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CATEGORICAL NONUNIFORMITY

*Sheldon A. Evans**

The categorical approach, which is a method federal courts use to ‘categorize’ which state law criminal convictions can trigger federal sanctions, is one of the most impactful yet misunderstood legal doctrines in criminal and immigration law. For thousands of criminal offenders, the categorical approach determines whether a previous state law conviction—as defined by the legal elements of the crime—sufficiently matches the elements of the federal crime counterpart that justifies imposing harsh federal sentencing enhancements or even deportation for noncitizens. One of the normative goals courts have invoked to uphold this elements-based categorical approach is that it produces nationwide uniformity. Ironically, however, the categorical approach produces the opposite. By examining the categorical approach in different contexts, this Article shows that relying on state criminal elements has produced nonuniformity due to the variations of state law.

While scholars are increasingly weighing in, this Article contributes to the literature by applying different theories of uniformity that juxtapose the ideals of nationwide uniformity with the potential benefits of nonuniformity. This novel analysis supports several paths forward, dictated by policy preferences. First, if uniformity is to be prioritized, the elements-based categorical approach must be fundamentally redesigned to properly accomplish this goal. Second, uniformity can be responsibly abandoned by justifying the elements-based categorical approach under a different theoretical framework that acknowledges the benefits of state variation. Finally, other options might prove effective to tailor the categorical approach to the policy goals unique to different statutes, and the possible abolition of the categorical approach altogether.

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INTRODUCTION

The categorical approach is a method of ‘categorizing’ which state criminal convictions can trigger federal sanctions.¹ But lurking underneath this simple encapsulation of the categorical approach lies a complex, muddled, and perplexing jurisprudence² that has broad impacts

1. See *United States v. Garcia-Santana*, 774 F.3d 528, 539 (9th Cir. 2014) (stating that the categorical approach helps courts assess “[w]hat set of prior state and federal criminal convictions . . . Congress mean[t] to encompass in a provision assigning [sanctions] to such previous convictions”). For this Article’s definition of “sanctions,” see *infra* note 4.

2. See, e.g., *Chambers v. United States*, 555 U.S. 122, 126 (2009) (“This categorical approach requires courts to choose the right category. And sometimes the choice is not obvious.”).

in the disparate imposition of federal criminal sentencing enhancements and immigration deportations.³ When Congress wrote a number of federal statutes governing the imposition of such harsh sanctions⁴—such as criminal sentencing enhancements under the Armed Career Criminal Act (ACCA)⁵ or deportation under the Immigration and Nationality Act (INA)⁶—it expressly allowed for state criminal convictions of certain crimes it enumerated in the statutes (such as murder, rape, and burglary) to serve as predicates to trigger these federal sanctions at a later time.⁷ The categorical approach purports to do this through an elements-based test; it compares the state criminal elements from an offender’s prior state criminal conviction to the federal elements of the crime enumerated in the statute.⁸ By way of example, courts utilize the categorical approach to determine if a state law’s version of *murder*, *rape*, or *burglary*—as defined by that state’s criminal elements—qualify under what Congress intended when it enumerated *murder*, *rape*, and *burglary* in the respective federal statute.⁹ If the state criminal elements match or criminalize narrower conduct than the federal elements, then the state criminal conviction can serve as a predicate to impose the federal sanction.¹⁰

For over a century,¹¹ courts have used the categorical approach to impact thousands of people every year,¹² justifying the elements-based

3. See *infra* notes 106–115, 137–146 and accompanying text.

4. This Article refers to federal criminal and civil penalties as sanctions because this term encompasses both criminal sentencing enhancements and civil immigration deportations. But see Gabriel J. Chin, *Illegal Entry as Crime, Deportation as Punishment: Immigration Status and the Criminal Process*, 58 *UCLA L. Rev.* 1417, 1441–51 (2011) (arguing that deportation constitutes quasi-punishment).

5. 18 U.S.C. § 924(e) (2018).

6. 8 U.S.C. §§ 1101–1537 (2018).

7. See, e.g., *id.* § 1101(a)(43) (applying convictions under either “Federal or State law” to aggravated felonies); *Taylor v. United States*, 495 U.S. 575, 588–89 (1990) (acknowledging that the ACCA could be triggered by state law convictions).

8. See *Mathis v. United States*, 136 S. Ct. 2243, 2248–49 (2016) (noting that, when applying the categorical approach, courts “focus solely on whether the elements of the crime of conviction sufficiently match the elements of [the crime], while ignoring the particular facts of the case”).

9. See, e.g., *id.*

10. See *id.* (explaining that, in the context of burglary, a federal conviction can be triggered by a state conviction if the state crime’s elements are “the same as, or narrower than, those of” the federal crime).

11. See *infra* notes 121–124 and accompanying text.

12. See Katherine Witsman, DHS, *Annual Report: Immigration Enforcement Actions: 2017*, at 12 tbl.6 (2019), https://www.dhs.gov/sites/default/files/publications/enforcement_actions_2017.pdf [<https://perma.cc/S56S-M7VT>] (stating that 295,364 noncitizens with criminal records were deported in 2017—down from 333,592 in 2016, 326,406 in 2015, and over 400,000 recorded annually between 2012 and 2014). These figures include all deportations on the basis of criminal convictions, without specifying deportations based alone on aggravated felony determinations. *Id.*; see also Jessica A. Roth, *The Divisibility of Crime*, 64 *Duke L.J. Online* 95, 97 n.7 (2015) (finding that “approximately 600 criminal defendants per year have been sentenced as Armed Career Criminals” under

approach as one that would promote nationwide uniformity across all jurisdictions,¹³ without relying on the different “technical definitions and labels” or the “vagaries of state law.”¹⁴ But the categorical approach’s reliance on state criminal elements has proven instead to be “an impediment to uniformity.”¹⁵ Therefore, because the categorical approach consistently results in disparities that are triggered by the very technicalities and differences in state law it promised to ignore, it has come time for its reconsideration.

