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Assessing Divisibility in the Armed Career Criminal Act

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NOTE

ASSESSING DIVISIBILITY IN THE ARMED CAREER CRIMINAL ACT

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When courts analyze whether a defendant's prior conviction qualifies as a "violent felony" under the Armed Career Criminal Act's "residual clause," they use a "categorical approach," looking only to the statutory language of the prior offense, rather than the facts disclosed by the record of conviction. But when a defendant is convicted under a "divisible" statute, which encompasses a broader range of conduct, only some of which would qualify as a predicate offense, courts may employ the "modified categorical approach." This approach allows courts to view additional documents to determine whether the jury convicted the defendant of the Armed Career Criminal Act—qualifying part of the statute. This Note identifies a split among the circuit courts regarding when a statute is divisible. Under the "formal method," a statute is divisible only when its text specifies qualifying and nonqualifying categories of conduct. By contrast, courts that employ the "functional method" divide a statute if, regardless of the statute's text, it is possible to violate the statute in a way that amounts to a "violent felony" and in a way that does not amount to a "violent felony." This Note contends that the text-based "formal method" is more consistent with the Supreme Court's Armed Career Criminal Act jurisprudence, the Sixth Amendment, and the rule of lenity. Finally, it argues that the "formal method" gives Congress the strongest incentive to revise the vague and confusing Armed Career Criminal Act.

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INTRODUCTION

More than two decades after its passage, the Armed Career Criminal Act ("ACCA") remains a nagging source of confusion and frustration. The statute mandates a fifteen-year minimum sentence for a felon who is convicted of possessing a firearm and who has three or more previous convictions for a "violent felony"[1] or "crime of violence."[2] It is used to increase the sentences of hundreds of criminal defendants per year.[3] In addition to four

1. 18 U.S.C. § 924(e)(1) (2006).

2. Although the statute uses the phrase "violent felony," many cases and articles interpreting the ACCA use the phrase "crime of violence" to refer to a predicate offense. I use these two terms interchangeably in this Note.

3. *E.g.*, U.S. SENTENCING COMM'N, 2008 SOURCEBOOK OF FEDERAL SENTENCING STATISTICS 47 tbl.22 (2008) (finding that in the 2008 fiscal year, federal courts applied 653 ACCA sentencing enhancements).

specifically enumerated crimes—burglary, arson, extortion, and the use of explosives—the ACCA includes as a "violent felony" any crime that "otherwise involves conduct that presents a serious potential risk of physical injury to another."[4] This provision is known as the "residual clause."

This broadly worded "residual clause" has attracted substantial attention from the Supreme Court, which has labored to interpret the ACCA five times in as many years and has produced an inconsistent patchwork of decisions.[5] The Justices themselves have described the ACCA's residual clause as "nearly impossible to apply consistently."[6] This difficulty has caused numerous splits among the circuit courts, "the resolution of which could occupy [the Supreme Court] for years."[7] The Court's own efforts to resolve the splits have fared no better, having been criticized as "piecemeal, suspenseful, [and] Scrabble-like."[8] Nor has Congress escaped the critical eye. One Justice labeled the ACCA a "drafting failure,"[9] and at least two Justices have urged Congress to rewrite the statute from square one.[10]

Much of the difficulty that the courts have faced stems from their attempts to navigate the two approaches to applying the ACCA's residual clause: the "categorical approach" and the "modified categorical approach." When a court considers an ACCA residual-clause case, it typically employs the categorical approach, in which it looks only at the fact that a defendant was convicted of a particular offense and not at *how* the defendant actually committed the crime.[11] The court then asks whether the conduct encompassed by the elements of the offense presents a serious potential risk of physical injury to another.[12] But when the statute the defendant violated includes multiple categories of conduct, some of which could amount to a crime of violence and some of which could not, the court may use the "modified categorical approach." Under this approach, the court may consult a limited set of documents to determine whether the jury convicted the defendant of (or whether the defendant pleaded to) violating the part of the statute that would constitute a "violent felony."[13] These two approaches are well-established parts of the ACCA inquiry. But there is substantially less agreement about when to move from the categorical approach to the modified categorical approach.

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4. 18 U.S.C. § 924(e)(2)(B)(ii).

5. *See infra* Section I.B.

6. Chambers v. United States, 555 U.S. 122, 133 (2009) (Alito, J., concurring in judgment).

7. *Id.*

8. Begay v. United States, 553 U.S. 137, 150 (2008) (Scalia, J., concurring).

9. James v. United States, 550 U.S. 192, 230 (2007) (Scalia, J., dissenting).

10. *See, e.g., id.*; *Chambers*, 555 U.S. at 132 (Alito, J., concurring in judgment) (insisting that "only Congress can rescue the federal courts from the mire into which ACCA's draftsmanship . . . [has] pushed us").

11. Taylor v. United States, 495 U.S. 575, 600 (1990).

12. *See id.* at 601–02.

13. Shepard v. United States, 544 U.S. 13, 16 (2005).

Whether a court employs the modified categorical approach turns on its assessment of whether a statute is "divisible." A statute is divisible if it contains multiple categories of offense conduct, such that a court may "divide" the statute into separate categories for the purpose of deciding whether the defendant's prior conviction will be counted as a predicate offense. One group of courts uses what I label the "formal method,"[14] which treats a statute as divisible only if the statute's text articulates multiple categories of conduct.[15] A second group uses the "functional method," which divides the statute if the crime for which the defendant was convicted could, as a practical matter, be committed in multiple ways, regardless of the statute's text.[16] The classification of a prior conviction—the fifteen-year mandatory minimum sentence resulting from the application of the enhancement—may turn on which method the sentencing court employs. Yet courts and commentators have not recognized the existence of the two methods and the uneven application of the residual clause that results from their use.[17]

This Note argues that sentencing courts should utilize the modified categorical approach only when appropriate under the formal method. In other words, the modified categorical approach should be used only when the text of the relevant statute specifies multiple categories of conduct, of which only some would qualify as a "crime of violence" under the ACCA's residual clause. Part I explains the legislative history and recent Supreme Court jurisprudence surrounding the ACCA. Part II describes the categorical and modified categorical approaches to analyzing predicate offenses. Part III details the circuit courts' formal and functional methods of assessing divisi-

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14. "Formal" and "functional" are my own ways of describing the different methods of divisibility. These terms are not used by sentencing courts.

15. *E.g.*, United States v. Woods, 576 F.3d 400, 406 (7th Cir. 2009) (noting that a divisible statute is one that "expressly identifies several ways in which a violation may occur").

16. *E.g.*, United States v. Parks, 620 F.3d 911, 914 (8th Cir. 2010) (suggesting that "over-inclusiveness for career offender purposes may arise even if a criminal statute . . . is not *textually* divisible").

17. The majority of the ACCA scholarship focuses on which crimes should or should not count as predicates, rather than on how courts actually analyze ACCA cases. *See, e.g.*, Jeffrey C. Bright, *Violent Felonies under The Residual Clause of the Armed Career Criminal Act: Whether Carrying a Concealed Handgun Without a Permit Should Be Considered a Violent Felony*, 48 DUQ. L. REV. 601, 618–36 (2010) (arguing that carrying a concealed weapon is a "violent felony"); Jason Abbott, Note, *The Use of Juvenile Adjudications under the Armed Career Criminal Act*, 85 B.U. L. REV. 263, 272–92 (2005) (arguing that judicial adjudications are not "convictions" and should not be counted for ACCA purposes); Tracey A. Basler, Note, *Does "Any" Mean "All" or Does "Any" Mean "Some"? An Analysis of the "Any Court" Ambiguity of the Armed Career Criminal Act and Whether Foreign Convictions Count as Predicate Convictions*, 37 NEW ENG. L. REV. 147, 177–82 (2002) (arguing that foreign convictions should count as predicate offenses); Krystle Lamprecht, Comment, *Formal, Categorical, but Incomplete: The Need for a New Standard in Evaluating Prior Convictions under the Armed Career Criminal Act*, 98 J. CRIM. L. & CRIMINOLOGY 1407, 1426–29 (2008) (arguing that courts should not count recidivism enhancements in prior convictions when assessing whether a prior conviction meets the ACCA's one-year minimum punishment requirement for inclusion as a predicate).

bility. Part IV argues that the formal method is more consistent with the categorical approach and the Supreme Court's ACCA jurisprudence. Part V analogizes the formal and functional methods to the familiar "rule versus standard" distinction and suggests that a formal, rule-based method is more likely to avoid Sixth Amendment concerns, is faithful to the rule of lenity, and gives Congress a strong incentive to revise the ACCA.

I. LEGISLATIVE HISTORY OF AND RECENT SUPREME COURT JURISPRUDENCE ON THE ARMED CAREER CRIMINAL ACT

Federal law prohibits previously convicted felons from possessing a firearm.[18] Felons who violate this provision receive a maximum sentence of ten years.[19] If, however, a felon has three or more prior convictions for an ACCA-qualifying "violent felony" or "serious drug offense," that felon will face a more severe fifteen-year mandatory minimum term of imprisonment.[20] The ACCA defines a "violent felony" as "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 use of explosives, *or otherwise involves conduct that presents a serious potential risk of physical injury to another.*[21]

Much of the difficulty that sentencing courts have faced in applying the ACCA has stemmed from the "otherwise involves" language—the language italicized above in 18 U.S.C. § 924(e)(2)(B)(ii)—which courts have termed the "residual clause."[22] The confusion over the scope of the clause stems, at least in part, from its opaque legislative history.

A. *Legislative History*

Responding to the "unmistakable" conclusion that a "small group [of criminals] was responsible for an extraordinarily large volume of crime," Congress enacted the ACCA in 1984.[23] Based on studies and testimony from local prosecutors regarding the dangerousness of recidivist offenders, Congress intended for the statute to protect citizens from violent criminals by incarcerating those criminals.[24] As the statute's name implies, Congress

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18. 18 U.S.C. § 922(g)(1) (2006).

19. *Id.* § 924(a)(2).

20. *Id.* § 924(e)(1). The same provision prohibits a court from suspending the sentence of or imposing a probationary sentence on a felon convicted under this statute.

21. *Id.* § 924(e)(2)(B) (emphasis added).

22. *See, e.g.*, Chambers v. United States, 555 U.S. 122, 124 (2009).

