)(ii).

200 Johnson v. United States, 576 U.S. 591, 606 (2015). Justice Scalia first raised his vagueness argument in dissent in *James v. United States*, 550 U.S. 192, 230 (2007). Chief Justice Roberts and Justices Kennedy and Breyer joined the majority in *James*, *id.* at 195, but Chief Justice Roberts and Justice Breyer switched and joined Justice Scalia's *Johnson* majority, and Justice Kennedy concurred in the judgment, *Johnson*, 576 U.S. at 592.

201 *See supra* note 109 and accompanying text; *infra* text accompanying note 227.

202 Borden v. United States, 141 S. Ct. 1817, 1821 (2021).

203 *Id.* at 1837 (Kavanaugh, J., dissenting).

204 *Id.* at 1830 (plurality opinion) (alterations in original) (quoting Oyebanji v. Gonzales, 418 F.3d 260, 264 (3d Cir. 2005)).

205 Voisine v. United States, 579 U.S. 686, 698–99 (2016).

206 *Borden*, 141 S. Ct. at 1833 (plurality opinion) (citing Leocal v. United States, 543 U.S. 1, 9 (2004)).

"against" is "intent-laden language"[207] or has "zero to do with *mens rea*."[208]

The net result was that all reckless crimes were out, including many that Congress almost certainly assumed were violent.[209] That includes Mr. Borden's convictions, which required proof that during the assaults he either "'caus[ed] serious bodily injury to another' or 'us[ed] or display[ed] a deadly weapon.'"[210] And mens rea *still* is not settled; lower courts now face litigation over depraved-heart crimes.[211]

A second line of cases tried to define "force" with no more success. It began with a Florida battery conviction, which state law made a felony because the defendant had a prior conviction for assaulting a female.[212] Florida, like most states, defined battery's "force" to include offensive touching, even a tap on the shoulder.[213] The Court understandably thought that did not seem violent,[214] but why? Mens rea was no help; battery, minor though it can be, is a textbook intentional crime. So the Court held that "force" meant "*violent* force—that is, force capable of causing physical pain or injury."[215]

Problem solved—until the Court realized that since most misdemeanor domestic violence offenders are convicted of battery or similar crimes, *Johnson* risked turning the prohibition on misdemeanor domestic violence offenders possessing firearms into a dead letter.[216] The Court then held that "force" is a "term of art"[217] in "domestic violence" that means something less than force capable of causing physical pain or injury.[218] *That* solution proved little help in the next domestic violence case, in which the defendant, citing *Leocal*, argued that "use" excluded reckless crimes, which virtually all

207 *Id.*

208 *Id.* at 1839 (Kavanaugh, J., dissenting).

209 *See id.* at 1855–57 (noting the *Borden* test would eliminate shootings, knifings, beatings, and even murders).

210 *Id.* at 1822 (plurality opinion) (quoting TENN. CODE ANN. § 39-13-102(a)(2) (2003) (current version at § 39-13-102(a)(1) (2024))).

211 *See* United States v. Jamison, 85 F.4th 796, 803–04 (6th Cir. 2023) (collecting cases).

212 Johnson v. United States, 559 U.S. 133, 136 (2010). The indictment for the disputed battery conviction named a female victim, and the sentencing judge observed that the defendant had "been convicted of multiple violent felony offenses" and "most of the victims of [his] violent acts have been women." Joint Appendix: Volume I of II at 37, 59, *Johnson*, 559 U.S. 133 (No. 08-6925).

213 *Johnson*, 559 U.S. at 138–39.

214 *Id.* at 139.

215 *Id.* at 140.

216 United States v. Castleman, 572 U.S. 157, 167–68 (2014).

217 *Id.* at 163 (quoting *Johnson*, 559 U.S. at 139).

218 *See id.* at 168.

domestic violence offenses are.[219] So the Court held that "use" includes recklessness.[220] Defining "use" to include recklessness merely teed up the absurd "against" mens rea debate in *Borden*. Next up: Is second-degree murder violent "force" when defendants can violate it by omission, such as by watching children starve to death or die of treatable conditions?[221]

The Supreme Court is fighting a losing battle. For two decades, it has searched for a principled, legal distinction between violent and nonviolent crime—and failed. Perhaps realizing its textual readings are tortured, the Court has repeatedly resorted to falling back on purposivism. "[W]e ultimately are determining the meaning of the term 'crime of violence.' The ordinary meaning of this term . . . suggests a category of violent, active crimes that cannot be said naturally to include DUI offenses."[222] But that is circular. The Court has basically spent two decades holding that some crimes cannot be crimes of violence because . . . they are not violent.

C. Judging Violence Categorically

The Court is making eyeball judgments. That would be defensible if the Court admitted it and developed an interpretive methodology to help lower courts to make those calls. Instead, the categorial approach has become increasingly inflexible and technical, insisting that criminal convictions and their elements answer whether a crime is violent without resorting to facts. But they do not. The categorical approach is torturing criminal law for answers it is not designed to provide.

Two lines of cases really built the straitjacket. First, in 2015, *Johnson v. United States* (*Samuel James Johnson*) held that ACCA's residual

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219 Voisine v. United States, 579 U.S. 686, 694, 696–97 (2016).

220 *Id.* at 698–99.

221 Brief for the Petitioner at 3, Delligatti v. United States, No. 23-825 (U.S. Aug. 8, 2024).

222 Leocal v. Ashcroft, 543 U.S. 1, 11 (2004); *accord, e.g.*, *Johnson*, 559 U.S. at 140 (defining force as "*violent* force—that is, force capable of causing physical pain or injury"); Begay v. United States, 553 U.S. 137, 146 (2008) ("[ACCA] focuses upon the special danger created when a particular type of offender—a violent criminal or drug trafficker—possesses a gun." (first citing Taylor v. United States, 495 U.S. 575, 587–88 (1990); and then citing United States v. Begay, 470 F.3d 964, 981 n.3 (10th Cir. 2006) (McConnell, J., dissenting in part))), *abrogated by* Johnson v. United States, 576 U.S. 591 (2015); Borden v. United States, 141 S. Ct. 1817, 1830 (2021) (plurality opinion) ("ACCA sets out to identify, for sentencing purposes, the eponymous 'armed career criminal'—the sort of offender who, when armed, 'might deliberately point the gun and pull the trigger.' . . . [T]hat is not so . . . of someone convicted of a crime, like a DUI offense, revealing only a 'degree of callousness toward risk.'" (quoting *Begay*, 553 U.S. at 145–46)).

clause is unconstitutionally vague;[223] later cases invalidated § 16's and § 924(c)'s residual clauses too.[224] The original idea, according to *Samuel James Johnson*'s author and proponent, Justice Scalia, was to stop "ad hoc application of ACCA to the vast variety of state criminal offenses until the cows come home."[225] The logic was understandable. The clauses forced courts to figure out how much risk a crime—robbery, reckless driving, etc.—poses, an abstract inquiry. The Court had attempted to narrow the standard to "violent, active crimes," which only confused courts and litigants more.[226] Eliminating the residual clause seemed to promise more clarity and fewer cert petitions.

It didn't work. Litigation—and cert grants—exploded after *Samuel James Johnson*.[227] The Court had misunderstood two points. First, the residual clauses generated more litigation, not because they were more confusing, but because they were statutory catch-alls, so courts tended to evaluate crimes under the residual clause and bypass the other clauses. Residual-clause cases weren't more confusing; they were simply more common.

Second, the residual clauses were the only provisions that let federal courts make some much-needed eyeball judgments. Because the test was how risky a *crime* is, courts could consider what the crime typically involves rather than the least serious case. That intuitive judgment was precisely what Justice Scalia was objecting to; yet, as Section II.B explained, it was inevitable even under the other clauses. The residual clauses, for all their imperfections, at least let federal judges assess how violent a crime was openly, with fewer textual gymnastics. And over time, circuits judged enough state crimes to have, effectively, a common law list of violent crimes that lower courts could apply easily.

Invalidating the residual clauses blew those lists up, forcing federal judges to revisit entire state codes. The other clauses proved more technical but no less judgment laden, generating more litigation, more cert grants, more textual glosses, and more lower-court litigation applying the Court's latest violence test. The Court did not

223 *Johnson*, 576 U.S. at 606.

224 *See, e.g.*, Sessions v. Dimaya, 138 S. Ct. 1204, 1223 (2018); United States v. Davis, 139 S. Ct. 2319, 2336 (2019).

225 Sykes v. United States, 564 U.S. 1, 33 (2011) (Scalia, J., dissenting), *abrogated by Johnson*, 576 U.S. 591; *see also Johnson*, 576 U.S. at 606 (concluding that cases affirming the clauses' constitutionality "proved to be anything but evenhanded, predictable, or consistent").

226 *See supra* note 182 and accompanying text; *Johnson*, 576 U.S. at 598–602.

227 *See supra* note 109 and accompanying text.

escape judging violence; it merely transferred that assessment to less hospitable text.

A second line of cases drew an increasingly rigid line separating elements from facts. *Taylor* had said that courts could consult court records when it was unclear which crime the defendant was convicted of committing, such as burglary breaking into a home versus a boat.[228] *Shepard v. United States* narrowed which records courts could consult, prohibiting more factually detailed police reports or statements appended to charging instruments.[229] But still, for years, courts used *Shepard* documents to clarify which way the defendant violated a statute—a practice the Court again ratified, in dicta, in 2010.[230]

Then *Descamps v. United States*[231] (2013) and *Mathis v. United States*[232] (2016) cracked down. *Descamps* limited the modified categorical approach to "divisible" statutes (those that list separate crimes) rather than statutes that list multiple ways of committing the crime,[233] even though the Court had earlier permitted applying it to both kinds of statutes.[234] Far fewer statutes met *Descamps*'s stricter test, so federal courts now had to pretend that an indictment did not specify whether a defendant broke into a "dwelling" or a "boat," even though it often did.

Next, *Mathis* held that even when the modified categorical approach applied, judges could use *Shepard* documents only to identify the subsection of conviction and had to ignore other information the records revealed.[235] The Court had its reasons; it wanted to ensure defendants were not sentenced based on facts they never admitted or

228 *See* Taylor v. United States, 495 U.S. 575, 602 (1990) ("For example, in a State whose burglary statutes include entry of an automobile as well as a building, if the indictment or information and jury instructions show that the defendant was charged only with a burglary of a building, and that the jury necessarily had to find an entry of a building to convict, then the Government should be allowed to use the conviction for enhancement.").

229 Shepard v. United States, 544 U.S. 13, 16 (2005). The "*Shepard* documents" are "the statutory definition, charging document, written plea agreement, transcript of plea colloquy, and any explicit factual finding by the trial judge to which the defendant assented." *Id.*

230 *See* Johnson v. United States, 559 U.S. 133, 144 (2010) (explaining that the dissent exaggerated the consequences of narrowing "force" because the modified categorical approach "permits a court to determine which statutory phrase was the basis for the conviction by consulting the trial record").

231 Descamps v. United States, 570 U.S. 254 (2013).

232 Mathis v. United States, 579 U.S. 500 (2016).

233 *Descamps*, 570 U.S. at 263, 263–65.

234 *See* Taylor v. United States, 495 U.S. 575, 600–02 (1990); *Johnson*, 559 U.S. at 144–45. Ironically, *Mathis* involved a burglary statute indistinguishable from the one in *Taylor*. *See Mathis*, 579 U.S. at 523–24 (Breyer, J., dissenting).

235 *Mathis*, 579 U.S. at 513–14 (majority opinion).

even necessarily litigated and avoid omnipresent Sixth Amendment concerns.[236] But federal courts lost another opportunity to let facts guide hard judgment calls.

Erlinger quashed any hope that *Descamps* and *Mathis* were textual glosses the Court might relax. In *Erlinger*, the defendant had three burglary convictions committed days apart at different locations,[237] information burglary indictments and convictions necessarily supplied because the date of an offense and a burglary's location are essential elements.[238] Citing *Descamps* and *Mathis*, the Court held that whether those burglaries occurred on separate occasions was a fact question a jury must decide under the Sixth Amendment.[239] But *Descamps* and *Mathis* were categorical-approach cases, not Sixth Amendment decisions. And since the categorical approach is a doctrine of statutory interpretation and constitutional avoidance, it should be broader than the Sixth Amendment. *Erlinger* appears to have transformed *Descamps*'s and *Mathis*'s excesses into constitutional law.

That is alarming because *Mathis* and *Descamps* rely on a false dichotomy between elements and facts that does not exist in criminal law. *Mathis* pronounced, "Facts . . . are mere real-world things—extraneous to the crime's legal requirements."[240] "How a given defendant actually perpetrated the crime—what we have referred to as the 'underlying brute facts or means' of commission—makes no difference,"[241] so federal violence law "cares not a whit about them."[242]

But facts are not "extraneous" to elements;[243] they are what make elements coherent. Is assault with a "deadly weapon" a crime of violence? That might depend on what, factually, a "deadly weapon" is.[244] A gun seems pretty violent, but what about a car?[245] Or someone who swallowed a fish on a dare?[246] Interpreting an element without the facts defining it becomes a meaningless abstraction.

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236 *Id.* at 511–12.

237 Erlinger v. United States, 144 S. Ct. 1840, 1867 (2024) (Kavanaugh, J., dissenting).

238 *Cf. id.* at 1854 (majority opinion).

239 *Id.* at 1854–56.

240 *Mathis*, 579 U.S. at 504.

241 *Id.* at 509 (quoting Richardson v. United States, 526 U.S. 813, 817 (1999)); *see* Descamps v. United States, 570 U.S. 254, 265 (2013).

242 *Mathis*, 579 U.S. at 504.

243 *Id.*

244 *See infra* notes 477–80 and accompanying text.

245 *E.g.*, State v. Jones, 538 S.E.2d 917, 922 (N.C. 2000) ("It is well settled in North Carolina that an automobile can be a deadly weapon if it is driven in a reckless or dangerous manner." (citing State v. Eason, 86 S.E.2d 774, 779 (N.C. 1955))).

246 *See* Associated Press, *National News Briefs; Man Chokes to Death in Effort to Beat a Dare*, N.Y. TIMES (Jan. 30, 1998), https://www.nytimes.com/1998/01/30/us/national-

Nor has the categorical approach successfully escaped facts; it simply treats caselaw interpreting elements as the relevant facts. Note how the Court's supposed "fact-free" cases devolve into fact disputes. The *Stokeling* opinions debated whether peeling fingers or pulling a purse strap involve enough "force" to be violent.[247] *Borden* reduces to a fight over whether "recklessness" means drunk driving or drunken brawls.[248] Mr. Delligatti has argued that second-degree murder from starvation occurs "from an internal biological process, rather than from contact with the external world."[249]

That opens a question the Court has not really confronted: Do convictions, their elements, and caselaw interpreting those elements answer whether crimes are violent as federal law defines it? Essentially, no.

Convictions are not violence adjudications. Prosecutions adjudicate guilt and punishment under a jurisdiction's laws, policies, and procedures. Violence factors little in many serious crimes, such as fraud or child sexual abuse. Many crimes can be violent or not depending on context—extortion can mean threatening to reveal an affair or to fit someone with concrete shoes. Even when violence is necessarily relevant, such as in robbery cases, it is one of many factors, and not always the decisive one, that influence the ultimate result. Criminal history, other case facts, sentencing law, and prosecutorial policies are just some of many factors that shape convictions.

Offense elements and cases interpreting them are not designed to answer whether a crime was violent either. Elements notify people what is illegal, distinguish similar offenses, and guide charging, conviction, and sentencing decisions. It is impossible to include every

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news-briefs-man-chokes-to-death-in-effort-to-beat-a-dare.html [https://perma.cc/JB5U-STGP]. Police declined to charge the darers because the adult who swallowed the fish should have known better. *Id.*

247 *Compare* Stokeling v. United States, 139 S. Ct. 544, 553 (2019) ("[T]he force necessary to overcome a victim's physical resistance is inherently 'violent' . . . ." (citing Johnson v. United States, 559 U.S. 133, 139 (2010))), *with id.* at 559 (Sotomayor, J., dissenting) ("Under Florida law, 'robbers' can be glorified pickpockets, shoplifters, and purse snatchers.").

248 *Compare* Borden v. United States, 141 S. Ct. 1817, 1830 (2021) (plurality opinion) ("[D]runk driving and other crimes of recklessness . . . do not fit within 'the ordinary meaning of the term "violent" crime.'" (quoting Oyebanji v. Gonzales, 418 F.3d 260, 264 (3d Cir. 2005))), *with id.* at 1855–56 (Kavanaugh, J., dissenting) (listing offenses that would no longer qualify as violent like "savagely beat[ing] [a] victim" and causing permanent, severe injuries, *id.* at 1856 (citing State v. McAmis, No. M2007-02643-CCA-R3-CD, 2010 WL 2244124, *4 (Tenn. Crim. App. June 4, 2010)), and "pick[ing] up a friend's gun, point[ing] it directly at another person's head, and pull[ing] the trigger," *id.* at 1855–56 (citing State v. Gough, No. 08-CA-55, 2009 WL 180298, *1–2 (Ohio Ct. App. Jan. 26, 2009))).

249 Brief for the Petitioner, *supra* note 221, at 8.

fact a criminal statute might reach; instead, legislatures select a few key facts that help achieve those purposes.

Violence is just one of many concerns legislators might highlight. New York, for example, elevates robbery from third to second degree if the offender uses a weapon, hurts someone, or steals a vehicle.[250] Using a weapon might seem more "violent" than stealing a vehicle, but the legislature could conclude both acts similarly threaten public safety because cars can become moving weapons.[251]

Even elements keyed to violence are not as helpful as the Court seems to assume. Justice Sotomayor's *Stokeling* dissent claimed, for example, that Florida "dilut[ed] . . . the term" "force" by reaching peeling the victim's fingers off cash.[252] Diluted relative to what, exactly? Florida law was not necessarily using the "force" element to distinguish violent from nonviolent crime, let alone as federal law defines it. The "force" element serves Florida law's needs, such as distinguishing robbery from lesser theft offenses, like larceny, and guiding sentencing. The categorical approach seems to expect fifty-plus jurisdictions to reengineer their crime definitions to satisfy ACCA's terms.

Moreover, other statutes, procedures, and practices like affirmative defenses, sentencing provisions, diversion programs, prosecutorial decisions, and investigative policies refine an offense's meaning, even though they appear nowhere in the crime definition.[253] As we shall see,[254] in *Moncrieffe v. Holder*,[255] the categorical approach blundered over a Georgia expunction statute intended to transform a serious drug felony into a clean slate. The categorical approach ignores that framework, but legislatures enacting crime elements do not.

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250 N.Y. PENAL LAW §§ 160.05, 160.10 (McKinney 2024).

