A Comprehensive Administrative Solution to the Armed Career Criminal Act Debacle

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A Comprehensive Administrative Solution to the Armed Career Criminal Act Debacle

Avi M. Kupfer*

For thirty years, the Armed Career Criminal Act (“ACCA”) has imposed a fifteen-year mandatory minimum sentence on those people convicted as felons in possession of a firearm or ammunition who have three prior convictions for a violent felony or serious drug offense. Debate about the law has existed mainly within a larger discussion on the normative value of mandatory minimums. Assuming that the ACCA endures, however, administering it will continue to be a challenge. The approach that courts use to determine whether past convictions qualify as ACCA predicate offenses creates ex ante uncertainty and the potential for intercourt disparities. Furthermore, the Supreme Court’s guidance on sentencing ACCA defendants has been unclear. The resulting ambiguity creates inequity between defendants and fails to give them fair warning of the statute’s scope. This ambiguity also depletes the resources of courts, defendants, and prosecutors and prevents the statute from realizing its full potential of deterring violent crime. This Note argues that rather than allowing this debacle to continue, Congress should delegate to a federal agency the task of compiling a binding list of state statutes that qualify as predicate offenses. Under this approach, the states would assist the federal agency by providing initial guidance on their ambiguous statutes. The U.S. Sentencing Commission has the manpower, subject familiarity, and institutional incentives to build and maintain the appendix, and state sentencing commissions would make ideal partners. In states that do not have sentencing commissions, comparable agencies and even properly incentivized attorneys general may be able to aid the federal Sentencing Commission. Congress should leverage this undertaking to resolve related definitional questions about the meaning of a violent crime in other areas of federal law.

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### Introduction

The Armed Career Criminal Act (“ACCA”), a federal criminal sentencing statute codified in a few brief sentences, has attracted substantial attention from the Supreme Court. Most ACCA cases would probably never be appealed were it not for the statute’s life-altering impact—a fifteen-year mandatory minimum sentence for felons found in possession of a firearm or ammunition who have three previous convictions for a “violent felony” or “serious drug offense.”

Although judges sentence relatively few offenders under the statute, frustrated courts, defendants, and prosecutors expend considerable resources on ACCA trials and appeals. Broad and imprecise statutory language as well as cryptic Supreme Court interpretations have predictably

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2. U.S. Sentencing Comm’n, Mandatory Minimum Penalties in the Federal Criminal Justice System 282–84 (2011) [hereinafter Mandatory Minimum Report], available at [http://www.ussc.gov/Legislative_and_Public_Affairs/Congressional_Testimony_and_Reports/Mandatory_Minimum_Penalties/20111031_RtC_Mandatory_Minimum.cfm](http://www.ussc.gov/Legislative_and_Public_Affairs/Congressional_Testimony_and_Reports/Mandatory_Minimum_Penalties/20111031_RtC_Mandatory_Minimum.cfm) (showing that of over 70,000 offenders analyzed, only 489 of 592 offenders who qualified for the ACCA enhancement in 2010 were sentenced under it). Over 5,600 individuals, or approximately 3 percent of federal inmates, qualify for the sentencing enhancement. Id. at 288. As this Note discusses, it is not completely clear which statutes count toward sentencing under the ACCA, but U.S. Sentencing Commission data should provide a rough estimate.

created confusion over the ACCA’s scope. As a result, defendants routinely challenge its application. Even among offenders convicted of crimes carrying mandatory minimum penalties—a group that proceeds to trial at nearly twice the federal average for criminal defendants\(^4\)—those sentenced under the ACCA are nearly three times as likely to get to trial.\(^5\)

The ACCA’s ambiguous reach stems mainly from uncertainty over which convictions count as ACCA predicate offenses. Three convictions for a “violent felony” or “serious drug offense” qualify felons in possession for sentencing under the ACCA,\(^6\) but the statute imprecisely defines these terms, and there is particular confusion about the meaning of a violent felony. The ACCA lays out two ways that a conviction can be a violent felony predicate offense. It can have an element that involves “the use, attempted use, or threatened use of physical force against the person of another.”\(^7\) Alternatively, it can be “burglary, arson, or extortion, involve[ ] use of explosives, or otherwise involve[ ] conduct that presents a serious potential risk of physical injury to another.”\(^8\) The “otherwise” catchall tacked onto the second prong of the violent felony definition is known as the residual clause. Its breadth is a source of substantial judicial confusion and academic debate.\(^9\)

Unclear guidance from the Supreme Court on how sentencing courts should decide when a given conviction counts as an ACCA predicate offense contributes to the statute’s ill-defined outer limits. The Court has directed federal judges to use a categorical approach to resolve whether a past conviction qualifies as an ACCA predicate. Thus, sentencing courts must determine if the elements of the statute under which the offender was convicted—rather than the underlying behavior that resulted in that conviction—amount to a violent felony or serious drug offense. This creates the potential for significant variance among lower courts.\(^10\)


\(^5\) In 2010, 17.4% of ACCA defendants went to trial. Mandatory Minimum Report, supra note 2, at 284.

\(^6\) 18 U.S.C. § 924(e)(1).

\(^7\) Id. § 924(e)(2)(B)(i).

\(^8\) Id. § 924(e)(2)(B)(ii).

\(^9\) See infra Section I.C.

\(^10\) See infra Section I.A.
The related issue of the methods that sentencing courts use to decide whether a statute categorically qualifies as an ACCA predicate has generated similar uncertainty. The Court has held that when a single statute contains alternative elements, judges may use a modified version of the categorical approach to establish whether the conviction was for an ACCA predicate offense, a method that allows judges to consult certain court documents from the previous conviction. But the Court is still responding to complications in applying this modified categorical approach. Just last year, it held in Descamps v. United States that the modified approach should be used only when a single statute explicitly lists alternative elements.

Despite the serious consequences that confusion over the ACCA creates for courts, prosecutors, and defendants, Congress has not demonstrated an interest in narrowing or better defining the statute’s scope. Yet ACCA scholarship that does not enter into the broader debate on the normative value of mandatory minimums largely focuses either on reading the tea leaves of Supreme Court opinions or suggesting piecemeal statutory improvements. No one has advocated for a comprehensive solution to the ACCA quandary. Perhaps the most far-reaching proposal has come from Justice Alito: in a recent concurrence, he recommended that Congress create a list of crimes that count toward the ACCA’s sentencing enhancement. Although it remains an incomplete solution, Justice Alito’s suggestion reflects the need for more clarity about which felonies count as ACCA predicate offenses.

This Note proposes such a comprehensive solution. In order to compile a binding list of statutes that qualify as predicate felonies under the ACCA, Congress should delegate the task to a federal agency working in tandem with state actors. The Note outlines this proposal in three stages. Part I recounts the confusion created by delegating the ACCA’s interpretative authority to judges. As Part II discusses, this confusion has resulted in negative consequences for courts, prosecutors, and defendants, and it vitiates the statute’s ability to deter violent crime. Part III then argues that, given the unlikelihood that Congress will repeal, narrow, or clarify the ACCA itself, it

11. See infra Section I.B.
13. See infra Part II.
14. See infra notes 85–86 and accompanying text.
15. For a general background on the history, debate surrounding, and current use of federal mandatory minimums, see Mandatory Minimum Report, supra note 2.
18. See infra Section III.D.
should delegate to a federal agency the task of defining what counts as a predicate offense—a move that would substantially reduce the current system’s negative consequences. Specifically, Congress should direct the U.S. Sentencing Commission to compile an appendix of every state felony that qualifies as an ACCA predicate, with assistance from the states in providing initial nonbinding guidance on ambiguous statutes. Finally, Congress should take advantage of this ambitious initiative to resolve related definitional questions about the meaning of a violent crime in other areas of federal law.

I. Confusion Applying the ACCA

This Part discusses the major sources of confusion over which statutes qualify as predicate offenses under the ACCA. Section I.A explains why, under the categorical approach, ex ante certainty about whether a given statute is an ACCA predicate is improbable. The inevitable result is intercourt disparities in how similar offenses are treated. Section I.B demonstrates that unanswered questions about applying the modified categorical approach could also lead to disparate results. Lastly, Section I.C shows that the residual clause’s scope is unclear because the Supreme Court has inconsistently defined a violent felony under the ACCA.