The nonuniformity of the categorical approach can be told as a tale of two jurisdictions. Compare the case of Arthur Taylor to that of Richard Mathis; both offenders were convicted of second-degree burglary, but Taylor was convicted under Missouri law and Mathis was convicted under Iowa law.¹⁶ The factual evidence preserved in each offender’s state court proceeding showed that both men admitted to similar conduct of having burgled buildings.¹⁷ Some years later, both Taylor and Mathis emerged on the radar of federal law enforcement because they both, as persons

the ACCA); How Many Hundreds (or Thousands?) of ACCA Prisoners Could Be Impacted by a Big Ruling in *Johnson?*, Sent’g L. & Pol’y (June 13, 2015), http://sentencing.typepad.com/sentencing_law_and_policy/2015/06/how-many-hundreds-or-thousands-of-acc-prisoners-could-be-impacted-by-a-big-ruling-in-johnson.html [https://perma.cc/6BN9-SK5M] (estimating that over 7,000 people are currently serving enhanced ACCA sentences).

13. See *Taylor v. United States*, 495 U.S. 575, 590 (1990) (emphasizing uniform definitions of predicate crimes); *United States v. Mayer*, 560 F.3d 948, 952 (9th Cir. 2009) (Kozinski, J., dissenting) (explaining the uniformity virtues of the categorical approach); *United States ex rel. Mylius v. Uhl*, 210 F. 860, 862 (2d Cir. 1914) (“[T]he rule which confines the proof of the nature of the offense to the judgment is clearly in the interest of a uniform . . . administration of the law”); Laura Jean Eichten, Comment, A Felony, I Presume? 21 USC § 841(b)’s Mitigating Provision and the Categorical Approach in Immigration Proceedings, 79 U. Chi. L. Rev. 1093, 1136 (2012) (“A key goal of the categorical approach has always been the uniform administration of the law.”). Courts have also justified using the categorical approach on the basis that it serves judicial economy, but that notion has been challenged. See *Mayer*, 560 F.3d at 952 (Kozinski, J., dissenting) (“A great virtue of the categorical approach has been its consistency across doctrinal areas.”); *Mylius*, 210 F. at 862 (claiming that the categorical approach promotes “efficient administration of the law”); see also *infra* notes 164–172 and accompanying text.

14. *Taylor*, 495 U.S. at 588, 590.

15. *United States v. Chapman*, 866 F.3d 129, 137 (3d Cir. 2017) (Jordan, J., concurring); see also Cristina M. Rodríguez, Uniformity and Integrity in Immigration Law: Lessons from the Decisions of Justice (and Judge) Sotomayor, 123 Yale L.J. Forum 499, 503–04 (2014) [hereinafter Rodríguez, Uniformity and Integrity in Immigration Law] (describing the categorical approach as a “design [that] thwarts uniformity, the courts’ best efforts notwithstanding”).

16. See *Mathis v. United States*, 136 S. Ct. 2243, 2250 (2016); *Taylor*, 495 U.S. at 578. Compare Mo. Rev. Stat. § 560.045 (1969) (current version at Mo. Ann. Stat. § 569.170 (West 2017)) (breaking and entering a dwelling house), with Iowa Code § 713.1 (1989) (burgling an occupied structure).

17. See *United States v. Mathis*, 786 F.3d 1068, 1075 (8th Cir. 2015) (finding that two of Mathis’s previous burglary convictions were for burgling garages), *rev’d*, 136 S. Ct. 2243; *United States v. Taylor*, 932 F.2d 703, 707 (8th Cir. 1991) (finding that Taylor’s previous burglary convictions were for burgling buildings, including a service station shop).

convicted of felonies, illegally possessed a firearm in violation of federal law.¹⁸ In these later federal court proceedings, federal prosecutors pursued sentencing enhancements under the ACCA based on the previous state burglary convictions.¹⁹ But even dealing with such similar criminal conduct, the Supreme Court came to different conclusions under the categorical approach. Whereas the Court held that Missouri's burglary statute can trigger the federal sanction, it separately held that Iowa's burglary statute cannot.²⁰ Because of the minor differences in how these two sister states drafted their respective burglary statutes, the Court applied the categorical approach differently to accommodate these differences in state law. This explains how Mathis, who had the "luck"²¹ of committing criminal conduct in Iowa, could enjoy a sentencing windfall²² whereas Taylor, committing similar criminal conduct across a northern border in Missouri, was not so lucky.²³ Two offenders who admitted to committing similar criminal conduct of burgling different buildings at the state-proceeding stage were treated differently by federal courts imposing sanctions at the federal-proceeding phase because of the differences in state law. And the disparate impact was monumental. The nonuniformity of the categorical approach can mean the difference between adding several years behind bars or receiving a lesser sentence, or even the difference between staying in the country or being deported.²⁴

This illustrates the incompatibility between an elements-based categorical approach and nationwide uniformity. Any state-to-federal sanctioning regime that relies so heavily on state criminal elements will struggle to achieve nationwide uniformity. The federal sanctions applied at a later date will always be wholly dependent on the differences between various state laws. Any promise or commitment that the courts have made to establish nationwide uniformity has proven to be illusory in practice.²⁵

18. See *Mathis*, 136 S. Ct. at 2250; *Taylor*, 495 U.S. at 578.

19. See *Mathis*, 136 S. Ct. at 2246; *Taylor*, 495 U.S. at 579.

20. See *Mathis*, 136 S. Ct. at 2257; *Taylor*, 495 U.S. at 602.

21. See *Cazarez-Gutierrez v. Ashcroft*, 382 F.3d 905, 917 (9th Cir. 2004) (characterizing defendants as having been "lucky enough" to commit a crime in a more lenient state that results in less serious consequences under the categorical approach).