23. H.R. REP. No. 98-1073, at 2 (1984).

24. *Id.* ("Both Congress and local prosecutors around the nation have recognized the importance of incapacitating these repeat offenders.").

aimed the statute at "career criminals" whose "full-time occupation is crime for profit"[25] and who therefore present a serious risk of physical injury to the public when they possess a weapon. Although Congress's general motivation for enacting the statute is plain, its rationale for enumerating the four qualifying predicate offenses, as well as the statute's "residual clause," is unclear.[26]

When Congress first passed the ACCA, the statute included only two predicate offenses: robbery and burglary.[27] The original statute also defined both of these enumerated offenses.[28] In 1986, Congress slightly amended the definition of burglary.[29] Five months later, Congress amended the statute to its current form.[30] This version expanded the range of predicate offenses from "robbery or burglary" to "a violent felony or a serious drug offense."[31] It also deleted the definition of burglary found in the previous version of the statute. Finally and most importantly, it added the clause that has presented courts with such difficulty: a violent felony "is burglary, arson, or extortion, involves use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another."[32] The legislative history is silent as to why Congress chose those specific enumerated crimes and why it deleted its previous definition of predicate offenses.[33]

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25. *Id.* at 3. For the argument that requiring mere possession of a firearm as a triggering factor "fails to identify reliably the persons from whom society needs protection," see Stephen R. Sady, *The Armed Career Criminal Act—What's Wrong with "Three Strikes, You're Out"?*, 7 FED. SENT'G REP. 69, 69 (1994).

26. Recent Case, United States v. Woods, *576 F.3d 400 (7th Cir. 2009)*, 123 HARV. L. REV. 760, 766 (2010) ("There is simply no principled basis for saying exactly what Congress intended the meaning of the residual clause to be . . . .").

27. Armed Career Criminal Act of 1984, Pub. L. No. 98-473, ch. 18, 98 Stat. 2185 (1984), *repealed by* Pub. L. No. 99-308, § 104(b), 100 Stat. 449, 459 (1986).

28. *Id.* at § 1803 (defining robbery as "any felony consisting of the taking of the property of another from the person or presence of another by force or violence, or by threatening or placing another person in fear that any person will imminently be subjected to bodily injury" and defining burglary as "any felony consisting of entering or remaining surreptitiously within a building that is property of another with intent to engage in conduct constituting a Federal or State offense").

29. Firearms Owners' Protection Act, Pub. L. No. 99-308, § 104(a)(4), 100 Stat. 449, 458–59 (1986).

30. Anti-Drug Abuse Act of 1986, Pub. L. No. 99-570, § 1402, 100 Stat. 3207, 3207–39 (1986).

31. *Id.*

32. 18 U.S.C. § 924(e)(2)(B)(ii) (2006). For a more thorough treatment of the ACCA's legislative history, see Sarah French Russell, *Rethinking Recidivist Enhancements: The Role of Prior Drug Convictions in Federal Sentencing*, 43 U.C. DAVIS L. REV. 1135, 1176–80 (2010); James G. Levine, Note, *The Armed Career Criminal Act and the U.S. Sentencing Guidelines: Moving Toward Consistency*, 46 HARV. J. ON LEGIS. 537, 545–49 (2009).

33. *See* Taylor v. United States, 495 U.S. 575, 582–88 (1990). For the argument that Congress left the ACCA intentionally unclear by "resorting to highly general language that facilitates legislative consensus by deferring resolution of controversial points to the moment of judicial application," see Recent Case, *supra* note 26, at 766 (quoting Dan M. Kahan, *Lenity and Federal Common Law Crimes*, 1994 SUP. CT. REV. 345, 369–70 (1994)).

B. *Supreme Court Jurisprudence on the ACCA's "Residual Clause"*

Called upon to interpret the meaning of the statute, the Supreme Court has taken a piecemeal approach to clarifying the ACCA's "crime of violence" category and has modified its view of the residual clause repeatedly over the past several years. This battery of recent cases has established that a court must answer two questions when determining whether an offense, considered in the abstract, falls within the residual clause's scope. First, the court must determine whether the offense poses "a serious potential risk of physical injury to another."[34] If this requirement is met, the court asks a second question: does the offense pose a comparable level of risk to its closest analog among the enumerated offenses?[35] If the court answers both questions in the affirmative, the offense will qualifies as a predicate under the residual clause.

In *James v. United States*,[36] the Supreme Court held that attempted burglary presents a "serious potential risk of physical injury to another," and therefore qualifies as a predicate crime under the ACCA's residual clause.[37] Rejecting James's argument that Congress intended to restrict the ACCA's residual clause to completed offenses, the Court initially noted that "Congress' inclusion of a broad residual provision in clause (ii) indicates that it did not intend the preceding enumerated offenses to be an exhaustive list of the types of crimes that might present a serious risk of injury to others and therefore merit status as a § 924(e) predicate offense."[38] Because an attempted burglary risks the possibility of a violent face-to-face confrontation between the burglar and a third party, the Court concluded that attempted burglary can serve as the basis for an ACCA enhancement.[39] The Court interpreted the residual clause broadly, inferring its use of "*potential* risk" to suggest "that Congress intended to encompass possibilities even more contingent or remote than a simple 'risk,' much less a certainty."[40] If an offense, in the ordinary case, presents a serious potential risk of injury to another, it is a valid enhancement predicate.[41]

One year later, the Court narrowed the scope of the residual clause in *Begay v. United States*, in which it held that driving under the influence of alcohol is not a "violent felony" under the ACCA.[42] If Congress had intended a broader view of the residual clause, the Court reasoned, Congress

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34. 18 U.S.C. § 924(e)(2)(B)(ii); *see* Begay v. United States, 553 U.S. 137, 141 (2008) (assuming that driving under the influence of alcohol poses such a serious risk).

35. Sykes v. United States, 131 S. Ct. 2267, 2273 (2011).

36. 550 U.S. 192 (2007).

37. *James*, 550 U.S. at 209.

38. *Id.* at 200.

39. *Id.* at 204–05.

40. *Id.* at 207–08 (emphasis added).

41. *Id.* at 209.

42. 553 U.S. 137, 148 (2008).

would not have included the example crimes at all.[43] In their absence, the clause would simply encompass all crimes that present "a serious potential risk of physical injury to another"[44] (the *James* approach), a much more intelligible articulation of sweeping congressional intent. The Court read the enumerated examples as "limiting the crimes that clause (ii) covers to crimes that are roughly similar, in kind as well as in degree of risk posed, to the examples themselves."[45] In order to qualify as a predicate crime, an offense must involve the same type of "purposeful, violent, and aggressive" conduct as the listed examples.[46] Crimes committed in such a manner are "potentially more dangerous when firearms are involved," and because they are likely to be committed by career criminals, such a test is consistent with the purpose of the ACCA itself.[47]

In *Chambers v. United States*,[48] the Supreme Court considered whether failure to report for penal confinement is a "violent felony" under the ACCA. The defendant was convicted under Illinois's "escape" statute.[49] The Court applied *Begay* and found that the statute's provisions criminalizing failure to report constituted a separate crime from the same statute's escape provisions, because failure to report "would seem less likely to involve a risk of physical harm than the less passive, more aggressive behavior underlying an escape from custody."[50] After dividing the statute into two categories, the Court analyzed whether failure to report qualified as an ACCA predicate. Because failure to report, "[c]onceptually speaking . . . amounts to a form of inaction," it does not involve the same kind of violent conduct as the enumerated offenses to satisfy clause (ii).[51] The Court therefore concluded that the ordinary failure-to-report case falls outside the scope of the ACCA's residual clause.[52]

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43. *Begay*, 553 U.S. at 142.

44. 18 U.S.C. § 924(e)(2)(B) (2006).

45. *Begay*, 553 U.S. at 143. When general words follow specific words in a list, the canon of *ejusdem generis* "limits general terms which follow specific ones to matters similar to those specified." Gooch v. United States, 297 U.S. 124, 128 (1936). For more detail on *ejusdem generis* and its application in the ACCA context, see David C. Holman, *Violent Crimes and Known Associates: The Residual Clause of the Armed Career Criminal Act*, 43 CONN. L. REV. 209, 216 (2010).

46. *Begay*, 553 U.S. at 145.

47. *Id.* (citing United States v. Begay, 470 F.3d 964, 980 (10th Cir. 2006) (McConnell, J., dissenting in part)) (internal quotation marks omitted).

48. 555 U.S. 122 (2009).

49. The statute defined seven different types of conduct: (1) escape from a penal institution, (2) escape from the custody of an employee of a penal institution, (3) failing to report to a penal institution, (4) failing to report for periodic imprisonment, (5) failing to return from furlough, (6) failing to return from work and day release, and (7) failing to abide by the terms of home confinement. 720 ILL. COMP. STAT. 5/31-6(a) (2010).

50. *Chambers*, 555 U.S. at 127.

51. *Id.* at 128.

52. *Id.* at 130.

The Court reshaped the residual-clause inquiry yet again in its most recent ACCA case, *Sykes v. United States*.[53] There, the Court considered whether vehicular flight from a police officer was a "violent felony."[54] The Court concluded that it was, but in doing so, it retreated from the "purposeful, violent, and aggressive" analysis it used in *Begay* and *Chambers* because that analysis "has no precise textual link to the residual clause."[55] Instead, the Court concluded that "levels of risk divide crimes that qualify from those that do not."[56] To determine whether vehicular flight qualified, it compared the risk from that crime to the risk "poses by its closest analog among the enumerated offenses."[57] The Court reasoned that vehicular flight poses a risk similar to arson, because both crimes involve the "intentional release of a destructive force dangerous to others."[58] And it is similar to burglary because both crimes can end in a violent confrontation with the police.[59] The Court also consulted statistical reports to support the "commonsense conclusion"[60] that vehicular flight is a "violent felony" with a higher incidence of violence than burglary and arson.[61] Finally, vehicular

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53. 131 S. Ct. 2267 (2011).

54. The Indiana statute at issue reads:

> Sec. 3. (a) A person who knowingly or intentionally:
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> . . .
>
> (3) flees from a law enforcement officer after the officer has, by visible or audible means, including operation of the law enforcement officer's siren or emergency lights, identified himself or herself and ordered the person to stop;
>
> commits resisting law enforcement, a Class A misdemeanor, except as provided in subsection (b).
>
> (b) The offense under subsection (a) is a:
>
> (1) Class D felony if:
>
> (A) the offense is described in subsection (a)(3) and the person uses a vehicle to commit the offense . . . .
>
> IND. CODE § 35-44-3-3 (2011).

55. *Sykes*, 131 S. Ct. at 2275. The Court did not expressly reject the purposeful, violent, and aggressive test, and implied that it may still apply to strict liability, negligence, and recklessness crimes. *Id.* at 2275–76; *see also id.* at 2285 (Scalia, J., dissenting) ("[The purposeful, violent, and aggressive test] has been neither overlooked nor renounced in today's tutti-frutti opinion.").

56. *Id.* at 2275 (majority opinion).

57. *Id.* at 2273 (quoting James v. United States, 550 U.S. 192, 203 (2007)) (internal quotation marks omitted).

58. *Id.*

59. *Id.* at 2273–74.

60. *Id.* at 2274.

