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CRIMINAL CERTIFICATION: RESTORING COMITY IN THE CATEGORICAL APPROACH

Joshua Rothenberg*

ABSTRACT

Federal sentencing enhancements force federal courts to delve into the world of substantive state criminal law. Does a state assault statute require violent force or just offensive touching? Does a state burglary statute that criminalizes breaking into a car or a house require prosecutors to charge the location entered as an element? Whether a person with prior convictions convicted of violating 18 U.S.C. § 922(g) faces a minimum sentence of fifteen years and a maximum of life imprisonment rather than a maximum sentence of ten years turns upon the answers to these questions. Yet, state law often does not resolve the uncertainties which exist at the edges of their criminal code. When a federal sentence turns upon a state crime, these uncertainties must be resolved by federal judges, leaving federal courts in the position of attempting to prophesize state law. As a result, two problems arise: a federal court may get a particular case wrong, sentencing a defendant to a sentence not properly applicable, and federal courts may split on the meaning of a state law, with no opportunity to get an authoritative ruling unless the precise issue arises in a new state case. There is a better way.

This problem was faced once before, in the civil context. An elegant solution was found: certification. The already constructed certification framework can and should be utilized by federal courts facing unclear, unsettled, or unencountered questions of substantive state criminal law. This would solve the federalism and accuracy problems currently inherent in federal sentencing based upon prior state conviction.

INTRODUCTION

Federal criminal sentences are often enhanced for offenders with prior convictions of certain types. Whether through the enhancements of Chapter Four of the United States Sentencing Guidelines or statutes like the Armed Career Criminal Act, codified at 18 U.S.C. § 924(e), offenders may receive much higher sentences

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than their crime and criminal history otherwise authorize or require. To trigger the enhancements a person must have prior convictions for either violent felonies or serious drug offenses. What constitutes a violent felony or a serious drug offense is a question of federal law.

The definitions of these categories present questions of law for federal courts. When the predicate crimes are federal, the federal court must consider the definitional question and whether the statute meets the definition. Federal courts are empowered to answer both questions authoritatively. But prior state convictions can also provide the requisite conditions for enhancement. When the predicate convictions are under state rather than federal law, federal courts must determine whether the state offense falls within the federal category. This often requires the federal court to determine not only the bounds of the federal definition but also the limits of the state statute. Such a determination creates a federalism problem: when federal courts engage in routine interpretation of state law, they often consider questions involving the previously unexplored boundaries of given state crimes. This Note suggests a solution: importing certification from the civil context into the criminal sentencing context. This modest suggestion does not solve all of the problems present in these enhancements. But unlike other proposed solutions, certification can be implemented immediately either by the judiciary alone or in partnership with litigants. This Note primarily examines the Armed Career Criminal Act. However, the solution also applies to other contexts where the categorical approach is used, such as the Sentencing Guidelines.

This Note proceeds in three parts. Part I explains the structure of and jurisprudence surrounding the Armed Career Criminal Act (ACCA), the categorical approach required by the Supreme Court, and the federalism problem inherent in applying this approach. Part II discusses the development of certification in the civil context and examines the literature surrounding its successes and failures. Part III shows that certification can apply in the criminal sentencing context through certification statutes as written and that any issues with certification in the categorical approach do not cause enough concern to avoid certifying predicate sentencing questions.

I. THE ARMED CAREER CRIMINAL ACT'S CURRENT OPERATION CREATES AN UNTENABLE FEDERALISM PROBLEM.

This Part explains the Act in question, the procedure for applying it, and the problem which this Note seeks to address. Section A

introduces the statutory language of the Armed Career Criminal Act (ACCA) and provides a brief overview of the jurisprudence surrounding the Act. Section B explains the categorical approach to deciding whether a given crime fits one of the definitions explained in Section A. Finally, Section C discusses how the categorical approach requires federal courts to determine the outside boundaries of state crimes and thus causes a significant federalism problem.

A. *The Armed Career Criminal Act*

Codified at 18 U.S.C. § 924(e), ACCA provides that if “a person [] violates section 922(g) of this title and has three previous convictions . . . for a violent felony or a serious drug offense, or both, committed on occasions different from one another,” that person is subject to a 15-year minimum sentence as opposed to the ordinary 10-year maximum sentence for violations of § 922(g).¹ Central to the statute are the definitions of “serious drug offense” and “violent felony.” A serious drug offense is defined as:

- i) an offense under the Controlled Substances Act, the Controlled Substances Import and Export Act, or chapter 705 of title 46 . . . ; or
- ii) an offense under [s]tate law involving manufacturing, distributing, or possessing with intent to manufacture a controlled substance . . . for which a maximum term of imprisonment of ten years or more is proscribed by law.²

Typically, ACCA’s definition of “violent felony” is split into three clauses: the force clause, the enumerated offenses clause, and the residual clause. The “force clause” comprises crimes that have “as an element the use, attempted use, or threatened use of physical force against the person of another”³ The second clause contains enumerated offenses, which Congress declared *per se* violent—“burglary, arson, or extortion, [or any offense which] involves use of explosives.”⁴ Finally, the “residual clause” includes all conduct that “presents a serious potential risk of physical injury to another.”⁵

1. 18 U.S.C. § 924(a)(2) (2012); 18 U.S.C. § 924(e)(1) (2012).

2. 18 U.S.C. § 924(e)(2)(A)(i)–(ii) (2012) (citations omitted).

3. 18 U.S.C. § 924(e)(2)(B)(i) (2012); *United States v. Davis*, 487 F.3d 282, 285 (5th Cir. 2007) (explaining the names given to the three clauses).

4. 18 U.S.C. § 924(e)(2)(B)(ii) (2012).

5. *Id.*; *Davis*, 487 F.3d at 285.

The residual clause's vagueness has been the subject of five Supreme Court cases.⁶ In the final case, *Johnson II*, the Court held "that the indeterminacy of the wide-ranging inquiry required by the residual clause both denies fair notice to defendants and invites arbitrary enforcement by judges."⁷ The Court held "that imposing an increased sentence under the residual clause of the [ACCA] violates the Constitution's guarantee of due process."⁸ Thus, the definition of violent felony is now narrowed to the enumerated offenses and the force clause.⁹

By the time the Supreme Court voided the residual clause, it had already clarified the definitions of the enumerated offenses and the meaning of the force clause. Five years prior, in *Johnson v. United States (Johnson I)*,¹⁰ the Court held that in the context of ACCA's force clause, "'physical force' means *violent* force—that is, force capable of causing physical pain or injury to another person."¹¹ The force clause, therefore, requires a crime to have as an element the use, attempted use, or threatened use of force against the person of another capable of causing physical pain or injury.

In *Taylor v. United States*¹² the Court explained that the enumerated offenses are not determined by whether the state codified the offense according to the names presented in ACCA.¹³ Rather, the enumerated offenses are used in "the generic sense in which the term is now used in the criminal codes of most [s]tates."¹⁴ Thus for a crime to be burglary in the meaning of ACCA, it must contain "at least the following elements: an unlawful or unprivileged entry into,

6. *Johnson v. United States (Johnson II)*, 135 S. Ct. 2551 (2015); *Sykes v. United States*, 564 U.S. 1 (2011); *Chambers v. United States*, 555 U.S. 122 (2009); *Begay v. United States*, 553 U.S. 137 (2008); *James v. United States*, 550 U.S. 192 (2007).

7. *Johnson II*, 135 S. Ct. at 2557.

8. *Id.* at 2563 (overruling both *Sykes* and *James*).

9. *Id.* (the Court's "decision [did] not call into question [the] application of the [ACCA] to the four enumerated offenses, or the remainder of the Act's definition of a violent felony."). Notably, the ACCA differs from the Career Offender Guidelines in this area, as "the advisory Sentencing Guidelines are not subject to a due process vagueness challenge." *Beckles v. United States*, 137 S. Ct. 886, 897 (2017). Therefore, the identically worded residual clause of those Guidelines was not unconstitutional. *Id.* However, the Sentencing Commission removed the Sentencing Guidelines' residual clause in an amendment effective in late 2017, further lengthening the list of enumerated offenses. U.S. SENTENCING COMM'N, AMENDMENTS TO THE SENTENCING GUIDELINES 2–3 (2016), https://www.ussc.gov/sites/default/files/pdf/amendment-process/reader-friendly-amendments/20160121_RF.pdf.