22. See *United States v. Doctor*, 842 F.3d 306, 314, 316 (4th Cir. 2016) (Wilkinson, J., concurring) (describing the categorical approach as creating sentencing windfalls); Caleb E. Mason & Scott M. Lesowitz, A Rational Post-*Booker* Proposal for Reform of Federal Sentencing Enhancements for Prior Convictions, 31 N. Ill. U. L. Rev. 339, 368–70 (2011) (arguing that differences in state law can result in offenders avoiding otherwise prescribed punishment under the categorical approach). But see Evan Tsen Lee, *Mathis v. U.S.* and the Future of the Categorical Approach, 101 Minn. L. Rev. Headnotes 263, 272–76 (2016) [hereinafter Lee, *The Future of the Categorical Approach*] (arguing against the windfall logic).

23. See *Mathis*, 136 S. Ct. at 2260–61 (Breyer, J., dissenting) (highlighting similarities between the Missouri statute in *Taylor* and the Iowa statute in *Mathis*, and criticizing the different applications of the categorical approach between cases).

24. See *infra* notes 106–115, 137–146 and accompanying text.

25. See *infra* notes 99–110, 137–146 and accompanying text.

As a result, courts have fallen into the very trap they sought to avoid: The different technicalities and vagaries of state law govern the imposition of federal sanctions.²⁶

This problem arises, in part, because the courts' broken promises are premised on the semantic imprecision of the ambiguous ideal of "uniformity." The irony of the term "uniformity" is that it is not uniform. It enjoys a diversity of meanings, some of which can lead down different policy paths. This Article focuses on two such meanings most commonly used by the courts to justify the categorical approach. First is uniformity in terms of application. This type of uniformity ensures that the same rule, or set of rules, is applied the same way to all cases within applicable boundaries.²⁷ Second is uniformity in terms of outcomes. This uniformity ensures that similar sanctions are meted out for similar cases.²⁸ So whereas uniformity of application is more concerned with similar *means*, uniformity of outcomes is more concerned with similar *ends*. While these uniformities are distinct in theory, they often share overlapping principles and goals in practice when utilized to build legitimacy in legal regimes.²⁹

By recognizing these distinct uniformities, this Article argues that the elements-based categorical approach fails both standards because of its dependence on state law. Not only do differences in state criminal

26. See Wayne A. Logan, *Contingent Constitutionalism: State and Local Criminal Laws and the Applicability of Federal Constitutional Rights*, 51 *Wm. & Mary L. Rev.* 143, 145–47 (2009) [hereinafter Logan, *Contingent Constitutionalism*] (discussing the national nonuniformity of federal constitutional rights in criminal procedure due to differences in state law); see also Letter from James Madison to Thomas Jefferson (Oct. 24, 1787), in *The Founders' Constitution* 644, 646 (Phillip B. Kurland & Ralph Lerner eds., 1987) (stating that "mutability" of state laws represented a "serious evil").

27. See, e.g., *United States v. Torres*, 923 F.3d 420, 424–25 (5th Cir. 2019) (citing the uniform application across different areas of law); *Amos v. Lynch*, 790 F.3d 512, 518 (4th Cir. 2015) (citing *Taylor v. United States*, 495 U.S. 575, 590–91 (1990)) (stating that the categorical "approach allows federal laws to be applied uniformly"); Rodríguez, *Uniformity and Integrity in Immigration Law*, supra note 15, at 506 ("[T]he best courts can do in their oversight . . . is to promote a kind of consistency in legal interpretation to guide law enforcement and administration. By consistency, I mean a predictable approach to resolving immigration law questions that pushes administrative actors to adhere to consistent legal standards . . ."); see also 6 Charles Gordon, Stanley Mailman, Stephen Yale-Loehr & Ronald Y. Wada, *Immigration Law and Procedure* § 71.05[2][b] (Matthew Bender & Co., Inc. rev. ed. 2013) (highlighting the importance of employing a "uniform rule" to determine which state convictions qualify as aggravated felonies).

28. See, e.g., *Gerbier v. Holmes*, 280 F.3d 297, 311–12 (3d Cir. 2002) (stating "that permanent resident aliens who are in like circumstances, but for irrelevant and fortuitous factors, [should] be treated in a like manner" (quoting *Francis v. Immigr. & Naturalization Serv.*, 532 F.2d 268, 273 (2d Cir. 1976))); Rebecca Sharpless, *Clear and Simple Deportation Rules for Crimes: Why We Need Them and Why It's Hard to Get Them*, 92 *Denv. U. L. Rev.* 933, 943 (2015) [hereinafter Sharpless, *Deportation Rules*] (noting that "[t]he categorical analysis rests on the bedrock principle[] that fairness requires that immigrants convicted of the same offenses be treated uniformly").

29. See *infra* notes 188–194 and accompanying text.

elements trigger different *applications* of the categorical approach,³⁰ but they also trigger different *outcomes* among otherwise similar offenses.³¹ The categorical approach has failed to meet the very metric that courts developed it to achieve.

The complexities of navigating the nonuniformity of the categorical approach have demanded more of the Supreme Court's docket in recent years in its attempt to clarify these complications; the Court has decided over twenty such cases in the past thirteen years,³² with two more cases pending during this 2020–2021 Term alone.³³ Increasingly, lower court judges have voiced complaints that the categorical approach has become one of the most judicially taxing issues burdening the federal bench.³⁴ It comes as no surprise, then, that there has also been a sharp increase in scholarly interest both praising the merits of the categorical approach³⁵ and/or proposing solutions to fix what has become nearly unworkable.³⁶

30. See *infra* section II.A.

31. See *infra* section II.B.

32. See *Shular v. United States*, 140 S. Ct. 779, 787 (2020); *United States v. Davis*, 139 S. Ct. 2319, 2336 (2019); *Quarles v. United States*, 139 S. Ct. 1872, 1880 (2019); *Stokeling v. United States*, 139 S. Ct. 544, 555 (2019); *United States v. Stitt*, 139 S. Ct. 399, 407–08 (2018); *Beckles v. United States*, 137 S. Ct. 886, 897 (2017); *Mathis v. United States*, 136 S. Ct. 2243, 2257 (2016); *Welch v. United States*, 136 S. Ct. 1257, 1268 (2016); *Johnson v. United States*, 135 S. Ct. 2551, 2563 (2015); *United States v. Castleman*, 572 U.S. 157, 171 (2014); *Descamps v. United States*, 570 U.S. 254, 277–78 (2013); *Moncrieffe v. Holder*, 569 U.S. 184, 190 (2013); *Sykes v. United States*, 564 U.S. 1, 15–16 (2011); *McNeill v. United States*, 563 U.S. 816, 823 (2011); *Johnson v. United States*, 559 U.S. 133, 145 (2010); *Nijhawan v. Holder*, 557 U.S. 29, 41–43 (2009); *Chambers v. United States*, 555 U.S. 122, 130 (2009); *United States v. Rodriguez*, 553 U.S. 377, 393 (2008); *Begay v. United States*, 553 U.S. 137, 148 (2008); *Logan v. United States*, 552 U.S. 23, 37 (2007); *James v. United States*, 550 U.S. 192, 208–09 (2007).