61. *Id.* at 2274–75 (citing several studies from the U.S. Fire Administration to show that in 2008, approximately 3.3 injuries occurred for every 100 arsons committed); SHANNAN CATALANO, BUREAU OF JUSTICE STATISTICS, VICTIMIZATION DURING HOUSEHOLD BURGLARY 1 (2010) (concluding that "[i]n 7% of all household burglaries, a household member experienced

flight—as proscribed by the Indiana statute—requires a mens rea of "knowingly or intentionally," rather than strict liability.[62] Together, these reasons supported a conclusion that vehicular flight presents a serious potential risk of physical injury to another.

Despite the residual clause's straightforward language, the Court itself has acknowledged that the residual-clause inquiry remains abstract and difficult to apply.[63] The four enumerated offenses, which bear little relation to each other with respect to the degree of risk posed, seem arbitrarily chosen, and legislative history does not illuminate the reasons why Congress chose them. Justice Scalia has noted that the uncertainty still present in the residual clause leaves courts in a difficult position:

> They can (1) apply the ACCA enhancement to virtually all predicate offenses; (2) apply it case by case in its pristine abstraction, finding it applicable whenever the particular sentencing judge (or the particular reviewing panel) believes there is a "serious potential risk of physical injury to another" (whatever that means); (3) try to figure out a coherent way of interpreting the statute so that it applies in a relatively predictable and administrable fashion to a smaller subset of crimes; or (4) recognize the statute for the drafting failure it is and hold it void for vagueness.[64]

The Court's recent ACCA cases indicate that it has chosen the second option, but its consistent refashioning of its interpretive approach in recent years suggests that the Court has not been entirely successful.

The residual clause, in short, is "a moving target."[65] And unfortunately, while the Court has struggled to articulate the correct questions to ask in a residual-clause inquiry, its methods of answering those questions—described below as the "categorical" and "modified categorical" approaches—only add to the confusion.

II. THE "CATEGORICAL" AND "MODIFIED CATEGORICAL" APPROACHES TO INTERPRETING ACCA PREDICATE OFFENSES

The "categorical approach" represents the default approach by which courts analyze whether a defendant's prior conviction counts as a "violent felony" under the ACCA's residual clause. But the categorical approach is insufficient when a sentencing court must classify a prior conviction under a statute that covers a broad range of conduct, only some of which would qualify as a predicate offense. In these circumstances, courts employ the

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some form of violent victimization"); CYNTHIA LUM & GEORGE FACHNER, INT'L ASS'N OF CHIEFS OF POLICE, POLICE PURSUITS IN AN AGE OF INNOVATION AND REFORM 57 (2008) (concluding that vehicle flight seriously injures bystanders in 4 percent of pursuits).

62. *Sykes*, 131 S. Ct. at 2275 (internal quotation marks omitted).

63. *See* Chambers v. United States, 555 U.S. 122, 133–34 (2009) (Alito, J., concurring); James v. United States, 550 U.S. 192, 230 (2007) (Scalia, J., dissenting) (asserting that the ACCA's "tedious" definition of a violent felony leads to unpredictable application that the "violates . . . the constitutional prohibition against vague criminal laws").

64. *James*, 550 U.S. at 229–30 (Scalia, J., dissenting) (citations omitted).

65. United States v. Oliveira, 798 F. Supp. 2d 319, 328 (D. Mass. 2011).

"modified categorical approach," which allows them to consider additional fact-disclosing documents to determine which part of a statute the defendant violated. This Part provides more detail on these interpretive approaches. Section II.A outlines the "categorical approach." Section II.B reviews the "modified categorical approach."

A. *The "Categorical Approach":* Taylor v. United States

The categorical approach originates in *Taylor v. United States*, in which the Supreme Court interpreted the ACCA to require courts to ignore the particular defendant's conduct and ask instead whether the elements of the offense present a serious risk of physical injury to another.[66] The Court based its opinion in part on the text of the ACCA itself, which refers to " 'a person who . . . has three previous *convictions*' for—not a person who has committed—three previous violent felonies or drug offenses."[67] The statute also focuses on crimes that have as an "element" the use of force against another, as opposed to crimes committed in a forceful manner.[68] Surveying the statute's legislative history, the Court noted that despite the extensive debate over what offenses should count for ACCA purposes, Congress never considered the possibility that an offense might count if it was committed in a violent way but be excluded if that same offense was committed in a nonviolent way.[69] If Congress had considered the possibility and concluded that courts should engage in such a thorough fact finding process, it would have said so.[70]

Finally, the Court observed that "the practical difficulties and potential unfairness of a factual approach are daunting."[71] An indictment or charging document might contain an insufficient factual record—or, in a pleaded case, no record whatsoever—for a sentencing court to determine what the defendant actually did.[72] Moreover, if a defendant was convicted under a statute containing both ACCA-qualifying and non-ACCA-qualifying offenses, but the sentencing judge, after reviewing the facts, concluded that the defendant committed an ACCA-qualifying crime, the defendant might argue

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66. 495 U.S. 575, 600–02 (1990).

67. *Taylor*, 495 U.S. at 600–01 (emphasis added) (quoting 18 U.S.C. § 924(e) (2006)).

68. *Id.*

69. *Id.* at 601.

70. *Id.*

71. *Id.* at 601–02. The categorical approach has been criticized as leading to unfair outcomes. *See* United States v. Thomas, 333 F.3d 280, 282 (D.C. Cir. 2003) (questioning the application of the categorical approach to all escape offenses because different methods of escape present different risks of injury to others); Timothy W. Castor, Note, *Escaping a Rigid Analysis: The Shift to a Fact-Based Approach for Crime of Violence Inquiries Involving Escape Offenses*, 46 WM. & MARY L. REV. 345, 362–71 (2004) (proposing that courts employ a fact-based approach to analyze escape cases).

72. *Taylor*, 495 U.S. at 601–02; *see also* Russell, *supra* note 32, at 1220–28; Castor, *supra* note 71, at 364.

that his Sixth Amendment right to a jury trial was violated.[73] The jury, the defendant might say, could have convicted him on a theory that did not require a finding that he had committed an ACCA-qualifying crime.[74]

The categorical approach requires courts to consider only whether the statutory elements of the offense categorically encompass violent conduct. Recent ACCA case law, however, has led courts to deviate from this approach, such that the way courts are employing—and should employ—the categorical approach has itself become a disputed matter.[75] Some courts, focusing on *James*'s instruction to identify whether the "ordinary case" involves violent conduct, simply employ their imagination to hypothesize how the ordinary crime might actually occur.[76] Empirical evidence represents another way of identifying whether a statute covers categorically violent crime.[77] In *Chambers*, the Court consulted a Sentencing Commission report documenting every failure-to-report case over the previous two years.[78] The report found that none of the 160 federal failure-to-report cases in 2006 and 2007 involved violent conduct, in either the commission of the offense or the subsequent apprehension of the offender.[79] Using this empirical evidence, the Court concluded that failure to report for penal confinement is not a violent felony for ACCA purposes.[80] The Court conducted a similar statistical analysis in *Sykes* with regard to incidence of violence from vehicular flight.[81]

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73. *Taylor*, 495 U.S. at 601. A decade later, the Court held that any fact (other than a prior conviction) sufficient to raise the limit of the possible federal sentence must be found by a jury. Apprendi v. New Jersey, 530 U.S. 466, 490 (2000).

74. *Taylor*, 495 U.S. at 601; *see also infra* Section V.A.

75. *See* United States v. Terrell, 621 F.3d 1154, 1157 (9th Cir. 2010) (M. Smith, J., dissenting from denial of rehearing en banc) (acknowledging that "reasonable minds may disagree on how one should go about applying *Taylor*'s categorical approach and what exactly the Supreme Court has in mind when it repeatedly tells us that we are not to consider 'how an individual offender might have committed [the offense] on a particular occasion' " (alteration in original) (quoting Begay v. United States, 553 U.S. 137, 141 (2008))); Holman, *supra* note 45, at 243 ("*James*, *Begay*, and *Chambers* progressively eroded the categorical approach and encouraged sentencing courts to determine whether someone *could* have committed the crime violently."). The Supreme Court has acknowledged the difficulty of assessing the risk posed by the range of state crimes of which ACCA defendants have been convicted. *See* James v. United States, 550 U.S. 192, 210 n.6 (2007) (noting that the ACCA "requires judges to make sometimes difficult evaluations of the risks posed by different offenses").

76. Holman, *supra* note 45, at 243–44.

77. *See* Sykes v. United States, 131 S. Ct. 2267, 2274 (2011) (noting that statistics are "not dispositive" but can be used to "confirm" a conclusion that a particular offense is a "violent felony").

78. Chambers v. United States, 555 U.S. 122, 129 (2009) (citing U.S. SENTENCING COMM'N, REPORT ON FEDERAL ESCAPE OFFENSES IN FISCAL YEARS 2006 AND 2007, at 6–7 (2008)).

79. *See* U.S. SENTENCING COMM'N, REPORT ON FEDERAL ESCAPE OFFENSES IN FISCAL YEARS 2006 AND 2007, at 6–7 (2008).

80. *Chambers*, 555 U.S. at 129.

81. *See supra* note 61 and accompanying text. Justice Scalia has questioned the Court's unquestioned acceptance of the methodology and reliability of these statistics. *Sykes*,

Still other courts, when lacking empirical evidence, ask whether there is a "realistic probability, not a theoretical possibility, that the State would apply its statute to conduct that falls outside" of the residual clause.[82] Demonstrating such a probability requires "more than the application of legal imagination to a state statute's language."[83] The defendant must point to actual cases—either his own or others—in which the statute has been applied to conduct that does not present a serious potential risk of physical injury.[84] It is not necessary for *every* conceivable variation of the offense to present that risk in order for the offense to be deemed a "violent felony,"[85] but

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131 S. Ct. at 2286 (Scalia, J., dissenting). To him, relying upon such statistics, which appear in the case for the first time at the Supreme Court level, constitutes inappropriate "judicial fact-finding masquerading as statutory interpretation." *Id.* For an additional critique of "[t]he [j]udge as [s]tatistician," as well as instances in which circuit courts have actually misused statistics, see Holman, *supra* note 45, at 250–53.

82. Gonzales v. Duenas-Alvarez, 549 U.S. 183, 193 (2007).

83. *Id.*; *see also Sykes*, 131 S. Ct. at 2281 (2011) (Thomas, J., concurring).

84. *See* United States v. Mayer, 560 F.3d 948, 951–52 (9th Cir. 2009) (Kozinski, J., dissenting from denial of rehearing en banc) (identifying Oregon's burglary statute, used to convict a defendant who stole change from coin boxes in public phone booths in *State v. Keys*, 419 P.2d 943 (Or. 1966), as an example of a state statute used to convict people for conduct which poses no risk of violence and is therefore beyond the scope of the ACCA's residual clause); *Duenas-Alvarez*, 549 U.S. at 193.