10. 559 U.S. 133 (2010).

11. *Id.* at 140.

12. 495 U.S. 575 (1990).

13. *See id.* at 590–92.

14. *Id.* at 598.

or remaining in, a building or other structure, with intent to commit a crime.”¹⁵ These generic definitions provide standards as clear, if not clearer, than the definition of the force clause.

B. *The Categorical Approach*

Although the standards are fairly well settled, courts are still left with the task of deciding whether an individual crime meets the definition of violent felony or serious drug offense. In *Taylor*, the Supreme Court held that courts must use a “formal categorical approach” to make this determination.¹⁶ The categorical approach “requires the trial court to look only to the fact of conviction and the statutory definition of the prior offense.”¹⁷ Thus, the categorical approach requires courts to look solely to the statutory elements of the predicate crime to determine whether it meets the definition of an enumerated offense or one of the other standards.¹⁸ To render the standard another way, the categorical approach requires that a person must engage in conduct constituting a violent felony or serious drug offense to violate a given statute. For example, even if a given defendant used force sufficient to satisfy the force clause, if his crime is charged under an assault statute that also, indivisibly, criminalizes offensive touching, the assault is not a predicate offense.

A wrinkle in the otherwise straightforward categorical approach arises where a statute lists “elements in the alternative, and thereby define[s] multiple crimes.”¹⁹ In these circumstances, the Supreme Court has allowed a “modified categorical approach” in which courts are permitted to look “to a limited class of documents . . . to determine what crime, with what elements, a defendant was convicted of.”²⁰ Thus, a court may use an individual case’s documents to look not to the defendant’s conduct, but to whether the defendant was charged with the version of the crime which is categorically a violent felony or serious drug offense.

However, not all alternatively phrased statutes present different elements—some list multiple ways of fulfilling a single element.²¹

15. *Id.* (footnote omitted).

16. *Id.* at 600.

17. *Id.* at 602.

18. *Mathis v. United States*, 136 S. Ct. 2243, 2248 (2016).

19. *Id.* at 2249.

20. *Id.*; see *Shepard v. United States*, 544 U.S. 13, 26 (2005) (specifying which documents may be used for this purpose).

21. *Mathis*, 136 S. Ct. at 2249.

For example, if a burglary statute proscribes unlawful entry into a building or enclosed field with intent to commit a crime, it is not immediately clear whether the “building or enclosed field” phrases two elements or one element with two means. The question turns on whether the jury must determine beyond a reasonable doubt whether the defendant entered “a building or an enclosed field” or if the jury could convict although some jurors believed the defendant entered an enclosed field and others believed it was a building.²² Thus, when faced with an alternatively phrased statute, courts face a preliminary question of whether the alternatives are means or elements. Only if they are elements is the modified categorical approach applied.²³

The final question is which body decides what a given statute means. For example, the determination of what elements are included in a criminal statute is, at the first order, determined by the legislature, with any lack of clarity resolved in the courts. Where a federal statute is at issue, the federal court system is more than qualified and empowered to engage in statutory interpretation.²⁴ However, the situation is different when a defendant was convicted of a state offense. All federal courts, up to and including the Supreme Court, are bound by a state’s highest court’s “interpretation of state law, including its determination of the elements of” a crime.²⁵

In sum, a federal court applying ACCA takes two steps. First, it determines what the elements of the predicate offense were when the defendant was convicted.²⁶ Second, it evaluates whether those elements meet any of the standards under 18 U.S.C. § 924(e) for violent felonies or serious drug offenses.²⁷ If they do, the penalty applies.²⁸

22. See *id.* (distinguishing statutes that set forth means from those that set forth elements, noting that in the former category “a jury need not make any specific findings (or a defendant admissions) on that score.”).

23. *Id.* at 2256.

24. *Williams v. Taylor*, 529 U.S. 362, 378–79 (2000) (holding that Article III of the Constitution grants the federal judiciary an “independent responsibility—independent from its coequal branches in the Federal Government, and independent from the separate authority of the several States—to interpret federal law.”).

25. *Johnson v. United States (Johnson I)*, 559 U.S. 133, 138 (2009).

26. See *United States v. Giggey*, 589 F.3d 38, 41–42 (1st Cir. 2009).

27. See *Johnson I*, 559 U.S. at 138.

28. 18 U.S.C. § 924(e)(1) (2012).

C. *The Federalism Problem Inherent in the Categorical Approach*

A federal court therefore has to interpret state law to apply ACCA. But how is a federal court to determine what a state statute means? With a certainty only possible from a court possessing discretionary review, the Supreme Court claimed that in many cases it will be “easy” because there will be “a state court decision [which] definitively answers the question.”²⁹ In practice, however, the issue may be a bit more difficult. It is true that where there is a case directly on point, the question is easy. For the question to be definitively answered, however, the highest court in a state must have directly confronted abstract questions about the boundaries of criminal statutes. For example: What is the minimum degree of force necessary to violate the statute? How serious does an offer for the sale of drugs have to be to violate the statute? Is “structure” defined more broadly by the statute than in the generic *Taylor* formulation?

There is no guarantee that a state court will have ever had the opportunity to answer these questions. In fact, the very foundations of our judicial system run against probing the outer edges of a crime. Prosecutorial discretion combined with incentives for prosecutors to avoid potential losses, the ubiquity of plea bargains in criminal law, and the lack of incentives for defendants to test the boundaries of the law with their conduct all operate to curb the opportunities for answers. On one side, the prosecutor may wish to avoid a costly trial and appellate process where the law is unclear. On the other, the defendant has a strong reason to plead to a crime with a lower sentence, especially if there is little doubt that the prosecutor would be able to secure a conviction on the lesser-included offense.³⁰ For instance, where it is unclear whether a defendant used the requisite amount of force for robbery, both the prosecution and defendant have an incentive to enter a plea deal for larceny.

Furthermore, state versions of the case or controversy requirement ensure that courts may not bindingly hold on the boundaries of the law when the question is not directly put to them.³¹ Therefore, so long as parties are avoiding the hard questions, state courts

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

30. The most recent Department of Justice data show that ninety-four percent of state felons sentenced in 2006 pleaded guilty. Sean Rosenmerkel et al., U.S. Dep’t of Justice, *Felony Sentences In State Courts, 2006 Statistical Tables*, NAT’L JUD. REPORTING PROGRAM, Dec. 2009, at 1, 25 tbl. 4.1 <https://www.bjs.gov/content/pub/pdf/fssc06st.pdf>.

31. The vast majority of States do not allow for advisory opinions to be issued absent a request from the legislature or executive branch of the state. See generally Jonathon D. Persky,

have no opportunity to clarify the law. And of course, legislatures are free to change or update the laws, meaning that if a court has yet to consider the newest iteration of a law, its precedent may not apply.

When faced with an unclear question of state law, a federal court can either guess correctly how the state court would rule or guess incorrectly.³² This runs contrary to the bedrock principle of federalism.³³ Some of the numerous problems which arise from this federalism tangle can be illustrated by examples drawn from cases on ACCA or the nearly identical provision in the United States Sentencing Guidelines.³⁴ Two examples serve to illustrate the problems: *United States v. Savage* and *United States v. Vann*.³⁵

In *Savage*, the Second Circuit determined that a Connecticut statute criminalizing the sale of narcotics could not serve as the basis for a career offender enhancement.³⁶ Citing to the Fifth Circuit, the court adopted the interpretation that “a mere offer to sell, absent possession, [did] not fit within the Guidelines’ definition.”³⁷ The court made clear that its concern was that such an offer could be made without intent to sell—“An offer to sell can be fraudulent, such as when one offers to sell the Brooklyn Bridge.”³⁸ A later Second Circuit case explained that unlike a potentially fraudulent offer, bona fide offers “made with the intent and ability to follow through on the transaction” would be sufficient to trigger the

Comment, “Ghosts That Slay”: A Contemporary Look at State Advisory Opinions, 37 CONN. L. REV. 1155 (2005).