33. See *United States v. Borden*, 769 F. App'x 266 (6th Cir. 2019), cert. granted, 140 S. Ct. 1262 (Mar. 2, 2020) (No. 19-5410) (mem.) (addressing the application of the ACCA under the categorical approach to mens rea elements); *Perieda v. Barr*, 916 F.3d 1128 (8th Cir. 2019), cert. granted, 140 S. Ct. 680 (Dec. 18, 2019) (No. 19-438) (mem.) (addressing whether a criminal attempt conviction qualifies as a deportable crime under categorical approach).

34. See *infra* notes 167–173 and accompanying text.

35. See, e.g., Jennifer Lee Koh, *The Whole Better than the Sum: A Case for the Categorical Approach to Determining the Immigration Consequences of Crime*, 26 *Geo. Immigr. L.J.* 257, 295–99 (2012) [hereinafter Koh, *The Whole Better than the Sum*] (arguing the benefits of the categorical approach include a clear doctrine and judicial efficiency); Rebecca Sharpless, *Toward a True Categorical Elements Test: Taylor and the Categorical Analysis of Crimes in Immigration Law*, 62 *U. Mia. L. Rev.* 979, 1031–34 (2008) [hereinafter Sharpless, *Toward a True Categorical Elements Test*] (same); see also Amit Jain & Phillip Dane Warren, *An Ode to the Categorical Approach*, 67 *UCLA L. Rev. Discourse* 132, 150 (2019) (arguing the merits of uniformity produced by the categorical approach); Fatma Marouf, *A Particularly Serious Exception to the Categorical Approach*, 97 *B.U. L. Rev.* 1427, 1470 (2017) (same).

36. See, e.g., Rachel E. Barkow, *Categorical Mistakes: The Flawed Framework of the Armed Career Criminal Act and Mandatory Minimum Sentencing*, 133 *Harv. L. Rev.* 200, 207–09 (2019) [hereinafter Barkow, *Categorical Mistakes*] (arguing that Congress's

This Article contributes a novel analysis to the literature on the categorical approach by juxtaposing the theoretical framework of nationwide uniformity with the political ideals of a federalist system of government. Building from the costs and benefits of each, the Article argues that there are unique paths forward that would restructure the categorical approach to solve its problem of nonuniformity. The first path prioritizes nationwide uniformity as a worthwhile and achievable pursuit. If either uniformity of application or outcomes is to be salvaged, the categorical approach must be redesigned to properly accommodate these uniformities. The most viable option to maximize both uniformities would be a conduct-based categorical approach. Such an approach would rely on the underlying criminal conduct of the offender's state court conviction, and then determine if such conduct—regardless of whether it was committed in Missouri or Iowa—would fit within the federal elements of the enumerated crime.³⁷ By excising reliance on state law criminal elements, a conduct-based categorical approach will impose sanctions according to criminal conduct, which would mitigate nonuniformity that comes with state law variety.³⁸

But there is another path forward, one that recognizes that while a conduct-based categorical approach holds a greater likelihood of coming closer to uniformity than the current elements-based approach, it will not eliminate all disparity. And if perfect uniformity cannot be achieved,³⁹ the current elements-based categorical approach can be retained, albeit under a different justification. This Article argues that the practical and theoretical benefits of federalism can serve to justify the disparate application and outcomes of the elements-based categorical approach. Embracing the natural differences that arise within a federal system that accounts for and encourages differences in state law according to the preferences of that polity would justify the disparate treatment of criminal offenders who choose to violate the laws of that state, and must then accept the different costs that come with such state citizenship.

This Article proceeds in Part I by focusing on the ACCA and the INA, two key areas in which applying the categorical approach has the greatest

statutory design of the ACCA is problematic for incorporating state law, and that Congress should have instead given discretion to the Sentencing Commission); Sheldon A. Evans, Punishing Criminals for Their Conduct: A Return to Reason for the Armed Career Criminal Act, 70 Okla. L. Rev. 623, 649–52 (2018) [hereinafter Evans, Punishing Criminals] (examining the inconsistencies of basing ACCA sentencing enhancements on state law); Iris Bennett, Note, The Unconstitutionality of Nonuniform Immigration Consequences of “Aggravated Felony” Convictions, 74 N.Y.U. L. Rev. 1696, 1720–24 (1999) (explaining that differences between states' criminal laws lead to discrepancies in the imposition of federal immigration sanctions).

37. See Evans, Punishing Criminals, *supra* note 36, at 666–67 (arguing that a conduct-based approach would solve nonuniformity between jurisdictions).