A. The Categorical Approach

When Congress passed the ACCA as part of the Sentencing Reform Act of 1984, it did not include directions on how judges should decide whether the previous convictions of a felon in possession were violent felonies or serious drug offenses.19 In 1990, the Supreme Court attempted to provide clarity for courts by directing them to use a categorical approach when sentencing under the ACCA.20 The categorical approach itself is a simple concept. Sentencing courts consider the elements of the prior statute under which the felon in possession was convicted—rather than the behavior that resulted in the conviction—and decide if the statute categorically amounts to a violent felony.21

Applying the categorical approach to criminal activities that are actually enumerated in the ACCA is relatively straightforward. In Taylor v. United States, the Court had to consider whether conviction under a particular burglary statute amounted to the ACCA predicate offense of burglary.22 It asked whether the statute in question carried the “basic elements” of burglary’s “uniform definition” in the “generic sense.”23 While the Court declined to

19. See Levine, supra note 16, at 545–48, for a background on the ACCA’s legislative history.
21. See id. at 590, 600 (holding that sentencing courts should analyze past offenses through a categorical approach, considering only the fact of conviction and the “statutory definitions of the prior offenses”).
22. Id. at 578–80.
23. Id. at 598–99.
precisely define this term, it did suggest that the term “roughly corre-
spond[s] to the definitions of burglary in a majority of the States’ criminal
codes.” The Court used this approach as a guideline to construe the ele-
ments of generic burglary. It rejected the common law definition of burglary
that several states still used as well as a narrow definition that only cap-
tured a particularly dangerous subclass of burglaries. Rather, the Court
adopted a generic definition used in most states and approximated in the
Model Penal Code: “an unlawful or unprivileged entry into, or remaining in,
a building or structure, with intent to commit a crime.” To determine
whether a given statute is categorically burglary under the ACCA, judges
need only compare its elements to those of generic burglary as defined by
the Taylor Court.

Applying the categorical approach to crimes that are not enumerated in
the ACCA but that still may qualify as predicate offenses yields results that
are more unpredictable. Many statutes clearly are or are not violent fel-
nies or serious drug offenses. For more ambiguous statutes, however, it is
impossible to predict whether they will qualify as ACCA predicate offenses
before a particular court issues its ruling because the Supreme Court does
not issue advisory opinions. Therefore, unless the Court definitively holds
that a statute is not an ACCA predicate offense, it is impossible to know with
certainty whether a lower court will find that it qualifies as a violent felony.
Receiving a conclusive judicial answer to whether each gray-area statute is a
predicate offense is infeasible. Federal courts would need to issue enough
ACCA sentences to reach each ambiguous statute in every U.S. jurisdiction.
All of the convicted felons would need to appeal their sentences, appellate
courts would need to uphold the convictions, and the Supreme Court would
then need to grant certiorari and issue opinions in every one of these cases.
Of course, whenever a state amends one of its existing criminal statutes or
creates a new criminal offense, this same process would need to repeat itself.

Confusion created by the categorical approach is exacerbated by the fact
that nothing prevents federal courts from issuing conflicting judgments
about the same statute. A felon in possession convicted in Michigan, for
example, may have a previous state conviction in Tennessee that the federal
judge sitting in Michigan believes is an ACCA predicate offense. There is no
guarantee, however, that a federal court in Arizona considering that Tennes-
see statute will reach the same conclusion as did the Michigan judge.

24. Id. at 589.
25. Id. at 593–96.
26. Id. at 596–97.
27. Id. at 598.
28. See infra notes 73–75 and accompanying text for a more detailed analysis of diver-
gences among courts interpreting similar statutes.
29. See, e.g., United States v. Mayer, 560 F.3d 948, 959–60 (9th Cir. 2009) (holding that
Oregon’s first-degree burglary statute is broader than the Supreme Court’s definition of ge-
neric burglary in Taylor but nonetheless qualifies as a violent felony through the ACCA’s
residual clause).
B. The Modified Categorical Approach

The Supreme Court has recognized that the categorical approach is insufficient for analyzing more complex criminal statutes that cover a range of conduct, only some of which qualifies as an ACCA predicate offense. In these cases, sentencing courts may use a modified categorical approach to "go beyond the mere fact of conviction" and consider documents from the original trial to determine if the defendant was convicted of the elements of a generic ACCA offense. Judges may consult specific documents in conducting this analysis, including the terms of the plea agreement or charging document, a transcript of the colloquy if the defendant confirmed the factual basis for the plea, or "some comparable judicial record of this information." Most recently, the Court held that the modified categorical approach should be used only when a statute explicitly lists alternative elements. This holding strongly affirmed that the ACCA predicate offense question is a statutory inquiry independent of the underlying behavior that resulted in the previous convictions.

Despite these clarifying decisions, courts may still apply the modified categorical approach unevenly because of many lingering uncertainties. It is unclear, for example, what constitutes the "comparable judicial record" that sentencing judges are allowed to examine. In some jurisdictions, a charging document—one of the acceptable records for determining whether a past conviction was for an ACCA predicate offense—requires prosecutors to allege nonelemental facts. A guilty plea based on the contents of a charging document may therefore amount to an admission of a fact beyond the statute’s elements. The predicate felony could also result from a plea of no contest to charges brought under a divisible statute. A sentencing court would normally apply the modified categorical approach to discern which of the statute’s elements the fact finder determined in the original case. It is unclear how this would work when the defendant’s plea does not admit guilt to any of the statute’s alternative elements. In addition, the Court explicitly
left unanswered whether judges may take into account binding holdings from the convicting jurisdiction when deciding whether a statute lists alternative elements. A clever prosecutor relying on precedent from the convicting jurisdiction could convince the sentencing court that the statute contains alternative elements and that the elements for which the offender was convicted constitute a violent felony.

Each of these potential application problems may seem trivial in isolation. Taken together, however, they represent a web of ambiguity that could exacerbate the categorical approach’s drawbacks—unpredictability as to whether a statute constitutes an ACCA predicate offense and, possibly, divergent lower court rulings. As Justice Alito has stated, the modified categorical approach is "extremely complicated, and occasionally produces results that seem to make no sense whatsoever."38

C. The Residual Clause’s Competing Interpretations

Using the categorical—or modified categorical—approach, sentencing courts must frequently consider whether a statute “involves conduct that presents a serious potential risk of physical injury to another”39 and therefore amounts to a violent felony predicate offense under the ACCA’s residual clause. In recent cases, the Supreme Court has failed to advance a coherent test regarding the residual clause’s scope. From 2007 to 2011, three different justices writing for the Court offered competing tests for applying the residual clause. In a debate that exemplifies the Roberts Court’s minimalist–formalist divisions, none of these views has gained traction.40

The Court’s first attempt to explain the residual clause came when Alphonso James challenged an Eleventh Circuit decision that his conviction under a Florida attempted burglary statute was an ACCA predicate felony.41 Writing for a bare majority, Justice Alito found that the residual clause applied because the risk of physical injury that attempted burglary presents “in the ordinary case”42 is comparable to that of burglary, its “closest analog among the enumerated offenses.”43 The Court reasoned that attempted burglary presents the same type of risk of physical injury as burglary, it noted that every appellate court construing an attempted burglary statute had held that the crime qualified as an ACCA predicate, and it also referenced the

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37. Descamps, 133 S. Ct. at 2291.
38. Transcript of Oral Argument at 50, Descamps, 133 S. Ct. 2276 (No. 11-9540).
42. Id. at 208.
43. Id. at 203.
Sentencing Commission’s classification of attempted burglary as a crime of violence. The Court relied on these arguments to conclude that conviction under Florida’s attempted burglary statute was a violent felony.