251 *See* Peter Hermann & Emily Davies, *MedStar Doctor Hit by His Own Car and Killed After a Thief Jumped In and Sped Off*, WASH. POST (Mar. 10, 2022, 2:21 PM EST), https://www.washingtonpost.com/dc-md-va/2022/03/09/patel-killed-car-stolen-dc/ [https://perma.cc/4X3W-ZVQ7].

252 *Stokeling*, 139 S. Ct. at 565 (Sotomayor, J., dissenting).

253 *Sykes* is the arguable exception. Sykes v. United States, 564 U.S. 1 (2011), *abrogated by* Johnson v. United States, 576 U.S. 591 (2015). Indiana's felony flight statute prohibited fleeing from law enforcement (1) while using a vehicle, (2) while operating a vehicle in a manner that creates a substantial risk of bodily injury to another, (3) while operating a vehicle that causes serious bodily injury, and (4) while operating a vehicle in a manner that causes the death of another person. IND. CODE § 35-44-3-3 (2004) (repealed 2012). The Justices debated whether these provisions' penalties signaled their relative violence, ignoring the simple answer: the Indiana legislature didn't much care. *Compare Sykes*, 564 U.S. at 13–15, *with id.* at 29–30 (Scalia, J., dissenting).

254 *See infra* notes 291–97 and accompanying text.

255 Moncrieffe v. Holder, 569 U.S. 184 (2013).

Likewise, appellate opinions interpret elements, not to answer how violent they are, but to assess—under an exceedingly deferential standard of review—whether the trial court's fact adjudication was defensible. Indeed, two juries facing virtually identical facts could reach opposite decisions about whether a given theft was forcible enough to be robbery. No Platonic "robbery" definition exists in any jurisdiction's laws, so no appellate opinion determines the least serious way anybody could commit the offense or how "violent" a robbery must be.

State appellate opinions' fact summaries are not especially helpful either. Few litigants appeal factual sufficiency unless the case was really borderline, so federal courts are envisioning what "robbery" is using the most questionable cases to survive an appeal. And because trial courts find facts, appellate opinions merely summarize facts and can omit or gloss over potentially critical details. As they debated whether finger-peeling is violent, neither the *Stokeling* majority nor the dissent noted that during that trial, the victim had also testified that he gave up his money out of fear that the defendant would hurt him.[256]

Ordinarily only state supreme court decisions bind federal courts,[257] but few supreme courts decide such fact-intensive issues.[258] Federal courts are often stuck with intermediate courts' unpublished opinions,[259] trial documents[260]—even dicta.[261] Federal judges wind up

256 Sanders v. State, 769 So. 2d 506, 508 (Fla. Dist. Ct. App. 2000).

257 *See* RICHARD H. FALLON, JR., JOHN F. MANNING, DANIEL J. MELTZER & DAVID L. SHAPIRO, HART & WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 597 (7th ed. 2015); *see also* United States v. Steed, 879 F.3d 440, 448 (1st Cir. 2018).

258 *See, e.g.*, *Steed*, 879 F.3d at 450 (reporting that a state supreme court opinion, instead of deciding whether purse snatching is robbery, simply "affirmed the intermediate appellate court's" fact-intensive conviction affirmance "in a one paragraph decision that also did not resolve the issue").

259 *See, e.g.*, *id.* at 448–49 (scouring intermediate appellate opinions); United States v. Reyes, 866 F.3d 316, 321 nn.2–3 (5th Cir. 2017) (collecting published and unpublished opinions); United States v. Espinoza-Morales, 621 F.3d 1141, 1147–48 (9th Cir. 2010) (relying on published and unpublished intermediate appellate decisions); Reliford v. United States, 773 F. App'x 248, 252 (6th Cir. 2019) (explaining that "Michigan law does not provide a clear answer on this issue" and citing an unpublished intermediate appellate opinion to show how "some Michigan courts have interpreted 'armed'" (citing People v. Young, No. 316129, 2014 WL 5690490, at *3 (Mich. Ct. App. Nov. 4, 2014)); *see also* United States v. Carranza-Raudales, 605 F. App'x 325, 327–29, 328 n.2 (5th Cir. 2015) (struggling with the intent element in a Michigan crime based on an unpublished, intermediate appellate decision and concluding the issue was too unclear to meet plain error); United States v. Rice, 36 F.4th 578, 590 (4th Cir. 2022) (King, J., dissenting) (arguing that North Carolina assault by strangulation is not a crime of violence and citing out-of-state, unpublished, intermediate appellate opinions describing strangulation with lesser mens rea).

scouring these sources for clues about what facts violate a given statute then assess (read: eyeball) those facts' violence. The Court's landmark cases have devolved into disagreements about state appellate decisions' facts, such as the *Stokeling* majority and dissent debating whether peeling fingers off cash is "force" and the *Borden* Justices fighting over reckless assault cases.

And by refusing to admit that it is using these opinions to find facts, the Court has never developed clear rules governing that inquiry. Which sources are sufficiently reliable? What about disputes within a state's courts? And if the point is to understand what *this* defendant admitted, may he rely on an opinion narrowing state law issued after his conviction?

The categorical approach turns criminal procedure's case-by-case approach into chaos. Offense elements are drafted to be fact sensitive, the framing around procedures designed to flesh out those elements depending on case circumstances. A resulting conviction is a shorthand "code" for that richer, careful analysis.[262] Appellate opinions then verify that output, occasionally checking a couple facts along the way but certainly not deciding what "robbery" means categorically and in all cases. Crime definitions cannot answer the question federal law seeks: Was this crime violent?

III. PREDICATE STATUTORY DESIGN AND CONSTRUCTION

Scholars thus might be forgiven for concluding that federal violence law was "doomed to fail."[263] Yet predicate statutes, including ones targeting violence, are common, and they all raise the same basic problem federal violence law has confronted: how to "read" the crime efficiently without misinterpretation. And many share features

260 *See, e.g.*, Baptiste v. Att'y Gen., 841 F.3d 601, 611 (3d Cir. 2016) (absent clear state law, relying on an unpublished intermediate appellate opinion's description of a verdict sheet).

261 For example, the *Stokeling* dissent focused on purse snatching. Stokeling v. United States, 139 S. Ct. 544, 558 (2019) (Sotomayor, J., dissenting). But the Florida case it relied on was deciding whether trial counsel's performance was ineffective and remarked, in dicta, that the counsel should not have admitted his client and the victim struggled over her purse because "a conviction for robbery may be based on a defendant's act of engaging in a tug-of-war over the victim's purse." Benitez-Saldana v. State, 67 So. 3d 320, 323, 322–23 (Fla. Dist. Ct. App. 2011) (citing McCloud v. State, 335 So. 2d 257, 258–59 (Fla. 1976)).

262 *Cf.* Daniel Richman, *The (Immediate) Future of Prosecution*, 50 FORDHAM URB. L.J. 1139, 1140–41 (2023) ("Perhaps as she gets jaded, the prosecutor might be tempted to think of herself as merely a 'coder'—one who processes, and to some extent gathers, information, gives it a provisional legal code, and drives an adjudicative process toward an authoritative coding.").

263 Barkow, *supra* note 11, at 201.

that critics commonly blame for federal violence law's chaos, mandatory minimums and categorical interpretation. Somehow, U.S. jurisdictions have applied predicate statutes workably for centuries without triggering a litigation avalanche.

Two differences stand out. First, most jurisdictions define qualifying predicates using simpler criteria or by listing which crimes qualify. And second, when issues arise, most jurisdictions let courts consult basic case facts and compare statutory elements more generously, injecting much-needed flexibility and judgment and avoiding endless technicalities. Federal violence law is a basic failure of statutory design and construction: Congress defined violence too abstractly, and the Supreme Court's rigid categorical approach translated abstraction into incoherence.

A. The Problem with Predicates

Predicate laws are ubiquitous in Anglo-American law. Administrative and civil statutes use predicates, for example, to calculate points for drivers' insurance,[264] define requirements to work in child-care centers,[265] or set grant eligibility.[266] Criminal-adjacent laws also use predicates, such as to identify who should register as a sex offender[267] or be deported.[268] Within criminal law, predicate statutes guide bail determinations,[269] define offenses,[270] and affect eligibility for probation, parole, or diversion.[271] Even the federal violence definitions have consequences that have nothing to do with sentencing, from guiding federal agents' authority to allocating victim assistance.[272]

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264 *E.g.*, N.C. GEN. STAT. §§ 58-36-65, 58-36-75 (2024).

265 *E.g.*, KY. REV. STAT. ANN. § 17.165 (West 2024).

266 *E.g.*, 20 U.S.C. § 1161w(f)(3)–(4) (2018).

267 Sex Offender Registration and Notification Act, 34 U.S.C. §§ 20901–20991 (2018); COLO. REV. STAT. § 16-22-103 (2024); S.C. CODE ANN. § 23-3-430 (2024); VA. CODE ANN. § 9.1-901 (2024).

268 *E.g.*, 8 U.S.C. § 1227(a)(2) (2018).

269 *E.g.*, 18 U.S.C. § 3142(f)–(g) (2018); ME. STAT. tit. 15, § 1026(4)(C)(7) (2024); MASS. GEN. LAWS ch. 276, § 58A (2024), *invalidated by* Scione v. Commonwealth, 114 N.E.3d 74 (Mass. 2019); OR. REV. STAT. § 135.240 (2024) (considering, among other offenses, whether the defendant "is charged with a violent felony," § 135.240(4)(a)).

270 *E.g.*, 18 U.S.C. § 922(g)(1) (2018); MD. CODE ANN., CRIM. LAW § 5-621(b) (LexisNexis 2024) (prohibiting possessing or carrying a firearm "[d]uring and in relation to a drug trafficking crime"); OHIO REV. CODE ANN. § 2903.08 (West 2024) (vehicular assault); *see also* 40 AM. JUR. 2D *Homicide* § 70, Westlaw (database updated August 2024) (listing qualifying crimes under the felony murder rule).

271 *E.g.*, ARIZ. REV. STAT. ANN. § 13-901.03 (2024); IOWA CODE §§ 902.11–12 (2024); KY. REV. STAT. ANN. §§ 439.3401, 532.040 (West 2024).

272 *See supra* notes 55, 161–168 and accompanying text.

Predicate sentencing is not unusual either. Probably the earliest example was the common law's benefit of clergy doctrine. It spared some first-time offenders from the gallows, but second-time offenders faced death.[273] After the Founding, American states increasingly shifted away from the common law and the death penalty toward criminal codes and imprisonment.[274] Even the earliest codes increased penalties for repeat offenders. Some laws punished repeated, low-level violations, usually of liquor[275] or theft[276] laws. The remainder were classic habitual-offender statutes, prescribing harsh penalties—often life in prison—after two to four felony convictions.[277] Massachusetts had a two-strikes-and-you're-out law as early as 1818.[278]

Today, nearly every common law nation increases penalties for recidivists, as do virtually all U.S. jurisdictions.[279] Those statutes vary too. Many focus on low-level offenses,[280] such as repeatedly violating DUI and other driving laws.[281] Others penalize repeatedly violating certain statutes or classes of crimes,[282] such as theft,[283] drug offenses,[284] and sex crimes.[285]

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273 Nancy J. King, *Sentencing and Prior Convictions: The Past, the Future, and the End of the Prior-Conviction Exception to* Apprendi, 97 MARQ. L. REV. 523, 526–27 (2014); John H. Langbein, *Shaping the Eighteenth-Century Criminal Trial: A View from the Ryder Sources*, 50 U. CHI. L. REV. 1, 37–41 (1983). That trend also reflected a move away from capital punishment toward the more humane penalty of imprisonment. *Id.*

274 *See* King, *supra* note 273, at 528–30.

275 *See, e.g.*, Garvey v. Commonwealth, 74 Mass. (8 Gray) 382, 383 (1857); State v. Adams, 13 A. 785, 785 (N.H. 1888).

276 *See, e.g.*, State v. Davidson, 32 S.E. 957, 957–58 (N.C. 1899); Evans v. State, 50 N.E. 820, 820–21 (Ind. 1898); State v. Riley, 28 Iowa 547, 547–48 (1870); Smith v. Commonwealth, 14 Serg. & Rawle 69, 70 (Pa. 1826) (burglary).

277 *See, e.g.*, Stover v. Commonwealth, 22 S.E. 874, 875 (Va. 1895); Blackburn v. State, 36 N.E. 18, 20 (Ohio 1893); Boggs v. Commonwealth, 5 S.W. 307, 308 (Ky. 1887).

278 *See* Commonwealth v. Phillips, 28 Mass. (11 Pick.) 28, 31–32 (1831).

279 *See* FRASE & ROBERTS, *supra* note 27, at 9, 77–78. The exception is Western Australia. *Id.* at 77.

280 *See, e.g.*, MASS. GEN. LAWS ch. 271, § 10 (2024) (increasing penalties for repeated gambling convictions).

281 *See, e.g.*, GA. CODE ANN. § 40-5-121 (2024); KAN. STAT. ANN. § 8-287 (2024); N.H. REV. STAT. ANN. §§ 259:39, 651:2(V)(b), 651:6(II)(b)–(c), III(h)–(i) (2024); N.C. GEN. STAT. § 20-28(a1) (2024); WASH. REV. CODE § 46.20.341(2)(b) (2024).

282 *See, e.g.*, NEB. REV. STAT. § 29-2221(1)(b) (2024) (increasing penalties for repeatedly committing vehicular homicide); N.J. STAT. ANN. § 2C:43-6(e) (West 2024) (increasing penalties for repeatedly breaking state tax laws); N.C. GEN. STAT. § 14-7.26 (2024) (habitual breaking and entering).

283 *See, e.g.*, NEB. REV. STAT. § 28-518(5)–(6) (2024).

284 *See, e.g.*, ME. STAT. tit. 17-A, § 1105-A(1)(B) (2024); N.J. STAT. ANN. § 2C:43-6(f) (West 2024).

285 *See, e.g.*, MINN. STAT. § 609.3455 (2024).

Predicate statutes all risk the same basic problem federal law has faced: How can the court interpreting the predicate law "read" the conviction efficiently and accurately? Take a relatively simple and common example. Many predicate laws incorporate prior felonies, but jurisdictions define felonies differently. Thus, the new jurisdiction must decide whether another jurisdiction's "felony" conviction counts. Should the current jurisdiction use its own definition? The convicting jurisdiction's label? A proxy, such as term of imprisonment?

The answer isn't always straightforward. For example, *United States v. Simmons* required an en banc court to decide whether some North Carolina felonies qualified under the federal felon-in-possession statute.[286] Federal law defines felony as "a crime punishable by imprisonment for a term exceeding one year,"[287] but North Carolina does not prescribe one penalty for each offense. The state uses a mandatory sentencing grid that calibrates felony sentencing ranges based on offender's criminal history and "aggravating" or "mitigating" case circumstances.[288] For many years, offenders with little criminal history convicted of lower-level felonies faced mandatory ranges below twelve months, even though others convicted of the same offense could receive more than one year in prison.[289] *Simmons* held that only defendants who personally faced more than one year in prison had a qualifying "felony" conviction under federal law.[290]

A "felony" caused different problems in *Moncrieffe*.[291] Mr. Moncrieffe, a Jamaican citizen, pleaded guilty in Georgia to felony possession with intent to deliver marijuana.[292] But he possessed a paltry 1.3 grams, a user amount that should have been handled as a misdemeanor.[293] The parties and briefing did not explain why Mr. Moncrieffe agreed to such a bizarre plea, but Georgia law suggests a reason. Everyone agreed that Mr. Moncrieffe's conviction could have

286 United States v. Simmons, 649 F.3d 237, 243 (4th Cir. 2011) (en banc).

287 18 U.S.C. § 922(g)(1) (2018).

288 N.C. GEN. STAT. § 15A-1340.17 (2024).

289 *See* N.C. GEN. STAT. § 15A-1340.17 (1995) (amended 2009); N.C. GEN. STAT. § 15A-1340.17 (2009) (amended 2011).

290 *See Simmons*, 649 F.3d at 241, 249–50.

291 Moncrieffe v. Holder, 569 U.S. 184 (2013).

292 *Id.* at 188.

293 *Id.* at 188–89. Jurisdictions, including Georgia, separate drug felonies from misdemeanors by quantity or evidence of dealing, either directly or indirectly. In Georgia, the felony threshold is 28 grams; 1.3 grams is the paragon of personal use. *See* GA. CODE ANN. § 16-13-2(b) (2024). Unless he was directly observed dealing it—not the case here, *Moncrieffe*, 569 U.S. at 188—it would be impossible to prove beyond a reasonable doubt that Mr. Moncrieffe intended to sell it, meaning no prosecutor could credibly threaten a felony conviction to induce Mr. Moncrieffe to plead guilty.

been expunged under a statute that applies only to *felonies*.[294] Another Georgia statute does permit misdemeanant drug offenders to obtain deferred prosecutions, but only once.[295] If Mr. Moncrieffe had previously obtained a misdemeanor deferral, pleading to a felony probably offered his only shot to wipe his record. Unfortunately, his lawyer likely failed to realize that immigration law does not acknowledge expunctions.

Federal immigration law was trying to read "felony" as a code for "serious." But Georgia's statutory scheme created an incentive to plead nonserious drug crimes, those deserving expunction, to a felony. The Supreme Court, applying the categorical approach, thus faced two unpalatable options: inflict a real injustice on Mr. Moncrieffe or hold that possession with intent to distribute marijuana never qualifies for deportation, even for kingpins or MS-13 members.[296] It chose the latter option, through a dubious statutory reading.[297]

How, then, do so many predicate statutes remain on the books, enforceable and enforced, without mass frustration? The solution lies in statutory design and construction: recognizing the "coding" pitfall and drafting and interpreting around it.

Two components dictate how a predicate statute operates. First, drafters—usually legislators—must identify the *criteria* that qualify a conviction for inclusion. Those criteria can be broad, such as all felonies, or narrow, such as three convictions under a state's specific DUI statute. They can describe qualifying crimes factually, such as offenses involving a gun; by consequence, such as resulting injury or resulting sentence; or pinpoint them with statutory citations. Predicate statutes can reach only in-state offenses or out-of-jurisdiction crimes too.

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294 *See* GA. CODE ANN. § 42-8-60(a) (2024).

295 § 16-13-2(a). A deferred prosecution means the defendant does not have a judgment of guilt entered against him but serves three years' probation, and if he successfully completes it, the charges are dismissed. *Id.*

296 *Moncrieffe* does not affect individuals convicted of distributing a specific quantity of marijuana, but many drug convictions do not specify a quantity, either because courts deal with quantity at sentencing or because many offenders plead down. *See Moncrieffe*, 569 U.S. at 203–04.

297 An obscure federal provision lets federal defendants ask the sentencing court, in its discretion, to sentence them to a misdemeanor rather than a felony if they can prove that they distributed a "small amount" of marijuana not for remuneration. 21 U.S.C. § 841(b)(4) (2018). *Moncrieffe* held that this exception was actually an element of federal possession with intent to distribute marijuana; since Georgia's statutory elements did not categorically disprove it, Georgia's offense did not match the federal definition. *Moncrieffe*, 569 U.S. at 193–95.