38. *Id.*

39. See Amanda Frost, Overvaluing Uniformity, 94 Va. L. Rev. 1567, 1606 (2008) (arguing that the detriments of nationwide nonuniformity of federal law are overstated).

effect on defendants and the doctrine's development. The examples illustrate how the differences in states' criminal statutes trigger different applications of the categorical approach and, in turn, trigger different outcomes for similar criminal conduct. Part II serves as the primary contribution of the Article by examining how the categorical approach fails to uphold courts' promises of uniformity. By comparing courts' logic with that of the different underpinnings of uniformity in application and uniformity in outcomes, it becomes nearly impossible to achieve either uniformity under the current elements-based categorical approach. Part III presents potential remedies to the categorical approach by exploring several paths with different views on uniformity. First, if nationwide uniformity is an achievable goal, this Article argues that the best option is to transition to a conduct-based categorical approach that removes the disparities created by differences in state law. Uniformity might also be achieved with a separate-sovereign system, allowing federal sanctions to be imposed for only previous federal—not state—convictions. Second, if nationwide uniformity is to be abandoned, the elements-based categorical approach can be salvaged, but under the different theoretical and practical justifications that may come by embracing the benefits of having variety in state law under a federal system of government. Embracing nonuniformity also allows a novel analysis of tailoring the categorical approach, pursuing different approaches for different statutes to serve the unique policy goals of each. And finally, the challenges of salvaging uniformity, and possibly redesigning the categorical approach, require consideration of complete abolition of the doctrine altogether.

I. THE CATEGORICAL APPROACH'S UNIFORMITY PROBLEM

"It surprises me that we have arrived at this point, because in theory, the categorical approach makes a good deal of sense But what was fine in theory has sometimes proven to be less so in practice."⁴⁰

The categorical approach is best understood as a method of 'categorizing' which state criminal convictions trigger later federal sanctions.⁴¹ The Supreme Court developed the categorical approach as an attempt to overcome what some had perceived as a problem of statutory design.⁴² Consequently, whenever Congress has designed a statute that

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

41. See *United States v. Garcia-Santana*, 774 F.3d 528, 539 (9th Cir. 2014) (stating that the categorical approach helps courts assess "[w]hat set of prior state and federal criminal convictions . . . Congress mean[t] to encompass in a provision assigning [sanctions] to such previous convictions").

42. See, e.g., *Graham Cnty. Soil & Water Conservation Dist. v. United States ex rel. Wilson*, 545 U.S. 409, 422 (2005) ("Congress could have drafted [§ 1101(a)(43)] with more precision than it did."); *Taylor v. United States*, 495 U.S. 575, 583–90 (1990) (explaining the legislative history that the Court used to justify developing the categorical approach); Barkow, *Categorical Mistakes*, *supra* note 36, at 207 ("The blame for this regime falls squarely on Congress and the statutory framework it elected to adopt.").

allowed a state criminal conviction to serve as a predicate for a downstream federal sanction, courts have utilized the categorical approach in some form to help categorize these state crimes.⁴³ The sweeping federalization of criminal law throughout the 1980s and 1990s⁴⁴ produced many federal statutes that subscribed to this design,⁴⁵ which explains why the reach of the categorical approach is quite vast and “seems to be always enlarging its territory.”⁴⁶ Its impact is felt even outside of federal law, with a number of state courts citing federal precedent when developing and applying their own parallel versions of the categorical approach in criminal sentencing.⁴⁷ When writing these statutes, Congress left them vague in certain instances by enumerating, but not precisely defining, state crimes that qualify as

43. See, e.g., *United States v. Mayer*, 560 F.3d 948, 951 (9th Cir. 2009) (Kozinski, J., dissenting) (noting that courts use the categorical approach to interpret federal sentencing statutes, federal sentencing guidelines, and immigration statutes).

44. See Sara Sun Beale, *Rethinking the Identity and Role of United States Attorneys*, 6 Ohio St. J. Crim. L. 369, 392, 399 (2009) (counting nearly 4,000 federal crimes); Kathleen F. Brickey, *Criminal Mischief: The Federalization of American Criminal Law*, 46 Hastings L.J. 1135, 1137–45 (1995) (providing a historical overview of federal regulation of crime); Lisa L. Miller & James Eisenstein, *The Federal/State Criminal Prosecution Nexus: A Case Study in Cooperation and Discretion*, 30 Law & Soc. Inquiry 239, 242–43 (2005) (explaining the history of the federalization of crime and noting that “[a] report by the American Bar Association Task Force on the Federalization of Criminal Law reports that over 40% of all federal criminal statutes enacted since the Civil War were passed after 1970”).

45. See, e.g., 18 U.S.C. § 16 (2018) (defining “crime of violence,” which includes state and federal offenses); *id.* § 249 (defining hate crimes that involve predicate kidnapping and other enumerated state law offenses); *id.* § 924(c)(3) (defining drug trafficking crimes involving crimes of violence defined in part by state law); *id.* § 1111(a) (defining the felony murder rule with enumerated crimes that can qualify under state law); *id.* § 1461 (criminalizing mailing materials that can induce violations of enumerated state crimes); *id.* § 1652 (enumerating murder or robbery against the United States in piracy actions); *id.* § 1956(c)(7) (defining “specified unlawful activity” involving enumerated state law crimes); *id.* § 1959 (enumerating state crimes that constitute violent crimes in aid of racketeering); *id.* § 1961 (defining “racketeering activity” as involving enumerated state crimes); *id.* § 1991 (enumerating state crimes while entering a train); *id.* § 3142(g) (outlining bail determinations based on “crime of violence”); *id.* § 3156(a)(4) (defining “crime of violence” as including certain state crimes); *id.* § 3185 (enumerating state crimes punishable while a fugitive is in flight); *id.* § 3559(c) (defining a federal life sentence for predicate violent felonies under state law); 21 U.S.C. § 841(b) (2018) (enhancing sentences for certain drug crimes based partly on state law); 34 U.S.C. § 20911 (2018) (outlining the Sex Offender Registration and Notification Act (SORNA) that requires registration based on state law sex offenses).

46. See *United States v. Chapman*, 866 F.3d 129, 136 (3d Cir. 2017) (Jordan, J., concurring) (critiquing the expansion of the categorical approach across different areas of criminal law).