32. See Sharika Robinson, Note, *Right, but for the Wrong Reasons: How a Certified Question to the Supreme Court of North Carolina Could Have Alleviated Conflicting Views and Brought Clarity to North Carolina State Law* 34 N.C. CENT. L. REV. 230, 230 (2012).

33. *Id.* at 230–31.

34. U.S. SENTENCING GUIDELINES MANUAL § 4B1.1–.2 (U.S. SENTENCING COMM’N 2016). Section 4B1.1 provides a sentence enhancement for “career offenders,” those who have two or more felony convictions for “crimes of violence” or “controlled substance offenses.” Those phrases are defined in § 4B1.2(a) and (b) respectively. Crime of violence is defined with a force clause identical to that of 924(e) and a longer list of enumerated offenses. “Controlled substance offense” is defined as “an offense under federal or state law, punishable by imprisonment for a term exceeding one year that prohibits the manufacture, import, export, distribution, or dispensing of a controlled substance” or its possession with “intent to manufacture, import, export, distribute or dispense.” While there are differences, for the purposes of this Note, they are unimportant. What is important is that the Career Offender Guidelines are also governed by the categorical approach. *Stinson v. United States*, 508 U.S. 36, 39 (1993).

35. *United States v. Vann*, 660 F.3d 771 (4th Cir. 2011); *United States v. Savage*, 542 F.3d 959 (2d Cir. 2008).

36. 524 F.3d at 964–65.

37. *Id.* at 965 (quoting *United States v. Price*, 516 F.3d 285, 288–89 (5th Cir. 2008)).

38. *Id.* at 965–66.

Guidelines.³⁹ The foregoing was simply a federal court interpreting a federal statute.

The problem arose in the court's understanding of Connecticut law. Connecticut defines "sale" to include offers.⁴⁰ Relying upon a 1972 Connecticut Supreme Court case,⁴¹ as well as opinions out of the Maine, Nevada, and Illinois courts of last resort, the Second Circuit determined that possession or control over the goods to be sold was not a requirement.⁴² However, a 2013 decision by the Connecticut Supreme Court suggests that the Second Circuit was wrong. In *State v. Webster* the Connecticut Supreme Court determined that an offer in the context of the statute should be rendered as "the presentation of a controlled substance for acceptance or rejection."⁴³ This language, as well as the court's rationale more broadly, implied that an offer which served as the basis of a Connecticut conviction for the sale of a controlled substance could not, in fact, be fraudulent.⁴⁴ At the least, *Webster* throws *Savage's* construction of Connecticut law into doubt. At the most, it means that the Second Circuit's interpretation was wrong.

What caused this situation was a combination of several problems with federal interpretation of state law. Connecticut's only pronouncements came from a 36-year-old case—a decision that was not even directly on point. With only that case to rely upon, the Second Circuit was forced to speculate what the law of Connecticut was. It appears to have guessed incorrectly.

Another example in the sentencing context that illustrates the problems with federal interpretation of state law involves a North Carolina statute that criminalizes taking indecent liberties with a child. The central issue with the North Carolina statute is whether it

39. *Pascual v. Holder*, 723 F.3d 156, 158–59 (2d Cir. 2013); *see also* *United States v. Sanchez*, 679 F. App'x 81, 83 (2d Cir. 2017) (explaining that *Pascual's* logic applies to the Sentencing Guidelines context.).

40. CONN. GEN. STAT. § 21a-240(50) (2013); *State v. Wassil*, 658 A.2d 548, 556–57 (Conn. 1995).

41. *State v. Brown*, 301 A.2d 547 (Conn. 1972).

42. *Savage*, 542 F.3d at 965. The other states' courts were used to show that similar language at common law meant mere offers to sell. *Id.* The court did not offer any support for its contention that a person need not have the means or intent to go through with the sale for it to be criminal under Connecticut law aside from the fact that possession was irrelevant. *Id.*

43. 60 A.3d 259, 265 (Conn. 2013).

44. *See id.* at 267 (noting that a jury could have found that the defendant "presented the [drug] in his hand for [the offeree's] acceptance, or at least indicated that it was available for sale . . ."). This language, in the context of explaining what constitutes an "offer," implies that a completely fictitious offer would not be enough, placing great weight on the apparent ability and intent to complete the sale.

criminalizes multiple offenses, and so warrants the modified categorical approach, or whether it criminalizes only one offense.⁴⁵ Sharika Robinson provides an in-depth analysis of how the Fourth Circuit was thrown into a state of confusion by the statute in *Vann*, and why that turmoil should prompt North Carolina to adopt a certification statute. Robinson explains that the *en banc* panel of the Fourth Circuit “could not reconcile its views, particularly because the North Carolina court’s interpretation of the [statute was] obscure.”⁴⁶ Ultimately, the majority concluded that the elements were set out in the alternative, so the modified categorical approach was appropriate.⁴⁷

Vann brought to light the issue of conformity across jurisdictions that arises when a state court has not addressed an issue directly.⁴⁸ The Fifth, Ninth, and Eleventh Circuits faced the same issue with the same statute.⁴⁹ The Fifth and Eleventh Circuits concluded that the modified categorical approach was not appropriate.⁵⁰ Like the Fourth Circuit, the Ninth Circuit applied the modified categorical approach.⁵¹

The problems illustrated by this circuit split fall into two categories: violations of federalism and inconsistencies in the federal courts. The federalism problems are more numerous. One problem is that if the federal court is incorrect, a state court might be forced to contradict the federal court’s reasoning.⁵² Another problem exists where a state court releases a later decision which is inconsistent with assumptions made in the federal court’s reasoning, creating confusion about the continuing validity of the federal court’s decision. Or, lower state courts (and for that matter, lawyers) seeking the correct meaning of a statute might look to the federal court’s interpretation for guidance, undermining the central principle that state courts are the ultimate arbiters of state law.⁵³

45. See Robinson, *supra* note 32 at 244–45.

46. *Id.* at 245.

47. United States v. Vann, 660 F.3d 771, 817 (4th Cir. 2011).

48. The ACCA and Career Offender Guidelines are focused on prior convictions. As such, many different jurisdictions may have reason to consider the meaning of a criminal law from one state.

49. United States v. Galarza-Bautista, 585 Fed.App’x 744 (9th Cir. 2014); United States v. Ramirez-Garcia, 646 F.3d 778 (11th Cir. 2011); United States v. Izaguirre-Flores, 405 F.3d 270 (5th Cir. 2008).

50. Robinson, *supra* note 32 at 247–48, 48 n.148.

51. *Galarza-Bautista*, 585 Fed. App’x at 745.

52. Robinson, *supra* note 32 at 231.

53. Johnson v. Fankell, 520 U.S. 911, 916 (1997) (“Neither [the Supreme] Court nor any other federal tribunal has any authority to place a construction on a state statute different from the one rendered by the highest court of the State.”).

The problem with federal uniformity is more difficult. Circuit splits may be exacerbated by procedural rules within the circuits.⁵⁴ Yet, the Supreme Court should not be resolving circuit splits on interpretations of state law because there is no reason to suppose that it will have a better grasp of state law than the circuits. But a circuit court's decision cannot be directly appealed to a state's highest court—the body with the final authority to say what the correct answer is.

Combined, the two problems make the categorical approach extremely problematic—both through a breakdown of federalism and an interference with the uniformity of the federal court system. Thus, the current use of the categorical approach undermines the workings of the judicial system both vertically and horizontally. While a difficult problem, this is not a problem without a solution. Indeed, it is a problem faced and solved before—all that is necessary is to apply that solution here.

II. CERTIFICATION IN THE CIVIL CONTEXT

The issue of state law interpretation in federal courts has long existed in the context of diversity jurisdiction for civil cases. This Part explains the origins of this problem in the civil context and its parallels to the ACCA context in Section A, and Section B discusses how interjurisdictional certified questions (hereinafter “certified questions”) provided a definitive solution. Section C briefly addresses the arguments against certification and the responses by proponents of certification. Ultimately, this Part seeks to explain how certification addresses the same problems in the civil context that ACCA faces, and to preview the pitfalls of certification in preparation for Part III, which will detail how certification could solve the issues in ACCA.