Second, drafters or courts must adopt a *procedure* for deciding which convictions satisfy the criteria. Procedures can include factually litigating the predicate crime before a judge or jury, reading statutory text, checking statutory elements, reading interpretive caselaw, reviewing court records, making judicial judgments, or letting juries interpret legal elements.

Those two components should work harmoniously to serve the predicate law's policy objective, with the procedures tailored to identify the crimes drafters meant to include. The length of a sentence might be a good proxy for how serious the offense was but not how violent it was. How many driving convictions a person has might be more relevant to a statute suspending licenses than one restricting gun ownership. Factfinding better answers whether the prior conviction involved a "dangerous weapon"; judgment paperwork is usually enough to determine the offense a defendant was convicted of violating. Statutes can answer what the maximum punishment for an offense is but not whether the defendant's acts were dangerous.

A chosen approach often requires a trade-off between efficiency and precision. Simple criteria, like all felonies, are probably more over- or underinclusive, but they are *much* easier to use. Complex criteria—like, ahem, complex violence definitions with multiple subtests—might help draw more precise lines, but they also create repeated opportunities to misread the predicate conviction. Meanwhile, laborious procedures, like relitigating crimes with juries, increase precision but bog courts down in reassessing previously settled facts. Consulting court records or statutory elements is more efficient but less precise.

No solution is perfect. The goal is to reduce misunderstanding by designing the statute's criteria and interpretive procedures to reliably answer the question the predicate statute is asking.

B. Designing Predicates Workably

It must be possible to strike that balance workably. Countless American predicate statutes have operated for centuries without attracting much notice, let alone widespread frustration. Something is different about federal violence law.

1. The Usual Suspects

Critics typically blame one of two culprits: bad policy and the categorical approach. And their diagnoses drive their proposed reforms. Many critics equate federal violence definitions with punitive consequences, especially mandatory-minimum sentences and deportation. They prefer abolishing or reducing violence enhancements,

which would offer the additional benefit of reducing violence litigation.[298]

Others prefer eliminating the categorical approach. Proposals vary,[299] but the favorite proposal is shifting to a conduct-based approach that would litigate the facts underlying the predicate crime, probably before a jury.[300] *Erlinger* represents the Court's first real step in that direction. Though the majority presented its decision as a straightforward application of precedent,[301] in fact, it was the first case holding that the Sixth Amendment requires a jury to decide whether a defendant has qualifying prior ACCA convictions since the statute was enacted in 1984.

Neither explanation fits what has happened in the states, however. Nearly every state has at least one habitual-offender statute imposing stiff mandatory minimums, typically decades or life in prison, for serious recidivists.[302] ACCA, by comparison, mandates fifteen years.[303] Nor are punitive sentencing statutes a modern aberration, as scholars repeatedly have claimed.[304] Decades-in-prison habitual-offender laws date to the late eighteenth and early nineteenth centuries and became increasingly common as the nation grew.[305] No known data

298 *See, e.g.*, Barkow, *supra* note 11, at 239–40 ("The categorical approach is part of a much larger pattern in federal law where Congress, with little analysis or research, creates blunt instruments of punishment resulting in inconsistent applications and disproportionate sentences that do not match the harms involved in the offense." *Id.* at 239.).

299 Some critics have urged Congress to adopt a list, as this Article does. *See infra* Section IV.A; *e.g.*, Chambers v. United States, 555 U.S. 122, 134 (2009) (Alito, J., concurring in the judgment), *abrogated by* Johnson v. United States, 576 U.S. 591 (2015); United States v. Tavares, 843 F.3d 1, 19 (1st Cir. 2016). Others have urged referring the issue to the U.S. Sentencing Commission. Caleb E. Mason & Scott M. Lesowitz, *A Rational Post-*Booker *Proposal for Reform of Federal Sentencing Enhancements for Prior Convictions*, 31 N. ILL. U. L. REV. 339, 341–42 (2011).

300 *See supra* note 34 and accompanying text.

301 Erlinger v. United States, 144 S. Ct. 1840, 1852–56 (2024).

302 Only Idaho appears to have no habitual-offender enhancement. *See infra* notes 342–46 and accompanying text.

303 18 U.S.C. § 924(e) (2018).

304 *E.g.*, Ronald F. Wright, *Three Strikes Legislation and Sentencing Commission Objectives*, 20 LAW & POL'Y 429, 442 (1998) (claiming that the 1990s invented three-strikes laws); Ely Aharonson, *Determinate Sentencing and American Exceptionalism: The Underpinnings and Effects of Cross-National Differences in the Regulation of Sentencing Discretion*, 76 LAW & CONTEMP. PROBS. 161, 166 (2013) (claiming that "[u]ntil the mid-1970s, criminal codes in the United States included very few mandatory sentences" and that in the 1990s, "[m]andatory sentences began to be increasingly used to address the problem of repeat offending"); *see also* V.F. Nourse, *Rethinking Crime Legislation: History and Harshness*, 39 TULSA L. REV. 925, 928–30 (2004) (observing that scholars usually date harsh sentencing statutes to tough-on-crime policies in the Nixon, Reagan, or Bush administrations and claiming that "habitual offender laws" date to "the mid-1920s until the mid-1930s").

305 *See* King, *supra* note 273, at 526–31, app. at 566–98.

show how many offenders received life sentences in the nineteenth century, but life sentences did occur,[306] probably sparingly.[307] That remains true today in the states[308] and federally.[309]

The categorical approach is not a modern federal anomaly either. Its basic premise, that predicates should be interpreted without redoing the conviction's facts, has always been the majority rule. *Erlinger* claimed that by requiring juries to decide case facts, the Court was upholding predicate laws' historical tradition of jury sentencing.[310] That misunderstands historical criminal procedure.

It's true that in the nineteenth century, juries usually imposed recidivist enhancements instead of judges.[311] Scholars and judges have therefore assumed that juries must have adjudicated those case facts.[312] *Erlinger*, following that logic, claimed that in early American law, "the facts of the offense were determined by the jury, [and] the judge was meant simply to impose the prescribed sentence";[313] therefore, only a jury could decide "the times, locations, purpose, and character" of the defendant's burglary convictions.[314]

Yet nineteenth-century juries, like federal judges today, considered only "the fact of conviction"; "[n]othing" else was "heard in

306 *E.g.*, Taylor v. Commonwealth, 11 Ky. Op. 642, 642–43 (1882); Herndon v. Commonwealth, 48 S.W. 989, 989–90 (Ky. 1899); Blackburn v. State, 36 N.E. 18, 20–21 (Ohio 1893).

307 I draw that conclusion from my review of state habitual-offender appellate opinions of the era.

308 JAMES AUSTIN, JOHN CLARK, PATRICIA HARDYMAN & D. ALAN HENRY, "THREE STRIKES AND YOU'RE OUT": THE IMPLEMENTATION AND IMPACT OF STRIKE LAWS 107–08 (2000) (finding that few offenders face three-strikes enhancements outside California and even there the penalty is applied less often than predicted).

309 U.S. SENT'G COMM'N, FEDERAL ARMED CAREER CRIMINALS: PREVALENCE, PATTERNS, AND PATHWAYS 18–20 (2021) ("Armed career criminals consistently comprise a small portion of the overall federal criminal caseload." *Id.* at 18.).

310 Erlinger v. United States, 144 S. Ct. 1840, 1847–50 (2024).

311 *See* King, *supra* note 273, at 530. *But see* Stephanos Bibas, *Judicial Fact-Finding and Sentence Enhancements in a World of Guilty Pleas*, 110 YALE L.J. 1097, 1128–29 (2001) (arguing that the history is mixed).

312 *See, e.g.*, Apprendi v. New Jersey, 530 U.S. 466, 506–08 (2000) (Thomas, J., concurring) (noting that early law "treated the fact of a prior conviction just as any other fact that increased the punishment by law," *id.* at 507); Sessions v. Dimaya, 138 S. Ct. 1204, 1256–57 (2018) (Thomas, J., dissenting) (urging using juries to constitutionally conduct an "underlying-conduct approach" to crimes of violence); Barrow, *supra* note 34, at 810 (arguing that a conduct-based approach is grounded in the tradition of jury sentencing); Evans, *supra* note 34, at 671–72, 672 n.289 (citing states that use jury sentencing as proof that a conduct-based approach is common and workable).

313 *Erlinger*, 144 S. Ct. at 1850 (quoting United States v. Haymond, 139 S. Ct. 2369, 2376 (2019) (plurality opinion)).

314 *Id.* at 1852.

reference to the former trials."[315] Jury factfinding was limited to *identity*, that is, proving that the defendant was the person named in the conviction, a real problem in an era before fingerprints and DNA.[316] That procedure should sound familiar to readers familiar with federal felon-in-possession trials: absent a stipulation, the jury receives the defendant's judgment and evidence the defendant on trial was the person named in that judgment—nothing more.[317] It is a far cry from litigating "the times, locations, purpose, and character" of the defendant's felony conviction.

Today, factually adjudicating predicate convictions—particularly before a jury—remains a rare practice. I conducted a fifty-state survey of state habitual-offender laws and cases interpreting how to qualify prior convictions, especially foreign convictions that state courts must translate into their own schemes. That survey immediately confirmed one intuition: state judges spend a lot less time deciding predicate crimes than their federal colleagues.[318] So what are they doing differently?

The answer isn't having juries rehear old cases. Overwhelmingly, states essentially classify crimes categorically, reviewing the offense of conviction, its elements, and often some basic conviction paperwork to decide whether the conviction qualifies.[319] A substantial minority

315 Chenowith v. Commonwealth, 12 S.W. 585, 585 (Ky. 1889); *accord, e.g.*, Stevens v. People, 1 Hill 261, 262 (N.Y. Sup. Ct. 1841) ("It is enough . . . [for the indictment] to say, the prisoner was convicted of petit larceny, without giving particulars. The mere conviction of petit larceny, is the material fact."); Maguire v. State, 47 Md. 485, 496–97 (1878) ("[T]his averment of prior conviction can only be sustained by the production of the record, or a duly authenticated copy of it, sustained by proof of the identity of the person on trial . . . ."); Commonwealth v. Holley, 69 Mass. (3 Gray) 458, 459 (1855) ("[A] prior conviction is a collateral fact, which can only be proved by record . . . .").

316 *See, e.g.*, King v. Lynn, 18 S.E. 439, 439 (Va. 1893).

317 *See* Old Chief v. United States, 519 U.S. 172, 174 (1997).

318 I reached that conclusion after finding a handful of cases in most states addressing this issue—if that—versus thousands of federal decisions.

319 *See, e.g.*, COLO. REV. STAT. §§ 18-1.3-801 to -802 (2024); NEV. REV. STAT. § 207.016 (2023); TENN. CODE ANN. § 40-35-120 (2024); Frankson v. State, 518 P.3d 743, 750–51 (Alaska Ct. App. 2022); State v. Smith, No. 1 CA-CR 13-0561, 2014 WL 3132017, at *3 (Ariz. Ct. App. July 8, 2014); People v. Gallardo, 407 P.3d 55, 64 (Cal. 2017); State v. Young, No. 0511017930A, 2016 WL 3251231, at *3 (Del. Super. Ct. June 6, 2016); Nordahl v. State, 829 S.E.2d 99, 104–07 (Ga. 2019); State v. Dickey, 350 P.3d 1054, 1066–67 (Kan. 2015); Long v. State, 52 So. 3d 1188, 1195–96 (Miss. 2011); State v. Jenkins, 884 N.W.2d 429, 449 (Neb. 2016), *abrogated by* Carpenter v. United States, 138 S. Ct. 2206 (2018); State v. Scognamiglio, 842 A.2d 109, 114–15 (N.H. 2004); State v. Pierce, 902 A.2d 1195, 1203 (N.J. 2006); People v. Johnson, 832 N.Y.S.2d 312, 316 (N.Y. App. Div. 2007); State v. Johnson, No. COA19-489, 2020 WL 774109, at *3 (N.C. Ct. App. Feb. 18, 2020) (citing State v. Riley, 802 S.E.2d 494, 499–500 (N.C. Ct. App. 2017)); State v. Hunter, 915 N.E.2d 292, 299 (Ohio 2009); Fischer v. State, 483 P.2d 1165, 1168 (Okla. Crim. App. 1971); Commonwealth v. Rose, 172 A.3d 1121, 1132–33 (Pa. Super. Ct. 2017); State v. Lindsey, 583 S.E.2d

of states authorize juries to impose recidivist enhancements, often if the defendant requests it.[320] But juries usually conduct limited inquiries into the existence of the conviction and proof of identity, much like nineteenth-century juries did.[321]

The majority of states authorize judges to impose mandatory minimums mostly by consulting conviction paperwork, statutes, and offense elements, though states are far more generous about letting

740, 741–42 (S.C. 2003); State v. Stuck, 434 N.W.2d 43, 47–48 (S.D. 1988) (quoting Griffin v. State, 415 N.E.2d 60, 66 (Ind. 1981)); Lee v. State, 582 S.W.3d 356, 366 (Tex. Ct. App. 2018); Dean v. Commonwealth, 734 S.E.2d 673, 676–77 (Va. Ct. App. 2012); *see also infra* subsection III.B.2.

320 *E.g.*, ARK. CODE ANN. §§ 5-4-501(c)(4), 5-4-504 (2024); IND. CODE § 35-50-2-8(h) (2024); MASS. GEN. LAWS ch. 278, § 11A (2024); N.M. STAT. ANN. § 31-18-24 (2024) (permitting either party to request a jury to resolve any fact issues); N.C. GEN. STAT. § 14-7.11 (2024); OKLA. STAT. tit. 22, § 860.1 (2024); OR. REV. STAT. §§ 136.785, 161.735 (2024); S.D. CODIFIED LAWS § 22-7-12 (2024); UTAH CODE ANN. § 76-3-203.5(3)–(4) (West 2024); W. VA. CODE § 61-11-19 (2024); WYO. STAT. ANN. § 6-10-203 (2024); *Gallardo*, 407 P.3d at 57 (citing CAL. PENAL CODE § 1025(b), (c) (West 2015)); State v. Harrington, 893 N.W.2d 36, 43–45 (Iowa 2017); State v. Robinson, 205 A.3d 893, 894–95 (Me. 2019); Wood v. State, 486 S.W.3d 583, 589 (Tex. Crim. App. 2016); State v. Bain, 975 A.2d 628, 630–31 (Vt. 2009); Washington v. Commonwealth, 634 S.E.2d 310, 315–17 (Va. 2006); CONN. R. SUPER. CT. CRIM. §§ 36-14, 42-2; MINN. R. CRIM. P. 11.04(2); *see also infra* notes 321–27.

321 *E.g.*, ARK. CODE ANN. §§ 5-4-501(c)(4), 5-4-502 (2024) (authorizing juries to recommend a sentence after the judge finds the defendant's convictions qualify); N.C. GEN. STAT. §§ 14-7.10, 14-7.11 (2024) (authorizing juries to find prior convictions but focusing evidence on stipulations or certified judgments of conviction); OR. REV. STAT. § 161.735(7) (2024); W. VA. CODE § 61-11-19 (2024); *Gallardo*, 407 P.3d at 57 (citing CAL. PENAL CODE § 1025(b), (c) (West 2015)) (authorizing juries to find that the defendant sustained a conviction but judges to determine whether the conviction qualifies); Johnson v. State, 699 N.E.2d 746, 751 (Ind. Ct. App. 1998) (limiting admissible evidence of prior convictions to court documents); *Harrington*, 893 N.W.2d at 44 (Iowa decision limiting factfinding to identity and basic constitutional violations); Mulazim v. Commonwealth, 600 S.W.3d 183, 201 (Ky. 2020) (prohibiting introducing case facts to the jury); Commonwealth v. Abernathy, No. 22-P-317, 2023 WL 3328407, at *2–3 (Mass. App. Ct. May 10, 2023) (describing evidence proving a conviction and identity); State v. Wiskow, 774 N.W.2d 612, 615–18 (Minn. Ct. App. 2009) (permitting, despite the right to a jury, state courts to decide whether prior convictions qualify if they mind Sixth Amendment boundaries); Cooper v. State, 810 P.2d 1303, 1306 (Okla. Crim. App. 1991) (the state must prove identity to the jury); State v. Red Cloud, 972 N.W.2d 517, 530–31 (S.D. 2022) (limiting juries to identity); *Lee*, 582 S.W.3d at 366 (Texas decision reviewing Louisiana conviction records to interpret the conviction and treating whether a foreign conviction qualifies as a legal question despite jury sentencing); *Bain*, 975 A.2d at 630 (Vermont decision focusing juries on basic court paperwork); *Washington*, 634 S.E.2d at 315–17 (Virginia decision limiting juries to whether the priors were part of a common act and whether the defendant was at liberty between them, as the statute requires); 5A DAVID M. BORDEN, DAVID P. GOLD & LEONARD ORLAND, CONNECTICUT PRACTICE SERIES: CRIMINAL JURY INSTRUCTIONS § 15.1 (4th ed. 2024) (juries decide only the fact of a conviction and the sentence imposed). *But see* KY. REV. STAT. ANN. § 532.055(2) (West 2024) (permitting, as part of Kentucky's jury-sentencing scheme, juries to hear "[t]he nature of prior offenses for which [the defendant] was convicted").

judges use conviction paperwork to better understand old convictions than the federal categorical approach is.[322] Alabama appears to authorize judicial factfinding, probably in violation of *Apprendi*;[323] a few other states have not slammed the door on judges finding a prior conviction qualifies factually.[324] Factfinding is less common and usually a last resort after courts have tried to prove the conviction other ways.[325] De novo retrials involving eyewitnesses and case evidence are very rare;[326] no state primarily uses such a procedure.[327]

Federal courts historically followed the same practice. Some scholars and judges have correctly pointed out that immigration courts began using a categorical approach in the early twentieth century to judge whether aliens had committed crimes of "moral turpitude,"[328] though not uniformly.[329] But scholars have largely over-

322 *Cf. supra* note 315 and accompanying text; *see also infra* notes 349–51 and accompanying text.

323 *See* ALA. R. CRIM. P. 26.6(b)(3); State v. Stallings, 274 So. 3d 317, 322 (Ala. Crim. App. 2018). But Alabama's habitual-offender enhancement counts felony convictions, so factfinding is pretty minimal. *See* ALA. CODE § 13A-5-9 (2024).