47. See Sharpless, *Deportation Rules*, *supra* note 28, at 944 (citing as an example *State v. Hearn*, 961 So. 2d 211, 212 (Fla. 2007), which held that the elements of an offense are the only relevant factors in determining whether a prior conviction constitutes a forcible felony).

predicates for a corresponding federal sanction.⁴⁸ Courts filled the legislative gap by designing the categorical approach.⁴⁹

This Part analyzes the practical application of the categorical approach by outlining the distinct steps and substeps courts employ when deciding cases. These multiple steps have in turn produced variations of the categorical approach, which has produced nonuniformity with significant consequences. These variations and consequences are analyzed under two statutes in which its nonuniformity is perhaps most impactful: applying the ACCA's enhanced fifteen-year mandatory minimum sentence to thousands more based on state criminal convictions, and deporting hundreds of thousands of noncitizens through the INA for their state criminal convictions.⁵⁰ As the analysis of these two statutes shows, not only has the categorical approach failed to deliver uniformity in application, but it has also resulted in disparate sanctioning outcomes because of its unnecessary reliance on the elements of state criminal law.

A. *The Multi-Step Categorical Approach*

The practice of the categorical approach is best understood in three steps. At Step One, a court must determine the federal elements of an enumerated crime. Courts have employed a variety of different ways of crafting such federal elements,⁵¹ but in many cases they craft their own “generic definition” of the enumerated crime.⁵² “By ‘generic,’” courts mean “the offenses must be viewed in the abstract, to see whether the state statute shares the nature of the federal offense that serves as a point of comparison.”⁵³ The Court has also formed “generic” definitions by getting

48. See, e.g., Carissa Byrne Hessick, *Johnson v. United States* and the Future of the Void-for-Vagueness Doctrine, 10 N.Y.U. J.L. & Liberty 152, 157–61 (2016) [hereinafter Hessick, *Johnson v. United States*] (describing vague immigration and federal sentencing statutes that could be reshaped by void-for-vagueness doctrine); Jennifer Lee Koh, *Crimmigration and the Void for Vagueness Doctrine*, 2016 Wis. L. Rev. 1127, 1133 [hereinafter Koh, *Crimmigration*] (arguing that the vagueness of immigration laws that determine federal sanctions supports an elements-based categorical approach).

49. See supra note 42 and accompanying text.

50. See supra note 12 and accompanying text.

51. See, e.g., *Torres v. Lynch*, 136 S. Ct. 1619, 1622 (2016) (explaining that “more than half” of the INA’s subsections fit into this category, cross-referencing a federal crime that would qualify as an aggravated felony (citations omitted)); *Renteria-Morales v. Mukasey*, 551 F.3d 1076, 1081 (9th Cir. 2008) (granting *Chevron* deference to the Board of Immigration Appeals’ interpretation of “relating to obstruction of justice” as an aggravated felony (quoting 8 U.S.C. § 1101(a)(43)(S) (2006))); see also Shannon M. Grammel, *Chevron Meets the Categorical Approach*, 70 Stan. L. Rev. 921, 960 (2018) (highlighting circuit splits on applying *Chevron* deference).

52. See, e.g., *Taylor v. United States*, 495 U.S. 575, 598 (1990) (creating a generic definition of the enumerated crime of burglary).

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

a “sense in which the [crime enumerated by Congress] is now used in the criminal codes of most states.”⁵⁴

Step Two is where the complexity curve spikes, requiring courts to determine the elements of the state crime of conviction. When the Supreme Court created this step, it may have sounded simple,⁵⁵ but the devil is often in the details of state law. Step Two often involves an intricate reading of the state’s criminal statute, as well as detailed analyses of state court decisions to determine which terms from a statute encompass the elements of the state crime.⁵⁶ The Court’s holding in *Mathis v. United States*, which explained that there is a distinction between a state statute listing elements and one listing mere facts, further complicated this analysis of state law.⁵⁷ “‘Elements’ are the ‘constituent parts’ of a crime’s legal definition—the things the ‘prosecution must prove to sustain a conviction’” and “what the jury must find beyond a reasonable doubt to convict the defendant.”⁵⁸ Facts, sometimes referred to as the mere *means* to fulfill these elements, are “real-world things—extraneous to the crime’s legal requirements In particular, they need neither be found by a jury nor admitted by a defendant.”⁵⁹ Making this elements/*means* distinction has proven to be no simple task. In *Mathis*, for example, the Court had to parse through multiple sections and subsections of the Iowa criminal code and cite the Iowa Supreme Court to determine exactly what were the necessary elements to convict a defendant of burglary in that state.⁶⁰ Ultimately, the case was decided based upon the state-specific technicality that the Iowa statute listed means, not actual elements.⁶¹ These differences in how a state has structured the text of a particular criminal statute can come down to minute details, such as whether several possible offenses are

54. *Taylor*, 495 U.S. at 598 (crafting a federal generic definition of “burglary”); see also *Quarles v. United States*, 139 S. Ct. 1872, 1879 (2019) (clarifying the generic definition of “burglary” in light of “the ordinary understanding of burglary as of 1986” when Congress amended the ACCA in part based on “the States’ law at that time”).

55. See *Mathis v. United States*, 136 S. Ct. 2243, 2256 (2016) (describing the “threshold inquiry—elements or means?” as being “easy in this case, as it will be in many others”); *Descamps v. United States*, 570 U.S. 254, 272 (2013) (describing the question of divisibility as having a “simple answer”); *Taylor*, 495 U.S. at 601 (arguing that an elements-based categorical approach avoided the “daunting” and inefficient conduct-based approach).

56. See *De Lima v. Sessions*, 867 F.3d 260, 268 (1st Cir. 2017) (describing “[e]ven a single such categorical analysis” as “an arduous task,” which “is often difficult and time consuming”).

57. See 136 S. Ct. at 2248.

58. *Id.* (citing *Richardson v. United States*, 526 U.S. 813, 817 (1999); *Elements of Crime*, Black’s Law Dictionary (10th ed. 2014)).

59. *Id.* (citing *Richardson*, 526 U.S. at 817; *Fact*, Black’s Law Dictionary (10th ed. 2014)).

60. *Id.* at 2250, 2256–57 (citing *State v. Rooney*, 862 N.W.2d 367, 376 (Iowa 2015); *State v. Duncan*, 312 N.W.2d 519, 523 (Iowa 1981)).