The *James* Court’s solution, however, fails as a panacea for all residual clause cases. Its dicta suggest both that the statute under consideration must pose a comparable level of risk to its closest enumerated analog and that it need not be “as great a risk as any of the enumerated offenses.” Furthermore, Justice Scalia’s dissent, in which he was joined by Justices Stevens and Ginsburg, accurately captures the inherent difficulty of applying the closest analog test to crimes that present a risk of physical injury yet are not comparable to any of the enumerated offenses. Sexual assault and evading arrest statutes, for example, are hardly akin to any of the listed ACCA offenses, but they may still present a serious potential risk of physical injury. Justice Scalia suggested that a statute should qualify as a predicate offense through the residual clause when the behavior that it punishes poses as much risk of serious physical injury as burglary, the “least risky” enumerated offense. But his alternative failed to gain traction and has therefore been relegated to dissents and concurrences.

Barely five months after Justices Alito and Scalia offered competing residual clause interpretations in *James*, a new five-justice grouping offered yet another residual clause interpretative approach in *Begay v. United States*. Writing for the majority, Justice Breyer reasoned that a New Mexico felony DUI was not an ACCA violent felony because it did not punish “purposive, violent, and aggressive conduct.” When the Court considered the residual clause less than a year later in *Chambers v. United States*, Justice Breyer again wrote for the majority. The Court applied the same purposive, violent, and aggressive test from *Begay* to hold that an Illinois failure to report statute was not a violent felony.

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44. *Id.* at 203–07.
45. *Id.* at 203.
46. *Id.* at 209.
47. *Id.* at 219–25 (Scalia, J., dissenting).
48. See, e.g., United States v. Terrell, 593 F.3d 1084 (9th Cir. 2010) (finding that Arizona sexual assault conviction is an ACCA predicate); United States v. Brown, 516 F. App’x 461 (6th Cir. 2013) (finding that Tennessee evading arrest conviction is an ACCA predicate).
51. *Begay*, 553 U.S. at 145.
52. 555 U.S. 122 (2009).
On pure lenity grounds, the purposeful, violent, and aggressive test was an improvement because by narrowing the broad residual clause, it inherently resolved ambiguities in favor of defendants.\textsuperscript{54} The test’s language, however, may be as vague as that of the residual clause itself.\textsuperscript{55} Furthermore, the \textit{Chambers} Court relied heavily on recent U.S. Sentencing Commission data to hold that failure to report was not purposeful, violent, and aggressive.\textsuperscript{56} The inconsistent use and availability of reliable empirical evidence in making similar judicial determinations could lead to divergent interpretations across statutes.\textsuperscript{57}

Yet \textit{Chambers} represented a high-water mark in residual clause clarity. In consecutive opinions concluding with \textit{Chambers}, the Court relied—at least rhetorically—on a single approach to decide whether an offense constituted a violent felony. And in the latter case, seven justices coalesced around Justice Breyer’s test.\textsuperscript{58} But confidence in the staying power of this unified approach\textsuperscript{59} was frustrated by the Court’s most recent residual clause case. After being convicted as a felon in possession, Marcus Sykes argued that a previous Indiana conviction for vehicular flight did not qualify as a violent felony under the ACCA.\textsuperscript{60} Borrowing from each of the Court’s previous residual clause opinions, Justice Kennedy held that the vehicular flight statute was a violent felony. The Court found support in Justice Alito’s comparative risk test from \textit{James}\textsuperscript{61} and relied on statistical data, much like the \textit{Chambers} Court did.\textsuperscript{62} Yet the \textit{Sykes} Court asserted that the vehicular flight statute was not subject to \textit{Chambers}’s purposeful, violent, and aggressive test. It found that the \textit{Chambers} test has little utility beyond explaining why a crime of strict liability, negligence, or recklessness may not qualify as an ACCA predicate.\textsuperscript{63}

\textsuperscript{55} See, e.g., Holman, supra note 16, at 224–28.
\textsuperscript{56} See \textit{Chambers}, 555 U.S. at 128–30.
\textsuperscript{59} See, e.g., Charles Doyle, CONG. RESEARCH SERV., R41449, Armed Career Criminal Act (18 U.S.C. 924(e)): An Overview 3 (2010) (concluding based on the \textit{Chambers} and \textit{Begay} holdings that the residual clause applies only to offenses marked by purposeful, violent, and aggressive conduct).
\textsuperscript{60} United States v. Sykes, 598 F.3d 334, 337–38 (2010).
\textsuperscript{61} Sykes v. United States, 131 S. Ct. 2267, 2273–74 (2011).
\textsuperscript{62} Id. at 2274.
\textsuperscript{63} See id. at 2276.
The two dissenting opinions epitomized the divided Court’s inability over four successive decisions to craft a coherent test for applying the residual clause. Criticizing the majority’s ostensible abandonment of the purposeful, violent, and aggressive test, Justice Scalia proclaimed the residual clause a drafting failure that should be declared void for vagueness. A less portentous dissent by Justice Kagan downplayed the Court’s apparent devaluation of the purposeful, violent, and aggressive test, which she “assume[d] . . . will make a resurgence.” The Court’s confused jurisprudence makes it less likely that sentencing courts will achieve uniformity when considering borderline statutes that potentially qualify as ACCA violent felony predicates through the residual clause.

II. The Negative Consequences of Judicial Delegation

The previous Part discussed the ambiguity created by the categorical approach’s inherent indefiniteness, by the unanswered questions about the modified categorical approach, and by the Supreme Court’s confusing guidance on the residual clause. This Part explains why that confusion is harmful to the courts, prosecutors, and defendants who must grapple with the ACCA, and why the confusion may detract from the statute’s potential to deter crime.

Section II.A details how courts, prosecutors, and defendants are forced to expend limited resources during trial and on appeal to establish whether individual statutes qualify as ACCA predicate offenses. Section II.B explains the current system’s consequences for defendants, noting in particular that disparity in courts’ treatment of similar statutes breeds inequity. In addition, defendants do not have fair warning of the potential punitive consequences of committing predicate offenses and later deciding to carry a firearm. Defendants are likewise uninformed about the repercussions of a guilty plea after being charged either with committing a predicate offense or being a felon in possession. Finally, Section II.C argues that since defendants are unaware of the ACCA’s scope, the full extent of its ability to deter violent crime is left unrealized.

A. Court, Defendant, and Prosecutor Resources

Federal judges generally believe that the ACCA appropriately sentences the offenders to whom it is applied. Yet the energy-intensive process of

64. Id. at 2284–85 (Scalia, J., dissenting).
65. Id. at 2289 n.1 (Kagan, J., dissenting).
66. See id. at 2287 (Scalia, J., dissenting) (warning that “[t]he residual-clause series will be endless”).
analyzing past convictions depletes resources and irritates judges because every court must come to its own determination on each statute that potentially qualifies as an ACCA predicate offense.68 Without additional clarity from Congress, federal judges will have no choice but to continue this piece-meal categorical approach, attempting to conjure meaning from confusing and sometimes contradictory Supreme Court precedents in order to sort state statutes.69

Prosecutors and defendants will also benefit from an ACCA modification that exhaustively clarifies which statutes are predicate felonies. The Department of Justice (“DOJ”) supports using mandatory minimums as a tool for maintaining “predictability, certainty, and uniformity” in the discretionary federal sentencing system.70 Yet the categorical approach for classifying past convictions has led to lengthy sentencing hearings and appeals that strain the resources of U.S. Attorneys’ Offices.71 The DOJ believes that this could be avoided by clarifying the statute’s scope.72

B. Implications for Defendants

Defendants suffer the most when the ACCA’s ambiguity makes it difficult to predict whether a conviction will count as a predicate offense. Most obviously, this creates inequity when judges inevitably disagree on how similar statutes should be classified,73 a situation that has undesirable normative implications for defendants. Federal sentencing courts must attempt

68. See supra Part I; see also United States v. Vann, 660 F.3d 771, 787 (4th Cir. 2011) (Agee, J., concurring in the judgment, concurring in the en banc majority opinion, and concurring in the opinion of Keenan, J.) (noting that the residual clause has created “judicial morass”); United States v. Oliveira, 798 F. Supp. 2d 319, 325 (D. Mass. 2011) (noting that the residual clause ambiguity is “troubling”).


71. See Breuer & Wroblewski, supra note 3, at 8 (expressing concern for resources needed to litigate ACCA cases under categorical approach).