United States v. Cadieux, 500 F.3d 37 (1st Cir. 2007), illustrates this analytical process. The defendant argued that his conviction for indecent assault and battery on a child under fourteen was not a violent felony for ACCA purposes. *Id.* at 42. The statute he violated, *id.* at 44 n.4, read:

> Whoever commits an indecent assault and battery on a child under the age of fourteen shall be punished . . . . In a prosecution under this section, a child under the age of fourteen years shall be deemed incapable of consenting to any conduct of the defendant for which said defendant is being prosecuted.

MASS. GEN. LAWS ch. 265, § 13B (1989). The defendant contended that this statute did not qualify as a statute covering categorically violent crime because it did not provide a child's consent as a defense and did not specify a minimum age gap between victim and perpetrator. *Cadieux*, 500 F.3d at 46. Therefore, the statute encompassed "consensual sexual contact between similarly-aged teenagers, for example, a fourteen-year-old and a thirteen-year-old who are simply making out." *Id.* The court noted that the argument "gives us pause," but nevertheless rejected it, because the court had "scoured the caselaw and could not discover a single reported case in which a juvenile was convicted under [the statute] for consensual sexual activity with a similarly-aged youth." *Id.*

Doug Keller contends that this analytical approach, which he calls the "evidentiary-burden view," is not uniformly applied by the circuit courts. Doug Keller, *Causing Mischief for* Taylor*'s Categorical Approach: Applying "Legal Imagination" to* Duenas-Alvarez, 18 GEO. MASON L. REV. 625, 637–38 (2011). A second group of circuits applies the "novel-interpretation view," which requires the defendant to point to actual cases only when he or she "offers a novel interpretation of state law to establish that the state statute is broader than the federal statutory hook at issue." *Id.* at 644; *see, e.g.*, United States v. Madera, 521 F. Supp. 2d 149, 156–57 (D. Conn. 2007) (interpreting the ACCA's "serious drug crime" provision).

85. James v. United States, 550 U.S. 192, 208 (2007).

all or almost all conduct under the statute would likely have to be violent for a court to conclude that the statute meets the ACCA's requirements.[86]

In short, although the Supreme Court's recent ACCA case law has muddled its application, the categorical approach, properly applied, requires the judge to decide whether the statutory conduct encompassed by the elements of the offense—in the abstract rather than in the defendant's particular case—presents a serious potential risk of injury to another.

B. *The "Modified Categorical Approach":* Shepard v. United States

The categorical approach answers most questions about the proper categorization of a prior offense, but it is not helpful when a statute includes conduct that would qualify as an ACCA predicate as well as conduct that would not qualify. In such a case, the sentencing court must look deeper in order to identify the offense for which the defendant was convicted. Consider this example: Massachusetts includes, in a single statutory section entitled "Breaking and entering at night," burglary of a "building, ship, vessel, or vehicle."[87] In *Taylor*, the Court held that only burglary of a building possesses the serious potential risk of physical injury to another that is needed to qualify as a "violent felony" under the ACCA.[88] A sentencing court evaluating a conviction under Massachusetts's breaking-and-entering statute must choose the right category of offense. Did the defendant burglarize a building, the qualifying predicate, or a vehicle, a nonqualifying predicate?[89] If the court only knows that the defendant was convicted under the all-encompassing statute, the choice is "not obvious."[90] The generic consideration of the offense in the categorical approach is not helpful when a court cannot determine which offense the defendant committed.

Recognizing this difficulty, the Court held in *Shepard v. United States* that courts facing such an issue may examine a limited set of documents to determine whether the jury convicted the defendant of a "violent felony."[91]

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86. The Supreme Court has not articulated a more precise percentage of cases involving violent conduct in order for a statute to be considered to cover categorically violent crime. *See id.* ("[T]he proper inquiry is whether the conduct encompassed by the elements of the offense, in the ordinary case, presents a serious potential risk of injury to another."); United States v. Woods, 576 F.3d 400, 404 (7th Cir. 2009) ("[A] crime must be categorized as one of violence even if, through some freak chance, the conduct did not turn out to be violent in an unusual case.").

87. MASS. GEN. LAWS ch. 266, § 16 (2010). The Illinois statute the Court examines in *Chambers v. United States*, 555 U.S. 122 (2009), provides another example. *See* 720 ILL. COMP. STAT. § 5/31-6(a) (2010).

88. Taylor v. United States, 495 U.S. 575, 598–99 (1990).

89. *Chambers*, 555 U.S. at 126 (stating that the behavior underlying breaking into a building differs so significantly from the behavior underlying breaking into a vehicle that sentencing courts must treat them as separate crimes for ACCA purposes).

90. *Id.*

91. 544 U.S. 13, 16 (2005).

In this inquiry, called the "modified categorical approach,"[92] courts may view "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."[93] This wider evidentiary net, at least in theory, allows courts to determine which part of the statute a defendant violated. Indeed, the modified categorical approach is available only for the purpose of categorizing offenses; it does not allow courts to ignore the categorical approach in favor of the full factual inquiry rejected in *Taylor*.[94] Thus, in the Massachusetts burglary statute described above, the court could only consult the *Shepard* documents to determine whether the defendant burglarized a building (the ACCA-qualifying category) or a vehicle (the non-ACCA qualifying offense). It could not use the documents to inquire into whether the defendant committed the burglary in a violent way.

In summary, when a judge considers whether a prior conviction counts as an ACCA predicate, the judge begins, as directed by the categorical approach, with the language of the statute the defendant violated. If the statute is "divisible," meaning that it encompasses a broader swath of conduct than that which would qualify as a predicate conviction under the ACCA, the court applies the modified categorical approach and consults the limited set of authorized documents to determine which part of the statute the defendant violated.[95] If the relevant documents reveal that the defendant violated the ACCA-qualifying part of the statute, the judge counts the conviction as a predicate offense. If the relevant documents either show that the defendant violated the nonqualifying part of the statute or do not reveal which part of the statute the defendant violated, the court does not include the conviction for enhancement purposes.[96]

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92. *See, e.g.*, United States v. Rivers, 595 F.3d 558, 562 (4th Cir. 2010), *abrogated by* Sykes v. United States, 131 S. Ct. 2267 (2011); United States v. Woods, 576 F.3d 400, 405 (7th Cir. 2009).

93. *Shepard*, 544 U.S. at 16. The Court held that courts may not look at police reports or complaint applications in this inquiry. *Id.*

94. *Id.* at 20 ("The *Taylor* Court drew a pragmatic conclusion about the best way to identify generic convictions in jury cases . . . that avoids subsequent evidentiary enquiries into the factual basis for the earlier conviction.").

95. If the prior conviction resulted from a jury trial, the court may look to the indictment and the jury instructions from the trial to see if those documents indicate whether the defendant violated the qualifying or nonqualifying part of the statute. If the defendant pleaded guilty to violating the statute in question, the judge may look at "the terms of a plea agreement or transcript of colloquy between judge and defendant in which the factual basis for the plea was confirmed by the defendant." *Id.* at 26.

96. *See, e.g.*, United States v. Savage, 542 F.3d 959, 966–67 (2d Cir. 2008). For a discussion of the government's frequent inability to meet its burden of production under the *Shepard*-authorized documents, and the contention that *Shepard* may be used strategically to reduce the application of sentencing enhancements, see Russell, *supra* note 32, at 1203–32.

III. Assessing Divisibility: The "Formal" and "Functional" Methods of Moving from the Categorical to the Modified Categorical Approach

A split has developed among the circuit courts about when a statute is considered "divisible," or inclusive of qualifying and nonqualifying conduct. Because divisibility is a prerequisite for departing from the categorical approach, the circuit split ultimately implicates whether a court will employ the categorical approach or the more searching modified categorical approach. At least three circuits (the Fourth, Seventh, and Tenth) employ a "formal" method that uses the text of the statute in question as the sole determinant of a statute's divisibility.[97] Three other circuits (the First, Sixth, and Eighth) use a more "functional" method that focuses on how a particular crime is committed as a practical matter when assessing a statute's divisibility.[98]

A. *The "Formal" Method*

The formal method consults only the text of the statute in question when determining whether a statute is divisible. Under the formal method, a statute is divisible when its text "expressly identifies several ways in which a violation may occur."[99] More specifically, the formal method allows a sentencing court to refer to the *Shepard*-authorized documents "[w]hen a statute encompasses multiple categories of offense conduct—some of which would constitute a violent felony and some of which would not."[100] If a statute is divisible, the court then employs the modified categorical approach, referring to the *Shepard* documents to determine "which part of a divisible statute was charged against a defendant and, therefore, which part of the statute to examine on its face."[101] Again, this inquiry is not intended to determine whether the defendant actually committed the crime in a violent way.[102] Rather, it aims to categorize the defendant's conduct so that a court may analyze whether, "in the ordinary case, [it] presents a serious potential risk of injury to another."[103]

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97. *See Rivers*, 595 F.3d at 564; *Woods*, 576 F.3d at 406; United States v. Zuniga-Soto, 527 F.3d 1110, 1121 (10th Cir. 2008).

98. *See* United States v. Parks, 620 F.3d 911, 914 (8th Cir. 2010); United States v. Pratt, 568 F.3d 11, 21–22 (1st Cir. 2009); United States v. Ford, 560 F.3d 420, 424 (6th Cir. 2009).

99. *Woods*, 576 F.3d at 406; *see also Zuniga-Soto*, 527 F.3d at 1121 ("[A] sentencing court . . . may consult the judicial records approved in *Shepard* in order to ascertain which definition of a crime to evaluate in the event that a statute defines a particular offense in more than one way.").

100. *Woods*, 576 F.3d at 404 (quoting United States v. Smith, 544 F.3d 781, 786 (7th Cir. 2008)).

101. *Zuniga-Soto*, 527 F.3d at 1113.

102. Such a factual inquiry would raise the *Apprendi* concerns discussed *infra* in Section V.A. *See* Shepard v. United States, 544 U.S. 13, 25 (2005).