61. *Id.* at 2254–57.

all listed disjunctively⁶² or in sub-paragraphs,⁶³ or merely contain the placement of an “or.”⁶⁴

If this textual consultation of the statute and research into state precedent does not yield a clear answer to the elements/means question, the Court prescribes yet another substep referred to as a “modified peek,” allowing a court to “peek at the [record] documents,”⁶⁵ such as “the indictment, jury instructions, or plea agreement and colloquy”⁶⁶ (often referred to as *Shepard* documents).⁶⁷ Such a “peek” cannot be used to consider the factual criminal conduct committed by the offender, but can only be used to determine the necessary elements as listed in an indictment or instructions to a jury.⁶⁸ So, if such a “peek” into an indictment revealed that a defendant was charged with “burgling a ‘building, structure, or vehicle,’” the Court would believe this was enough to clarify that “each alternative is only a possible *means* of commission, not an *element* that the prosecutor must prove to a jury beyond a reasonable doubt.”⁶⁹

At Step Three, a court compares the elements of the federal version of the enumerated crime (from Step One) to the elements of the state law version of the crime (from Step Two). If the state criminal elements match or criminalize narrower conduct than the federal criminal elements, the previous state criminal conviction can serve as a predicate to impose the corresponding federal sanction.⁷⁰ If, however, the state criminal elements do not match, or criminalize broader conduct than the federal criminal elements, then the state conviction cannot serve as a predicate.⁷¹ But yet again, the Court created another substep to this analysis if a state criminal statute is divisible, meaning that it lists alternative sets of elements.⁷² If one set of these state criminal elements would match with the federal criminal

62. See *infra* notes 101–103 and accompanying text.

63. See *infra* notes 101–103 and accompanying text.

64. See *infra* notes 137–147 and accompanying text.

65. *Mathis*, 136 S. Ct. at 2256 (alteration in original) (quoting *Rendon v. Holder*, 782 F.3d 466, 473–74 (9th Cir. 2015) (Kozinski, J., dissenting)).

66. *Id.* at 2249.

67. See *Shepard v. United States*, 544 U.S. 13, 17–21 (2005) (establishing documents of conclusive records that courts can consult under the modified categorical approach).

68. See *United States v. Pam*, 867 F.3d 1191, 1206 n.14 (10th Cir. 2017) (recognizing modified peek as different from the modified categorical approach); *United States v. Powell*, No. 6:03-CR-60122-AA, 2016 WL 8732306, at *9 n.11 (D. Or. Feb. 5, 2016) (classifying the modified peek approach as a “minor variant of the modified categorical approach”).

69. *Mathis*, 136 S. Ct. at 2257 (emphasis added).

70. *Id.*; *Descamps v. United States*, 570 U.S. 254, 257 (2013); *Taylor v. United States*, 495 U.S. 575, 599–600 (1990).

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

72. *Descamps*, 570 U.S. at 261–63 (outlining the development of the modified categorical approach).

elements, but another set of elements would not, another “variant” of the categorical approach—“labeled (not very inventively) the ‘modified categorical approach’”⁷³—would apply. While this substep was originally contemplated in *Taylor v. United States*,⁷⁴ it was further developed in *Shepard v. United States*—which established the acceptable universe of possible documents⁷⁵ courts could consult in a “modified peek”—and *Descamps v. United States*—which clarified the differences between divisible and indivisible state-law statutes.⁷⁶ The modified categorical approach allows a court to examine generally the same set of *Shepard* documents as the “modified peek” to determine under which set of state criminal elements—the qualifying or nonqualifying set—the offender was convicted.⁷⁷ After the correct set of convicting elements is determined, the court continues the categorical analysis to match that set of elements to the federal criminal elements of the enumerated crime.

If the categorical approach sounds complicated in practice, that is because it is. These varieties of application of the categorical approach constitute one aspect of nonuniformity. Some state laws trigger the regular categorical approach, while some others trigger application of the modified categorical approach, while yet others trigger a modified peek approach. This variety of application has caused jurisprudential havoc for courts applying the ACCA and the INA.

B. *The ACCA and Criminal Sentencing Enhancements*

For nearly thirty years, ACCA jurisprudence has served as the primary vehicle shaping the categorical approach.⁷⁸ These cases are often cited to export the Court’s application of the categorical approach to other areas of law to which the categorical approach also applies.⁷⁹ Promoted in the early 1980s in the midst of a nationalized fear of drugs and crime,⁸⁰ Congress enacted the ACCA with the intention of imposing heightened

73. *Id.* at 257.

74. See 495 U.S. at 600–02.

75. 544 U.S. 13, 17 (2005).

76. 570 U.S. at 261–63.

77. *Id.* at 263–64.

78. See Sarah French Russell, *Rethinking Recidivist Enhancements: The Role of Prior Drug Convictions in Federal Sentencing*, 43 U.C. Davis L. Rev. 1135, 1177 (2010) (citing legislative history showing incapacitation as one of Congress’s primary goals in passing the ACCA).

79. See, e.g., *Moncrieffe v. Holder*, 569 U.S. 184, 190 (2013) (citing ACCA jurisprudence in an immigration case).

80. Michael Schearer, *The Armed Career Criminal Act: Imprecise, Indeterminate, and Unconstitutional 3* (Dec. 3, 2015), <https://ssrn.com/abstract=2698973> (on file with the *Columbia Law Review*) (unpublished manuscript) (“In the two decades from 1960 to 1980, violent crime in the United States rose by an astounding 271%. . . . [T]he burglary rate increased by 231% and robbery increased by 318%. Similar increases were noted in rates of forcible rape, aggravated assault, property crime, larceny, and motor vehicle theft.” (footnotes omitted)).

sentences to incapacitate particularly dangerous repeat offenders.⁸¹ Congress designed the ACCA to impose a sentencing enhancement for defendants who were convicted in federal court for being a felon in possession of a firearm and also had previously been convicted of at least three “violent felon[ies].”⁸² The term “violent felony” is loosely defined in the statute, but Congress specified that state convictions for burglary, arson, and extortion qualify.⁸³

Establishing uniformity in ACCA jurisprudence was of the utmost importance to the Court when fashioning the categorical approach, but the Court’s ACCA jurisprudence has ironically ensured nonuniformity. The Court recognized “[t]his point [as] critically important. Congress’ basic goal in passing [the new federal sentencing regime] was to move the sentencing system in the direction of increased uniformity.”⁸⁴ As referenced above, from the Court’s first foray into applying the categorical approach in an effort to achieve such uniformity in an ACCA case in *Taylor*, to more recent cases of *Descamps* and *Mathis*, the Court has created multiple variants of the categorical approach that are triggered according to different variations of state law.