72. Id.

73. Even beyond statutes whose classification divides the Supreme Court, see supra Section I.C, lower courts have struggled to reach agreement on whether ambiguous statutes qualify as ACCA predicates. See, e.g., Hutchison et al., supra note 34, § 4B1.2 cmt. 3(e)(iii)(C) (discussing circuit split on whether burglary of a building other than a dwelling is a per se violent crime); id. § 4B1.2 cmt. 3(c)(xxiv) (discussing a circuit split on resisting arrest); 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 Doug. L. Rev. 601 (2010) (discussing circuit split over whether concealed handgun presents serious risk of physical injury to another); Sarena M. Holder, Note, Resolving the Post-Begay Maelstrom: Statutory Rape as a Violent Felony Under the Armed Career Criminal Act, 60 Clery. St. L. Rev. 507 (2012); Brett T. Runyon, Comment, ACCA Residual Clause: Strike Four? The Court’s Missed Opportunity to Create a Workable Residual Clause Violent Felony Test, 51 Washburn L.J. 447, 459 (2012) (noting Eleventh Circuit’s “distinction between a flight statute
to avoid unwarranted sentence disparities. Theoretically, the categorical approach’s singular focus on statutory elements achieves complete sentencing uniformity between defendants by ignoring defendant-specific factors, such as offender characteristics and offense circumstances. But intercourt disagreement could result in vastly divergent periods of incarceration for defendants convicted under the same criminal statute. Any disparity in how sentencing courts treat statutes with similar elements when classifying ACCA predicate offenses creates inequity for convicted felons in possession.

In addition to diminishing parity between defendants, the current system leaves individual offenders without fair warning. The Supreme Court has essentially rejected the argument that defendants lack notice that certain criminal offenses will count as ACCA predicates. Yet the ACCA’s ambiguity may leave defendants with little more than a murky sense of whether a conviction will carry severe future punitive consequences.

Fair warning matters at several different points during the criminal process. First, knowing that conviction under a given state statute will count toward the ACCA enhancement fundamentally affects a defendant’s decision to plead guilty in both the state case and the federal felon in possession case. The Supreme Court has recognized the importance of a defendant’s ability to comprehend the collateral consequences of accepting a plea agreement. In the case of aliens, for example, the Court held in *Padilla v. Kentucky* that given the stakes, competent counsel must advise on “the seriousness of deportation as a consequence of a criminal plea.” This basic logic holds true in the ACCA context. Were the collateral implications of a guilty plea clear, the same Sixth Amendment ineffective assistance of counsel concerns that requires reckless driving and a statute that does not place [the latter] out of the reach of *Sykes’s* holding, so *Sykes* did not resolve the circuit split*.

Compare *United States v. Thornton*, 554 F.3d 443 (4th Cir. 2009) (statutory rape does not qualify as ACCA violent felony), with *United States v. Richards*, 456 F.3d 260 (1st Cir. 2006) (unlawful sexual contact qualifies as ACCA violent felony). Compare *United States v. Miller*, 721 F.3d 435 (7th Cir. 2013) (possession of sawed-off shotgun is not ACCA violent felony), with *United States v. Fortes*, 141 F.3d 1 (1st Cir. 1998) (possession of sawed-off shotgun is ACCA violent felony).


75. Compare the offense-specific nature of the categorical approach with 18 U.S.C. § 3553(a)(1), which requires federal courts to consider “the history and characteristics of the defendant” during sentencing.

76. See *James v. United States*, 550 U.S. 192, 209 (2007) (rejecting the argument that lower courts have insufficient guidance to determine which unenumerated offenses constitute violent felonies); see also *United States v. Carrigan*, 724 F.3d 435 (7th Cir. 2013) (noting that the absence of precedent alerting defendant that a resisting arrest statute was a predicate did not render the ACCA unconstitutionally ambiguous or warrant applying the rule of lenity), *cert. denied*, 134 S. Ct. 668 (2013). But see *Sykes v. United States*, 131 S. Ct. 2267, 2287 (2011) (Scalia, J., dissenting) (noting that the Court’s evolving interpretation “will keep defendants . . . guessing”); *James*, 550 U.S. at 216 (Scalia, J., dissenting) (discussing the Court’s responsibility to derive rules of application that provide notice to defendants); *United States v. Mobley*, 687 F.3d 625, 636 (4th Cir. 2012) (Wynn, J., dissenting) (arguing that residual clause ambiguity and court-created confusion left an inmate with insufficient notice that possessing a shank constitutes a crime of violence under the ACCA), *cert. denied*, 133 S. Ct. 888 (2013).

77. 130 S. Ct. 1473, 1486 (2010).
guided the Court’s decision in Padilla would apply to the ACCA. There is a fundamental need for ACCA defendants to appreciate the possible collateral legal consequences of pleading guilty for the initial state offenses as well as for the federal felon in possession statute.

The lack of fair warning also limits the extent to which defendants know the penal implications of their criminal activity. For certain crimes, it is not inherently obvious that the ACCA will apply, especially under the Court’s ever-evolving definition of the residual clause. Since the ACCA’s scope is unclear, defendants lack fair warning about the implications of the decision to commit state offenses that may count as ACCA predicates. When these felons are later convicted for ACCA predicate offenses, they may be unaware of the serious implications of carrying a firearm—far more serious than the ten-year maximum sentence that courts otherwise impose on convicted felons in possession.

C. The ACCA’s Potential to Deter Crime

Since defendants lack awareness of the potentially severe consequences of committing a predicate felony or later deciding to carry a firearm, the goal of using the ACCA’s harsh penalty to deter violent crime is less well served. Congress’s original aim in enacting the statute may have been to incapacitate career criminals rather than to deter future violent and drug-related crime. Yet to the extent that the federal penal code is animated at least in part by utilitarian goals, effective punishment should have the "power to produce an effect upon the will, and . . . a tendency towards the prevention of like acts."

78. In Padilla, failure to inform a client that pleading guilty carried a risk of deportation amounted to ineffective assistance of counsel only because the consequence of the plea was clear. Padilla, 130 S. Ct. at 1483. Similarly, the consequences would presumably be clear for failure to advise on the possible repercussions of pleading guilty to violating a state statute enumerated in an appendix of ACCA predicate offenses or of pleading guilty to the federal felon in possession offense with three previous convictions under statutes listed in the appendix.


80. Compare, e.g., United States v. McCall, 439 F.3d 967, 983 (8th Cir. 2006) (Lay, J., dissenting) (arguing for rule of lenity because it is unclear if the ACCA would apply to drunk driving), with Butler v. O’Brien, 663 F.3d 514, 518 (1st Cir. 2011) (person of average intelligence would have been on notice that aggravated rape presented risk of physical injury for purpose of sentencing enhancement), cert. denied, 132 S. Ct. 2748 (2012).


82. See Levine, supra note 16.

83. 2 Jeremy Bentham, Theory of Legislation 322 (photo. reprint 1999) (Richard Hildreth trans., Boston, Weeks, Jordan & Co. 1840) (1802). Although this Note does not enter the debate on relative sentence severity’s ability to deter crime, the ACCA’s mandatory minimum sentence does not exist in a vacuum. Any deterrence-based policy argument advocating for additional clarity on which crimes are ACCA predicates inherently takes the position that this would have a greater impact on a felon’s choice to carry a firearm than the lesser sanctions
goal of deterring crime, potential offenders must be made more aware of the collateral consequences of committing violent felonies or serious drug offenses and later carrying a firearm.84

III. The ACCA Appendix

The previous Part explained the ways in which the current ad hoc approach to defining predicate felonies has unintended negative consequences for courts, prosecutors, and defendants and potentially weakens the ACCA as a deterrent of violent crime. Despite these ramifications, Congress has not indicated any intention to restrict the scope of this tough-on-crime statute85 or more clearly define its language.86 Assigning interpretative authority to an agency would allow Congress to avoid the potential fallout from moderating the ACCA87 while mitigating the current approach’s negative consequences. Congress should delegate to a federal agency the task of creating and maintaining a binding appendix of state laws that qualify as ACCA predicate offenses. The U.S. Sentencing Commission is well positioned to assume this substantial responsibility and can do so with support from state actors, who can provide initial nonbinding guidance on their jurisdictions’ ambiguous statutes.