324 *See, e.g.*, State v. Oliphant, 113 So. 3d 165, 172–73 (La. 2013) (discussing case facts), *superseded by statute*, 2014 La. Acts 1764 (codified as amended at LA. STAT. ANN. § 14:32.1(C) (2024)); People v. Stefanski, No. 357102, 2022 WL 2760434, at *5 (Mich. Ct. App. July 14, 2022) (quoting People v. Quintanilla, 571 N.W.2d 228, 228 (Mich. Ct. App. 1997)) (permitting factfinding to qualify out-of-state convictions); State v. Scott, 467 P.3d 595, 598–99 (Mont. 2020) (suggesting in dicta that prosecutors could prove a predicate's case facts); State v. Hulbert, 544 S.E.2d 919, 924 (W. Va. 2001) (requiring proof, when a foreign jurisdiction's offense doesn't match the West Virginia qualifying crime exactly, that the defendant's conduct violated West Virginia's statute); Daniel v. State, 78 P.3d 205, 215–16 (Wyo. 2003) (permitting courts to consider case facts to determine whether offenses were committed separately).

325 *See, e.g.*, Commonwealth v. Riley, No. 18-P-575, 2019 WL 3521906, at *2–3 (Mass. App. Ct. Aug. 2, 2019); N.M. STAT. ANN. § 31-18-24 (2024) (permitting either party to request a jury to resolve any fact issues); N.D. CENT. CODE § 12.1-32-09(5) (2023); State v. Hoehn, 932 N.W.2d 553, 557–59 (N.D. 2019).

326 *But see* State v. Hastey, 196 A.3d 432, 442–44 (Me. 2018) (permitting prosecutors to prove prior convictions' case facts when the state statute authorizes it); State v. Robinson, 205 A.3d 893, 894–95 (Me. 2019) (applying *Hastey* to recidivist enhancements).

327 Oregon's scheme, uniquely, focuses on psychological evidence of whether the defendant suffers "from a severe personality disorder indicating a propensity toward crimes that seriously endanger the life or safety of another" and includes factual criteria for prior convictions and the present offense. OR. REV. STAT. § 161.725(1) (2024). Juries decide those issues, but even the evidence of prior felonies can generally consist of basic conviction and fingerprint records. *Id.* § 161.735.

328 Alina Das, *The Immigration Penalties of Criminal Convictions: Resurrecting Categorical Analysis in Immigration Law*, 86 N.Y.U. L. REV. 1669, 1688–97 (2011); *see also* Moncrieffe v. Holder, 569 U.S. 184, 191 (2013) ("This categorical approach has a long pedigree in our Nation's immigration law." (citing Das, *supra*, at 1688–1702, 1749–52)).

329 Some cases did consider case facts. *See, e.g.*, Smith v. Hays, 10 F.2d 145, 146 (8th Cir. 1925); *Ex parte* Yoshimasa Nomura, 297 F. 191, 193 (9th Cir. 1924); Kaneda v. United States, 278 F. 694, 698–99 (9th Cir. 1922); Prentis v. Cosmas, 196 F. 372, 372 (7th Cir.

looked how federal courts interpreted the original, 1930s-era violence definitions.[330] The answer, basically, is the categorical approach. Though federal juries decided whether convictions qualified, "at trial the government" merely "introduced in evidence a certified copy of the sentence"[331]—basically, today's felon-in-possession trial procedure.[332]

Despite using some form of the categorical approach, historical and modern cases are remarkably free from the appellate chaos that federal courts experience today. Indeed, for three decades, federal law defined violence with only a handful of circuit opinions deciding which convictions qualify[333] and one Supreme Court decision treating the issue as a throwaway point in a footnote.[334] Somehow, states and earlier federal courts interpreted predicates workably.

2. What Working Predicate Laws Do Differently

The answer is that most jurisdictions define qualifying crimes more simply and interpret them more flexibly. Historically, most habitual-offender statutes used simpler criteria, such as all felonies,[335] all larcenies,[336] or all sentences of imprisonment[337] or hard labor.[338] A handful of modern habitual-offender laws still merely count prior felonies.[339]

1912); United States *ex rel.* Elliopulos v. Williams, 192 F. 536, 537 (2d Cir. 1911); Prentis v. Stathakos, 192 F. 469, 470–71 (7th Cir. 1911).

330 The Supreme Court has never cited these cases as precedents for the categorical approach, and only one scholar has mentioned them. C. Kevin Marshall, *Why Can't Martha Stewart Have a Gun?*, 32 HARV. J.L. & PUB. POL'Y 695, 699–700 (2009) (noting their existence).

331 Cases v. United States, 131 F.2d 916, 924 (1st Cir. 1942); *accord, e.g.*, Nicholson v. United States, 141 F.2d 552, 553 (9th Cir. 1944); Gravatt v. United States, 260 F.2d 498, 499 (10th Cir. 1958); Gonns v. United States, 231 F.2d 907, 908–09 (10th Cir. 1956); *cf.* Edwards v. United States, 333 F.2d 588, 590 (8th Cir. 1964); Braswell v. United States, 224 F.2d 706, 709–10 (10th Cir. 1955).

332 *See* Old Chief v. United States, 519 U.S. 172, 174 (1997).

333 *See* cases cited *supra* note 331; *see also* United States v. Bando, 244 F.2d 833, 836–37 (2d Cir. 1957); Thomas v. United States, 210 F.2d 21, 22 (D.C. Cir. 1954) (per curiam); Martinez v. United States, 295 F.2d 426, 428 (10th Cir. 1961); Costello v. United States, 255 F.2d 389, 393–94 (8th Cir. 1958).

334 *See* Tot v. United States, 319 U.S. 463, 465 n.5 (1943).

335 *E.g.*, Chenowith v. Commonwealth, 12 S.W. 585, 585 (Ky. 1889); People v. Raymond, 96 N.Y. 38, 40 (1884).

336 *E.g.*, Evans v. State, 50 N.E. 820, 820–21 (Ind. 1898).

337 *E.g.*, State v. Manecke, 41 S.W. 223, 224 (Mo. 1897); Commonwealth v. Walker, 39 N.E. 1014, 1014 n.1 (Mass. 1895); Combs v. Commonwealth, 20 S.W. 268, 268 (Ky. 1892).

338 *E.g.*, People v. Butler, 80 N.W. 883, 883 (Mich. 1899).

339 *E.g.*, ALA. CODE § 13A-5-9 (2024); KAN. STAT. ANN. § 21-6706 (2024); KY. REV. STAT. ANN. § 532.080 (West 2024); N.H. REV. STAT. ANN. § 651:6(II)(a) (2024).

Those criteria are relatively easy to apply simply by looking at basic conviction paperwork, which typically identifies the offense of conviction, whether the offense was a felony or misdemeanor, and the defendant's sentence. And though whether a crime was a felony is not always clear-cut, it requires drawing just one imperfect line rather than deciding what "force" means, then whether a crime is divisible, then what the crime's elements are, then what the least serious case on record is, and so on.

During the twentieth century, habitual-offender laws increasingly focused on a subset of especially serious or violent convictions. David Sklansky dates that shift to the 1980s and 1990s,[340] but its roots belong in the 1920s and 1930s, when a few statutes, like the federal laws discussed in Section II.A, began targeting violent crimes and criminals specifically, mostly in firearms offenses.[341] Today, habitual-offender laws focusing on violence, dangerousness, or seriousness are common,[342] though most states pair those statutes with more traditional, count-the-felonies enhancements.[343] Most laws impose mandatory sentences, like ACCA, but some adjust penalties other ways, such as

340 *See* SKLANSKY, *supra* note 14, at 86–87.

341 *See supra* notes 141–43 and accompanying text. In the 1920s and 1930s, many states, as well as the District of Columbia, adopted the Uniform Firearms Act, which prohibited possessing a firearm after committing or using a firearm during a crime of violence. *See* Charles V. Imlay, *The Uniform Firearms Act*, 12 A.B.A. J. 767, 767–68 (1926); Act of July 8, 1932, ch. 465, §§ 2–3, 47 Stat. 650, 650–51.

342 *E.g.*, ALASKA STAT. § 12.55.125(*l*) (2024); CONN. GEN. STAT. § 53a-40 (2024); DEL. CODE ANN. tit. 11, § 4214 (2024); GA. CODE ANN. § 17-10-7(b) (2024); ME. STAT. tit. 17-A, § 1604 (2024); MD. CODE ANN., CRIM. LAW § 14-101 (LexisNexis 2024); NEB. REV. STAT. § 29-2221(1)(a) (2024); OHIO REV. CODE ANN. § 2929.14 (West 2024); OR. REV. STAT. §§ 161.725, 161.737 (2024); 42 PA. CONS. STAT. § 9714 (2024); S.C. CODE ANN. § 17-25-45 (2024); TENN. CODE ANN. § 40-35-120 (2024); VA. CODE ANN. § 19.2-297.1 (2024); WASH. REV. CODE §§ 9.94A.030, 9.94A.570 (2024); WIS. STAT. § 939.619 (2024).

343 *See* ARIZ. REV. STAT. ANN. §§ 13-703, 13-704, 13-706 (2024); ARK. CODE ANN. § 5-4-501 (2024); CAL. PENAL CODE §§ 667, 1170.12(c) (West 2024); COLO. REV. STAT. § 18-1.3-801(2) (2024); D.C. CODE § 22-1804a (2024); FLA. STAT. § 775.084 (2024); HAW. REV. STAT. §§ 706-606.5(2), 706-606.6 (2024); 730 ILL. COMP. STAT. 5/5-4.5-95(a), (b) (2024); IND. CODE § 35-50-2-8 (2024); IOWA CODE §§ 902.8, 902.11 (2024); LA. STAT. ANN. § 15:529.1 (2024); MASS. GEN. LAWS ch. 279, § 25 (2024), *amended by* 2024 Mass. Legis. Serv. ch. 135 (West); MICH. COMP. LAWS §§ 769.10–12 (2024); MINN. STAT. § 609.1095 (2024); MISS. CODE ANN. §§ 99-19-81, 99-19-83 (2024); MO. REV. STAT. §§ 558.016, 558.019(2) (2024); MONT. CODE ANN. §§ 46-1-202(18), 46-18-502 (2023); NEV. REV. STAT. §§ 207.010, 207.012 (2023); N.J. STAT. ANN. §§ 2C:43-7.1(b), 2C:44-3 (West 2024); N.M. STAT. ANN. §§ 31-18-17, 31-18-23 (2024); N.Y. PENAL LAW §§ 70.02, 70.04, 70.06, 70.08, 70.10 (McKinney 2024); N.C. GEN. STAT. §§ 14-7.1, 14-7.7 (2024); N.D. CENT. CODE § 12.1-32-09 (2023); OKLA. STAT. tit. 21, § 51.1 (2024); S.C. CODE ANN. § 16-1-120 (2024); S.D. CODIFIED LAWS §§ 22-7-8, 22-7-8.1 (2024); TENN. CODE ANN. §§ 40-35-107, 40-35-108 (2024); UTAH CODE ANN. § 76-3-203.5 (West 2024); W. VA. CODE § 61-11-18 (2024); WIS. STAT. § 939.62 (2024); WYO. STAT. ANN. § 6-10-201 (2024).

relieving statutory caps or restricting diversion, probation, or parole after some convictions.[344]

Most habitual-offender laws that target violence, dangerousness, or seriousness list which crimes qualify.[345] A smaller subset adds descriptive criteria, like whether injury resulted, but as tack ons to robust lists,[346] which reduces litigation. Statutes describing violence, like the federal definitions, usually target only current convictions, further lessening *Apprendi* issues.[347] Purely descriptive criteria for past convictions are exceedingly rare.[348]

Lists are easier to apply categorically, without delving into case facts. Nobody debates whether robbery or battery seems violent or forceful; either it's on the list or it's not. Litigation generally arises only in two circumstances: when an offense isn't on the list but might

344 *E.g.*, ARIZ. REV. STAT. ANN. § 13-901.03 (2024); KY. REV. STAT. ANN. §§ 439.3401, 532.040, 532.080, 532.230 (West 2024); MISS. CODE ANN. § 97-3-2(2) (2024); N.J. STAT. ANN. § 2C:43-7.2 (West 2024); TEX. CODE CRIM. PROC. ANN. art. 17.03(b-2) (West 2023).

345 *See* ALASKA STAT. § 12.55.185(10) (2024); ARIZ. REV. STAT. ANN. § 13-706(F)(2) (2024); ARK. CODE ANN. § 5-4-501(c)(2) (2024); CAL. PENAL CODE §§ 667.5(c), 1192.7(c) (West 2024); COLO. REV. STAT. § 18-1.3-406(2)(a) (2024); CONN. GEN. STAT. § 53a-40(a)(1) (2024); DEL. CODE ANN. tit. 11, § 4201(c) (2024); D.C. CODE § 23-1331(4) (2024); FLA. STAT. § 775.084(1)(b)(1), (c)(1) (2024); GA. CODE ANN. § 17-10-6.1(a) (2024); HAW. REV. STAT. § 706-606.6(1) (2024); 720 ILL. COMP. STAT. 5/2-8 (2024); IND. CODE §§ 35-50-1-2(a), 35-47-4-5(b) (2024); IOWA CODE § 702.11 (2024); KY. REV. STAT. ANN. § 532.200(3) (West 2024); LA. STAT. ANN. § 14:2(B) (2024); ME. STAT. tit. 17-A, § 1604(5)(B) (2024); MD. CODE ANN., CRIM. LAW § 14-101(a) (LexisNexis 2024); MASS. GEN. LAWS ch. 279, § 25(b) (2024), 2024 Mass. Legis. Serv. ch. 135 (West); MICH. COMP. LAWS § 769.12(6)(a), (c) (2024); MINN. STAT. §§ 609.106(1)(a), 609.1095(1)(d) (2024); MISS. CODE ANN. § 97-3-2(1) (2024); MO. REV. STAT. § 556.061(19) (2024); MONT. CODE ANN. § 46-23-502(14) (2023); NEB. REV. STAT. § 29-2221 (2024); NEV. REV. STAT. § 207.012 (2023); N.H. REV. STAT. ANN. § 651:5(XIII) (2024); N.J. STAT. ANN. § 2C:43-7.1(b) (West 2024); N.M. STAT. ANN. § 31-18-23(E)(2) (2024); N.Y. PENAL LAW § 70.02(1) (McKinney 2024); N.C. GEN. STAT. § 14-7.7(b) (2024); N.D. CENT. CODE § 12.1-32-09.1 (2023); OHIO REV. CODE ANN. §§ 2901.01(A)(9), 2929.01(CC) (West 2024); OKLA. STAT. tit. 57, § 571(2) (2024); 42 PA. CONS. STAT. § 9714(g) (2024); S.C. CODE ANN. §§ 16-1-60, 17-25-45(C) (2024); S.D. CODIFIED LAWS § 22-1-2(9) (2024); TENN. CODE ANN. § 40-35-120(b)–(d) (2024); UTAH CODE ANN. § 76-3-203.5(1)(c) (West 2024); VA. CODE ANN. § 19.2-297.1(A) (2024); WASH. REV. CODE § 9.94A.030(46) (2024); W. VA. CODE § 61-11-18 (2024); WIS. STAT. § 939.619(1) (2024); WYO. STAT. ANN. § 6-1-104(a)(xii) (2024).

346 *See, e.g.*, 720 ILL. COMP. STAT. 5/2-8 (2024); LA. STAT. ANN. § 14:2(B) (2024); MISS. CODE ANN. § 97-3-2(2) (2024); MONT. CODE ANN. § 46-23-502(14) (2023); N.Y. CRIM. PROC. LAW § 1.20(41) (McKinney 2024); N.Y. PENAL LAW § 70.02(4) (McKinney 2024); OHIO REV. CODE ANN. §§ 2901.01(A)(9), 2929.01(CC) (West 2024); S.D. CODIFIED LAWS § 22-1-2(9) (2024).

347 *E.g.*, COLO. REV. STAT. § 18-1.3-406 (2024); KY. REV. STAT. ANN. § 439.3401 (West 2024); MASS. GEN. LAWS ch. 140, § 121 (2024), *amended by* 2024 Mass. Legis. Serv. ch. 135 (West); MO. REV. STAT. § 558.016(4) (2024).

348 Arizona uses one as part of its sentencing scheme for repetitive offenders, ARIZ. REV. STAT. ANN. § 13-105(22) (2024), but not in its habitual-offender enhancement, *id.* §§ 13-703, 13-704, 13-706.

qualify under a descriptive tack on or, more often, when the conviction arose in another jurisdiction and therefore must be compared to convictions on the list.

For both situations, most states give their courts more flexibility to assess unlisted convictions. First, many state courts can consider what the defendant was convicted of doing by consulting a broader array of court records. Recall that nineteenth-century juries considered only "the fact of conviction," as *Apprendi* mandates today.[349] But to assess a conviction, they could consult any available court documents and consider whatever those documents revealed about what the defendant actually did.[350] Many states today follow that practice, authorizing using basic court records to better understand the conviction.[351]

Some scholars and jurists have interpreted that process as a conduct-based approach, one in which juries or courts retry case facts.[352] That misunderstands most states' procedures. Those jurisdictions' procedures are better understood as a generous modified categorical approach, consulting court records to better understand the nature of the conviction rather than re-adjudicating its facts.[353] Case fact-finding is rare and typically a last resort.

Erlinger imperils that solution. Until *Erlinger*, the Court had never made the categorical approach constitutional, and many states

349 *See supra* note 315 and accompanying text.

350 *See, e.g.*, State v. Cox, 41 A. 862, 862 (N.H. 1898) (complaint and clerk's minutes); Pryor v. Commonwealth, 26 S.E. 864, 865 (Va. 1897) (appeal documents); Myers v. State, 92 Ind. 390, 396 (1883) (transcripts); Maguire v. State, 47 Md. 485, 497–98 (1878) (docket entries).

351 *See, e.g.*, People v. Gallardo, 407 P.3d 55, 64 (Cal. 2017); Daniels v. State, 246 A.3d 557, 561 (Del. 2021); Valentine v. State, 207 A.3d 166 (Del. 2019) (unpublished table decision); State v. Bloom, 983 N.W.2d 44, 52–53 (Iowa 2022); State v. Hamdan, 112 So. 3d 812, 819–21 (La. 2013); Scott v. State, 148 A.3d 72, 90–91 (Md. Ct. Spec. App. 2016), *aff'd*, 164 A.3d 177 (Md. 2017); State v. Wiskow, 774 N.W.2d 612, 615–18 (Minn. Ct. App. 2009); Taylor v. State, 122 So. 3d 707, 711 (Miss. 2013); State v. Hunter, 915 N.E.2d 292, 299 (Ohio 2009); Clonce v. State, 588 P.2d 584, 591 (Okla. Crim. App. 1978) (describing court documents); Lee v. State, 582 S.W.3d 356, 366 (Tex. Ct. App. 2018) (reviewing Louisiana conviction records to interpret the conviction); State v. Olsen, 325 P.3d 187, 192 (Wash. 2014) (en banc) (permitting courts to consider any "facts that were admitted, stipulated to, or proved beyond a reasonable doubt" (citing State v. Thiefault, 158 P.3d 580, 583 (Wash. 2007) (en banc))); State v. Collins, 649 N.W.2d 325, 333 (Wis. Ct. App. 2002); *cf.* Chung Que Fong v. Nagle, 15 F.2d 789, 789 (9th Cir. 1926) (consulting an indictment to decide whether a prior offense was a "crime involving moral turpitude" under immigration law).