103. James v. United States, 550 U.S. 192, 208 (2007).

Consider two examples, in which courts interpret similar statutes in the same manner, but reach different results. South Carolina has a "blue light" statute that makes it a crime to fail to stop when signaled to do so by a law enforcement officer. The statute reads:

> In the absence of mitigating circumstances, it is unlawful for a motor vehicle driver, while driving on a road, street, or highway of the State, to fail to stop when signaled by a law enforcement vehicle by means of a siren or flashing light. An attempt to increase the speed of a vehicle or in other manner avoid the pursuing law enforcement vehicle when signaled by a siren or flashing light is prima facie evidence of a violation of this section.[104]

In *United States v. Rivers*, the defendant contended that his conviction for violating this statute was not a "violent felony" under the ACCA. The Fourth Circuit did not use the modified categorical approach, because the statute's text "proscribes only one type of behavior: failing to stop for a blue light."[105] Because "[t]here is no varied behavior underlying the elements of a blue light offense," the statute "only contains one category of crime," and the statute is therefore not divisible.[106] Under the categorical approach, the court found that, as a strict liability offense, the statute criminalized a broader range of conduct than the purposeful, violent, and aggressive conduct typical of ACCA's enumerated crimes.[107] Considering the risk posed by the ordinary failure-to-stop case, the offense proscribed by the statute did not constitute a "violent felony." Therefore, the court did not count the conviction as an ACCA predicate and remanded the case for resentencing.[108]

The Seventh Circuit reached a different conclusion when applying the formal method to Wisconsin's vehicular-fleeing offense, which states the following:

> No operator of a vehicle, after having received a visual or audible signal from a traffic officer, or marked police vehicle, shall knowingly flee or attempt to elude any traffic officer by willful or wanton disregard of such signal so as to interfere with or endanger the operation of the police vehicle, or the traffic officer or other vehicles or pedestrians, nor shall the operator increase the speed of the operator's vehicle or extinguish the lights of the vehicle in an attempt to elude or flee.[109]

The court used the text of the statute to divide it into two categories of behavior: (1) fleeing or attempting to elude "by willful or wanton disregard of [the officer's] signal so as to interfere with or endanger the operation of the police vehicle, or the traffic officer or other vehicles or pedestrians," and (2) "increas[ing] the speed of the operator's vehicle or extinguish[ing] the

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104. S.C. CODE ANN. § 56-5-750(A) (2006).

105. United States v. Rivers, 595 F.3d 558, 564 (4th Cir. 2010), *abrogated by* Sykes v. United States, 131 S. Ct. 2267 (2011).

106. *Id.* at 564.

107. *Id.* at 565.

108. *Id.*

109. WIS. STAT. § 346.04(3) (2011).

lights of the vehicle in an attempt to elude or flee."[110] Finding that the statute was divisible, the court employed the modified categorical approach and, after viewing the criminal complaint, held that the defendant was charged with committing the latter offense.[111] The court found that fleeing from a police officer in such a manner presents "a similar potential for violence and therefore injury as the enumerated offenses."[112] Therefore, the court concluded that vehicular flight from a police officer was properly classified as a "violent felony" for ACCA purposes.[113]

B. *The "Functional" Method*

By contrast, the functional method does not rely entirely on the text of the applicable statute when assessing divisibility. Instead, it gives greater weight to how the crime is committed as a practical matter. Courts that apply the functional method will move to the modified categorical approach "[i]f it is possible to violate a criminal law in a way that amounts to a crime of violence and in a way that does not."[114] Regardless of whether the statute's text enumerates different categories of conduct under the banner of a single offense, the functional method will consider a statute overinclusive if it "covers conduct that does and does not trigger the career offender enhancement."[115]

For example, New Hampshire's criminal escape statute provides the following:

> I. A person is guilty of an offense if he escapes from official custody.
>
> II. "Official custody" means arrest, custody in a penal institution, an institution for confinement of juvenile offenders or other confinement pursuant to an order of a court.
>
> III. The offense is a class A felony if the actor employs force against any person or threatens any person with a deadly weapon to effect the escape, except that if the deadly weapon is a firearm, he shall be sentenced in accordance with RSA 651:2, II-g. Otherwise it is a class B felony.[116]

In *United States v. Pratt*, the First Circuit noted that while this statute did distinguish between escapes committed with and without a violent weapon,

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110. United States v. Dismuke, 593 F.3d 582, 590 (7th Cir. 2010) (quoting § 346.04(3)) (internal quotation marks omitted).

111. *Id.* at 590–91.

112. *Id.* at 594.

113. *Id.* at 596.

114. United States v. Ford, 560 F.3d 420, 422 (6th Cir. 2009) (finding divisible and applying the modified categorical approach to a second-degree escape statute whose text "covers everything from a felon who breaks out of a maximum-security prison to one who fails to report to a halfway house").

115. United States v. Pearson, 553 F.3d 1183, 1186 (8th Cir. 2009).

116. N.H. REV. STAT. ANN. § 642:6 (2007).

it did not distinguish between types of confinement.[117] Thus, "[t]he Class B felony . . . covers a category of escapes that includes both [the defendant's] failure to return from a break at a halfway house and the prisoner who manages to break out of jail by stealth."[118] Despite its lack of textual divisibility, the court nevertheless divided the Class B felony into two categories: "failure to report" and "escape from secure custody."[119] After employing the modified categorical approach and learning that Pratt had escaped from jail by crawling under a fence and leaving the area, the court concluded that Pratt had been convicted of the "escape from secure custody" portion of the statute.[120] The court then found that "escape from secure custody" categorically involves the "less passive, more aggressive conduct"[121] that is "roughly similar, in kind as well as in degree of risk posed,"[122] to the enumerated crimes, and concluded that escape from secure custody is a violent felony within the meaning of the ACCA.[123]

The federal criminal escape statute best illustrates the difference between the two methods. Courts employing both the formal and functional methods have analyzed this statute, which provides the following:

> Whoever escapes or attempts to escape from the custody of the Attorney General or his authorized representative, or from any institution or facility in which he is confined by direction of the Attorney General, or from any custody under or by virtue of any process issued under the laws of the United States . . . or from the custody of an officer or employee of the United States pursuant to lawful arrest, shall, if the custody or confinement is by virtue of an arrest on a charge of felony, or conviction of any offense, be fined under this title or imprisoned not more than five years, or both . . . .[124]

Applying the formal method, the Seventh Circuit found that, while the "statute covers a wide range of conduct, from violent jailbreaks to quiet walkaways to passive failures to report," its text does not "enumerate explicitly the different ways in which the statute can be violated," and it is therefore not divisible.[125] Faced with the difficult task of affixing a categorically "violent" or "non-violent" label to such a broadly written statute, the court asked, "[W]hat is the 'nature' of a crime that can be committed in so

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117. 568 F.3d 11, 20 (1st Cir. 2009).

118. *Pratt*, 568 F.3d at 20 (quoting United States v. Winn, 364 F.3d 7, 12 (1st Cir. 2004), *abrogated by* Chambers v. United States, 555 U.S. 122, 130 (2009) (holding that failures to report and escapes from custody do not belong to the same category of crimes for ACCA purposes, even if grouped together within a single criminal statute)).

119. *See id.* at 21.

120. *Id.* at 21–22.

121. *Id.* at 22 (quoting *Chambers*, 555 U.S. at 127).

122. *Id.* (quoting Begay v. United States, 553 U.S. 137, 143 (2008)).

123. *Id.*

124. 18 U.S.C. § 751(a) (2006).

125. *See* United States v. Hart, 578 F.3d 674, 681 (7th Cir. 2009).

many different ways?"[126] It answered its own question: because it is possible for one to commit escape without putting anyone in harm's way, criminal escape is not a categorically violent crime.[127]

Yet the Eighth Circuit explicitly disagreed with both the formal method and the resulting categorization when it interpreted the same statute.[128] The court read *Chambers* as instructing sentencing courts to determine whether the risks posed by the categories of conduct within a statute are so substantially different that the court must treat the statutory categories as separate crimes for ACCA purposes, even though the categories are part of an identically numbered statutory section.[129] This instruction "suggests that overinclusiveness for career offender purposes may arise even if a criminal statute ... is not *textually* divisible."[130] The Eighth Circuit found that because "escaping[ing] or attempt[ing] to escape from the custody of the Attorney General"[131] includes such passive conduct as failing to return to custody, the federal criminal escape statute is overinclusive and triggers the modified categorical approach.[132] The court then viewed the permissible judicial records and learned that the defendant ran past a security guard and out of a gate that had been opened for the routine intake of inmates.[133] Therefore, the defendant committed the generic crime of escape from a secure facility, which the court concluded qualifies as a "violent crime" under the ACCA.[134]

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126. *Id.*

127. *Id.*

128. *See* United States v. Parks, 620 F.3d 911, 914–15 (8th Cir. 2010). The Seventh Circuit has itself acknowledged the arbitrary nature of hinging its divisibility analysis on the statute's text alone. *See United States v. Woods*, 576 F.3d 400, 405 (7th Cir. 2009) ("One could argue that it is artificial to draw a line between, on the one hand, general statutes that prohibit both violent and nonviolent conduct, and, on the other, statutes that differentiate between violent and nonviolent offenses.").

129. The Court did exactly this in *Chambers v. United States*, 555 U.S. 122 (2009). It concluded that "failure to report ... is a separate crime, different from escape," even though they are part of the same criminal statute. *Id.* at 126–27.

130. *Parks*, 620 F.3d at 914. The Eighth Circuit has provided some support for the formal method in other opinions. *See* United States v. Salean, 583 F.3d 1059, 1061 (8th Cir. 2009); United States v. Boaz, 558 F.3d 800, 807 (8th Cir. 2009) (citing U.S. v. Livingston, 442 F.3d 1082, 1084 (8th Cir. 2006)) ("When the law defines an offense by proscribing several discrete, alternative sets of elements that might be shown as different manners of committing the offense, we employ the modified categorical approach that permits examination of a limited class of materials to determine which set of elements the defendant was found to have violated.").

131. United States v. Pearson, 553 F.3d 1183, 1186 (8th Cir. 2009) (alternations in original) (quoting 18 U.S.C. § 751(a) (2006)) (internal quotation marks omitted).

132. *Id.* at 1186; *see also* United States v. Jackson, 594 F.3d 1027, 1029–30 n.2 (8th Cir. 2010) ("We have recognized that § 751(a) defines multiple different offenses, is therefore 'overinclusive,' and is subject to analysis as per the modified categorical approach ....").

133. *Parks*, 620 F.3d at 916.

134. *Id.*

IV. THE FORMAL METHOD IS MORE CONSISTENT WITH SUPREME COURT ACCA JURISPRUDENCE

The Supreme Court has not expressly endorsed one method of assessing divisibility. This Part, however, contends that the formal method is the most consistent with the Court's ACCA jurisprudence. Section IV.A asserts that the Court has provided implicit support for the formal method when discussing its ACCA cases in another context. Section IV.B argues that the formal method more closely tracks the Court's record of dividing the statutes that it has categorized. Finally, Section IV.C contends that the functional method is inconsistent with the categorical approach, the default interpretive framework in ACCA cases.