Section III.A explains why delegating to an agency—and to the Sentencing Commission in particular—is warranted. Section III.B then discusses the

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that otherwise apply to the offense. Compare Anthony N. Doob & Cheryl Marie Webster, Sentence Severity and Crime: Accepting the Null Hypothesis, 30 Crime & Just. 143, 187 (2003) (noting that more severe sentences do not have a differential deterrent effect), with Paul H. Robinson & John M. Darley, Does Criminal Law Deter? A Behavioural Science Investigation, 24 Oxford J. Legal Stud. 173, 198, 200–205 (2004) (implying that an increased sentence may deter in some circumstances). The deterrence argument, however, is not essential to this Note’s proposal because it is one of several justifications for creating the appendix.

84. See Michael Tonry, The Functions of Sentencing and Sentencing Reform, 58 STAN. L. REV. 37, 52 (2005) (concluding that “certainty . . . of punishment [is a] much more powerful deterrent[ ] than severity”).


86. See generally David B. Spence & Frank Cross, A Public Choice for the Administrative State, 89 Geo. L.J. 97, 135–38 (2000) (explaining that it is difficult for Congress to legislate with specificity due to its political cost).

87. See generally Daniel Richman, Overcriminalization for Lack of Better Options: A Celebration of Bill Stuntz, in The Political Heart of Criminal Procedure 64, 66–81 (Michael Klarman et al. eds., 2012). Scholars debate the precise causes of federal overcriminalization, and political motivation is just one of many explanations. See Paul J. Larkin, Jr., Public Choice Theory and Overcriminalization 36 Harv. L. & Pub. Pol’y 715, 729–32 (2013) (survey of various explanations for overcriminalization). Although that discussion is outside of this Note’s scope, to the extent that congressional inaction on the ACCA is the result of the political incentive for harsh criminal punishments, the agency delegation solution provides Congress with an escape hatch.
standard that the Sentencing Commission should use to decide whether statutes qualify as ACCA predicate offenses. Section III.C describes the benefits of working with state actors to classify ambiguous statutes, and Section III.D highlights the deficiencies of the existing proposals to list ACCA predicate offenses. Lastly, Section III.E demonstrates how Congress can leverage the appendix to resolve related questions in other areas of federal law.

A. Delegating to an Agency

1. Policy Considerations for Deferring to an Agency

The Supreme Court has recognized that “Congress simply cannot do its job absent an ability to delegate power under broad general directives.”88 The decision to write a statute whose broad phrasing begs for clarification is inevitably a choice to delegate interpretative authority to the courts or an agency. In the case of the ACCA, this interpretative authority has rested with the courts for thirty years. But relative competencies in crafting an immediate and comprehensive solution counsel in favor of shifting this authority to an expert agency.

The traditional policy rationales for delegating to agencies apply to determining predicate offenses under the ACCA as well. Unlike courts responsible for issuing rulings on a broad array of laws, agencies are able to gain expertise in a narrow set of issues.89 Proponents of judicial delegation often argue that courts are more adept than agencies at deciding matters of law, but this reasoning is not so easily applicable to determining ACCA predicate offenses. Federal courts lack the capabilities that will inevitably be necessary to discern whether statutes from other jurisdictions target violent crime.90 Even the most ardent supporters of delegating to courts recognize that the ACCA predicate offense determination represents a clear situation in which judges are inferior to experts.91 A body of experts dedicated to analyzing and cataloguing potentially implicated state laws has an advantage over courts in clarifying the residual clause’s broad scope.

90. See, e.g., Spence & Cross, supra note 86, at 140.
91. Compare Stephen Breyer, Judicial Review of Questions of Law and Policy, 38 ADMIN. L. REV. 363, 397 (1986) (judicial deference to agencies on matters of law is irrational), with Transcript of Oral Argument at 47, Descamps v. United States, 133 S. Ct. 2276 (2013) (No. 11-9540) (Justice Breyer asking why the Sentencing Commission cannot “look and see what are the real behaviors that are convicted under” various statutes), and Transcript of Oral Argument at 12, James v. United States, 550 U.S. 192 (2007) (No. 05-9264) (Justice Breyer suggesting that law professors specializing in economic and statistical analysis should determine risk of physical injury associated with each offense “instead of sitting here and trying to figure out something I know nothing about”).
The ex ante clarity of an ACCA appendix will also bring predictability to the predicate offense question.92 This comparative advantage would be moot were federal courts able to write advisory opinions. The judiciary’s measured pace, however, forces courts, prosecutors, and defendants to reason by analogy from often inconsistent ACCA precedent. Although court rulings may be less elastic than agency determinations in the long run,93 ACCA judicial decisions are not applicable beyond the specific statute under consideration in the jurisdiction issuing the ruling.94 Thus comprehensive agency resolution rather than gradual judicial determination will more definitively resolve the legal question of whether individual statutes are ACCA predicate offenses.

A popular rationale for judicial delegation is that the adjustment cost of adhering to an imperfect court rule is preferable to periodic agency revisions.95 An ACCA appendix, however, will need revision only when legislatures tweak the language of existing statutes and add to their states’ criminal codes. Agencies are able to respond to these changes more efficiently than courts, which must wait for individual controversies to ripen.96 Whereas courts are ideal for resolving concrete disputes, sifting through thousands of state statutes to determine which are violent felonies under the ACCA is a more systematic undertaking that an agency is better equipped to complete in reasonable time.

Agencies’ expertise, consistency, and efficiency give them a comparative advantage over courts in determining ACCA predicate offenses. Leveraging these competencies to create an ACCA appendix will ultimately alleviate the current system’s negative consequences.

2. The U.S. Sentencing Commission’s Role

Of the federal agencies to which Congress could assign interpretative authority, the U.S. Sentencing Commission is best positioned to determine which statutes are ACCA predicate offenses. Even in its diminished role as an advisory body, the Sentencing Commission has a broad mandate to study sentencing. Although its capabilities regarding statistical analysis are widely

92. See, e.g., United States v. Mead Corp., 533 U.S. 218, 234 (2001) (framing the value of agency action as the "uniformity in its administrative and judicial understandings of what a national law requires").


94. See supra notes 28–29 and accompanying text.


criticized, empirical research is not essential to compiling the appendix, and there are additional reasons for delegating to the Sentencing Commission.

The crux of building an ACCA appendix will be qualitatively analyzing state statutes. The Sentencing Commission’s longtime directive to study federal sentencing has endowed it with the manpower, subject familiarity, and institutional incentives to do so. More specifically, it has experience reviewing the types of crimes that constitute violent felonies. To calculate criminal history points under the Federal Sentencing Guidelines, the Sentencing Commission defines “crime of violence” in nearly identical terms to “violent felony” under the ACCA and suggests applicable offenses in its advisory notes. Like the ACCA, the guidelines explicitly consider which prior crime of violence and controlled substance offenses should enhance the sentences of offenders who are convicted of being felons in possession.

The Sentencing Commission is hardly the only agency capable of analyzing state statutes. The DOJ oversees the active Bureau of Justice Statistics, which collects and analyzes data on a wide range of criminal topics. For example, its 2006 study on felony sentences in state courts contains data from 300 counties, including 58 of the nation’s 75 largest. The blatant conflict of interest presented by the DOJ’s responsibility to prosecute criminals advises against giving it the power to decide the scope of federal sentencing law. In addition, the DOJ would prefer that the Sentencing Commission make ACCA reform suggestions to Congress. This may reflect the


98. See infra Section III.B.

99. The single difference between the two definitions is that the guidelines qualify burglary as a crime of violence limited to dwellings. U.S. SENTENCING GUIDELINES MANUAL § 4B1.2 (2013). This is barely narrower than the generic burglary definition that the Supreme Court applied to the ACCA—that definition includes a “building or other structure.” Taylor v. United States, 495 U.S. 575, 598 (1990).