352 *See, e.g.*, Ovalles v. United States, 905 F.3d 1231, 1257–61 (11th Cir. 2018) (en banc) (W. Pryor, J., concurring), *abrogated by* United States v. Davis, 139 S. Ct. 2319 (2019); *see also supra* note 312 and accompanying text.

353 *See, e.g.*, *Collins*, 649 N.W.2d at 333–34 (explaining how Wisconsin courts should grapple with that problem).

used that gap to give their judges more room to review and interpret conviction paperwork. But *Erlinger* suggests that even obvious information on the face of judgments—like the date the offense was committed—is now a "fact" the jury must find.[354] Many state habitual-offender laws, like ACCA, require that prior convictions occurred during different transactions; case procedures letting judges settle that question are now probably unconstitutional.[355]

Second, states often require less exactitude between qualifying in-state offenses and an out-of-jurisdiction offense of conviction. Recall that the federal categorical approach dings entire crimes as nonviolent if even one case arguably reached broader than the federal definition.[356] Many states, however, merely require similarity between elements.[357] So state courts have room to judge convictions more holistically rather than being bogged down in technicalities.

That resembles how federal courts applied the residual clauses until the Supreme Court voided them for vagueness. Rather than the least-serious-means test, federal judges assessed whether the "ordinary case" satisfied the clause.[358] Though Justice Scalia fairly complained that judging the "ordinary case" was difficult,[359] it at least gave judges more room to exercise some common sense.

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354 Erlinger v. United States, 144 S. Ct. 1840, 1854 (2024).

355 For example, South Dakota limits convictions to one per transaction, S.D. CODIFIED LAWS § 22-7-9 (2024), but only authorizes juries to decide identity, *id.* § 22-7-12; State v. Red Cloud, 972 N.W.2d 517, 530–31 (S.D. 2022). That procedure is probably now unconstitutional.

356 *See supra* Section I.B.

357 *E.g.*, ALASKA STAT. § 12.55.145 (2024) ("similar" elements); ARK. CODE ANN. § 5-4-501(c)(4)(B) (2024) (giving judges discretion to decide whether an out-of-state conviction is sufficiently similar to a listed offense); FLA. STAT. § 775.084(1)(e) (2024) ("substantially similar in elements and penalties to an offense in this state"); HAW. REV. STAT. § 706-606.6(1) (2024) ("comparable to an offense" on the list); IOWA CODE § 902.11 (2024) ("crime of a similar gravity"); ME. STAT. tit. 17-A, § 1604(5)(B) (2024); MONT. CODE ANN. § 46-23-502(14)(b) (2023) ("reasonably equivalent to"); NEB. REV. STAT. § 29-2221(1)(a) (2024) ("similar statute"); N.J. STAT. ANN. § 2C:43-7.1(a) (West 2024) ("substantially equivalent to a" listed crime); N.D. CENT. CODE § 12.1-32-09(1)(d) (2023) ("similar offense"); 42 PA. CONS. STAT. § 9714(g) (2024) ("equivalent"); VA. CODE ANN. § 19.2-297.1(B) (2024) ("substantially similar"); W. VA. CODE § 61-11-18(c)–(d) (2024) ("the same or substantially similar elements"); WIS. STAT. § 939.62(2m)(a)(2m)(d) (2024) ("comparable to a crime specified"); State v. Johnson, No. COA19-489, 2020 WL 774109, at *3 (N.C. Ct. App. Feb. 18, 2020) (citing State v. Riley, 802 S.E.2d 494, 499–500 (N.C. Ct. App. 2017)) ("substantially similar to the offenses" listed, *id.* at *2 (quoting N.C. GEN. STAT. § 14-7.7(b) (2017))); State v. Roedder, 923 N.W.2d 537, 545–46 (S.D. 2019) ("substantially similar," *id.* at 546).

358 James v. United States, 550 U.S. 192, 208 (2007), *abrogated by* Johnson v. United States, 576 U.S. 591 (2015).

359 *Johnson*, 576 U.S. at 597, 599–600.

States do enjoy some inherent advantages over the federal system. State criminal codes are comprehensive, and their crime elements have been interpreted and refined over thousands of cases. If a state court has to decide whether its burglary statute matches another state's, it at least has a pretty good idea what its own burglary definition is. The federal criminal code's coverage is spottier, federal crimes typically have quirky jurisdictional elements, and enforcement is often sporadic.[360] That is why *Taylor* resorted to inventing "generic burglary," a crime that exists nowhere and therefore misses organic common law development. And states are more likely to face defendants with mostly in-state convictions, whereas the federal system mostly adopts cases because defendants have lengthy state-court records that federal judges then must interpret.[361]

Interestingly, federal courts applying the 1930s-era "crime of violence" definition found a different solution: accepting state law labels, so "burglary" meant whatever conduct the state labeled as such.[362] They also seemed more willing to eyeball offenses rather than craft federal definitions and elaborate rules for applying them.[363] That is, from the 1930s through 1960s, federal violence law more closely followed majority state practice. Federal law listed violent crimes rather than describing them. Federal courts used state definitions rather than redefining federally what "burglary" or "force" is. And they accepted that crimes that seem intuitively violent, like robbery, probably were and moved on.

That approach certainly had downsides, but it did seem to accomplish what Justice Scalia sought: to stop "ad hoc application of ACCA to the vast variety of state criminal offenses until the cows come home."[364]

IV. HOW TO FIX FEDERAL VIOLENCE LAW

Historical and state experience offers a pathway to fix federal violence law. First, Congress should return to listing which crimes are

360 *See* Blondel, *supra* note 157, at 1049–59 (explaining the federal system's smaller role).

361 *See infra* note 440 and accompanying text.

362 *See, e.g.*, Cases v. United States, 131 F.2d 916, 924 (1st Cir. 1942); Braswell v. United States, 224 F.2d 706, 709–10 (10th Cir. 1955); Costello v. United States, 255 F.2d 389, 393–94 (8th Cir. 1958).

363 *See, e.g.*, Martinez v. United States, 295 F.2d 426, 428 (10th Cir. 1961) (accepting how various states defined robbery without requiring a precise federal definition).

364 Sykes v. United States, 564 U.S. 1, 33 (2011) (Scalia, J., dissenting), *abrogated by Johnson*, 576 U.S. 591; *see also Johnson*, 576 U.S. at 606 (concluding that cases affirming the clause's constitutionality "proved to be anything but evenhanded, predictable, or consistent").

violent. Since assembling fifty-plus lists would be daunting, Congress should consider adopting existing lists of violent crimes that nearly all states have enacted already. Second, the Supreme Court should soften the categorical approach and permit as much judgment and marginal factfinding as *Apprendi* will permit, with the Court either limiting or jettisoning *Erlinger*.

The Court should walk back from the precipice of mandating jury adjudication of prior convictions. There are very good reasons—practical *and* jurisprudential—why almost no U.S. jurisdiction hits redo on such a complex process every time courts face a predicate statute, nor ever has. The point of predicates is not to shoddily redo that process but to effectively use the results from a full adjudication to answer the predicate law's new aim. That is possible with careful drafting and interpretation.

A. List the Crimes

Today and historically, jurisdictions have listed qualifying predicates for good reason. Lists are clearer and easier to apply without relitigating old convictions. Which crimes signal the degree of dangerousness, violence, recidivism, risk, vulnerability, and so on that the predicate statute is meant to cover is a quintessential policy judgment. Policymakers, usually an elected legislature,[365] who drafted the predicate statute are best positioned to make that call. One reason federal judges, including the Supreme Court, are so frustrated is that Congress unfairly shifted that burden onto them.[366]

Thus, Congress should return to listing which crimes are violent. But what should be on the list? Congress could follow the original 1930s approach, which the Sentencing Guidelines use now, and list major offenses generically, like murder, robbery, and aggravated assault.[367] Congress could even take that one step further and provide definitions, as the Guidelines increasingly do and as ACCA originally did.[368]

But federal courts' experience defining generic burglary illustrates the downsides. The federal criminal code is an unusual creature. *States* comprehensively define criminal laws; the federal code is a "backstop" and gap filler that often includes quirky jurisdictional

365 Sometimes, agencies like sentencing commissions draft predicates. *See, e.g.*, SENT'G GUIDELINES 2024, *supra* note 65, § 4B1.2.

366 Justice Scalia fairly complained in *Sykes v. United States* that ACCA is another annoying example of "[f]uzzy, leave-the-details-to-be-sorted-out-by-the-courts legislation." *Sykes*, 564 U.S. at 35 (Scalia, J., dissenting).

367 SENT'G GUIDELINES 2024, *supra* note 65, § 4B1.2(a)(2).

368 *See supra* text accompanying notes 64, 172–73.

elements.[369] State courts facing an out-of-state burglary conviction can compare it to in-state caselaw developed over thousands of cases. Federal courts are inventing crime standards out of thin air. Even if the statute provided basic definitions, courts still would have to interpret the details—like remaining-in burglary—on their own.

Federal courts solved this problem in the 1930s through 1960s by simply accepting state law labels.[370] Yet states do name and define crimes very differently. That approach possibly worked because before the 1980s, far fewer statutes and cases depended on what's violent. Today, trying to translate state labels across thousands of federal prosecutions annually likely would prove frustrating. One partial solution would be to follow many states' practice and statutorily require only reasonable or substantial similarity.[371]

But it would be better for Congress to ground the list, as much as possible, in real statutes. Within the federal code, that should be easy. Congress lists qualifying federal crimes for other commonly used federal predicates, like money laundering[372] and the Racketeer Influenced and Corrupt Organization (RICO) Act.[373] The Violent Crimes in Aid of Racketeering Activity (VICAR) statute[374] already lists violent offenses,[375] as does an enhancement for committing a "serious violent felony."[376] Congress could list which federal statutes are violent and eliminate a genre of litigation.

Listing states' and territories' violent crimes is more daunting. Congress has no real expertise—to say nothing of time—to comb fifty-plus codes for violent crimes. It could delegate that duty to the Sentencing Commission, which researches criminal justice issues and could tap local experts. But the Commission is not a democratically elected legislature, and that process might raise difficult nondelegation issues.[377]

Another mostly off-the-shelf solution is possible: existing state laws' lists. Most states have enacted lists of predicates that qualify for

369 William J. Stuntz, *Terrorism, Federalism, and Police Misconduct*, 25 HARV. J.L. & PUB. POL'Y 665, 666 (2002); *see* Blondel, *supra* note 157, at 1049–59.

370 *See supra* notes 362–63 and accompanying text.

371 *See supra* note 357 and accompanying text.

372 18 U.S.C. § 1956(c)(7) (2018).

373 18 U.S.C. § 1961(1) (2018).

374 18 U.S.C. § 1959 (2018).

375 *Id.* (including murder, kidnapping, maiming, assault with a dangerous weapon, assault resulting in serious bodily injury, threatening to commit a crime of violence, and attempting and conspiring to commit those offenses).

376 18 U.S.C. § 3559(c)(2)(F)(i) (2018); *see also* 21 U.S.C. §§ 802(58)(A), 841(b) (2018) (adopting that definition for drug enhancements).

377 *See* F. Andrew Hessick & Carissa Byrne Hessick, *Nondelegation and Criminal Law*, 107 VA. L. REV. 281, 284–85 (2021).

their own habitual-offender enhancements. Many states expressly have designated those crimes as violent;[378] most others have enacted lists of forcible, serious, or dangerous crimes.[379] The handful of states that have no habitual-offender laws predicated on a list of qualifying crimes still have enacted lists of qualifying violent crimes for other purposes.[380] Every state has at least one list that Congress could adopt.

Having Congress adopt existing state lists eliminates federal courts defining "generic" laws that exist nowhere and lack grounding in actual cases. Federal courts could capitalize on state law interpreting those crimes and on state legislatures' superior knowledge of their own laws and enforcement cultures. Indeed, states might even start using the federal lists for their habitual-offender enhancements, simplifying cross-jurisdictional issues in state court too.

That solution is not without practical challenges. Many states have several lists, sometimes even several lists of violent crimes,[381] that

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378 *See, e.g.*, ARIZ. REV. STAT. ANN. § 13-706(F)(2) (2024); ARK. CODE ANN. § 5-4-501(c)(2) (2024); CAL. PENAL CODE § 667.5 (West 2024); COLO. REV. STAT. § 18-1.3-406(2)(a) (2024); DEL. CODE ANN. tit. 11, § 4201(c) (2024); D.C. CODE § 23-1331(4) (2024); FLA. STAT. § 775.084(1)(b)(1), (c)(1) (2024); HAW. REV. STAT. § 706-606.6(1) (2024); 720 ILL. COMP. STAT. 5/2-8 (2024); IND. CODE §§ 35-50-1-2(a), 35-47-4-5(b) (2024); KY. REV. STAT. ANN. §§ 532.200(3), 439.3401(1) (West 2024); LA. STAT. ANN. § 14:2(B) (2024); MD. CODE ANN., CRIM. LAW § 14-101(a) (LexisNexis 2024); MINN. STAT. § 609.1095(1)(d) (2024); MISS. CODE ANN. § 97-3-2(1) (2024); MONT. CODE ANN. § 46-23-502(14) (2023); N.J. STAT. ANN. § 2C:43-7.1(b)(1) (West 2024); N.M. STAT. ANN. § 31-18-23(E)(2) (2024); N.Y. PENAL LAW § 70.02(1) (McKinney 2024); N.C. GEN. STAT. § 14-7.7(b) (2024); N.D. CENT. CODE § 12.1-32-09.1 (2023); OHIO REV. CODE ANN. §§ 2901.01(A)(9), 2929.01(CC) (West 2024); OKLA. STAT. tit. 57, § 571(2) (2024); 42 PA. CONS. STAT. § 9714(g) (2024); S.C. CODE ANN. § 16-1-60 (2024); S.D. CODIFIED LAWS § 22-1-2(9) (2024); TENN. CODE ANN. § 40-35-120(b)–(d) (2024); UTAH CODE ANN. § 76-3-203.5(1)(c) (West 2024); VA. CODE ANN. § 19.2-297.1(A) (2024); WASH. REV. CODE § 9.94A.030(46) (2024); WIS. STAT. § 939.619(1) (2024); WYO. STAT. ANN. § 6-1-104(a)(xii) (2024).

379 *See, e.g.*, ALASKA STAT. § 12.55.185(10) (2024); CONN. GEN. STAT. § 53a-40(a)(1) (2024); GA. CODE ANN. § 17-10-6.1 (2024); IOWA CODE § 702.11 (2024); ME. STAT. tit. 17-A, § 1604(5)(B) (2024); MINN. STAT. § 609.106(1)(a) (2024); MO. REV. STAT. §§ 556.061(19), 558.016(4) (2024); NEB. REV. STAT. § 29-2221 (2024); NEV. REV. STAT. § 207.012 (2023); S.C. CODE ANN. § 17-25-45(C) (2024); *see also* KAN. STAT. ANN. § 21-6811(e)(3)(B) (2024) (listing "person" crimes); W. VA. CODE § 61-11-18 (2024) (listing "qualifying offense[s]").

380 *E.g.*, ALA. CODE § 13A-11-70(3) (2024) (weapons offenses); N.H. REV. STAT. ANN. § 651:5(XIII) (2024) (records annulments); OR. REV. STAT. § 475.908(3)(b) (2024) (drug offense); 12 R.I. GEN. LAWS §§ 12-1.5-2(8), 12-19-2.2(d)(2), 12-29.1-3(3) (2024) (DNA collection, exemption from alternative sentencing programs, and crimes against the elderly); TEX. CODE CRIM. PROC. ANN. art. 17.03(b-3)(2) (West 2023) (bond); VT. STAT. ANN. tit. 13, § 4017(d)(3) (2024) (firearms prohibition).

381 *E.g.*, FLA. STAT. § 775.084(1)(b)(1), (c)(1) (2024); IND. CODE §§ 35-50-1-2(a), 35-47-4-5(b) (2024); MASS. GEN. LAWS ch. 279, § 25 (2024), *amended by* 2024 Mass. Legis. Serv.

Congress would have to choose from. And lists vary state to state. For example, some states' general habitual-offender laws include sexual offenses, while other states address serious sexual recidivism separately.[382] Some lists are narrow; others are quite broad.[383] And states do amend and recodify laws, risking statutory obsolescence if Congress doesn't keep up.

Inevitably, legislatures will face crimes that are often, but not always, violent, and people will disagree about where to draw that line. Critics and scholars concerned about defendants' rights and overincarceration especially will worry that elected legislatures will prefer to look "tough on crime" and err toward inclusion, as Congress did with ACCA.[384] One partial answer is that states have balanced-budget requirements and therefore incentives to keep their own lists—and the imprisonment costs they create—down.[385]

And increasingly, policy winds have shifted toward (some) legal reform, particularly in the states.[386] Reformers might find it easier to lobby their states to reduce lists of qualifying crimes. That is not a complete solution; polling data confirm that voters care deeply about violent crime,[387] likely preventing legislatures from straying too far

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ch. 135 (West); *id.* at ch. 140, § 121, *amended by* 2024 Mass. Legis. Serv. ch. 135 (West); MICH. COMP. LAWS § 769.12(6)(a), (c) (2024); MO. REV. STAT. §§ 556.061(19), 558.016(4) (2024).

382 *Compare, e.g.*, D.C. CODE § 23-1331(4) (2024) (including sexual offenses), *with* MONT. CODE ANN. § 46-23-502(10), (14) (2023) (separately defining "[s]exual offense" and "[v]iolent offense"), *and* NEB. REV. STAT. §§ 29-2221, 28-319(3), 28-319.01(3) (2024) (including a couple of very serious sexual offenses in the habitual-offender definition but otherwise separately penalizing sexual recidivism).

383 *Compare, e.g.*, MASS. GEN. LAWS ch. 279, § 25 (2024) (including some property crimes), *amended by* 2024 Mass. Legis. Serv. ch. 135 (West), *and* W. VA. CODE § 61-11-18(a) (2024) (broadly listing "qualifying offense[s]"), *with* N.M. STAT. ANN. § 31-18-23(E)(2) (2024) (including only a handful of murder, shooting, kidnapping, rape, and robbery crimes).

384 *See, e.g.*, Sara Sun Beale, *What's Law Got to Do with It? The Political, Social, Psychological and Other Non-Legal Factors Influencing the Development of (Federal) Criminal Law*, 1 BUFF. CRIM. L. REV. 23, 28–29 (1997) (citing federal mandatory minimums as proof of a tough-on-crime political culture).

385 Samuel R. Wiseman, *Fixing Bail*, 84 GEO. WASH. L. REV. 417, 422 (2016); *see* Rachel E. Barkow, *Administering Crime*, 52 UCLA L. REV. 715, 719–20 (2005) (describing legislatures' receptiveness to cost-effective criminal sentencing).