A. *The Supreme Court Has Provided Implicit Support for the Formal Method*

The Supreme Court has suggested that a sentencing court may only consult the additional materials permitted by the modified categorical approach if the statute's text contains multiple offense categories, some of which would constitute a crime of violence and some of which would not. In a non-ACCA case, *Nijhawan v. Holder*, the Court considered a provision of the Immigration and Nationality Act ("INA") that defined an "aggravated felony" for deportation purposes.[135] The Court distinguished a portion of the INA, which it characterized as circumstance specific, from the ACCA, which uses a categorical approach.[136] Referring to its past ACCA cases, the Court said, "*Taylor*, *James*, and *Shepard*, the cases that developed the evidentiary list to which petitioner points, developed that list for a very different purpose, namely that of determining *which statutory phrase (contained within a statutory provision that covers several different generic crimes) covered a prior conviction*."[137] Courts using the formal method have seized on this statement as confirmation of their practice of dividing statutes only when the statutes "expressly identif[y] several ways in which a violation may occur" and consulting the *Shepard* documents only to determine "under which part of a divisible statute the defendant was charged."[138] The Court's statement in *Nijhawan* does not expressly reject the functional

135. 129 S. Ct. 2294 (2009). The statute defined an "aggravated felony" as, *inter alia*, "an offense that . . . involves fraud or deceit in which the loss to the victim or victims exceeds $10,000." 8 U.S.C. § 1101(a)(43)(M)(i) (2006), *quoted in Nijhawan*, 129 S. Ct. at 2297. The question in the case was whether the specific statute under which the defendant was convicted must include in its text the $10,000 minimum loss amount as an element of the offense (*i.e.*, a text-based formal method), or whether the requisite loss amount resulting from the defendant's actual conduct must exceed $10,000 to satisfy the INA's definition (*i.e.*, a conduct-based functional method). *Nijhawan*, 129 S. Ct. at 2297.

136. *Nijhawan*, 129 S. Ct. at 2297–98.

137. *Id.* at 2303 (emphasis added).

138. United States v. Woods, 576 F.3d 400, 406 (7th Cir. 2009).

method, but it nevertheless implies that the Court considers the statutory text the appropriate place to look when conducting a divisibility analysis.

B. *The Formal Method Is More Consistent with the Supreme Court's Record of Dividing Statutes*

The formal method more closely tracks the Court's actual practice of dividing statutes for ACCA purposes. In short, the Court has divided formally divisible statutes and failed to divide formally indivisible statutes.

The statutes at issue in *Taylor*, the case in which the Court first set out the categorical approach in the ACCA context, were formally divisible.[139] At the time that the defendant was convicted of second-degree burglary, Missouri had seven different second-degree burglary statutes.[140] Because those statutes criminalized entry into buildings and other structures,[141] which the Court held to be a necessary part of a burglary conviction for ACCA purposes,[142] the statutes contained both violent and nonviolent offense categories. The Court noted that "[d]espite the Government's argument to the contrary, it is not apparent to us from the sparse record before us which of those statutes were the basis for Taylor's prior convictions."[143] The Court remanded the case for the lower court to properly categorize Taylor's conviction for enhancement purposes. The Illinois escape statute at issue in *Chambers* followed a similar pattern. It listed seven different ways in which a defendant could be convicted of "escape," some of which encompassed violent conduct and some of which did not.[144] Thus, it was formally divisible, and the Court divided it, "treat[ing] the statute for ACCA purposes as containing at least two separate crimes, namely, escape from custody on the one hand, and a failure to report on the other."[145]

By contrast, the Court has not divided statutes that are functionally—but not formally—divisible.[146] Consider the attempt statute at issue in *James*.[147]

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139. *See id.* at 407 ("[T]he statute before the Court in *Taylor* was a divisible one, as we are using that term"). *But see id.* at 415 (Easterbrook, J., dissenting from denial of rehearing en banc) ("So instead of asking whether a state law is 'divisible,' we should ask whether the jury (or judge) necessarily found all the elements required to classify the crime as 'violent' for federal purposes.").

140. *See* Taylor v. United States, 495 U.S. 575, 578 n.1 (1990). In 1979, Missouri replaced these statutes with a more generic statute. *See* MO. REV. STAT. § 569.170 (2000).

141. *Taylor*, 495 U.S. at 578 n.1.

142. *Id.* at 598–99.

143. *Id.* at 602.

144. 720 ILL. COMP. STAT. § 5/31-6(a) (2010).

145. Chambers v. United States, 555 U.S. 122, 127 (2009).

146. Because it is not guaranteed that a lower court would have divided these functionally divisible statutes anyway, the Supreme Court's refusal to divide them does not automatically establish a preference for the formal method. But given that a division was at least possible—yet nevertheless not undertaken—in *James* and *Sykes*, the Court's categorical consideration of the statute does provide some support for the formal method.

147. FLA. STAT. § 777.04(1) (2010) ("A person who attempts to commit an offense prohibited by law and in such attempt does any act toward the commission of such offense,

The text of the statute does not create multiple offense categories. It is, however, possible to attempt a crime in a way that would amount to a crime of violence and in a way that would not. The attempt statute is therefore formally indivisible but functionally divisible. Yet the Supreme Court did not turn to the modified categorical approach when categorizing attempted burglary as an ACCA predicate. Rather, it simply analyzed whether, in the ordinary case, attempted burglary presents a serious risk of physical injury to another.[148] Concluding that it does, the Court counted attempted burglary as an ACCA predicate.[149] The same is true of the New Mexico statute at issue in *Begay*. The statute contained only one offense category: driving with a blood-alcohol concentration of greater than eight one-hundredths.[150] Instead of using the modified categorical approach, the Court analyzed whether drunk driving was similar in kind and in degree of risk posed to the enumerated crimes.[151] The same is true of *Sykes*.[152] The Court did not divide the statute but instead analyzed whether vehicular flight from a police officer is categorically violent.[153]

C. *The Functional Method Is Inconsistent with the Categorical Approach*

By hinging the divisibility analysis on a judge's intuition regarding the means of committing a crime, the functional method permits a judge to bypass the categorical approach in favor of a fact-based inquiry into the defendant's prior conduct—precisely the inquiry the Supreme Court rejected in *Taylor*. *Taylor* held, and *Shepard* reiterated,[154] that the modified categorical approach should only be applied in "a narrow range of cases."[155] Case-by-case determinations (utilizing the expanded inquiry in the modified categorical approach) of whether a prior violation of a statute posed the requisite risk of violence for ACCA predicate status are the exception, not the rule.[156]

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but fails in the perpetration or is intercepted or prevented in the execution thereof, commits the offense of criminal attempt . . . .").

148. James v. United States, 550 U.S. 192, 208 (2007).

149. *Id.* at 209.

150. N.M. STAT. ANN. § 66-8-102(C)(1) (Supp. 2011).

151. Begay v. United States, 553 U.S. 137, 144–45 (2008).

152. The Indiana statute at issue in *Sykes* criminalized "flee[ing] from a law enforcement officer after the officer has, by visible or audible means . . . identified himself . . . and ordered the person to stop." IND. CODE § 35-44-3-3(a)(3) (2011). The defendant was convicted of a Class D felony because he committed "the offense [as] described in subsection (a)(3) and . . . use[d] a vehicle to commit the offense." *Id.* § 35-44-3-3(b)(1)(A).

153. Sykes v. United States, 131 S. Ct. 2267, 2273–76 (2011).

154. Shepard v. United States, 544 U.S. 13, 24–26 (2005).

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

156. This is appropriate in order to stay faithful to the statute's text and legislative history, as well as to avoid evidentiary difficulties and Sixth Amendment challenges, all of which are described *supra* in Section II.A.

The functional method, however, places no limit on the judge's ability to reach the modified categorical approach. Because it is very often possible (at least in theory) for a crime to be committed in a violent and a nonviolent way, a judge applying the functional method will have little trouble dividing the statute and conducting the expanded factual inquiry. Dividing a statute does not inherently pose a problem. But a problem does lie in the judge's ability to create arbitrary divisions that collapse the distinction between the categorical approach and the modified categorical approach and that serve only to permit the court to consult the *Shepard* documents, despite the Supreme Court's warning not to do so.[157] In other words, when judges use the functional method, they run the risk of allowing the modified categorical approach exception to swallow the categorical approach rule.

Consider Kentucky's second-degree escape statute, for instance. It states that "[a] person is guilty of escape in the second degree when he escapes from a detention facility or, being charged with or convicted of a felony, he escapes from custody."[158] Interpreting the statute in *United States v. Ford*, the Sixth Circuit noted initially that the statute covers everything from "a felon who breaks out of a maximum-security prison to one who fails to report to a halfway house."[159] After consulting additional Kentucky escape laws,[160] the court functionally divided Kentucky escape law into four categories: (1) leaving custody with the use or threat of force, (2) leaving custody in a secured setting, (3) leaving custody in a nonsecured setting by "walking away," and (4) failing to report.[161] Because it tracks differences in conduct that plausibly correlate to different risk levels, this is a defensible division.

The functional method, however, would just as easily have allowed the *Ford* court to divide the Kentucky escape law in a more artificial way designed to allow the judge to reach the modified categorical approach: "escapes involving a serious potential risk of injury to another" and "escapes not involving a serious potential risk of injury to another." The court could then have consulted the *Shepard* documents, viewed the facts that led to the defendant's conviction, and categorized that conviction accordingly. This uncabined judicial discretion brings little clarity or predictability to a

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157. *Taylor*, 495 U.S. at 602. A functional-method court might have to identify at least plausible differences in risk levels posed by the conduct encompassed by the statute in order to divide it. Whether courts have actually identified plausible differences is an empirical question for which there is no available data. It is safe to say, though, that the functional method gives judges more discretion to create categories—principled or arbitrary—divide statutes, and utilize the modified categorical approach.

158. KY. REV. STAT. ANN. § 520.030(1) (LexisNexis 2008).

159. 560 F.3d 420, 422 (6th Cir. 2009).

160. *See* KY. REV. STAT. ANN. § 520.010(5) (LexisNexis 2008) (defining escape as departing from custody or a detention center "when the departure is unpermitted" or failing to return to such a facility "following a temporary leave granted for a specific purpose or for a limited period"); *id.* § 520.020(1) (criminalizing first-degree escape, which covers "escapes from custody or a detention facility by the use of force or threat of force against another person").

161. *Ford*, 560 F.3d at 424.

statute marked by vagueness, and the *Ford* court recognized the danger it poses:

> Think of the risk-of-physical-injury inquiry from the perspective of a definition of escape that picks up all departures from custody on the one hand and a definition that picks up just walkaway offenses on the other. The former category will contain a higher risk of physical injury and therefore seem more like the prototypical crime of violence than the latter category by itself. If we include walkaway escapes in the general category, they likely will be treated as crimes of violence; if not, they likely will not be. *In this respect, the level of generality is destiny, requiring us to be careful that the lines we draw are meaningful ones.*[162]

Because the functional method permits courts to fashion categories without direction from the statutory text, these courts can create conduct-based distinctions that lack significant differences in degree of risk posed and that stifle uniform application. Such artificial distinctions are exactly what the categorical approach rejects.