100. The guidelines establish the base offense level for unlawful receipt, possession, or transportation of firearms or ammunition for “prohibited person(s),” which includes offenders convicted under the federal felon in possession statute. USSG § 2K2.1 cmt. n.3. The guidelines also recommend an enhanced base level if the offender “committed any part of the instant offense subsequent to sustaining at least two felony convictions of either a crime of violence or a controlled substance offense.” Id. § 2K2.1(a)(1).


DOJ leadership’s awareness of this conflict. At the very least, the department’s deference indicates its belief that the Sentencing Commission is better positioned to fill this role.

This is not to say that Congress must delegate to the Sentencing Commission if in the future a better implementer emerges or that the Sentencing Commission is the appropriate agency to make similar determinations in other contexts where an appendix may be useful. Rather, this Note argues merely that given its expertise, mandate, and institutional incentives, the Sentencing Commission is currently the best-positioned federal agency to populate and maintain an ACCA appendix.

B. Predicate Offenses

Whichever agency Congress assigns the task of determining ACCA predicate offenses will need to settle on a consistent standard for deciding which statutes belong in the appendix. To lawfully delegate to an agency, Congress must provide an intelligible principle to which the agency must conform in making its regulations.103 Even if the ACCA’s definitions of serious drug offense and violent felony are outwardly clear,104 Congress must prescribe, or the agency will itself need to institute, a substantive standard for determining which statutes are predicate offenses.

Maintaining the categorical approach’s focus on elements rather than behavior makes the most sense. As the Supreme Court stated in Taylor, Congress ostensibly intended that a particular crime should always count or not count as an ACCA predicate irrespective of the facts that led to the conviction.105 Even if this were not Congress’s initial intent, the elaborate judicial probe into individual defendant behavior under a noncategorical standard would render the ACCA an unconstitutional reach into jury fact-finding.106

In determining ACCA predicate offenses, the agency’s inquiry should be limited to a qualitative analysis of statutory elements. Fact-specific questions such as whether a particular defendant committed the crime in a violent way or whether offenders usually commit the crime in a way that presents a serious risk of injury are immaterial under a categorical standard where the only consideration is the statute of conviction. In cases that are easy to resolve, the legal elements of the statute will present a clear risk of injury. In other cases, it will be equally obvious that there are ways to commit the crime that could not possibly be dangerous. And in more difficult cases, the

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104. See Sykes v. United States, 131 S. Ct. 2267, 2277 (2011) (concluding that the ACCA “states an intelligible principle and provides guidance that allows a person to ‘conform his or her conduct to the law’” (quoting City of Chicago v. Morales, 527 U.S. 41, 58 (1999) (plurality opinion))).
106. See Alleyne v. United States, 133 S. Ct. 2151, 2155 (2013) (“[A]ny fact that increases the mandatory minimum is an ‘element’ that must be submitted to the jury.”).
agency will be able to consult experts and qualitative statutory information. This interpretative role is comparable to that of a jury when it must decide whether a predicate offense to felony murder categorically—rather than frequently—poses a risk of injury.107

In its residual clause line of cases, the Court has sometimes depended on empirical analysis to decide whether an offense is categorically an ACCA predicate.108 This reliance is demonstrative of the belief that when a statute’s potential risk of physical injury is not inherently obvious, determining whether it is violent is a task better suited for statisticians than sentencing judges.109 Most evidently, the Court in Chambers heavily relied on data from a week-old U.S. Sentencing Commission report on federal escape offenses.110

But statistical generalizations about the average risk presented when a crime is committed should be irrelevant to whether a statute categorically presents a serious risk of physical injury. An overall high rate of physical injury correlated with a crime does not speak to the categorical question of whether the crime’s elements constitute a violent felony. Even if empirical data could answer this categorical question, the massive research that would be required to uncover the risk of physical injury posed by idiosyncratic state statutes would make it an impractical test on which to base the appendix.

The qualitative standard that this Note proposes is not essential to the efficacy of an appendix of ACCA crimes—assuming that the agency consistently applies whichever test it adopts. Yet an approach that qualitatively analyzes statutory elements to determine ACCA predicate offenses is fundamentally fair, comparatively easy to implement, and conforms to the categorical approach that the Supreme Court mandated.

Finally, the ACCA appendix should be binding. Federal courts will simply need to consult the appendix to determine if prior offenses count as ACCA predicates.111 This ex ante certainty will alleviate the current system’s

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107. See Guyora Binder, Making the Best of Felony Murder, 91 B.U. L. Rev. 403, 440–49 (2011), for a discussion on the split between jurisdictions that exhaustively enumerate, partially enumerate, and do not enumerate offenses that qualify as predicates to felony murder.

108. E.g., Sykes, 131 S. Ct. at 2274 (“Although statistics are not dispositive, here they confirm the commonsense conclusion that Indiana’s vehicular flight crime is a violent felony.”); James v. United States, 550 U.S. 192, 206 (2007) (considering U.S. Sentencing Commission data in determining elements of generic burglary).

109. See supra note 91.


111. A prior conviction is a judicially determinable fact that need not be admitted by the defendant or proved by a jury beyond a reasonable doubt. See Alleyne, 133 S. Ct. at 2160 n.1 (“In Almendarez–Torres . . . we recognized a narrow exception to this general rule for the fact of a prior conviction. Because the parties do not contest that decision’s vitality, we do not revisit it for purposes of our decision today.”). But see Shepard v. United States, 544 U.S. 13, 27 (2005) (Thomas, J., concurring in part and concurring in the judgment) (arguing that subsequent jurisprudence has nullified the Supreme Court’s carve out in Almendarez–Torres
ambiguity. A binding appendix does not impact defendants’ ability to challenge facially the reasonableness of an agency’s decision to classify a particular statute as an ACCA predicate offense.\textsuperscript{112}

An appendix will not fix every difficulty in applying the ACCA. In particular, courts will still need to use the modified categorical approach for statutes that have alternative paths to conviction. Even for these divisible statutes, the appendix will provide a blueprint for judges by clarifying which of the statute’s prongs counts toward the ACCA’s enhancement. Judges will still need to consult documents from the convicting court to determine the prong under which the defendant was sentenced.\textsuperscript{113}

C. Working with the States

Cooperative federalism will accelerate the expansive endeavor of categorizing each statute in states’ penal codes. This is not unprecedented in the law enforcement arena. Federal agencies routinely coordinate with the states to carry out an array of mandates ranging from exchanging narcotics intelligence\textsuperscript{114} to maintaining a national sex offender registry.\textsuperscript{115} Sometimes Congress even grants state entities the authority to make interstitial findings for federal administrative bodies\textsuperscript{116} and to enforce agency regulations\textsuperscript{117}—responsibilities that will be similar to those of a state agency advising on the ACCA appendix.

It will be unnecessary for Congress to delegate the entire task of preliminarily cataloguing state criminal statutes to a state agency. The Sentencing Commission will not need outside direction on the vast majority of laws the classification of which will be unambiguous and uncontroversial. Even so, state agencies will play an integral role by providing initial and nonbinding guidance on many gray-area statutes. Such guidance must include coherent

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\textsuperscript{113}. See supra Section I.B.


\textsuperscript{115}. The Adam Walsh Act “establish[ed] a comprehensive national system for the registration of [sex] offenders,” 42 U.S.C. § 16901 (2006), and required that states “maintain a jurisdiction-wide sex offender registry conforming to the requirements” of the Act’s provisions. Id. § 16912(a). If states fail to comply, the attorney general may withhold 10 percent of the funds that the jurisdiction would otherwise have received as part of the Omnibus Crime Control and Safe Streets Act of 1968. Id. § 16925(a).

\textsuperscript{116}. See, e.g., Jessica Bulman-Pozen, Federalism as a Safeguard of the Separation of Powers, 112 Colum. L. Rev. 459, 475 & n.67 (2012) (discussing the requirement in the Patient Protection and Affordable Care Act of 2010 that state entities “recommend medical loss ratio standards to the Department of Health and Human Services”).

reasoning for each statute so the Sentencing Commission can conduct compliance review to ensure a consistent and accurate standard. Under this approach, the state agency’s role can be analogized to that of state high courts responding to the U.S. Supreme Court’s certified questions on substantive matters of state law.