386 Nicole D. Porter, *Top Trends in Criminal Legal Reform, 2023*, SENT'G PROJECT (Dec. 20, 2023), https://www.sentencingproject.org/publications/top-trends-in-criminal-legal-reform-2023/ [https://perma.cc/2EEZ-9Y6G].

387 *See* Michael O'Hear & Darren Wheelock, *Violent Crime and Punitiveness: An Empirical Study of Public Opinion*, 103 MARQ. L. REV. 1035, 1050–51, 1069–70 (2020) (finding, consistent with past polls, that the public cares more about violent-crime enforcement than other kinds of crime); Eli Yokley, *Most Voters See Violent Crime as a Major and Increasing Problem. But They're Split on Its Causes and How to Fix It*, MORNING CONSULT (July 14, 2021,

from public intuition. But at bottom, elected legislatures are well suited to draw those lines, which represent a policy decision about which crimes deserve condemnation as violent.

Another partial solution for critics worried about overly punitive mandatory minimums would be to create a statutory exception that lets defendants prove to a judge—perhaps by a preponderance of the evidence—that *their* cases were not violent. *Apprendi* does not prevent judges from relieving defendants from mandatory minimums.[388] Such an approach would give defendants like Mr. Moncrieffe or Mr. Stokeling[389] the chance to argue that, in their cases, the legislature's line doesn't make sense without contorting whole crime definitions.

B. Reform the Categorical Approach

Waiting for Congress to act is never a smart bet, and even if it did, disputes at the borders likely would arise (though hopefully they would be far fewer). For now, Congress has assigned judging violence to federal courts. Annoying as that might be, it is beyond time for the Supreme Court to accept it and develop interpretive rules that make the job easier.

The violence definitions, as currently written, focus on *crimes*. In other words, Congress wanted the Supreme Court to judge offenses themselves: Is robbery violent—yes or no? But the Supreme Court has interpreted that to mean that the defendant's offense *conduct* must have been violent. That is, current doctrine asks whether the defendant necessarily was convicted of *factually* committing a violent act, for example, a robbery. But because the Sixth Amendment prohibits learning what the defendant did, the Court uses proxies—offense elements and caselaw interpreting them—for understanding the defendant's conduct. "The result is a Rube Goldberg jurisprudence of abstractions piled on top of one another in a manner that renders doubtful anyone's confidence in predicting what will pop out at the end."[390]

The Court's current categorical approach pits two fundamentally incompatible doctrines against each other: the Sixth Amendment's prohibition on deciding case facts versus the Court's insistence that

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6:00 AM EST), https://morningconsult.com/2021/07/14/violent-crime-public-safety-polling/ [https://perma.cc/YY4T-EY6H].

388 *See* Apprendi v. New Jersey, 530 U.S. 466, 469 (2000). For example, federal judges often do that when defendants provided substantial assistance to the government. *See* 18 U.S.C. § 3553(e) (2018).

389 That is effectively what the district court tried to do, finding as a fact that Mr. Stokeling's robbery did not involve violence. *See* Stokeling v. United States, 139 S. Ct. 544, 549 (2019).

390 United States v. Tavares, 843 F.3d 1, 19 (1st Cir. 2016).

the defendant must have been convicted of violent behavior, a necessarily factual question. The Court could escape that catch-22 one of two ways.

1. Divorce the Categorical Approach from the Sixth Amendment

The Supreme Court could stop even trying to assess what the defendant was necessarily convicted of doing and simply judge crimes as violent or not. That would essentially restore how federal courts interpreted the residual clauses before the Court voided them for vagueness. For decades, federal courts interpreting the residual clauses looked at the "ordinary case" and decided whether the crime was violent.[391] It is a lot simpler to say that DUI ordinarily is not a violent crime, but robbery is, than to contort mens rea, "force," and "against" to justify that intuition. The Sixth Amendment prohibits case factfinding; it does not prohibit federal judges from judging offenses.

That solution probably would require overturning *Samuel James Johnson* and its progeny, which strongly implied that the ordinary-case approach was unconstitutionally vague.[392] But *Samuel James Johnson* always ignored an uncomfortable problem: the Court voided a provision that had obvious constitutional applications. Intuitively, a murder conspiracy risks serious injury to another person.[393] Robbery and aggravated assault are widely accepted violent crimes.[394] Asking whether second-degree murder is violent because young children's caregivers can starve them to death might seem like an oral argument hypothetical[395]—but the Supreme Court has granted cert on that question.[396]

What's violent is not vague; it's simply a "qualitative standard" that even the *Samuel James Johnson* majority admitted courts can constitutionally apply.[397] Nor has *Samuel James Johnson* lived up to Justice Scalia's promise to make the ACCA litigation end. That's because the Court has never avoided judging violence. The Justices still debate

391 *See, e.g.*, James v. United States, 550 U.S. 192, 208 (2007), *abrogated by* Johnson v. United States, 576 U.S. 591 (2015).

392 *Johnson*, 576 U.S. at 597–99.

393 Outside the categorical approach, of course. United States v. McCollum, 885 F.3d 300, 304 (4th Cir. 2018).

394 *See, e.g.*, *FBI Releases 2022 Crime in the Nation Statistics*, FBI (Oct. 16, 2023), https://www.fbi.gov/news/press-releases/fbi-releases-2022-crime-in-the-nation-statistics [https://perma.cc/TTY5-78CF] (listing robbery and aggravated assault as index violent crimes the FBI uses to calculate violent crime rates nationwide).

395 *See* Brief for the Petitioner, *supra* note 221, at 3.

396 Delligatti v. United States, 144 S. Ct. 2603 (2024) (mem.).

397 *Johnson*, 576 U.S. at 604, 603–04.

whether prying fingers off cash[398] or firing a gun at someone's head without checking whether it is loaded[399] is violent. They are simply relying on case facts that were never designed to answer that question. State courts seem better able to make those calls without vagueness or chaos.[400] The federal courts can too.

Three changes could implement that approach. First, the Court should jettison its least-serious-means test in favor of a test that asks whether a crime like robbery ordinarily or typically involves violence. That cannot violate the Sixth Amendment, which prohibits factfinding about the defendant's conduct, not assessing crimes a legislature enacted. The real constitutional problem judging crimes raises is vagueness, as *Samuel James Johnson* held. But there is little question that some crimes are violent. The next two solutions would go a long way to helping federal courts apply the definitions Congress originally enacted to judge crimes more holistically.

Second, when federal courts assess how closely state offenses match federal violence definitions, the Court should stop requiring precise matches and accept state crimes that are substantially or reasonably similar to federal definitions. Imagine if federal courts could accept any burglary conviction whose elements are close to generic burglary. No more cert petitions over what "remaining-in burglary" is.[401] Nothing in Congress's text mandates exact matches. ACCA's text does not even mention "generic burglary," let alone demand that state burglary laws conform to it. Likewise, requiring state crimes to satisfy some quantum of "force" is purely a Supreme Court invention. Whatever state law deems sufficient force would equally satisfy the statute Congress wrote. Simply accepting close-enough matches would let the use-of-force clause guide federal courts without putting them in straitjackets.

Third, the Court should overturn *Samuel James Johnson* and its progeny and restore the residual clauses and the caselaw interpreting them, as Justice Thomas has urged.[402] Far from causing the confusion, the residual clauses were the only provisions letting federal judges exercise some discretion and develop a list of qualifying

398 Stokeling v. United States, 139 S. Ct. 544, 565 (2019) (Sotomayor, J., dissenting).

399 Borden v. United States, 141 S. Ct. 1817, 1855–56 (2021) (Kavanaugh, J., dissenting) (citing State v. Gough, No. 08-CA-55, 2009 WL 180298, at *1–2 (Ohio Ct. App. Jan. 26, 2009)).

400 *E.g.*, Timothy v. State, 90 P.3d 177 (Alaska Ct. App. 2004); State v. Scott, 467 P.3d 595, 597–99 (Mont. 2020); State v. Johnson, No. COA19-489, 2020 WL 774109, at *3 (N.C. Ct. App. Feb. 18, 2020) (citing State v. Riley, 802 S.E.2d 494, 499–500 (N.C. Ct. App. 2017)).

401 *See, e.g.*, Quarles v. United States, 139 S. Ct. 1872, 1875 (2019); United States v. Stitt, 139 S. Ct. 399, 406–08 (2018).

402 *Borden*, 141 S. Ct. at 1835 (Thomas, J., concurring in the judgment).

crimes. Blowing those lists up and forcing federal courts into an even more rules-based provision—the use-of-force clause—merely accelerated litigation and amplified absurdity.

2. Stretch the Categorical Approach to the Sixth Amendment's Limits

Alternatively, if the Court still wants to judge the defendant's conviction rather than the crime, then the Court should try using as many case facts as constitutionally possible to ground courts' judgments about defendants' convictions. At least until *Erlinger*, *Apprendi* and its progeny had never explained what *Almendarez-Torres* and the Sixth Amendment let courts learn from case and conviction paperwork. *Shepard*, *Descamps*, and *Mathis* were statutory interpretation rulings that avoided Sixth Amendment issues by narrowly constricting case facts.[403] But that implied some breathing room behind those opinions.

Many state courts embraced that gap, authorizing their judges to consult court paperwork to assess what the defendant indisputably was convicted of doing.[404] That approach has historical precedent: nineteenth-century juries could use records to clarify what the defendant was convicted of doing without redeciding case facts.[405] *Apprendi* proponents might argue that the fact juries were doing so is the critical difference, but it bears repeating that in the nineteenth century, nobody viewed juries as conducting factfinding—they were prohibited from doing it.[406] They were counting convictions using conviction paperwork, exactly what *Almendarez-Torres* held the Sixth Amendment permits.

Erlinger complicates that by holding, for the first time, that information on the face of basic conviction paperwork is a "fact" juries must find.[407] All criminal defendants plead guilty or are convicted of committing crimes on or about specified dates (among other reasons, to satisfy statutes of limitations), and because the location of a burglary is an essential element—not all locations qualify—location is an offense element too. *Erlinger* could mean the Sixth Amendment

403 *See* Shepard v. United States, 544 U.S. 13, 23 (2005); Descamps v. United States, 570 U.S. 254, 267 (2013); Mathis v. United States, 579 U.S. 500, 511 (2016).

404 *See supra* note 351 and accompanying text.

405 *See, e.g.*, State v. Cox, 41 A. 862, 862 (N.H. 1898) (complaint and clerk's minutes); Pryor v. Commonwealth, 26 S.E. 864, 865 (Va. 1897) (appeal documents); Myers v. State, 92 Ind. 390, 396 (1883) (transcripts); Maguire v. State, 47 Md. 485, 497–98 (1878) (docket entries).

406 *See supra* notes 315–17 and accompanying text.

407 Erlinger v. United States, 144 S. Ct. 1840, 1855 (2024).

mandates the fact-free, document-constrained categorical approach federal courts use.

That would depart dramatically from decades of caselaw treating the categorical approach as a rule of statutory construction and constitutional avoidance. It also would invalidate many states' approaches to their own habitual-offender laws. And it would constitutionalize a doctrine that has many federal judges across the ideological spectrum tearing their hair out.

To avoid that, the Court could constrain *Erlinger* to its facts. Or it could revise its interpretation of ACCA's requirement that prior convictions be "committed on occasions different from one another."[408] *Wooden v. United States* treated that test as essentially factual,[409] which largely prompted the U.S. Department of Justice to concede in *Erlinger* that a jury had to decide the issue.[410] Once again, the Supreme Court's statutory interpretation has created a constitutional issue that didn't previously exist instead of avoiding the problem with a different, plausible construction.[411] The Court could simply conclude that going forward, "different occasions" means different days or another test that conviction paperwork can definitively answer.

C. Reject a Conduct-Based Approach—with One Possible Exception

The Supreme Court should resist the temptation to adopt a full-throated conduct-based approach. Jurisdictions have rarely done it, and for good reasons.

Practically, it's difficult.[412] In an era when most convictions end in guilty pleas rather than jury verdicts,[413] some facts are never litigated—or even investigated—fully. Evidence that did exist vanishes over time, as memories fade, witnesses die, and law enforcement agencies purge records and storage rooms. And because sentences typically correlate with seriousness and violence, the oldest convictions—and therefore the hardest to prove—would be the ones most worthy of an enhancement. Defendants convicted of less serious crimes might, perversely, face more enhancements than their more violent counterparts.

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408 18 U.S.C. § 924(e)(1) (2018).

409 Wooden v. United States, 142 S. Ct. 1063, 1074 (2022).

410 *Erlinger*, 144 S. Ct. at 1851.

411 *Cf.* United States *ex rel.* Att'y Gen. v. Del. & Hudson Co., 213 U.S. 366, 407–08 (1909).

412 *See Erlinger*, 144 S. Ct. at 1886–88 (Jackson, J., dissenting) (discussion of practical problems).

413 *See* Bibas, *supra* note 311, at 1152.

Apprendi would require a full-blown jury trial when a predicate statute, like ACCA, increases statutory penalties. Jury trials are time- and resource-consuming for courts, litigants, and jurors. And rights like the Confrontation Clause[414] and evidentiary rules would exacerbate the difficulty of retrying old crimes using aging witnesses and evidence.

Erlinger dismissed practical objections as irrelevant.[415] But two more basic principles strongly disfavor the conduct-based approach. First, American law prizes finality. Re-adjudicating convictions would not technically violate double jeopardy, but it would undermine the settled expectations that a conviction reflects. Legal procedure, including criminal procedure, is designed to give parties one full, fair opportunity to factually adjudicate a dispute. That's why appellate courts defer to trial court factfinding, post-conviction litigation rarely reopens fact issues, and collateral attacks are strictly limited. It would be bizarre to reopen all those fact issues, only with worse evidence. And what if the new jury found a defendant not guilty of the predicate crime—would his prior conviction have to be vacated too?

And second, the conduct-based approach misunderstands the objective of predicate statutes. They are not, never have been, and should not be invitations to redo prior convictions. The point of incorporating a prior conviction into a statute is to capitalize on the conclusion that earlier adjudication already reached. When Congress prohibits people with felony convictions or convictions for misdemeanor crimes of domestic violence from possessing firearms, Congress doesn't want to reopen whether those offenders beat their domestic partners. The point is to use the existing assessment to regulate firearms possession.

The exception is predicate statutes that incorporate other crimes into a current offense, like § 924(c). Recall that to convict under § 924(c), prosecutors must prove a defendant committed a crime of violence and used a firearm.[416] The parties are already litigating the predicate crime, so finality and efficiency are not issues. The only remaining question is whether uniformity or precision is preferable. If Congress listed which federal crimes qualify, then uniformity would prevail. If juries decide, they could return a verdict tailored to each case, and verdicts might conflict over time. Whether, in § 924(c) cases, violence should be uniform or case by case is a policy question that Congress ideally should decide.

414 U.S. CONST. amend. VI.

415 *Erlinger*, 144 S. Ct. at 1859–60.

416 18 U.S.C. § 924(c)(1)(A) (2018).

Some Justices have urged interpreting § 924(c) to authorize asking juries to decide whether the crime was violent, at least as a matter of constitutional avoidance.[417] As enacted, § 924(c)'s text fits only partially with jury decisionmaking. The use-of-force clause focuses on offense elements,[418] seemingly a legal test juries have little expertise assessing.[419] The residual clause includes an offense "that by its nature, involves a substantial risk that physical force . . . may be used in the course of committing the offense."[420] An offense's "nature" seems like a legal question for judges, though what occurred "in the course of committing the offense" is more fact based.

In the interim, referring violence decisions to juries in § 924(c) cases would at least reduce crimes-of-violence litigation until Congress (hopefully) intervenes. The practical and philosophical issues that prior convictions raise would not apply, and courts probably could craft a jury instruction that would work well enough. Juries apply community values to case facts and crime definitions. In those cases, predicate factfinding might be a sensible stopgap measure.

D. Final Caveats and Objections

Many critics probably still would prefer abolishing the violence definitions, or at least their major applications, like ACCA, § 924(c), and immigration law.[421] Of course, if those statutes were eliminated, litigation surrounding them would die too—though recall that the definitions have been incorporated in many other statutes that probably would endure. I have not focused on that solution for two reasons.

First, Congress is exceedingly unlikely to stop using violent predicates. For reasons I have explained elsewhere, the federal criminal system primarily corrects and supplements state enforcement difficulties.[422] One of the biggest crime issues voters care about is violence,[423] and violent predicates are one major way Congress directs limited federal resources toward a problem constituents expect it to address.[424]

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417 *See* United States v. Davis, 139 S. Ct. 2319, 2351 (2019) (Kavanaugh, J., joined by Thomas & Alito, JJ., dissenting).

418 § 924(c)(3)(A).

419 Unusually, Kentucky does permit prosecutors, as a last resort, to have witnesses to testify about offense elements to sentencing juries. Webb v. Commonwealth, 387 S.W.3d 319, 330–31 (Ky. 2012).

420 § 924(c)(3)(B).

421 *Cf. supra* note 13.

422 Blondel, *supra* note 157, at 1049–55.

423 *See supra* note 387 and accompanying text.

424 Blondel, *supra* note 157, at 1092–94.

And data do not support critics' insistence that federal violence law "fail[s] to capture those who present the greatest risk of future violence."[425] The U.S. Sentencing Commission's studies have repeatedly found that federal offenders convicted of current or past violent crimes were more likely to have lengthy criminal histories, to reoffend, and to commit violent offenses than any other category of federal defendant, including drug offenders.[426] Notably, the studies' offenders were convicted in 2010, when courts read violence definitions more broadly and therefore more offenders qualified.

Second, critics ought to consider unintended consequences of squeezing or eliminating violent predicates. Federal enforcers likely will never stop focusing on recidivist offenders entirely. Data consistently confirm that criminal history is one of the strongest predictors of future recidivism, including violent reoffending.[427] It's natural, logical even, to use predicates to direct criminal enforcement. The better question is which crimes should trigger increased focus and consequences. If violence becomes impossible to target, enforcers might focus on easier-to-define convictions, probably drugs.[428] Those convictions present many of the same injustices critics object to, but they predict recidivism more poorly than violent ones.

In his study of violence law, David Sklansky argues that in the 1980s and 1990s, habitual-offender laws began "treat[ing] criminal violence as characterological instead of situational."[429] That may be right, but older law simply treated all recidivists—or at least all felony recidivists—as criminal characters whom the law could not reform.[430]

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425 Barkow, *supra* note 11, at 230.