A. *Diversity Jurisdiction and Difficulties Ascertaining State Law*

In *Erie Railroad Co. v. Tompkins*,⁵⁵ the Supreme Court famously held, “[t]here is no federal general common law.”⁵⁶ Thus, for cases

54. See, e.g., Ryan Walters, Note, *Raise it or Waive it? Addressing the Federal and State Split in Authority on Whether a Conviction Under an Unconstitutional Statute is a Jurisdictional Defect*, 62 BAYLOR L. REV. 909, 935–36 (2010) (discussing the “law of the circuit” rule).

55. 304 U.S. 64 (1938).

56. *Id.* at 78.

before a federal court on diversity jurisdiction “the law to be applied in any case is the law of the state.”⁵⁷ This landmark decision served to restore “uniformity in the administration of the law of the state . . . ,” which the prior doctrine had undermined.⁵⁸

However, *Erie* created a new problem: “how should federal courts ascertain state law in cases where it is unclear?”⁵⁹ The Court itself did not attempt to divine the state law at issue in *Erie*, but instead remanded to the circuit court.⁶⁰ Subsequent cases established that federal courts hearing a case through diversity jurisdiction are, “in effect, only another court of the [s]tate.”⁶¹ However, “no matter how seasoned the judgment of the [federal] court may be, it cannot escape being a forecast rather than a determination” where state law is unsettled.⁶² Thus, the federal court must “look to analogous state court decisions, persuasive adjudications by courts of sister states, learned treatises and public policy considerations identified in state decisional law in order to make an ‘informed prophecy’ of how the state court would rule on the precise issue.”⁶³ In the civil context, a further and more complex difficulty can arise when choice of law forces a federal court to prophesize how the court of last resort of one state would guess how the courts of another state would interpret its law.⁶⁴

If these procedures sound like guesswork, that is because they are.⁶⁵ And, as in the ACCA context, litigants are unable to directly appeal the decision of the federal court to the state court for the final say.⁶⁶ One judge on a state court of last resort explained: “Federal judges generally do not have as much experience with state law as their state counterparts Incorrect predictions [of state law can] detract from the role of the state high court in declaring the

57. *Id.*

58. *Id.* at 75.

59. Judith S. Kaye & Kenneth I. Weissman, *Interactive Judicial Federalism: Certified Questions in New York*, 69 *FORDHAM L. REV.* 373, 376 (2000).

60. *Erie*, 304 U.S. at 80.

61. *Guar. Tr. Co. of N.Y. v. York*, 326 U.S. 99, 108 (1945).

62. *R.R. Comm’n of Tex. v. Pullman Co.*, 312 U.S. 496, 499 (1941).

63. *Rodriguez-Suris v. Montesinos*, 123 F.3d 10, 13 (1st Cir. 1997) (quoting *Blinzler v. Marriot Int’l, Inc.*, 81 F.3d 1148, 1151 (1st Cir. 1996)) (internal quotation marks omitted).

64. Kaye & Weissman, *supra* note 59, 378 (“As Judge Henry J. Friendly observed in such a situation, ‘[o]ur principal task, in this diversity of citizenship case, is to determine what the New York courts would think the California courts would think on an issue about which neither has thought.’”) (quoting *Nolan v. Transocean Air Lines*, 276 F.2d 280, 281 (2d Cir. 1960)).

65. John R. Brown, *Certification—Federalism in Action*, 7 *CUMB. L. REV.* 455, 455 (1977) (“[T]he federal judge must often trade his judicial robes for the garb of the prophet.”).

66. *See id.* at 456 (noting “the frustration for litigants when the rule of law [the federal court] prescribe[s] turns out to be a ticket for one ride only.”).

law of the state and hamper orderly development of the law.”⁶⁷ In other words, the same issues that manifest in the ACCA context also manifest in the civil context.⁶⁸

B. Certification as a Solution

State actors and federal courts have had ample opportunities to seek solutions to this problem throughout the nearly eighty years since *Erie*. In 1945, Florida broke new ground with a statute allowing federal courts to certify questions of law to the Florida Supreme Court.⁶⁹ However, because the Fifth Circuit was “either unaware of it or apprehensive in its use,” the statute was completely unused for fifteen years.⁷⁰ In 1960, however, the Supreme Court praised the “rare foresight” of the Florida Legislature in passing the statute, and instructed the Fifth Circuit to certify a question on remand.⁷¹ This decision “[u]nshackled” the certification of questions and the Fifth Circuit began to “frequently use[]” the procedure in Florida.⁷² With further approval by the Supreme Court,⁷³ certification procedures were ultimately adopted in forty-nine states.⁷⁴

67. Kaye & Weissman, *supra* note 59, 378–79. Chief Judge Kaye served on the New York Court of Appeals from 1983 until 2008. Sam Roberts, *Judith S. Kaye, First Woman to Serve as New York’s Chief Judge, Dies at 77*, N.Y. TIMES (Jan. 7, 2016), https://www.nytimes.com/2016/01/08/nyregion/judith-s-kaye-first-woman-to-serve-as-new-yorks-chief-judge-dies-at-77.html?mcubz=3&_r=1.

68. The ACCA context may actually suffer more acutely. Every force clause case asks about the minimum amount of force necessary to violate the statute, every divisibility question about wheat is an element rather than a means. *E.g. Mathis v. United States*, 136 S. Ct. 2243, 2257 (2016); *Johnson v. United States (Johnson I)*, 559 U.S. 133, 137–38 (2010). By contrast, not every case before a federal court by virtue of diversity jurisdiction will ask questions about the limits of state law.

69. 1945 Fla. Laws. Ch. 23098, § 1 (codified at FLA. STAT. § 25.031 (1998)). The statute officially provided only that “the Supreme Court of Florida may devise rules to govern such certifications,” and no promulgation occurred for at least 15 years. *Clay v. Sun Ins. Office*, 363 U.S. 207, 212 n.3 (1960). The Supreme Court, however, declared that “[i]t is not to be assumed . . . that such rules are a jurisdictional requirement for the entertainment by the Florida Supreme Court . . .” *Id.*

70. *Brown*, *supra* note 65, at 457.

71. *Clay*, 363 U.S. at 212.

72. *Brown*, *supra* note 65, at 457, 459.

73. See Kaye & Weissman, *supra* note 59, 382–86 (discussing multiple Supreme Court cases approving of certification).

74. Eric Eisenberg, Note, *A Divine Comity: Certification (At Last) in North Carolina*, 58 DUKE L.J. 69, 71 (2008). As the title of Eisenberg’s article suggests, the lone holdout is North Carolina. An additional complication is notable: despite adopting official certification procedures, the Missouri Supreme Court has held that the Missouri Constitution forbids it from answering a certified question. *Grantham v. Mo. Dep’t of Corr.*, No. 72576, 1990 WL 602159, at *1 (Mo. July 13, 1990) (en banc); *Id.* at 71 n.13.

There are commonalities among the procedures of certification, but the particulars vary from jurisdiction to jurisdiction. For the purposes of this Note, a high-level gloss will suffice. Certification “is a procedure by which an inferior court is able to obtain from a defining court a conclusive answer to a material question of law.”⁷⁵ When interpreting state law, federal courts are “inferior” to state courts of last resort because the federal courts’ decisions are not the ultimate interpretation. The provisions of the Uniform Certification of Questions of Law Act of 1995 are illustrative of the laws actually enacted. Section 3 of that Act empowers the highest court of a state to “answer a question of law certified to it by a court of the United States . . . if the answer may be determinative of an issue in pending litigation in the certifying court and there is no controlling appellate decision, constitutional provision, or statute of this State.”⁷⁶ Importantly, while the Uniform Law would allow a state court to answer the question of any federal court, a minority of jurisdictions will only accept certified questions from appellate courts.⁷⁷ Even if it comes from a proper certifying court, the state court may also choose to not answer such a question.⁷⁸

Certified questions are in no way “advisory.” The certifying court must provide the court with a question of law and the facts behind the question.⁷⁹ Many jurisdictions either require or permit the parties to brief the issue, and some allow oral argument.⁸⁰ In so doing, certification proceedings may “bear[] the hallmarks of the adversarial system and the purported benefits that follow.”⁸¹

Although numbers may vary jurisdiction to jurisdiction,⁸² Kaye and Weissman provided a window into the first fifteen years of New

75. Allan D. Vestal, *The Certified Question of Law*, 39 IOWA L. REV. 629, 629–30 (1951) (footnote omitted).

76. UNIF. CERTIFICATION OF QUESTIONS OF LAW ACT § 3 (NAT’L CONFERENCE OF COMM’RS ON UNIF. STATE LAWS 1995).

77. See Kaye & Weissman, *supra* note 59, at 396. When Kaye and Weissman’s article was published in 2000, thirty-six jurisdictions allowed certified questions from federal district courts. *Id.*

78. See UNIF. CERTIFICATION OF QUESTIONS OF LAW ACT § 3, § 3 cmt. (NAT’L CONFERENCE OF COMM’RS ON UNIF. STATE LAWS 1995).