It may seem counterintuitive to assign part of the task of interpreting the legal meaning of a federal statute to the states, but federal agencies are not the most suitable actors to deliberate on complicated state statutes that may or may not qualify as violent felonies. Certain state agencies possess a comparative advantage because of their familiarity with the inner workings of idiosyncratic state criminal statutes. Although the Sentencing Commission may be able to conduct macrolevel analysis across federal jurisdictions, a more localized knowledge of the activity that statutes categorically target will more efficiently achieve an accurate list of ACCA predicate felonies.

Discerning the elements of specific state statutes may also require a sophisticated appreciation of the intricacies of state case law. This is best left to those with a command of its subtleties and evolution. The Supreme Court has not seemed averse to lower courts taking relevant judicial rulings into account when determining the elements of a predicate offense. Certainly it would be prudent to exercise lenity by requiring that the Sentencing Commission make clear that any offense included in the appendix qualifies as a violent felony. It should be uncontroversial, however, that clear direction on the scope of a statute’s elements from at least the convicting jurisdiction’s highest court will factor into whether the offense constitutes a violent felony.

Dictating to the states whether their statutes target criminal activity that presents a risk of physical injury may create state–federal tension. In the long run, however, the appendix promotes more respect for state–federal relations than a system in which federal judges disparately apply state laws without any guidance from the states. The appendix solution will at least give the states some input on which of their statutes constitute ACCA predicate offenses. Even if a federal agency is ultimately making this decision, state participation creates a channel for states to air concerns about the meaning of their own statutes.

118. See supra Section III.B.
121. See, e.g., Descamps v. United States, 133 S. Ct. 2276, 2291 (2013) (“We may reserve the question whether, in determining a crime’s elements, a sentencing court should take account not only of the relevant statute’s text, but of judicial rulings interpreting it.”).
Of the various state agencies that could fill this role, state sentencing commissions are logical partners for many of the same reasons that delegating to the U.S. Sentencing Commission is compelling. Among state actors, state sentencing commissions are mandated to recommend sentencing adjustments, and they possess unique experience in analyzing state criminal statutes. Although some commissions reside in the executive and others in the judiciary, their location has neither been controversial nor had a noticeable impact on their efficacy. Equally important, sentencing commissions are designed as neutral advisory bodies. Even some states without dedicated commissions have comparable administrative agencies with mandates to serve the commission-like function of analyzing statutes and making recommendations for reform. Although sentencing commissions are not isolated from political pressure, they should have little incentive to report inaccurately to a federal agency the state statutes that qualify as predicate offenses in a different jurisdiction. That said, sentencing commissions and similar bodies may not be a universal cure. Although they may be ideal state collaborators, some states lack such bodies. Furthermore, there is no guarantee that legislatures will not completely eliminate their states’ sentencing commissions.

State attorneys general may also be able to help build the appendix. Their sensitivity to political factors creates an incentive for them to implement a federal criminal statute that benefits from state assistance. Additionally, political ambition may motivate them to champion their role in enforcing the ACCA. Federal laws with state enforcement provisions that single out attorneys general are not unprecedented. In the field of consumer

125. See, e.g., CAL. GOV’T CODE § 8289 (West 2012) (“The commission shall . . . examine the common law and statutes of the state and judicial decisions for the purpose of discovering defects and anachronisms in the law and recommending needed reforms.”); MIC. COMP. LAWS ANN. § 4.1403 (West 2013) (authorizing state law revision commission to “[e]xamine the common law and statutes of [the] state and current judicial decisions for the purpose of discovering defects and anachronisms in the law and recommending needed reforms”); N.J. STAT. ANN. § 1:12A-8 (West 1992) (describing the review duties of the commission to include remedying defects, reconciling conflicting provisions, clarifying confusing provisions, and excising redundant provisions in the law).
128. See Harry First, Delivering Remedies: The Role of the States in Antitrust Enforcement, 69 GEO. WASH. L. REV. 1004, 1036 (2001); see also Lemos, supra note 120, at 701–02.
129. See Widman, supra note 117, at 213 (considering state enforcement of the Consumer Product Safety Improvement Act).
protection, for example, state attorneys general may sue private actors for failure to comply with federal standards. 130 For states that do not have sentencing commissions, attorneys general are feasible alternative actors with whom the federal agency can collaborate.

Yet zealous attorneys general may be overinclusive due to the potential for political fallout from appearing apathetic to crime. 131 Congress can try to counter this possibility ex ante by stipulating that the federal agency reviewing state recommendations will view underinclusion and overinclusion as a failure to fulfill the delegated responsibility. Constituents who want to resist the tentacles of the federal system may also deter overinclusion if they perceive it as federal overreach. 132 But if attorneys general are under political pressure to appear tough on crime, 133 providing an overinclusive list of statutes that qualify as ACCA predicate offenses is an easy way to create this impression without having to shoulder the cost of incarcerations resulting from their own recommendations.

Congress has other ways of incentivizing state actors to provide an accurate list of statutes. It currently induces the states to engage in a number of law enforcement programs by conditioning federal funding on competent state participation. 134 State actors are unsurprisingly responsive to this approach, especially when the amount of federal assistance involved is substantial. 135 The healthy fear of appearing inept or indifferent to crime can serve as an important motivating tool when receiving sizeable federal grants depends on competent state collaboration.

For example, anchoring a federal initiative that requires state assistance to Justice Assistance Grant funding has been used in other contexts. 136 For state and local jurisdictions, these grants are “critical [for] a range of program areas including law enforcement, prosecution, indigent defense, courts, crime prevention and education, corrections and community corrections, drug treatment and enforcement, planning, evaluation, technology improvement, and crime victim and witness initiatives.” 137 Even though

130. Lemos, supra note 120, at 708–09.
131. See id. at 730 n.145.
132. See id. at 722.
134. See, e.g., Wayne A. Logan, Criminal Justice Federalism and National Sex Offender Policy, 6 Ohio St. J. Crim. L. 51, 52 (2008) (noting the success of “strategic use of honey” as an incentive to secure state participation in federal criminal justice programs); Michael M. O’Hear, Federalism and Drug Control, 57 Vand. L. Rev. 783, 806–07 (2004) (although the federal government does not require state participation in implementing drug policy, it “utilizes grants and other incentives” successfully to encourage state participation).
136. See, e.g., supra note 115.
much of this funding does not directly contribute to the budgets of the attorneys general, the interconnectedness of the criminal justice system creates an incentive for them to promote the efficiency of—and therefore protect a substantial funding source for—other state offices that receive these grants.

D. Other Agency Delegation Solutions

This Note’s proposed solution is not the first argument in favor of delegating the ACCA’s interpretation to an agency. In his Chambers dissent, Justice Alito suggested that “the only tenable, long-term solution is for Congress to formulate a specific list of expressly defined crimes that are deemed worthy of the ACCA’s sentencing enhancement.”138 Echoing this sentiment, Justice Kennedy, writing for the Court in Sykes, complained that Congress “could have defined violent felonies by compiling a list of specific covered offenses” before he concluded that the residual clause nonetheless states an intelligible principle.139 Proposals for ACCA overhaul have similarly recommended that either Congress or an administrative body construct a list of qualifying generic crimes.140 Yet these proposals merely postpone rather than resolve the problem of applying the ACCA. The categorical approach requires courts to focus on each statute’s individual elements rather than on a hypothetical and idealized form of the offense.141 Even if Congress compiled a list of generic crimes that per se qualify as ACCA predicate offenses, the categorical approach requires courts to analyze statutes. The Supreme Court’s recent foray into lower court disagreement on different burglary statutes, for example, illustrates the incompleteness of simply enumerating general crimes.142 Statutory idiosyncrasies prevent generalizable offense categories from doing much work for courts, which must inevitably scrutinize individual elements.143 In addition, if one of the ACCA’s goals is to ensure that “every armed felon . . . know[s] which of his prior felonies could serve to increase his sentence,”144 providing a list of the platonic forms of generic predicate offenses will engender a false sense of clarity.