426 U.S. SENT'G COMM'N, RECIDIVISM OF FEDERAL VIOLENT OFFENDERS RELEASED IN 2010, at 5–6 (2022); U.S. SENT'G COMM'N, RECIDIVISM OF FEDERAL FIREARMS OFFENDERS RELEASED IN 2010, at 57–61 (2021); U.S. SENT'G COMM'N, FEDERAL ROBBERY: PREVALENCE, TRENDS, AND FACTORS IN SENTENCING 3 (2022); U.S. SENT'G COMM'N, REPORT TO THE CONGRESS: CAREER OFFENDER SENTENCING ENHANCEMENTS 2–3 (2016); Jennifer Lee Barrow, *Recidivism Reformation: Eliminating Drug Predicates*, 135 HARV. L. REV. F. 418, 441–43 (2022). Nor does research support critics' claims that the violence definitions failed to "target[] the small number of people who repeatedly exhibited a propensity for violence." Barkow, *supra* note 11, at 201. ACCA defendants "consistently comprise a small portion of the federal criminal caseload." U.S. SENT'G COMM'N, *supra* note 309, at 7.

427 *See supra* note 426 and accompanying text.

428 Many violent-predicate statutes, such as § 924(c) and ACCA, also target drug predicates, incentivizing prosecutors to turn to drug predicates when violent ones fail. *E.g.*, 18 U.S.C. § 924(c), (e) (2018).

429 SKLANSKY, *supra* note 14, at 87, 66–68, 86–87.

430 *See, e.g.*, People v. Raymond, 96 N.Y. 38, 41 (1884) (explaining that a second conviction proves that the defendant "shows such a persistence in evil, such a continued criminality" that he "is a persistent criminal, toward whom mercy is misplaced; and by reason of this character of the man, thus shown by his conduct, greater severity of punishment is prescribed"); Plumbly v. Commonwealth, 43 Mass. (2 Met.) 413, 414–15 (1841) (explain-

If anything, focusing predicate statutes on violence or dangerousness *narrowed* the people the law deemed less reformable. Reasonable minds can disagree about which convictions should merit recidivist penalties. Expecting that gutting violence will somehow eliminate recidivist penalties discounts long history and current law.

What's more, violence cuts other ways. The federal system has long led efforts to combat racial and police violence, and civil rights law uses the federal violence definitions.[431] A recent case held—almost certainly correctly, under current precedent—that the federal statute routinely used to charge police violence, including George Floyd's killer, is not a "crime of violence."[432] Narrowing violence definitions also undermines statutes that direct government services, including toward victims and at-risk youth.[433]

Though I ultimately disagree with ACCA's leading critics, they raise serious objections that deserve repeating. Predicates—especially recidivist penalties—affect low-income and minority defendants disproportionately.[434] That hurts disadvantaged people and communities and eventually undermines law's legitimacy.[435] Addressing structural inequalities in criminal justice is a serious problem ultimately beyond this Article's scope. But haphazardly slashing violence definitions, contrary to Congress's intent and ordinary vernacular, does not exactly promote legitimacy either. And members of those same communities are also disproportionately likely to be victims of violent crimes; they deserve protection, justice, and aid too.

Though critics overly blame mandatory minimums for the doctrinal chaos, punitiveness does exacerbate the problems this Article has identified. Congress, as scholars have complained, adopted the violence definitions among broader legislation designed to target and punish violent offending more severely.[436] For reasons I have detailed

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ing that habitual-offender statutes "enhance the punishment, in proportion as the convict proves himself incorrigible by former punishment," *id.* at 414).

431 *See supra* note 167 and accompanying text.

432 Acosta v. United States, Nos. 1:16-cv-00401 & 1:03-cr-00011, 2019 WL 4140943, at *8 (W.D.N.Y. Sept. 2, 2019). That case involved conduct the Second Circuit described as "rogue, vigilante-style tactics worthy of a television drama," including robbing suspected drug dealers at gunpoint. United States v. Acosta, 470 F.3d 132, 134 (2d Cir. 2006).

433 *See supra* notes 161–68 and accompanying text.

434 *Cf. supra* note 426; *see also* Barkow, *supra* note 11, at 201–02; SKLANSKY, *supra* note 14, at 142.

435 *See, e.g.*, Monica C. Bell, *Police Reform and the Dismantling of Legal Estrangement*, 126 YALE L.J. 2054, 2068–126 (2017); Andrew V. Papachristos, Tracey L. Meares & Jeffrey Fagan, *Why Do Criminals Obey the Law? The Influence of Legitimacy and Social Networks on Active Gun Offenders*, 102 J. CRIM. L. & CRIMINOLOGY 397, 400 (2012); Tom R. Tyler & Jeffrey Fagan, *Legitimacy and Cooperation: Why Do People Help the Police Fight Crime in Their Communities?*, 6 OHIO ST. J. CRIM. L. 231, 237–38 (2008).

436 Barkow, *supra* note 11, at 201, 210–11.

elsewhere, federal prosecutors typically charge strong cases involving easier-to-prove crimes like drugs, weapons, and immigration offenses.[437] Those offenses are also, not coincidentally, the most charged in the federal system.

That dynamic unwittingly made contesting violent predicates the best litigation strategy for thousands of federal defendants annually.[438] They often can't seriously dispute that they possessed a gun, sold drugs, or reentered the country after deportation, but they can challenge whether their prior convictions are violent. Over time, federal violence law, hobbled by the weaknesses this Article has identified, buckled under that onslaught. And more intense focus on violent crimes would explain why a concept that dates to the 1930s only became a litigation focus in the twenty-first century, as the very crimes that turn on violence most often became the most charged federally.[439]

Other federal dynamics force federal courts to interpret tricky predicates far more often than their state counterparts. Federal convictions comprise fewer than five percent of felony convictions annually and even fewer violent crime convictions.[440] So most federal offenders' criminal histories are mostly state crimes. What's more, many defendants "go federal" because they have long criminal histories. Thus, whereas state courts see more of a spectrum of criminal histories and a steady stream of offenders who have mostly in-state convictions, federal courts face a concentrated diet of offenders with many state-court convictions that must be assessed for violence.

One arguable benefit must be acknowledged: today, the list of violent crimes has shortened considerably, and fewer federal defendants face increased penalties as a result. For some critics, that is enough.[441] But the downsides are many. It is hard to argue that the Court's present interpretation remotely reflects what Congress had in mind.[442] Meanwhile, which crimes are violent is, if anything, more confusing, arcane, and out of step with common sense now than twenty years ago. Most people would agree that an attempted robbery in which the victim was shot and killed is violent; the Supreme

437 *See* Blondel, *supra* note 157, at 1075–82.

438 *See* Koh, *supra* note 12, at 270–72 (explaining why "immigrants with convictions often have few legal options to defend themselves from removal, other than to argue that their convictions do not constitute removable offenses," *id.* at 272, which has strained the categorical approach in immigration law).

439 *See* U.S. SENT'G COMM'N, *supra* note 47, at 4–5.

440 *See* Blondel, *supra* note 157, at 1050–51.

441 *Cf. supra* note 12 and accompanying text.

442 *See supra* Section II.A.

Court says it isn't.[443] Trimming haphazardly is not the clear, fair, predictable constraint that a rule of law promises.

V. CRIMES AS RULES VERSUS STANDARDS

Professor William Stuntz famously declared that that criminal law is "pathological" because legislatures define crimes too broadly, giving prosecutors too much discretion.[444] Since then, scholars have urged legislators and courts to define and interpret crime definitions precisely, targeting the "real" prohibited conduct.[445] Supreme Court textualists like Justice Scalia have likewise favored bright-line rules, including in criminal law.[446] The violence cases unwittingly put scholars' proposal to the test—and failed miserably.

Those critics have overlooked the critical role discretion plays in interpreting and applying criminal laws across thousands of unique cases. Put another way, scholars and textualists want to treat crime definitions as rules, but they are standards: laws designed to be judged on individual case facts. The better question is not how to write a better rule but how to design criminal laws, procedures, and practices to distribute and regulate that discretion fairly and workably.

A. Treating Crimes as Rules

William Stuntz argued:

> The existing [criminal justice] system rests on open-ended, unbounded, essentially non-legal judgments about who deserves to go to prison and who doesn't. Law enforcers make those judgments. Courts review them only for their compliance with legal doctrine . . . designed to give law enforcers a great deal of flexibility, [so] in practice the review is forgiving.[447]

That critique has become received wisdom. "A wide and deep scholarly consensus exists that criminal legislation has been dysfunctional for many years."[448] Legislatures enact "imprecise or overly broad laws," "even though existing laws had already criminalized the con-

443 United States v. Taylor, 142 S. Ct. 2015, 2019, 2025 (2022).

444 Stuntz, *supra* note 40, at 505.

445 *See supra* subsection IV.B.1.

446 *See* Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175, 1179–82 (1989) (listing benefits); *see also infra* notes 460–63.

447 Stuntz, *supra* note 40, at 597.

448 Carissa Byrne Hessick & Joseph E. Kennedy, *Criminal Clear Statement Rules*, 97 WASH. U. L. REV. 351, 359 (2019); *accord, e.g.*, Stuntz, *supra* note 40, at 507, 529–33; Joshua Kleinfeld, *Textual Rules in Criminal Statutes*, 88 U. CHI. L. REV. 1791 (2021).

duct and punished it with substantial penalties."[449] Far from checking that tendency, prosecutors, law enforcement, and courts enable and extend it.[450] To solve that dysfunction, scholars have urged legislatures to enact fewer, narrower laws that avoid overlapping with other prohibitions.[451] Prosecutorial discretion should be curtailed.[452] Courts should vigorously police statutes for overbreadth and adopt narrowing interpretations whenever possible.[453]

Justice-system actors have largely ignored their entreaties,[454] a position scholars find so indefensible that they blame dysfunction. Legislatures, critics claim, privilege expediency, want politically to appear tough on crime without counterbalancing political checks, or fear or dislike criminals.[455] Prosecutors capitalize on the unfettered discretion these statutes provide to promote their careers.[456] Overly cautious judges aid and abet them.[457] Stuntz labeled this dynamic "pathological"[458] and eventually concluded that the failure to limit crime definitions was one reason that American criminal justice had "collapsed."[459]

Criminal justice sometimes makes strange bedfellows,[460] and the leading jurists who share that jurisprudence are the textualists, above

449 Hessick & Kennedy, *supra* note 448, at 360; *accord, e.g.*, Stephen F. Smith, *Overcoming Overcriminalization*, 102 J. CRIM. L. & CRIMINOLOGY 537, 537–38, 542, 544 (2012); Paul H. Robinson & Michael T. Cahill, *The Accelerating Degradation of American Criminal Codes*, 56 HASTINGS L.J. 633, 635–44 (2005); *see also* Robert Leider, *The Modern Common Law of Crime*, 111 J. CRIM. L. & CRIMINOLOGY 407, 409–10 & nn.5–10 (2021) (summarizing that argument).

450 *See, e.g.*, Stuntz, *supra* note 40, at 533–42; Smith, *supra* note 449, at 544–45; Robinson & Cahill, *supra* note 449, at 645–48.

451 *E.g.*, Robinson & Cahill, *supra* note 449, at 635; *see also* Kleinfeld, *supra* note 448, at 1822 ("[L]egislatures vacate their responsibility to write fully specified law and, in so doing, empower . . . unchecked executive power . . . .").

452 *See* Stephanos Bibas, *Prosecutorial Regulation Versus Prosecutorial Accountability*, 157 U. PA. L. REV. 959, 962, 965–66 (2009) (collecting scholarship).

453 *E.g.*, Kleinfeld, *supra* note 448, at 1826; Smith, *supra* note 449, at 579; F. Andrew Hessick & Carissa Byrne Hessick, *Constraining Criminal Laws*, 106 MINN. L. REV. 2299, 2360–61 (2022).

454 *See* Robinson & Cahill, *supra* note 449, at 649.

455 *See* Hessick & Kennedy, *supra* note 448, at 360–61; Robinson & Cahill, *supra* note 449, at 645.

456 *See, e.g.*, Stuntz, *supra* note 40, at 533–42; Hessick & Hessick, *supra* note 453, at 2341.

457 *See supra* note 450 and accompanying text.

458 Stuntz, *supra* note 40, at 505.

459 WILLIAM J. STUNTZ, THE COLLAPSE OF AMERICAN CRIMINAL JUSTICE 2, 2–4, 80–83 (2011).

460 *See* William N. Eskridge, Jr., Brian G. Slocum & Kevin Tobia, *Textualism's Defining Moment*, 123 COLUM. L. REV. 1611, 1613–14 (2023) (noting academic skepticism of Scalian textualism).

all Justice Scalia, who have hailed bright-line rules as the solution to constrain discretion and promote clarity,[461] including in criminal jurisprudence.[462] More recently, Justices Sotomayor and Gorsuch have urged reinvigorating the rule of lenity for the same reason.[463]

In other words, the Supreme Court has tried to treat violence as a rule. The rules-versus-standards literature is too rich to possibly capture here.[464] But scholars broadly agree about essential definitions. "Rules aim to confine the decisionmaker to facts, leaving irreducibly arbitrary and subjective value choices to be worked out elsewhere."[465] "Standards," meanwhile, "allow the decisionmaker to take into account all relevant factors or the totality of the circumstances," so "the application of a standard in one case ties the decisionmaker's hand in the next case less than does a rule."[466] Or, as Louis Kaplow

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461 *See generally, e.g.*, Scalia, *supra* note 446; Frank H. Easterbrook, *Text, History, and Structure in Statutory Interpretation*, 17 HARV. J.L. & PUB. POL'Y 61 (1994); Neomi Rao, *Textualism's Political Morality*, 73 CASE W. RSRV. L. REV. 191 (2022). *See also* Dan M. Kahan, *Lenity and Federal Common Law Crimes*, 1994 SUP. CT. REV. 345, 348 (summarizing that position); Eskridge et al., *supra* note 460, at 1614–15 (listing textualists on the 2023 Court).

462 *E.g.*, United States v. Jones, 565 U.S. 400, 406–11 (2012) (resurrecting trespass as a per se Fourth Amendment violation); *see* Kahan, *supra* note 461, at 348, 390, 393 (discussing that jurisprudence in federal criminal law).

463 Wooden v. United States, 142 S. Ct. 1063, 1075 (2022) (Sotomayor, J., concurring) ("I agree with Justice Gorsuch, however, that the rule of lenity provides an independent basis for ruling in favor of a defendant in a closer case . . . .").

464 *See generally* FREDERICK SCHAUER, PLAYING BY THE RULES: A PHILOSOPHICAL EXAMINATION OF RULE-BASED DECISION-MAKING IN LAW AND IN LIFE (1993); Steven G. Calabresi & Gary Lawson, *The Rule of Law as a Law of Law*, 90 NOTRE DAME L. REV. 483 (2014); Isaac Ehrlich & Richard A. Posner, *An Economic Analysis of Legal Rulemaking*, 3 J. LEGAL STUD. 257 (1974); Richard H. Fallon, Jr., *"The Rule of Law" as a Concept in Constitutional Discourse*, 97 COLUM. L. REV. 1 (1997); Daniel A. Farber, *The Rule of Law and the Law of Precedents*, 90 MINN. L. REV. 1173 (2006); Jamal Greene, *The Rule of Law as a Law of Standards*, 99 GEO. L.J. 1289 (2011); Jamal Greene, *Rule Originalism*, 116 COLUM. L. REV. 1639 (2016); Joseph R. Grodin, *Are Rules Really Better than Standards?*, 45 HASTINGS L.J. 569 (1994); Louis Kaplow, *Rules Versus Standards: An Economic Analysis*, 42 DUKE L.J. 557 (1992); Duncan Kennedy, *Form and Substance in Private Law Adjudication*, 89 HARV. L. REV. 1685 (1976); Jonathan Remy Nash, *The Rules and Standards of Personal Jurisdiction*, 72 ALA. L. REV. 465 (2020); Kathleen M. Sullivan, *The Supreme Court 1991 Term — Foreword: The Justices of Rules and Standards*, 106 HARV. L. REV. 22 (1992); Cass R. Sunstein, *Problems with Rules*, 83 CALIF. L. REV. 953 (1995).

465 Sullivan, *supra* note 464, at 58; *see also* SCHAUER, *supra* note 464, at 78 ("The two diverge, however, when a decision-maker applying yesterday's generalizations to today is faced with a recalcitrant experience . . . . [P]articularistic decision-making adapts the generalization to the needs of the moment, treating the prior generalization as entitled to no intrinsic weight in the calculus of decision. Rule-based decision-making, however, rejects the continuous revisability of generalizations, and consequently imbues them with force even in those cases in which that force appears misplaced.").

466 Sullivan, *supra* note 464, at 59.

summarizes, rules and standards differ on whether the decisionmaker judges behavior "before or after individuals act."[467]

Though I have not seen scholars frame it in these terms, translated into the rules-versus-standards debate, critical jurists and scholars complain that criminal law is too standard-like when rules would serve better. The logic is understandable: rules eliminate discretion and supply constraint. For textualists like Justice Scalia, elected legislatures, not unelected on-the-ground enforcers, should decide what behavior is illegal.[468] For other critics, criminal enforcement carries severe, life-altering consequences for its targets; giving prosecutors and police discretion invites injustice and abuse, with the poor and minorities paying the price disproportionately.[469]

B. Understanding Crimes as Standards

For two decades, the Supreme Court has conducted a mostly unwitting[470] and largely unnoticed[471] experiment in the tighten-the-rules proposal, better known as the categorical approach.

In the 1980s, Congress enacted statutes embodying features that drive criminal law's critics crazy. The crime-of-violence definitions were (deliberately) broad and flexible, leaving federal judges stuck judging violence with few concrete limits—a fact the Court's then leading law-of-rules proponent, Justice Scalia, certainly noticed. "Congress has simply abdicated its responsibility when it passes a criminal statute insusceptible of an interpretation that enables principled, predictable application; and this Court has abdicated its responsibility when it allows that."[472]

That was in 2007. Justice Scalia's colleagues soon heeded his call, embarking on a quest to pinpoint the violent conduct Congress "really" had in mind. Put in terms of rules versus standards, the Court decided to treat violence as a rule. Recall Justice Kagan's dis-

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467 Kaplow, *supra* note 464, at 585.

468 Rao, *supra* note 461, at 195–96.

469 *See* I. Bennett Capers, *Against Prosecutors*, 105 CORNELL L. REV. 1561, 1561–64 (2020) (collecting and extending that literature); *see also* Jeffrey Bellin, *Reassessing Prosecutorial Power Through the Lens of Mass Incarceration*, 116 MICH. L. REV. 835, 837 (2018) (reviewing PFAFF, *supra* note 22) (collecting literature).

470 Arguably, Justice Scalia's crime-of-violence decisions consciously embodied his "law of rules" jurisprudence. But other authors of leading categorical-approach cases, such as Justice Kagan, have less documented support for such a jurisprudential approach.

471 Certainly, the categorical approach has received plenty of attention. But I have not found any scholarship connecting that caselaw to law scholars' larger critique of overbroad criminal statutes or the larger rules-versus-standards debate.