79. *Id.* at § 6(a)(1)–(2).

80. Jessica Smith, *Avoiding Prognostication and Promoting Federalism: The Need for an Inter-Jurisdictional Certification Procedure in North Carolina*, 77 N.C. L. REV. 2123, 2131 (1999).

81. William G. Bassler & Michael Potenza, *Certification Granted: The Practical and Jurisprudential Reasons Why New Jersey Should Adopt a Certification Procedure*, 29 SETON HALL L. REV. 491, 522 (1998).

82. Indeed, given the size of New York, the development of the law, and its refusal to hear cases from district courts, the numbers in New York may be fairly low. Ohio, which allows Federal District Courts to certify questions, saw fifty-five cases during the almost thirteen years following its adoption of certification. Rebecca A. Cochran, *Federal Court*

York's experience with certification.⁸³ During that time, forty-five questions were certified by federal appellate courts, almost all of them by the Second Circuit.⁸⁴ The New York Court of Appeals agreed to answer thirty-nine, two of which were withdrawn, declined five, and had one pending when the article was published.⁸⁵ Between 1990 and 1994, nationwide federal appellate courts certified 120 questions, 119 of which were answered, and federal district courts certified 171, 165 of which were answered.⁸⁶

C. *The Debate Over Certification*

Like most doctrines, certification has its proponents and detractors. Although both sides of the debate make important points, empirical studies have repeatedly shown that the “overwhelming majority” of judges find that certification is useful, that the disadvantages of certification procedures are not significant, and that the disadvantages that do exist are outweighed by the benefits.⁸⁷ In addition to its support within the judiciary, certification enjoys significant support from legal commentators as well as institutions such as the American Law Institute and the Judicial Administration Division of the American Bar Association.⁸⁸

This list of support is not meant to undermine the detractors' objections, but rather to present their arguments as those of a vocal minority. Their concerns must be taken seriously, especially as some apply with special significance in the ACCA context. Conversely, some do not naturally transfer from civil trials to criminal sentencing.

In challenging the “sacred cow in our modern judicial barnyard,” Judge Selya of the First Circuit argued that certification had “not lived up to its promise” and had “been plagued by theoretical and practical difficulties since its inception”⁸⁹ In concluding that

Certification of Questions of State Law to State Courts: A Theoretical and Empirical Study, 29 J. LEGIS. 157, 169 (2013).

83. Kaye & Weissman, *supra* note 59, at 397.

84. *Id.* Specifically, forty-four questions came from the Second Circuit and one came from the Eleventh. *Id.*

85. *Id.*

86. JONA GOLDSCHMIDT, AM. JUDICATURE SOC'Y, CERTIFICATION OF QUESTIONS OF LAW: FEDERALISM IN PRACTICE 35 (1995).

87. Bassler & Potenza, *supra* note 81, at 505–07 (describing empirical studies of certification).

88. *Id.* at 496–97.

89. Bruce M. Selya, *Certified Madness: Ask a Silly Question . . .*, 29 SUFFOLK U. L. REV. 677, 678, 691 (1995).

“neither federalism nor efficiency nor fairness” justifies certification,⁹⁰ Judge Selya’s critique weaves together four of the main concerns with certification: delay and expense, burdening state court dockets, impairing the development of state law, and the claim that certified questions are advisory or otherwise too abstract.⁹¹

The arguments about the delay (and thus expense) that accompanies certification are largely empirical. The average time a litigant spends waiting for an answer is around six months.⁹² However, there have certainly been instances where the delay has been longer. Judge Selya noted a six-year delay in one case, and a greater than two-year wait for a plurality opinion refusing to answer the question in another.⁹³ A six-month delay is certainly reasonable in light of the time the parties spend briefing the issues and the court writing its decision.⁹⁴ And although six years is certainly unreasonable, the low average wait time suggests that this problem is often overstated.⁹⁵

Critics charge that “[c]ertified questions also add to the workload of the responding court” and use “scarce judicial resources to tackle . . . ‘somebody else’s problem.’”⁹⁶ But the actual use of certification suggests that “the certification floodgates have not opened as feared.”⁹⁷ There are two reasons this concern has not manifested: the discretion of federal courts and the discretion of state courts.⁹⁸ Federal courts do not certify questions “automatically or unthinkingly” but rather do so with “much judgment, restraint and

90. *Id.* at 691.

91. *See* Bassler & Potenza, *supra* note 81, at 509–10 (discussing the concerns with certification). A fifth concern raised in Bassler & Potenza article is the interaction between certification and state constitutions. Obviously, if state constitutions forbade certification, it would no longer be an attractive solution for the problems posed by ACCA. However, thus far only one state constitution appears to. *See supra* note 74 and accompanying text.

92. Bassler & Potenza, *supra* note 81, at 511 (listing the median time as “approximately six months”); Eisenberg, *supra* note 74, at 77–78 (citing a study that found the mean time to be 6.6 months). As Eisenberg notes, this is the average for appeals courts’ requests, while the study found the average for district courts to be 8.2 months. *Id.*; *see also* Kaye & Weissman, *supra* note 59, at 397 (“The average time from certification to acceptance or rejection [in New York] has been approximately six weeks, and the average time from acceptance to resolution about six months.”).

93. Selya, *supra* note 89, at 681 n.18 (citing *Wood v. City of E. Providence*, 811 F.2d 677, 678 (1st Cir. 1987) and *Cuesnogle v. Ramos*, 835 F.2d 1486, 1489–90 (1st Cir. 1987)).

94. *See* Bassler & Potenza, *supra* note 81, at 511–12.

95. John B. Corr & Ira P. Robbins, *Interjurisdictional Certification and Choice of Law*, 41 VAND. L. REV. 411, 456–57 (1988).

96. Selya, *supra* note 89, at 682.

97. Bassler & Potenza, *supra* note 81, at 514.

98. *See id.* (attributing the unopened “certification floodgates” to, *inter alia*, federal and state court discretion).

discretion”⁹⁹ The result is that federal courts exercise their power to certify “sparingly.”¹⁰⁰ This is likely due not only to their respect for the state courts’ time, but also because the federal courts, aware of the delay, have no desire to see their own dockets congested.¹⁰¹ After federal courts exercise discretion in certifying a question, the state court is free to decline them. Thus, even if the federal courts were poor gatekeepers, the state “court will always have a means to control its caseload”¹⁰²

A third criticism peculiarly argues that the state courts benefit from federal courts prognosticating on state law. Critics suggest that the benefit to state courts is the federal courts’ insight into their precedent and law.¹⁰³ This “cross-pollination” occurs when federal courts “anticipate” the changes state law will make, and “their pronouncements of state law echo beyond the case at hand and influence positively the course of state law development.”¹⁰⁴ While this may sound appealing, it ignores the state’s sovereignty and right to have the final say on its law, and it creates significant confusion to have two sovereigns interpreting the same law.¹⁰⁵

A gentler version of this critique argues that federal courts gain “more understanding[] and a healthier respect for state courts” when the federal court assumes the state court’s task.¹⁰⁶ While Judge Selya is certain that “[t]he risks are very small” when federal courts do not certify a question,¹⁰⁷ that is cold comfort to the plaintiff denied restitution or the defendant bankrupted by a federal misinterpretation of state law. Recognizing this, Judge Selya points out that “this argument only goes so far; such a litigant is no more

99. Brown, *supra* note 65, at 458 (quoting *Barnes v. Atlantic & Pac. Life Ins. Co. of Am.*, 514 F.2d 704, 705 n.4 (5th Cir. 1975)).