Listing applicable crime categories is not incompatible with this Note’s proposal to compile an appendix of all predicate statutes. Were Congress to

140. E.g., Hutchison et al., supra note 34, § 4B1.2, at 1357 (suggesting that the Sentencing Commission could “alleviate” confusion by “providing a list of which common offenses are, or are not, covered by [the] ‘otherwise clause’”); Nash, supra note 57.
141. Sykes, 131 S. Ct. at 2289 (Kagan, J., dissenting) (“[The Court does not] proceed by exploring whether some platonic form of an offense . . . satisfies ACCA’s residual clause.”).
142. See supra notes 23–27 and accompanying text.
143. See Transcript of Oral Argument at 13, 27, Descamps v. United States, 133 S. Ct. 2276 (2013) (No. 11-9540) (Justice Breyer noting that the number of state statutes “that are sort of like something, but not completely like something is in the thousands”).
144. See Sykes, 131 S. Ct. at 2277.
do so, a federal agency could then assemble an ACCA appendix of statutes that constitute crimes on that list. Although Congress has been resistant to further enumeration that would moderate the ACCA’s scope,\textsuperscript{145} taking this step would make compiling the appendix a smaller-scale endeavor. Regardless of whether Congress follows Justice Alito’s advice, the appendix proposal stands on its own.

E. Resolving Related Issues

Although this Note focuses on the ACCA, Congress should require the Sentencing Commission to use the appendix to resolve other closely related issues. For example, the Sentencing Commission’s own Federal Sentencing Guidelines use the term “crime of violence” to calculate criminal history points—and its definition is nearly identical to that of a violent felony under the ACCA.\textsuperscript{146} Yet some courts justify a broader reading of the guidelines definition by pointing to accompanying commentary suggesting that it may reach some offenses that do not satisfy the Supreme Court’s fluctuating definition of an ACCA violent felony.\textsuperscript{147} Unsurprisingly, however, most courts prefer to consider the two definitions of a violent crime as coterminous.\textsuperscript{148} Yet their interchangeability ultimately depends on the Court’s unpredictable definition of a violent felony under the ACCA.\textsuperscript{149}

It would be illogical for the Sentencing Commission to undertake the enormous task of cataloguing ACCA violent felonies without also resolving closely related issues such as which state felony statutes qualify as violent crimes under the guidelines. Settling the latter issue will require answering questions outside of this Note’s scope. For example, the Sentencing Commission would need to determine whether the ACCA appendix’s standard should be applied in designating state statutes as crimes of violence under the guidelines. Yet the larger issue of clarifying which statutes count toward

\textsuperscript{145.} See supra notes 85–86.

\textsuperscript{146.} See U.S. Sentencing Guidelines Manual §§ 4B1.1–2 (2013); supra note 99. Although the guidelines present a clear example of potential definitional overlap with the ACCA—and one with wide-ranging impact—this is not the only place where the ambiguous term “crime of violence” impacts criminal defendants. See, e.g., Bail Reform Act of 1984, 18 U.S.C. § 3142 (2012) (conviction for a crime of violence creates a rebuttable presumption that no set of conditions short of pretrial defendant detention will ensure community safety). Although examining each of these examples is outside of this Note’s scope, Congress could presumably use the ACCA appendix to provide definitional clarity to other areas of federal criminal law that use similar crime categories.

\textsuperscript{147.} Amy Baron-Evans et al., Deconstructing the Career Offender Guideline, 2 Charlotte L. Rev. 39, 72 (2010).

\textsuperscript{148.} E.g., United States v. Wyatt, 672 F.3d 519, 521 (7th Cir. 2012) (analyzing the ACCA and guidelines definitions coterminously); United States v. Coronado, 603 F.3d 706, 709 (9th Cir. 2010) (citing “agreement” between “every circuit that has had occasion” to compare the guidelines and ACCA definitions of violent felony).

\textsuperscript{149.} See, e.g., United States v. Miller, 721 F.3d 435, 438–39 (7th Cir. 2013) (noting a shift in the Supreme Court’s residual clause jurisprudence from Begay v. United States, 553 U.S. 137 (2008), to Sykes v. United States, 131 S. Ct. 2267 (2011), and analyzing a prior conviction for possession of a short-barreled shotgun under the latter’s standard).
the guidelines’s career-offender designation is an area of uncertainty that Congress could readily resolve with the ACCA appendix.

Even outside of the criminal context, federal courts must determine the scope of a crime of violence, and the ACCA appendix can help in doing so. The Department of Homeland Security, for example, requires applicants for naturalized citizenship to establish their good moral character, which they cannot do if they have an aggravated felony conviction. An aggravated felony within immigration law includes a “crime of violence,” which is distinct from the ACCA’s definition. It has been widely noted that an especially confusing aspect of this complex area of law is predicting whether a conviction for a particular offense will render an alien deportable. The immigration definition is more expansive than the ACCA’s in that it also includes physical force against another’s property. It is narrower than the ACCA’s definition, however, in that conduct in which the “substantial risk that physical force . . . may be used” is less inclusive than “conduct that presents a serious potential risk of physical injury.”

Yet some courts have held that the two statutes are sufficiently similar to merit treating them interchangeably. These courts have relied on the purposeful, violent, and aggressive language from Begay to hold that an ACCA violent felony is indistinguishable from a crime of violence in the immigration context. But this justification is complicated by the Sykes Court’s declaration that purposeful, violent, and aggressive has no “precise textual link” to the ACCA’s residual clause and is therefore potentially not determinative of a crime’s classification as a violent felony. Either Congress should declare that the definitions are identical and apply to the same state statutes or clarify the substantive difference between them. It would make little sense to leave this issue unresolved when the Sentencing Commission compiles an appendix of state statutes that probably applies here as well.


155. Id. § 924(c)(2)(B).

156. E.g., United States v. Castleman, 695 F.3d 582, 586 (6th Cir. 2012) (“The provisions’ similarity supports the inference that Congress intended them to capture offenses criminalizing identical degrees of force.”), rev’d, No. 12-1371, 2014 WL 1225196 (U.S. Mar. 26, 2014); United States v. White, 606 F.3d 144, 153 (4th Cir. 2010) (finding “little, if any, distinction between the ‘physical force’ element[s]” of the two definitions).

157. See, e.g., United States v. Gomez-Leon, 545 F.3d 777, 789 (9th Cir. 2008) (“Following Begay, it is unclear whether there is any meaningful difference between the two risk-based approaches . . . .”).

Even if Congress fails to resolve these definitional questions, comprehensively defining the scope of a violent felony in the ACCA context can provide clarity in other ways. Federal courts already consult case law commenting on the ACCA when considering the scope of other violent crime language. An appendix that definitively indicates whether the conviction in question was for an ACCA predicate offense will have even more probative force.

Lastly, the appendix will have greater influence in collateral contexts if the Sentencing Commission indicates why each statute was included. The appendix should differentiate between statutes that qualify as violent felony predicate offenses because of an element that includes the use of physical force and those statutes that present a serious risk of physical injury. At the very least, bracketing physical force predicates will serve as a dispositive indicator of a violent crime conviction under the Sentencing Guidelines’s identical language and for nonproperty violent crimes in the immigration context.

Conclusion

Creating and maintaining an exhaustive appendix of every state statute that qualifies as an ACCA predicate offense will be a significant undertaking. Yet Congress shows no signs of ending its use of broadly categorized convictions from other jurisdictions to answer federal legal questions. In contrast to the current approach of statute-by-statute judicial interpretation, a comprehensive administrative solution would eliminate unjust intercourt disparity, streamline enforcement for courts, reduce the costs of debating the ACCA’s scope for prosecutors and defendants, and give fair warning to those considering committing certain crimes and contemplating plea offers. Such a solution will also better serve the goal of using a harsh penalty to deter violent crime. There is likely to be disagreement over which federal and state agencies should be involved in this process as well as over the proper governing standard for determining predicate offenses. In addition to recommending reform of the ACCA, this Note could also serve as a template for a broader discussion on how best to use agencies to provide comprehensive guidance on convictions from other jurisdictions.