V. THE RULE-BASED NATURE OF THE FORMAL METHOD IS MORE FAITHFUL TO *APPRENDI V. NEW JERSEY* AND THE RULE OF LENITY AND GIVES CONGRESS A STRONG INCENTIVE TO REVISE THE ACCA

The debate over whether to use the formal or functional method to divide a statute and employ the modified categorical approach is an example of the familiar distinction between "rules" and "standards."[163] The formal method is a rule-based system because the sentencing outcome is determined by the existence of an objective factor: whether the statute's text includes both violent and nonviolent ways of committing the crime. The sentencing court has little discretion to make value judgments. By contrast, the functional method is a standard-based system because it varies more by the individual case. This Part argues that a rule-based ACCA regime is best for the following reasons.

A. *The Functional Method Is Inconsistent with* Apprendi v. New Jersey

Because functional-method courts will divide statutes and employ the modified categorical approach more often than formal-method courts, the functional method presents a more significant *Apprendi* concern than the formal method. In *Apprendi v. New Jersey*, the Supreme Court held that, "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt."[164] Leaving such a determination

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162. *Id.* (emphasis added).

163. *See, e.g.*, Duncan Kennedy, *Form and Substance in Private Law Adjudication*, 89 HARV. L. REV. 1685, 1687–88 (1976).

164. 530 U.S. 466, 490 (2000).

to a judge is unconstitutional.[165] *Taylor* was decided a decade before *Apprendi* and *Jones*, but the Court prefigured the role that the Sixth Amendment would play in ongoing ACCA jurisprudence. The *Taylor* Court recognized that a sentencing judge who applies a factual, noncategorical method of interpreting a divisible statute might violate the defendant's Sixth Amendment right to a jury trial.[166] The jury, the Court reasoned, might return a verdict on a theory that would not qualify the defendant's conduct as an ACCA predicate. Yet the sentencing judge in a future case, upon reviewing the full facts, might classify the past conviction as the exact opposite—a "violent felony."[167] As the Court later reiterated in *Shepard*, this ex post determination by a judge is constitutionally invalid, because "the *Sixth* and *Fourteenth Amendments* guarantee a jury standing between a defendant and the power of the State, and they guarantee a jury's finding of any disputed fact essential to increase the ceiling of a potential sentence."[168]

The functional method treads very closely to exactly such a violation. As discussed above, a defendant can usually parse a statute very closely to identify a way of violating the statute in a nonviolent manner.[169] If a functional-method court accepts such a division, it will apply the modified categorical approach and view the appropriate documents. At that point, the same problems arise once again. Given inconclusive or conflicting facts and only a general verdict of guilty, a court will be faced with a choice of either not applying the ACCA predicate or facing an *Apprendi* violation.[170]

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

166. *See* Taylor v. United States, 495 U.S. 575, 601 (1990). The permitted overinclusiveness of the categorical approach does not make it vulnerable to *Apprendi* problems. When the categorical approach is properly applied, whether a prior conviction is a violent felony is a legal question, in which the judge considers only the elements of the law and not the facts. This consideration does not implicate the Sixth Amendment. It is only when the judge considers aspects of the crime not found by the jury or admitted by the defendant that the Sixth Amendment comes into play. *See* Holman, *supra* note 45, at 218 n.49.

167. *See Taylor*, 495 U.S. at 601.

168. Shepard v. United States, 544 U.S. 13, 25 (2005) (emphasis added). In *Shepard*, the government argued that an expanded factual inquiry could be conducted consistently with *Apprendi* because a sentencing judge was, after all, dealing with a prior conviction, Brief for the United States at 43–44, *Shepard*, 544 U.S. 13 (No. 03-9168), and the Supreme Court had specifically excluded prior convictions from vulnerability to Sixth Amendment issues in *Apprendi*, 530 U.S. at 490, and in *Almendarez-Torres v. United States*, 523 U.S. 224, 235 (1998) (holding that recidivism is a sentencing factor, rather than an element of the offense that must be proved to a jury). But the *Shepard* Court rejected that argument, noting that categorizing a prior conviction for ACCA purposes is "too far removed from the conclusive significance of a prior judicial record, and too much like the findings subject to *Jones* and *Apprendi*, to say that *Almendarez-Torres* clearly authorizes a judge to resolve the dispute." *Shepard*, 544 U.S. at 25.

169. *See supra* Section III.B. For examples of creative parsing with respect to the ACCA's "serious drug offense" provision, see Russell, *supra* note 32, at 1203–06.

170. On the related issue of the Ex Post Facto Clause, courts have held that as long as the crime leading to the application of the enhancement is committed after the ACCA's passage, the enhancement will be viewed as a stiffened penalty for the post-passage crime, rather than a retroactive punishment for any pre-ACCA convictions. *See, e.g.*, United States v. Springfield, 337 F.3d 1175, 1178 (10th Cir. 2003) (citing Gryger v. Burke, 334 U.S. 728, 732

Imagine a hypothetical escape statute that is not formally divisible but is functionally divisible. It simply says, "It is a crime to flee from police custody." A court applying the formal method would have to consider the risk posed by all methods of fleeing, because the statute's text does not allow it to divide the statute. But a functional-method court could divide the statute however it saw fit. One way of doing so would be to say that simply walking away from a police officer after being ordered to stop does not count as an ACCA predicate, but assaulting a police officer after doing so does count as a predicate. Both of these actions, though, are fleeing from custody and are therefore sufficient to violate the statute itself.

Now imagine that the jury hears evidence indicating that, at first, the defendant allegedly walked away, but after some time had passed, the defendant assaulted an officer. The jury then returns a general guilty verdict. The ACCA sentencing court now has a problem. It does not know on which theory the jury convicted; either one is sufficient for conviction, but only one counts as a predicate. If a judge counts such a conviction as an ACCA predicate, the conviction is no longer tied to facts *necessarily* found by a jury, because the jury may have convicted the defendant based on conduct that does not constitute a predicate offense. This is exactly the problem the Court envisioned in *Taylor* and found unconstitutional in *Apprendi*.[171] A judge applying the formal method, however, would not arrive at this problematic point, because he or she would have to consider the risk of physical injury posed by all fleeing, without the information contained in the *Shepard* documents. If nothing else, the formal method has the virtues of simplicity and ease of application, avoiding the subtle and complex dilemma posed by dividing a statute and wading into a beguiling evidentiary record.

B. *The Formal Method Is More Consistent with the Rule of Lenity*

"The rule of lenity requires ambiguous criminal laws to be interpreted in favor of the defendants subjected to them."[172] The rule "places the weight of

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(1948) (holding that a habitual offender sentence is not "a new jeopardy or additional penalty for earlier crimes," but rather "a stiffened penalty for the latest crime")); *see also* Jill C. Rafaloff, Note, *The Armed Career Criminal Act: Sentence Enhancement Statute or New Offense?*, 56 FORDHAM L. REV. 1085, 1091–98 (1988) (concluding that the ACCA's language and legislative history indicate Congress's intent that it be considered a sentencing enhancement statute rather than a separate federal crime).

171. One might respond that *any* application of the modified categorical approach violates the Sixth Amendment, because, no matter how the court arrives there, the court is still viewing facts that may not have been found by a jury. But the *Apprendi* problem would only arise where the defendant was alleged to have violated *both* the ACCA-qualifying and the non-ACCA-qualifying portion of the statute, and the jury returned a general guilty verdict. If the judge were to view the documents and sees that the defendant was convicted of violating *only* the qualifying part of the statute, the judge could then conclude that the jury *necessarily* convicted the defendant of the qualifying part of the statute. The judge could therefore count the conviction as a predicate without violating the Sixth Amendment.

172. United States v. Santos, 553 U.S. 507, 514 (2008) (plurality opinion). Because this argument attempts to give defendants the benefit of the ambiguity present in the ACCA, a sentencing enhancement statute, as opposed to the elements of the predicate crimes, it might be

inertia upon the party that can best induce Congress to speak more clearly"[173] and prevents courts from having to "play the part of a mindreader."[174] The ACCA's vagueness makes it a particularly strong rule-of-lenity candidate,[175] and at least one member of the Court has acknowledged as much in the past.[176] Years of imprisonment hinge on the sentencing court's interpretation of the ACCA's residual clause, yet there has been no consistent, uniformly applied articulation of its meaning. The frequency with which the Court has attempted to resolve circuit splits by taking ACCA cases in recent years demonstrates the vagueness of the statute.[177] The rule of lenity favors resolving this vagueness with a more underinclusive method of categorizing prior convictions.

Rule-based systems are both overinclusive and underinclusive, because they do not tie their outcomes to real-world conduct or the relevant values at stake, but rather to the presence or absence of an objective factor or set of factors.[178] This is true of the formal method, a rule-based system in which the sentencing outcome depends on whether the statute's text makes the statute divisible. There is reason to believe, however, that the formal method will be more likely than the functional method to avoid overinclusiveness, consistent with the values embodied in the rule of lenity.

Most formally indivisible statutes will not amount to ACCA predicates. Because the statute's text makes it indivisible, the court will, of course, not

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said that this argument is based not on the rule of lenity, but rather lenity itself. Whatever its name, the justification for construing the ACCA in favor of defendants is identical to that for the underlying crimes: "the fundamental principle that no citizen should be held accountable for a violation of a statute whose commands are uncertain, or subjected to punishment that is not clearly prescribed." *Id.*

173. *Id.*

174. *Id.* at 515.

175. For an explanation of the traditional due process and separation of powers foundations of the rule of lenity in the ACCA context, see *The Supreme Court, 2006 Term—Leading Cases*, 121 HARV. L. REV. 345, 350–52 (2007) (arguing that applying the rule of lenity when interpreting the ACCA's residual clause is consistent with "the due process notion that only clearly stated laws can justify significant deprivations of liberty" and "prevents legislatures from punting their crime-defining function to the courts").

176. Begay v. United States, 553 U.S. 137, 153 (2008) (Scalia, J., concurring) (applying the rule of lenity because it was unclear if drunk driving posed at least as serious of a risk of physical injury as burglary); James v. United States, 550 U.S. 192, 219 (2007) (Scalia, J., dissenting) ("The rule of lenity . . . demands that we give this text the more narrow reading of which it is susceptible.").

177. Sykes v. United States, 131 S. Ct. 2267, 2287 (2011) (Scalia, J., dissenting) ("What sets ACCA apart from [other vague] statutes—and what confirms its incurable vagueness—is our repeated inability to craft a principled test out of the statutory text."). In his separate opinion in *Chambers*, Justice Alito identified circuit splits over whether the following crimes count as ACCA predicates: rape, retaliation against a government officer, attempting or conspiring to commit burglary (even after *James*), carrying a concealed weapon, and fleeing from the police in a motor vehicle (resolved by *Sykes*). Chambers v. United States, 555 U.S. 122, 133 n.2 (2009) (Alito, J., concurring). There have doubtless been more splits since *Chambers*.