100. Bassler & Potenza, *supra* note 81, at 514.

101. *Id.* at 514 n.118.

102. Smith, *supra* note 80, at 2146.

103. See David L. Shapiro, *Federal Diversity Jurisdiction: A Survey and a Proposal*, 91 HARV. L. REV. 317, 324 (1977); William M. Landes & Richard A. Posner, *Legal Change, Judicial Behavior, and the Diversity Jurisdiction*, 9 J. LEGAL. STUD. 367, 372, 386 (1980) (“[W]e find that the federal courts in diversity cases appear to make a significant contribution to the continuing development of the common law.”).

104. Geri J. Yonover, *A Kinder, Gentler Erie: Reining in the use of Certification*, 47 ARK. L. REV. 305, 339–40 (1994). Yonover’s view is informed by his position that federal judges are more competent than state judges both due to the federal appointment processes and as a matter of substantive familiarity with the law. *Id.* at 336–37. Bassler & Potenza had the following response: “Needless to say, this is a view which the authors, including the one having the most pertinent experience (Judge Bassler has sat both as a federal judge and a judge of the Superior Court of New Jersey), strongly disagree.” Bassler & Potenza, *supra* note 81, at 516 n.124.

105. Bassler & Potenza, *supra* note 81, at 517.

106. Selya, *supra* note 89, at 687.

107. *Id.*

greatly disadvantaged than a litigant who loses in a lower state court and is thereafter denied discretionary review, only to have the [S]tate's high court decide the issue favorably in some other case at a later date."¹⁰⁸ Noting that there is no right to be heard by the ultimate authority, Judge Selya concludes that "[f]airness, as a rationale for certification, does not take us very far."¹⁰⁹

With due respect to Judge Selya, he has ignored the *ability* to present the question to the court of last resort. Absent certification, a litigant arguing state law in the federal courts will get *a* final answer, while a litigant in the state courts may petition to get *the* final answer. There is a difference between a state high court refusing to hear a case and never being able to request the hearing. Fairness, it seems, takes us further than Judge Selya recognized.

A final line of attack is based upon the premise that certified questions are advisory opinions: "[T]he advisory nature of certified questions poses a psychological barrier to enthusiastic engagement with the issues. The view that certified questions present a live case and controversy to the responding court requires judges to accept a fiction that may prove difficult to swallow."¹¹⁰ This concern is shared by a substantial minority of judges. An empirical study found that two-thirds of the judges surveyed did not see certified questions as advisory opinions, while the other third did.¹¹¹ Proponents of certification respond that the problems raised by advisory opinions are simply not present with certification, as most of the benefits of the adversarial system exist when the court answers a certified question.¹¹² The adversaries often argue the question, orally or written, and there are very real consequences of the decision with a negative impact on one party.¹¹³

Certification in the civil context has proven a much lauded and successful procedure in defusing the problems created by *Erie*. Its critics, while raising significant points, do not present a compelling enough argument to abandon it—all that stands in the way of the entire country having certified questions is the legislature of North Carolina and the Supreme Court of Missouri.¹¹⁴ The remaining

108. *Id.* at 690.

109. *Id.* at 691.

110. *Id.* at 682.

111. Corr & Robbins, *supra* note 95, at 447, 455. A Kentucky Justice, however, succinctly responded to the question of whether the advantages of certification outweighed its disadvantages: "No. Our experience had been that only advisory opinions have been rendered." *Id.* at 468.

112. See, e.g., Bassler & Potenza, *supra* note 81, at 521–22; Corr & Robbins, *supra* note 95, at 455–56; Eisenberg, *supra* note 69, at 83–85; Smith, *supra* note 80, at 2138–41.

113. Bassler & Potenza, *supra* note 81, at 522.

114. See *supra* note 74 and accompanying text.

question is whether this solution can be successfully duplicated in the ACCA context.

III. CERTIFICATION IN THE CATEGORICAL APPROACH CONTEXT

The accuracy provided and federalism preserved by certification in the *Erie* context could easily be imported to the ACCA context. The legislative framework already exists—the courts need only use it. By certifying questions of law, the federal courts could ensure that a given statute is actually divisible, that a given felony contains the amount of violence they believe it to, and that a particular drug offense requires a bona fide offer. Section A explains how the already-extant certification statutes allow for certification in the ACCA context. Section B considers whether the claimed problems with certification manifest in the categorical approach context and whether there are problems unique to that context. Finally, Section C addresses what problems are not solved with this approach.

It is difficult to say as an empirical matter that no federal court has certified a criminal sentencing question it faced under the categorical approach. But it is clear that courts do not see certification as a method for dealing with criminal sentencing issues. In *Mathis v. United States*,¹¹⁵ the Supreme Court sought to support its claim that the “threshold inquiry [for whether a statute sets forth elements or means] is easy in this case, as it will be in many others.”¹¹⁶ Seeking to show the ease of determining state law, the Court stated that judges would have three sources from which they might easily determine the answer: state court decisions; the statute itself; and using the “peek” method, by looking briefly to the record documents to see how a given crime was charged.¹¹⁷ However, it did not mention the option presented in this Note—simply asking the state court. Granted, where there is a decision on point (as there was in *Mathis*¹¹⁸) no such certification is necessary. But it would certainly lead to greater certainty and clarity than the “peek” method the Court endorses.¹¹⁹ At least one federal court of appeals also does

115. 136 S. Ct. 2243 (2016).

116. *Id.* at 2256.

117. *Id.* at 2256–57.

118. *Id.* at 2256.

119. The “peek” method is likely to prove highly inaccurate, and not just as compared to certification. Different prosecutors may charge an offense or fashion jury instructions differently, so some may concede that a statute sets out elements while others may argue that it lays out only means. If defenders and prosecutors are strategic at the federal level, they may bring a case to the federal courts of appeals only when the documents below support their favored reading. The court of appeals would, per *Mathis*, peek at those documents and make a ruling,

not seem to view certification as an option, but rather feel that they are bound to “make an informed prophecy as to the state court’s likely stance.”¹²⁰ If any court has used certification while engaging in the categorical approach, it would be an outlier. Neither the Supreme Court nor lower courts seem to recognize certification as an option, let alone a solution. This Note proposes that courts should do so with little hesitation, and see certification as the preferred alternative where no state law yet definitively answers the question.

A. *Already Extant Certification Statutes Allow for Certification of ACCA Questions*

The language of certification statutes and rules fall broadly into two categories with respect to the requirements for the law certified. One group of states only allows for certification “if the answer is determinative of the cause.”¹²¹ Black’s Law Dictionary defines “cause” as “[a] lawsuit; a case.”¹²² “Case,” in turn, means “[a] civil or criminal proceeding, action, suit, or controversy at law”¹²³ Given that the question of state law would be determinative of the case, insofar as it would control the length of sentence, these statutes should still allow the state court to answer the certified question. This group of states adopted almost word for word the Uniform Certification of Questions of Law Act of 1967, while the second group patterned their statutes on the 1995 revision.¹²⁴

but the ruling would likely be fashioned broadly (i.e., burglary under the Iowa statute from *Mathis* is not divisible). This ruling would then hold even in cases where the charging documents would suggest the opposite conclusion. In other words, the federal court would believe it had ascertained a definitive answer to state law when in fact there was a significant split. This would cause a substantial amount of injustice. It may come as no surprise that I would suggest instead of ever using the peek method, the court should certify the question for a binding and determinative answer.

120. *United States v. Tavares*, 843 F.3d 1, 14–15 (1st Cir. 2016) (quoting *Andrew Robinson Int’l, Inc. v. Hartford Fire Ins. Co.*, 547 F.3d 48, 51 (1st Cir. 2008)).