472 James v. United States, 550 U.S. 192, 230 (2007) (Scalia, J., dissenting), *abrogated by* Johnson v. United States, 576 U.S. 591 (2015).

missive insistence, in *Mathis*, that "[f]acts . . . are mere real-world things—extraneous to the crime's legal requirements," so the categorical approach "cares not a whit about them."[473] In other words, the Court insisted on defining violence ex ante, without considering facts or other case-specific circumstances. It's no coincidence that Justices Scalia and Gorsuch, the Court's leading textualists,[474] have also written many major categorical approach opinions.[475]

Conventional wisdom would expect—and Justice Scalia himself anticipated—great results. For example, *Samuel James Johnson* promised that striking down the residual clause would eliminate "the indeterminacy" and "arbitrary enforcement" that the residual clause generated.[476] Yet the opposite resulted. Attempts to define "force," adopt mens rea limits, cut the residual clause, and curtail judicial factfinding promoted neither determinacy nor predictability. Instead, those changes turned crimes-of-violence cases into an annoying game of lower court whack-a-mole, leaving district and circuit judges applying and reapplying new definitions with little clarity and no end in sight.

The categorical approach has failed because it confuses a standard for a rule. At a glance, crime definitions might seem like rules. But consider the *Mathis* Court's example, a "deadly weapon."[477] If a bank robber passed a threatening note to tellers but never displayed a weapon, legally, he would not be guilty of robbery with a deadly weapon. That's a rule. But what if a bank robber brandishes a BB gun? Many modern BB guns look like real firearms,[478] pellets can cause (usually nonfatal) injuries,[479] and a robber could injure someone by striking the victim with the BB gun. Most states treat whether robbery with a BB gun qualifies as a context-dependent jury question, sometimes after providing some definitional guidelines.[480] So rules exist—but at some point, a "deadly weapon" is a standard.

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473 Mathis v. United States, 579 U.S. 500, 504 (2016).

474 *See* Eskridge et al., *supra* note 460, at 1615.

475 *E.g.*, Erlinger v. United States, 144 S. Ct. 1840 (2024); United States v. Davis, 139 S. Ct. 2319 (2019); *Johnson*, 576 U.S. 591; Johnson v. United States, 559 U.S. 133 (2010).

476 *Johnson*, 576 U.S. at 597.

477 *Mathis*, 579 U.S. at 506.

478 *See, e.g.*, *Bushmaster MPW (BB)*, CROSMAN, https://www.crosman.com/bushmaster-mpw-bb [https://perma.cc/U85K-8G4E].

479 Jonathan M. Hyak, Hannah Todd, Daniel Rubalcava, Adam M. Vogel, Sara Fallon & Bindi Naik-Mathuria, *Barely Benign: The Dangers of BB and Other Nonpowder Guns*, 55 J. PEDIATRIC SURGERY 1604 (2020); Tsui Kwok Leung, Tsui Chi Leung & Tang Yiu Hang, *Ball Bearing (BB) Gun Injuries*, 17 H.K. J. EMERGENCY MED. 488, 488 (2010).

480 *See, e.g.*, People v. Thorne, 817 N.E.2d 1163, 1171–72 (Ill. App. Ct. 2004); State v. Hall, 599 S.E.2d 104, 108–09 (N.C. Ct. App. 2004); State v. Wagner, 807 P.2d 139, 142–43 (Kan. 1991); *see also* State v. Wilson, 936 P.2d 316, 318 (Mont. 1997) (holding that the

Or recall, again, the *Stokeling* debate over a state case purportedly holding that peeling the victim's fingers off a wad of cash is "force."[481] That Florida jury did not hold that finger peeling is per se forcible. After observing the victim's testimony that he gave up his money out of fear that the defendant would hurt him, other testimony, and evidence, much of which the Florida appellate court probably didn't bother to mention, *that* jury concluded that *this* defendant's actions toward *this* victim deserved to be labeled "robbery."[482]

Justice Sotomayor's other example of potentially nonviolent robbery, purse snatching,[483] also illustrates. Before *Stokeling*, several circuits had concluded that robbery crimes could not be violent if purse snatching qualified.[484] In isolation, that rule makes sense. But consider a different Florida robbery case in which the defendant grabbed a woman's purse strap, then dragged her with his car through the parking lot until the strap broke.[485] Is purse-snatching-by-car forceful enough to be violent?

Whether those cases were decided "correctly" is the wrong question. Crimes and their elements frame circumstance-specific adjudication that includes a "subjective value choice[]"[486] about the offender and offense conduct. Or as Samuel Buell has observed, crime definitions are "a structure for contextual inquiry into social norms," especially "in novel or borderline instances of these offenses."[487] What's robbery, what's force, and what's violent are standards that decisionmakers decide case by case, considering case facts and circumstances plus social, legal, political, and moral values.

One of the ironies of the crimes-of-violence caselaw is that everybody's eyeball judgments make a lot more sense than their legal justifications. The Court's intuition that battery and driving offenses are not that violent is far more defensible than its textual gymnastics. Meanwhile, prosecutors' case selection was more rational than the Court's analysis might suggest. Calling battery "violent" in *Johnson v. United States* (*Curtis Johnson*) seemed questionable. But Curtis John-

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state did not prove a BB gun was a "dangerous weapon" when the BB gun was "broken, unloaded, and inoperable" and the defendant did not use it to strike or harm someone); *In re* Bartholomew D., 31 Cal. Rptr. 3d 728, 730–35 (Cal. Ct. App. 2005) (summarizing cases finding factually that pellet guns and similar objects are dangerous and holding that a BB gun was, as a matter of law, a "dangerous weapon," *id.* at 734).

481 *See supra* notes 247, 252 and accompanying text.

482 *See Sanders*, 769 So. 2d at 508.

483 *Stokeling*, 139 S. Ct. at 558–59 (Sotomayor, J., dissenting).

484 *E.g.*, United States v. Mulkern, 854 F.3d 87, 93–94 (1st Cir. 2017).

485 Burris v. State, 825 So. 2d 1034, 1035–36 (Fla. Dist. Ct. App. 2002).

486 Sullivan, *supra* note 464, at 58.

487 Samuel W. Buell, *Culpability and Modern Crime*, 103 GEO. L.J. 547, 570, 587 (2015).

son was a serial domestic abuser.[488] Mr. Leocal and Mr. Begay committed driving offenses, yes, but Mr. Leocal disfigured two people,[489] while Mr. Begay was a menace on the roadways and terrorized his family with firearms.[490] The categorical approach is so frustrating because it misses that "contextual inquiry" that decisionmakers use to apply standards coherently.

C. Process of Distributed Discretion

One major reason critics return, again and again, to treating crimes as rules is discomfort with discretion. For textualists, judicial discretion is the real problem; for scholars, the *bête noire* is prosecutorial discretion. Or, as Professor Bellin put it, "[p]rosecutors are the Darth Vader of academic writing,"[491] with some critics adopting extreme stereotypes of prosecutors "reporting to no one save God."[492]

The federal experience defining violence offers an object lesson in the danger of interpreting crimes as rules, without discretion. Scholars agree that rules require relatively finite, knowable facts that the rule creator can prejudge.[493] In a recently rediscovered essay, H.L.A. Hart argued that rules fail and discretion becomes necessary when human limitations make predicting the future impossible.[494] Hart cited two situations: "Relative Ignorance of Fact," when human ingenuity outstrips fact predictions, and "Relative Indeterminacy of Aim," when we must balance a rule against unpredictable value judgments.[495]

Hart and other jurisprudential scholars, including Frederick Schauer, have offered criminal sentencing as an example of a decisionmaker applying a discretionary standard.[496] But the point reaches criminal convictions more broadly. Criminal law writers face both problems Hart identified: anticipating the myriad ways someone can cause harm and the complex circumstances that affect the law's

488 *See supra* note 212 and accompanying text.

489 *See* Leocal v. Ashcroft, 543 U.S. 1, 4 (2004).

490 *See* United States v. Begay, 470 F.3d 964, 965–66 (10th Cir. 2006).

491 Bellin, *supra* note 469, at 837.

492 Adam Gopnik, *How We Misunderstand Mass Incarceration*, NEW YORKER (Apr. 3, 2017), https://www.newyorker.com/magazine/2017/04/10/how-we-misunderstand-mass-incarceration [https://perma.cc/LZ7K-MHP7] (reviewing PFAFF, *supra* note 22); *see* Jeffrey Bellin, *The Power of Prosecutors*, 94 N.Y.U. L. REV. 171, 177 (2019) (collecting similar quotes from scholars).

493 Kaplow, *supra* note 464, at 585; *see* Hart, *supra* note 43, at 662 (explaining that rules fail when borderline cases raise unpredictable facts).

494 Hart, *supra* note 43, at 661.

495 *Id.* at 661, 661–63.

496 *Id.* at 655; SCHAUER, *supra* note 464, at 11.

judgment. What exactly occurred? Who are the victims? Who is the offender and what is his history? What did the offender intend? What other harms—economic, emotional, community—occurred? Truth is stranger than fiction, and the only way to apply the law justly and rationally in that much uncertainty is to leave room for discretion.

If Hart was correct, then discretion isn't "pathological"—it's essential to interpreting crimes as standards coherently. That means criminal scholars have wrongly assumed that discretion equates to, as Stuntz put it, "essentially non-legal judgments about who deserves to go to prison and who doesn't."[497] Prosecutorial discretion is not just enforcement discretion; it's a form of statutory interpretation.

Meanwhile, in the statutory interpretation literature, discretion typically means interpretive discretion—usually exercised by judges—over the statute's text.[498] But criminal scholars are right that enforcement is an essential component of interpretation. Criminal statutory interpretation requires deciding not just what the words in the statute mean but how they apply in real-world cases.

Accepting that interpreting criminal law requires discretion does not mean conceding to prosecutors "reporting to no one save God."[499] When interpretive discretion is "inevitable," Hart explained, "we can at least do what we can to obtain the best conditions for decisions."[500] More recently, Thomas Merrill urged, in contested interpretive questions, "changing the focus from legitimate interpretation to legitimate adjudication."[501] That is, adjudication is how the law interprets contested, value-laden, context-dependent statutes like crime definitions—or violence.[502]

Adjudication offers the real constraints that the Court hoped crime definitions would supply.[503] First, prosecutorial discretion is a misnomer. Focusing on statutory interpretation rather than bare en-

497 Stuntz, *supra* note 40, at 597.

498 *See, e.g.*, Thomas W. Merrill, *Legitimate Interpretation—Or Legitimate Adjudication?*, 105 CORNELL L. REV. 1395, 1396–400 (2020); *see also* Kahan, *supra* note 461, at 389–96 (arguing that the rule of lenity is a delegation of statutory interpretation discretion to judges).

499 *See supra* note 492 and accompanying text.

500 Hart, *supra* note 43, at 664.

501 Merrill, *supra* note 498, at 1398.

502 *See id.* at 1398–401.

503 As Justice Scalia put it, "Supreme Court briefs are an inappropriate place to develop the key facts in a case. We normally give parties more robust protection, leaving important factual questions to district courts and juries aided by expert witnesses and the procedural protections of discovery." Sykes v. United States, 564 U.S. 1, 31 (2011) (Scalia, J., dissenting) (citing FED. R. CRIM. P. 16(a)(1)(F), (G); FED. R. EVID. 702–703, 705).

forcement discretion helps clarify that many actors contribute to a richer back-and-forth debate about crime laws' meaning.

I call that process "distributed discretion." Criminal procedure repeatedly requires justice-system actors to apply crime definitions in every case under prevailing legal, policy, moral, and social standards. Legislatures grade offenses and prescribe penalties to start signaling how serious they are. Law enforcement and prosecutors then look at a case's facts—including the offender's criminal history—when deciding what to investigate and which charges to bring.[504] Grand juries might not offer frequent checks, but they remain a body that prosecutors must anticipate and satisfy before proceeding.

After charging, judges often provide some input by reviewing probable cause, making detention decisions, and ruling on evidentiary and preliminary motions. Defendants and their attorneys play a role too. They review the charges and evidence and assess the case. Defendants retain the ability to plead not guilty; even if defendants are factually guilty, their attorneys can argue, either during plea negotiations or at sentencing, that mitigating factors warrant more lenient treatment. And though scholars sometimes discuss plea-bargaining as a one-way punitive ratchet, data confirm that both parties often use pleas—as in *Moncrieffe*[505]—to reduce harsher penalties, especially for factually guilty offenders who might deserve more mercy.[506]

At trial, the factfinder, usually a jury, then decides again whether case facts meet the offense elements. It is no coincidence that criminal defendants enjoy an absolute right to a jury trial: Juries are the ultimate standard-applier. They can consider individualized facts and apply community values to resolve disputed legal questions like whether a theft was a robbery or larceny or whether a defendant's actions were accidental or taken in self-defense.[507] Judges also can find the defendant not guilty before or after a jury verdict.

At sentencing, prosecutors, defense attorneys, defendants, and victims all present their views about the case, and judges (or occasionally sentencing juries) decide a suitable punishment. Then, ap-

504 Officers often arrest on charges without any prosecutor's involvement, so formal indictment reacts to decisions an officer already made. Adam M. Gershowitz, *Justice on the Line: Prosecutorial Screening Before Arrest*, 2019 U. ILL. L. REV. 833, 837–59. Even when prosecutors are involved prearrest, law enforcement officers investigate, develop facts, and recommend charges. *See id.* at 859–61.

505 *See* Moncrieffe v. Holder, 569 U.S. 184, 188–98 (2013).

506 Jeffrey Bellin, *Plea Bargaining's Uncertainty Problem*, 101 TEX. L. REV. 539, 554–59 (2023).

507 AKHIL REED AMAR, THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION 94–96 (1998).

pellate courts review how the trial court applied the law to the facts to ensure no major errors occurred.

Many scholars might object that this narrative obscures prosecutors' enormous power throughout that process. Yet other scholars, including Jeffrey Bellin and David Sklansky, have pushed back, agreeing that prosecutorial discretion is real and important but attempting to ground and understand it in normative and institutional-function principles.[508]

Distributed discretion spreads some of that discretion beyond prosecutors. As Jeffrey Bellin has observed, other justice-system actors profoundly shape criminal law, enforcement, and prosecutions.[509] Certainly, prosecutors make key decisions at some procedural stages that constrain other actors' choices. Charges haul defendants into court and compel them to defend themselves, with their liberty or even lives at stake. Defendants can accept only plea offers prosecutors are willing to extend.

But other actors make choices that shape and constrain the adjudication, including for prosecutors. Police decide what evidence to pursue and which cases to bring to prosecutors. Judges can suppress or exclude evidence, acquit defendants, reject pleas, and impose sentences. Defendants can—and do—reject prosecutors' plea offers and force them to jury trial.[510] And they can argue at plea or sentencing that facts or circumstances warrant dismissal or leniency, arguments that surely carry some weight given that nearly half of felonies in state courts are dismissed or pleaded down.[511]

Those choices are exercises of discretion. All justice system actors, not just prosecutors, must decide how criminal laws apply to each case. That discretion is a combination of enforcement—what to do—and interpretation—what the law means given these facts. Prosecutors play a different institutional role than, say, judges or defense attorneys, and their position offers real advantages at many stages. How great those advantages are is contestable and contested. No matter what, though, "prosecutorial discretion" should be understood as shorthand for a much more complex, iterative, statute-

508 Jeffrey Bellin, *Theories of Prosecution*, 108 CALIF. L. REV. 1203, 1212–15 (2020); David Alan Sklansky, *The Nature and Function of Prosecutorial Power*, 106 J. CRIM. L. & CRIMINOLOGY 473, 478–80 (2016).

509 Bellin, *supra* note 492, at 200.

510 One scholar studying federal plea data concluded that, if anything, more defendants go to trial federally than data would recommend rationally. *See* Andrew Chongseh Kim, *Underestimating the Trial Penalty: An Empirical Analysis of the Federal Trial Penalty and Critique of the Abrams Study*, 84 MISS. L.J. 1195, 1202–03 (2015).

511 Blondel, *supra* note 157, at 1047.

grounded process of interpreting criminal law through criminal adjudication.

Moreover, distributed discretion is hardly rule free. Beyond crime definitions, a complex framework of laws, procedures, policies, and norms powerfully shapes how criminal procedure distributes interpretive discretion. Crime definitions are just one piece of a panoply of laws, substantive and procedural, that frame and guide criminal investigations and prosecutions. Sentencing laws are hugely important; they signal how seriously to treat an offense and an offender but often appear nowhere in crime definitions. Affirmative defenses, safety valve and other reduced-penalty provisions, insanity defenses, pretrial diversion, and alternative courts might affect outcomes but not change the offense itself, as Mr. Moncrieffe learned.

Procedural and evidentiary rules shape and constrain investigations and prosecutions from beginning to end. So do social and "cultural" norms within legal communities that scholars have increasingly studied.[512] Indeed, Mr. Moncrieffe's conundrum very possibly began because prosecutors and defense attorneys in that Georgia court system commonly used expunctions to resolve minor drug cases without anyone thinking through the immigration consequences.

The point is not that American criminal procedure is foolproof or optimal. It isn't. But discretion interpreting crime statutes is inevitable, necessary even, so the better question becomes how to shape it. Heavy focus on how "[l]egislators define crimes"[513] and curbing prosecutorial discretion has obscured other important constraints, including how other justice-system actors exercise *their* discretion amid an ecosystem of laws, rules, policies, and norms. As the Court has learned the hard way, trying to "read" crimes without context is a fool's errand.

CONCLUSION

A design flaw has undermined one of the most important recurring questions in federal criminal law: which crimes are violent. Federal law and criminal scholars assume that crimes are rules. But they are standards. Predicate statutes incorporating crimes therefore face a potential design pitfall: courts interpreting those statutes are trying to "read" crimes without the normal process the law uses, factual adjudication. The goal should not be to redo criminal adjudications,

512 *E.g.*, Mona Lynch, Matt Barno & Marisa Omori, *Prosecutors, Court Communities, and Policy Change: The Impact of Internal DOJ Reforms on Federal Prosecutorial Practices*, 59 CRIMINOLOGY 480, 482 (2021); Lauren M. Ouziel, *Fact-Finder Choice in Felony Courts*, 57 U.C. DAVIS L. REV. 1191, 1195–96 (2023).

513 Stuntz, *supra* note 40, at 547.

however. Well-designed predicate statutes must use a workable rule to identify which crimes qualify. When they don't, interpreters must exercise discretion to interpret convictions as they would any standard.

The Supreme Court seems poised to revise federal violence law yet again. Unless it understands predicate statutes' inherent pitfalls, its "fixes" will continue generating ire. Scholars, meanwhile, have looked for constraints on prosecutorial discretion in the wrong place. Crime definitions require discretion to apply them fairly and rationally across thousands of varied, unpredictable facts. Distributing that discretion across many actors within a careful framework of laws, procedures, and norms restrains criminal enforcers without excising vital interpretive flexibility. Judgment is essential to make criminal law make sense. The goal is to design a system that exercises it responsibly.