178. Michael M. O'Hear, *The Original Intent of Uniformity in Federal Sentencing*, 74 U. CIN. L. REV. 749, 755 (2006).

divide it, even though the defendant could have violated that statute in a way that would amount to a crime of violence. The court will then consider the conduct encompassed by the elements of the offense and ask if that conduct presents a serious potential risk of physical injury.[179] Given the Court's analysis in *James*, almost all ways of violating a statute would have to qualify as a crime of violence in order for the defendant's conviction to be classified as an ACCA predicate under a formally indivisible statute.[180] As noted above, such a threshold could lead to either over- or under-inclusiveness, but given that ACCA categorization problems arise in the context of—and indeed, are caused by—broadly written statutes, it is unlikely that all or almost all ways of violating such a broad, inclusive statute would be violent. Because the formal method would not treat convictions under these statutes as ACCA predicates, the result is likely to avoid overinclusiveness and is therefore more lenient to criminal defendants.[181]

Not so for the functional method, which would proceed to divide the broad, formally indivisible statutes that a formal-method court would consider in the abstract. By consulting the additional documents, functional method courts would, given a sufficient record, categorize defendants' past convictions accordingly. Many—perhaps most—of the convictions under these formally indivisible statutes may amount to conduct which qualifies as a violent crime. The functional method is thus harsher on criminal defendants, lumping in more convictions than the self-imposed abstraction of the formal method would tolerate.

Of course, by "skimming the surface" and applying the categorical approach (rather than dividing the statute), the formal method presents the risk

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179. For more detail on the application of the categorical approach, see *supra* Section II.A.

180. *See James*, 550 U.S. at 208 (stating that the categorical approach does not require "every conceivable factual offense covered by a statute [to] necessarily present a serious potential risk of injury before the offense can be deemed a violent felony," but the "ordinary case" must present such a risk); United States v. Woods, 576 F.3d 400, 404 (7th Cir. 2009) ("[A] crime must be categorized as one of violence even if, through some freak chance, the conduct did not turn out to be violent in an unusual case.").

It should also be noted that the permitted overinclusiveness of the categorical approach is in tension with the Court's conclusion in *Gonzales v. Duenas-Alvarez*, 549 U.S. 183, 193 (2007), that the defendant must point to actual cases in order to show that the state statute has been applied to conduct which would not qualify under a listed crime in a federal statute. *See supra* notes 84–85 and accompanying text. Presumably, if the defendant did identify such a case, the sentencing court would be allowed to simply deem the case a "freak chance" and proceed to categorize the statute as violent. The Supreme Court has not addressed this tension.

181. Here, one might respond that the functional method is harsher where appropriate. By dividing the statute and examining the defendant's conduct, the functional method "gets it right" by punishing only those who actually commit "crimes of violence." For this reason, it might also be said that the functional method leads to more even treatment of defendants. But this argument would justify looking at the defendant's conduct in *every* case, an approach the Supreme Court has rejected without exception. *See supra* Section II.A. And while it is an empirical question for which there is no available data, any unevenness created by the formal method is likely to cut in favor of defendants because, compared to the functional method, it leads to more categorical consideration of prior convictions.

of unfair under- or overinclusiveness contained within the categorical approach itself. The approach may be underinclusive in that a defendant may violate a categorically nonviolent statute in a violent way.[182] The approach may also be overinclusive in that the defendant may be convicted of violating a prototypically violent crime, when, in the defendant's particular case, the defendant's conduct did not actually present a risk of injury.[183] There is no empirical evidence available, but logically there should be more instances of defendants violently running afoul of broadly written, categorically nonviolent statutes than instances in which, "through some freak chance," a defendant violates a categorically-violent-crime statute even though his conduct was not violent.[184]

For example, compare the drunk-driving statute at issue in *Begay v. United States*, which the Supreme Court concluded did not cover categorically violent crime,[185] with Oklahoma's statute criminalizing assault and battery against a law enforcement officer, which the Tenth Circuit categorized as violent in *United States v. Kutz*.[186] It is easy to conceive of conduct that would violate the categorically nonviolent drunk driving statute in a violent way. Yet it is difficult to imagine circumstances in which a defendant could violate the categorically violent assault-and-battery statute in a nonviolent way. Not all cases are clear-cut, but the general point remains that the categorical approach is, if anything, likely to avoid overinclusiveness. And because it stays hinged to the categorical approach, the formal method is more likely to avoid overinclusiveness than the functional method.

The formal method's avoidance of overinclusiveness is more consistent with the rule of lenity. The formal method rightly gives criminal defendants the benefit of statutory vagueness by considering the convictions under a formally indivisible statute in the abstract. The functional method, however, uses the modified categorical approach to bypass the statute's vagueness,

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182. *See* Holman, *supra* note 45, at 213 (describing, as an example of this underinclusiveness, a defendant who violates a statute prohibiting tampering with witnesses by physically harming the witness in order to prevent the witness from testifying).

183. United States v. Thomas, 361 F.3d 653, 658–59 (D.C. Cir. 2004), *vacated*, 543 U.S. 1111 (2005) (describing, as an example of this overinclusiveness, a defendant who is convicted of attempted murder for trying to shoot someone when the gun, unbeknownst to the defendant, had no bullets in it).

184. *See Woods*, 576 F.3d at 404 (characterizing overinclusion as a "freak chance").

185. 553 U.S. 137, 144–48 (2008). The statute provided that it is unlawful for "a person to drive a vehicle in this state if the person has an alcohol concentration of eight one hundredths or more in the person's blood or breath within three hours of driving the vehicle and the alcohol concentration results from alcohol consumed before or while driving the vehicle." N.M. STAT. ANN. § 66-8-102(C)(1) (Supp. 2011).

186. 439 F. App'x 751, 753 (10th Cir. 2011). The statute reads as follows:

> Every person who, without justifiable or excusable cause knowingly commits battery or assault and battery upon the person of a police officer, sheriff, deputy sheriff . . . while said officer is in the performance of his duties, upon conviction, shall be guilty of a felony . . . .

OKLA. STAT. tit. 21, § 649(B) (2011).

and if it finds that the defendant's prior conviction is a "crime of violence," it resolves the ACCA's vagueness at the defendant's expense. Until congress heeds the judiciary's call and amends the ACCA,[187] the formal method best guarantees that criminal defendants do not bear the burden of poor congressional drafting.

C. *A Rule-Based Approach Provides the Strongest Incentive to Congress to Rewrite the ACCA*

The formal method stands a better chance of motivating Congress to rewrite the ACCA itself.[188] Rules provide for greater clarity[189] and consistency[190] of decisionmaking. This clarity and consistency results in a more intelligible body of judicial decisions, which gives public officials greater guidance when they evaluate the statute in the future.[191] In other words, if courts use the formal method, Congress will know that courts will only divide a statute if its text contains multiple categories of behavior, only some of which constitute predicate convictions. If Congress is unsatisfied with the number or type of crimes courts include as predicates under that

187. Two Supreme Court justices have called for revision of the statute. *See* Chambers v. United States, 555 U.S. 122, 134 (2009) (Alito, J., concurring) ("At this point, the only tenable, long-term solution is for Congress to formulate a specific list of expressly defined crimes that are deemed to be worthy of ACCA's sentencing enhancement."); James v. United States, 550 U.S. 192, 230 (2007) (Scalia, J., dissenting) (suggesting that the Court could "recognize the statute for the drafting failure it is and hold it void for vagueness").

188. Neither the formal nor functional method may provide states any incentive at all to rewrite their statutes. In 2008, courts applied only 653 ACCA sentencing enhancements. U.S. SENTENCING COMM'N, 2008 SOURCEBOOK OF FEDERAL SENTENCING STATISTICS 47 tbl.22 (2008). Assuming an equal distribution of ACCA enhancements across states, this amounts to approximately thirteen ACCA enhancements per state, per year. It is unlikely that such a small number of cases would command the significant effort needed to rewrite a state criminal statute, much less a group of statutes.

189. *See* Lee E. Teitelbaum, *Youth Crime and the Choice between Rules and Standards*, 1991 BYU. L. REV. 351, 358 (1991) ("A further reflection of the importance of rules to the criminal justice system is that system's hostility to ambiguity and discretion.").

190. *See* Cass R. Sunstein, *Problems with Rules*, 83 CALIF. L. REV. 953, 976 (1995) ("Here, too, rules have large virtues in a system that aspires to consistent decisions amidst heterogeneity.").

191. *See id.* at 977; Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175, 1186 (1989) (criticizing the lack of guidance to future decisionmakers when standards are used to resolve cases). To some degree, the formal method does leave federal courts at the mercy of state legislatures, who write the criminal statutes that serve as the basis for predicate convictions. Yet any arbitrariness resulting from the formal method is counterbalanced by the judicial arbitrariness in the functional method. Because it more clearly defines the circumstances in which a judge can divide a statute, the formal method offers defendants greater predictability. Combined with the benefits of fidelity to precedent and Congressional intent, avoiding constitutional problems, and lenity, this predictability reduces the extent to which this legislative arbitrariness is problematic.

framework, it can revise the statute to suit its preferences.[192] But when judges try to fix Congress's poor drafting through a series of standards and loose decisions, a less concrete body of law emerges.[193] Thus, Congress has a weaker incentive to fix the problem. That is the case with the functional method. The lack of predictability and consistency of statutory divisions makes the statute's flaws less comprehensible. A less clearly objectionable body of law is less likely to get Congress's attention, and the Supreme Court will continue to issue piecemeal ACCA decisions, as it has for the last five years. If the goal is to convince Congress to rewrite the ACCA,[194] the formal method is best.

CONCLUSION

Sentencing courts that seek to determine whether a prior conviction may be counted as a predicate offense under the ACCA's residual clause should resort to the modified categorical approach only when the state criminal statute textually identifies multiple categories of behavior, only some of which constitute a crime of violence. This formal, rule-based method is consistent with the Supreme Court's ACCA jurisprudence, as well as the rule of lenity, and is less likely to implicate the Sixth Amendment concerns raised by recidivist sentencing enhancements in the past. Because it is more comprehensible to outsiders, such an approach may also prompt Congress, if it disagrees, to redraft the ACCA, a statute whose application has been marked by imprecision and unpredictability. Until that time, however, courts seeking a ready solution to divisibility problems in ACCA predicate analysis will find it in the formal method.

192. Sykes v. United States, 131 S. Ct. 2267, 2288 (2011) (Scalia, J., dissenting) (suggesting that if the ACCA were limited only to the enumerated crimes, Congress could respond by "quickly add[ing] what it wishe[d]").

193. Scalia, *supra* note 191, at 1186. For a response to the argument that poor drafting makes a standard more preferable, see *id.* at 1183 ("Such reduction of vague congressional commands into rules that are less than a perfect fit is not a frustration of legislative intent because that is what courts have traditionally done, and hence what Congress anticipates when it legislates.").

194. This does appear to be the goal of several Justices. *See supra* notes 8–9 and accompanying text.