121. FLA. R. APP. P. 9.150(a); *see, e.g.*, Ga. Code Ann. § 15-2-9 (2015 & Supp. 2017); HAW. R. APP. P. 13; IDAHO R. APP. 12.3; MISS. SUP. CT. R. 21.

122. *Cause*, BLACK’S LAW DICTIONARY (10th ed. 2014). This is the only definition that fits in Anglo-American jurisdictions. “Cause” may also mean “something that produces an effect or result” or “[a] ground for legal action” *Id.*

123. *Case*, BLACK’S LAW DICTIONARY (10th ed. 2014).

124. UNIF. CERTIFICATION OF QUESTIONS OF LAW ACT § 2 (NAT’L CONFERENCE OF COMM’RS ON UNIF. STATE LAWS 1995); UNIF. CERTIFICATION OF QUESTIONS OF LAW ACT § 1 (NAT’L CONFERENCE ON COMM’RS ON UNIF. STATE LAWS 1967); FLA. R. APP. P. 9.150(a) (copying the 1967 Act); *Legislative Fact Sheet—Certification of Questions of Law (1995)*, UNIFORM L.COMM., [http://www.uniformlaws.org/LegislativeFactSheet.aspx?title=Certification%20Of%20Questions%20of%20Law%20\(1995\)](http://www.uniformlaws.org/LegislativeFactSheet.aspx?title=Certification%20Of%20Questions%20of%20Law%20(1995)) (last visited Oct. 1, 2017) (listing states that adopted the 1995 Act).

The second group uses more permissive language, merely requiring that the question of state law “could determine the outcome of a matter pending in the requesting court”¹²⁵ or “that determinative questions of [state] law are involved in a case pending before [the certifying] court.”¹²⁶ This more lax requirement for what the question determines would allow any issue which turns on state law or is determinative of any proceeding to be certified. In these jurisdictions, the fact that the matter is a criminal sentencing as opposed to a civil action makes no difference on the face of the statute.

Thus, the statutes already in place allow for certification in the criminal context as well as the civil. Indeed, on at least two occasions, federal courts have utilized certification in habeas corpus cases.¹²⁷ The legislative and executive branches need not take any further action; the judiciary, on its own, may simply use the framework the other branches created for it.

B. Issues Certifying Categorical Approach Questions

The fact that certification in the criminal categorical context provides increased clarity and is easily implemented must be measured against the costs of implementation. A starting point for examining the potential negatives are the criticisms which have been levied against certification in the civil context.

Some problems simply are not as problematic. A delay of several months is less of a difficulty for someone convicted of being a felon in possession of a firearm than it might be for a civil litigant. To be eligible for ACCA enhancements, a convict is necessarily eligible also for a ten-year maximum sentence under 18 U.S.C. § 922(g).¹²⁸ Although the Career Offender Guidelines may present a different situation, the fact remains that the delay in sentencing ultimately is

125. CAL. R. CT. 8.548(a); *see, e.g.*, ALASKA R. APP. P. 407(a); ARIZ. REV. STAT. ANN. § 12-1861 (2016 & Supp. 2017); N.Y. CT. R. 500.27(a); W. VA. CODE ANN. § 51-1A-3 (LexisNexis 2016); WIS. STAT. ANN. § 821.01 (West 2007); WYO. STAT. ANN. § 1-13-106 (West 2017).

126. N.Y. CT. R. 500.27(a).

127. *See* *Shea v. Heggie*, 624 F.2d 175 (10th Cir. 1980); *Adams v. Murphy*, 653 F.2d 224 (5th Cir. 1979). A federal court also certified a criminal issue in *Noble v. U.S. Parole Comm'n*, 82 F.3d 1108 (D.C. Cir., 1996), but the court certified the criminal issue to the District of Columbia Court of Appeals rather than a state court, *id.* at 1113.

128. *See* 18 U.S.C. § 924(a)(2) (2012) (“Whoever knowing violates subsection . . . (g) . . . of section 922 shall be fined as provided in this title, imprisoned not more than 10 years, or both.”). Data from 2012 indicate that 95.6% of offenders convicted under § 922(g) were imprisoned, with three quarters serving twenty-four months or less. U.S. SENTENCING COMM’N, QUICK FACTS: FELON IN POSSESSION OF A FIREARM 1 (n.d.), https://www.ussc.gov/sites/default/files/pdf/research-and-publications/quick-facts/Quick_Facts_Felon_in_Possession_of_a_Firearm.pdf.

just the service of part of the sentence.¹²⁹ The parties should find the delay palatable in exchange for the certainty.

However, the expense question remains. Presumably, it would be more costly for both parties to brief and argue the question of state law before the state court. But, as it stands, the parties would need to brief the questions already. The added expense likely would not be great, certainly not great enough to outweigh the benefits of certification. In the criminal context, the expense may never be enough to outweigh the benefits. The primary reason is that the financial burden of criminal litigation falls upon the government—the prosecutor will always be a federal employee, and they will often be opposed by a government-employed federal defender. In the civil context, litigants may be deterred from certifying questions of law in a purely cost-benefit analysis. When the case is criminal, however, the prosecutor is focused not only on the instant case but also on ensuring the law's development for the next case. If the defense attorney is public, they share this concern. Many private defense attorneys will as well. But if not, their client's liberty interest is still greater than money, and so the defense remains less likely to be deterred by expense.

This use of certified questions would not only avoid the impairment of state law, but would actually serve to develop it. State courts often do not have opportunities to examine the outer boundaries of statutes, and, as discussed above, other actors have little reason to test them. By certifying questions of law for categorical purposes, the murky edges of criminal law could be defined. Furthermore, these opinions would not be merely advisory or too abstract. Parties with interests of the highest nature, liberty and justice, will be fiercely litigating the issues with all the benefits and energy of the adversary system.

The concern about overburdening the state, however, exists with special significance in this context. It would be easy to note that there are a limited number of criminal statutes, and a limited number of essential questions of state law. Once a state has determined that a burglary statute, for example, is divisible in the meaning of *Mathis*, the issue would be settled. Were we living in a different time, such a contention would show that certification in this context would, in fact, burden state courts less than in the *Erie* context. The Armed Career Criminal Act, however, takes us out of the realm

129. See *Betterman v. Montana*, 136 S. Ct. 1609, 1617 n.9 (2016) (noting that while defendants may be incarcerated post-conviction, “postconviction incarceration is considered punishment for the offense [and so] a defendant will ordinarily earn time-served credit for any period of presentencing detention.”).

of ordinary times. *Johnson II* and *Welch v. United States* exemplified an opening of the floodgates by allowing for retroactive collateral ACCA challenges.¹³⁰ If this flood reaches the state courts, it might overwhelm them. All this suggests, however, is that while the *Johnson II* challenges are pending, federal courts should control the amount of questions actually certified. Once this flare up wears down, they can certify more. Alternatively, the state courts could face the flood now and leave no question unanswered, allowing the federal courts to never darken their dockets again (at least in this context). That certification is discretionary, however, for both the federal and state courts can still serve as a check until this tumultuous time is over.

Beyond the problems in *Erie*, there are some additional problems that the categorical approach creates. One issue is timing. By their nature, sentencing enhancements for prior convictions may involve laws that have since been reformed or repealed. Thus, the incentives are lower for a state court to answer the question: why interpret a repealed statute? The double discretion of federal and state courts in deciding, respectively, whether to certify and whether to answer should be used here. Federal courts simply should not certify repealed statutes unless they are facing a significant number of cases where the statute is implicated. The same logic suggests not certifying statutes which have been substantially revised. The state courts may simply decline to answer should they receive such a request. In either type of case, the litigants would be in no worse position than they are under the current practice.

A second problem is that predicate offense cases may involve prior convictions from multiple jurisdictions. ACCA requires three convictions for a sentence to be enhanced. But one convict may have far more qualifying convictions. Suppose a given individual has been convicted of five separate burglaries in five states. Some states may already have answered whether their crime is defined more broadly than the generic *Taylor* definition, and if so whether it is divisible such that the court may still determine if a particular individual's conviction falls within the generic definition. If three of the five convictions clearly qualify, no issue is presented. But, if only two are clearly identified, the court would need to decide whether to certify all three other offenses or certify only one at a time. From

130. See *Welch v. United States*, 136 S. Ct. 1257, 1265 (2016) (holding that *Johnson II* applies retroactively on collateral review); *Johnson v. United States (Johnson II)*, 135 S. Ct. 2551, 2263 (2014) (striking down the residual clause of ACCA). The Career Offender Guidelines will not face the same type of overwhelming flood following *Johnson II* because no part of the definition has been struck down. *Beckles v. United States*, 137 S. Ct. 886, 897 (2017).

the perspective of accuracy and avoiding undue delay, certifying all three questions would be ideal, but if all federal courts did this, state courts might be overwhelmed. Additionally, if the certifying court is a federal district court, it may not be able to certify to a given jurisdiction: some states only answer questions from appellate courts.¹³¹

In such a case, the federal court should nonetheless certify questions to all jurisdictions that will accept them. By certifying all questions at once, the court ensures that there will be only one delay period. If the court instead certifies one question, waits to hear the response, and certifies the next question, delays will run consecutively and create too long of a wait. Additionally, the limited number of criminal statutes that could qualify as predicates results in a limited number of possible questions. Once the state court has answered the question once, it will not need to do so again. It is preferable to have these questions answered definitively early so that other federal courts (not to mention state courts and criminal attorneys) receive clarity quickly. A federal district court could then engage in guesswork to determine the answers to unclear questions for jurisdictions which decline to answer the question or to which it may not certify only when there are not sufficient predicates.

A final issue specific to the criminal categorical approach is the potentially shifting standards. *Taylor*, the two *Johnson* cases, and *Mathis* demonstrate that the Supreme Court has settled many of the questions in the ACCA context, but overruling is always possible.¹³² Furthermore, the Supreme Court has yet to definitively determine the limits of what constitutes a “serious drug crime.” As discussed above, the federal courts of appeals have converged on a definition with the “bona fide offer” requirement, but that requirement could be simply rejected by the Supreme Court. There is a federal standard being applied whenever a federal court decides one of these cases. It is perfectly permissible to certify the question of state law, but what the question is may differ.¹³³ For example, under the current offer to sell drug standard, the federal courts would ask: “Does

131. See, e.g., FLA. R. APP. P. 9.150(a) (“On either its own motion or that of a party, the Supreme Court of the United States or a United States court of appeals may certify. . . questions of law . . .”).

132. Indeed, *Johnson II* overruled a line of Supreme Court precedent not even ten years old. 135 S. Ct. at 2563.

133. By this I mean the question that is entirely state law, questions such as “How much force does robbery require?” “Is breaking into a car burglary under this statute?” “Must the prosecutor charge these different things as elements, or are they simply means?” I do not mean to suggest that it would be appropriate for the federal court to ask, “Does this statute require violent force capable of causing physical pain or injury to another?” The state court should be asked only to provide the input—the federal court must still apply the standard.

this statute criminalize offers to sell drugs which are fraudulent, or only offers ‘made with the intent and ability to follow through on the transaction?’”¹³⁴ But if they ask that question for ten years, receive answers from most jurisdictions, and thus have settled law, nothing prevents the Supreme Court from creating a new standard, for example, requiring that an offer is allowed only where the defendant had the *immediate* ability to follow through with the transaction. Suddenly, there is a different question.

This problem cannot exist in the *Erie* context, where no federal standard is applied. Here, it creates a new danger: multiple rounds of sudden short bursts of certification whenever the Supreme Court changes federal standard. But, this is still preferable than the alternative. There will already be a flurry of activity in federal courts, and the federalism and accuracy dangers that go with it justify passing some of that activity along to the state courts.

C. *The Problems Left Unsolved*

This Note proposes a solution that is more patch than panacea. The aim of using certification in the ACCA context is to ameliorate the federalism and accuracy problems inherent in applying a categorical approach to determine whether state law meets a federal definition. There are two problems in particular that are left unanswered by this Note.

First is the broad moral and policy question: Should we have these mandatory enhancements at all? Much has been written about the wisdom (or lack thereof) of enhancements like ACCA.¹³⁵ This Note is explicitly neutral on that question. The fact is that we have such enhancements and lawyers and judges must navigate them. This Note is focused on patching the immediate problem, rather than the larger policy question.

The second problem is the seeming lack of clarity and consistency within the doctrinal web that the Supreme Court has woven around ACCA. As one federal circuit court of appeals recently noted while considering a Career Offender Guidelines case:

Even a careful reader of this opinion may at this point feel lost. We began with a seemingly simple question. Has Tavares been

134. *Pascual v. Holder*, 723 F.3d 156, 159 (2d Cir. 2013) (providing the quoted standard).

135. See U.S. SENTENCING COMM’N, 2011 REPORT TO CONGRESS: MANDATORY MINIMUM PENALTIES IN THE FEDERAL CRIMINAL JUSTICE SYSTEM ch. 5 (2011) (discussing the debate surrounding these kinds of enhancements), <https://www.ussc.gov/research/congressional-reports/2011-report-congress-mandatory-minimum-penalties-federal-criminal-justice-system>.

convicted of a crime of violence? Trying to answer that question then led us down several rabbit holes: Is Massachusetts ABDW a divisible offense under *Descamps* [*v. United States*, 133 S. Ct. 2276 (2013),] and *Mathis* [*v. United States*, 136 S. Ct. 2243 (2016)]? How does Massachusetts law define the relationship between the two common forms of the offense? Does *Voisine v. United States*, 136 S. Ct. 2272 (2016),] upend the circuits' wide consensus that recklessly causing injury is different than using force against a person?¹³⁶

The solution proposed in this Note will not entirely dismantle the “Rube Goldberg of jurisprudence of abstractions piled on top of one another in a manner that renders doubtful anyone’s confidence in predicting what will pop out at the end.”¹³⁷ But, it will fill in the first and second rabbit hole referenced in *Tavares*. And, it enables the judiciary to better ensure certainty in cases to come. The First Circuit would have been surer of the questions of Massachusetts law, even though it would still have been left with some thorny questions of federal law.¹³⁸

The advantage of this proposal over other proposed solutions is its pragmatism and immediate applicability. Scholars suggesting complete solutions must propose legislative action.¹³⁹ A complete solution may ultimately be desirable. However, this Note proposes a solution that litigants and judges may put into practice today, without further action from any legislature. It can thus immediately solve some of the issues created by the categorical approach.

CONCLUSION

Certification is ready and waiting to be applied in the criminal sentencing, categorical approach context. It would not fix all of the

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

137. *Id.*

138. See generally Daija M. Page, *Forcing the Issue: An Examination of Johnson v. United States*, 65 U. MIAMI L. REV. 1191 (2011) (arguing that the force clause is ambiguously drafted and the Supreme Court was incorrect in its interpretation of that clause in *Johnson v. United States (Johnson I)*, 599 U.S. 133 (2010)).

139. Avi M. Kupfer, Note, *A Comprehensive Administrative Solution to the Armed Career Criminal Act Debacle*, 113 MICH. L. REV. 151, 154 (2014) (proposing that Congress delegate to federal agencies the ability to create a binding list of predicate felonies.); see also *Tavares*, 843 F.3d at 19 (the First Circuit endorsed a federally created “list of state and federal laws deemed to be crimes of violence that warranted the desired penalties and sentencing enhancements.”).

problems present with the current way that federal courts apply sentencing enhancements for state predicate convictions. But it would ensure that such a system does not damage federalism and that individual defendants are receiving sentences that correspond with Congress's intentions in creating these sentencing enhancements.

State court dockets should be respected and not overwhelmed with certification requests. But, should federal courts begin to certify in this context, state courts will be able to answer all of the open questions in their jurisdictions fairly quickly. Moving forward, certification would only be necessary where the federal courts change the standard, where the state adopts or revises a criminal statute, or where the state court reinterprets one.

The ability to ensure accuracy in the deprivation of liberty of a person and the faithfulness to the principles of federalism would outweigh even a greater burden on state courts. Certification is an available remedy to these issues. For this reform to take effect, all that is necessary is for litigants to ask for it or federal courts to start using it.