Taylor started this jurisprudence by addressing whether a conviction under Missouri’s second-degree burglary statute qualified as an ACCA predicate.⁸⁵ Part of the Court’s justification for using the categorical approach in federal sentencing law was to preserve what it perceived to be the intent of Congress that “the same type of *conduct*” be “punishable on the Federal level in all cases.”⁸⁶ The Court rejected a type of state-law labeling approach, which would only require that a defendant be convicted of a state law that matches the label of a congressionally enumerated crime.⁸⁷ Taking burglary as the example, the Court realized

81. See *Taylor v. United States*, 495 U.S. 575, 581 (1990) (“The House Report accompanying the Act explained that a ‘large percentage’ of crimes of theft and violence ‘are committed by a very small percentage of repeat offenders,’ and that robbery and burglary are the crimes most frequently committed by these career criminals.” (quoting H.R. Rep. No. 98-1073, at 1, 3 (1984))).

82. 18 U.S.C. § 924(e)(1), (e)(2)(B) (2018). In addition, previous convictions for “serious drug offenses” as defined by subsection (e)(2)(A) can also count toward an ACCA enhanced sentence. See generally Russell, *supra* note 78 (outlining inconsistencies in applying the “serious drug offenses” section of the ACCA).

83. 18 U.S.C. § 924(e)(2)(B)(ii); see also U.S. Sent’g Guidelines Manual §§ 2L1.2, 4B1.1 (U.S. Sent’g Comm’n 2018) (providing sentencing guidelines that correspond with the ACCA in immigration and sentencing enhancement contexts).

84. *United States v. Booker*, 543 U.S. 220, 253–54 (2005) (citing 28 U.S.C. §§ 991(b)(1)(B), 994(f) (2018)).

85. *Taylor*, 495 U.S. at 577–78.

86. *Id.* at 582 (emphasis added) (internal quotation marks omitted) (quoting S. Rep. No. 98-190, at 20 (1983)).

87. *Id.* at 588–89.

that different states define the crime of burglary differently.⁸⁸ Instead, the Court invoked the overarching goal of uniformity by pursuing “uniform, categorical definitions” and comparing federal and state elements of crimes.⁸⁹ It promised that such a categorical approach would avoid the “vagaries of state law” and impose punishment “regardless of technical definitions and labels under state law.”⁹⁰

But somewhere along the journey, the Court lost its way. By making a distinction between divisible and indivisible state criminal statutes, and invoking hypothetical statutes to illustrate the distinction,⁹¹ the Court unintentionally created even more confusion, which some Justices openly acknowledged.⁹² By creating the *elements/means* distinction and making it a material inquiry in applying the categorical approach, the Court created yet another well of confusion and another substep and variant of the categorical approach.⁹³ And yet again, concurring and dissenting Justices openly acknowledged the difficulty caused by this ever-changing doctrine.⁹⁴

The Court’s recent unanimous decision in *United States v. Stitt*⁹⁵ stands as another example of how different state laws confuse the application of the categorical approach. In *Stitt*, the Court held that the Tennessee and Arkansas burglary statutes that criminalized the burgling of vehicles designed for overnight accommodations⁹⁶ both fit within the federal generic definition of burglary. But that very generic definition only prohibits burgling “a building or other structure.”⁹⁷ Whereas the *Taylor* Court specifically stated that an element of “entry of an automobile” would not fit under federal generic burglary,⁹⁸ and *Shepard* further specified that

88. *Id.* at 580 (“The word ‘burglary’ has not been given a single accepted meaning by the state courts; the criminal codes of the States define burglary in many different ways.” (citation omitted)).

89. *Id.* at 590.

90. *Id.* at 588, 590.

91. See *Descamps v. United States*, 570 U.S. 254, 262, 272 (2013) (offering a hypothetical in which a divisible state statute “criminalizes assault with any of eight specified weapons,” while “only assault with a gun counts as an ACCA offense” (emphasis omitted)); *Taylor*, 495 U.S. at 602.

92. See *Quarles v. United States*, 139 S. Ct. 1872, 1880–81 (2019) (Thomas, J., concurring) (stating that the categorical approach is not necessary); *Mathis v. United States*, 136 S. Ct. 2243, 2258 (2016) (Kennedy, J., concurring) (criticizing the categorical approach’s lack of clarity); *Descamps*, 570 U.S. at 279 (Kennedy, J., concurring) (same); see also *Mathis*, 136 S. Ct. at 2259 (Breyer, J., dissenting) (criticizing the inconsistent jurisprudence of the categorical approach); *Descamps*, 570 U.S. at 282 (Alito, J., dissenting) (same).

93. See *supra* notes 65–69 and accompanying text.

94. See *supra* note 92.

95. 139 S. Ct. 399 (2018).

96. See Ark. Code Ann. §§ 5-39-101(1), 5-39-201(a)(1) (1997); Tenn. Code Ann. §§ 39-14-403(a), 39-14-401(1)(A)–(B) (1997).

97. *Stitt*, 139 S. Ct. at 405–06 (citing *Taylor v. United States*, 495 U.S. 575, 598 (1990)).

98. *Taylor*, 495 U.S. at 602.

elements prohibiting “entries into boats and cars” would not fit under federal generic burglary,⁹⁹ *Stitt* clarified that a state criminal burglary element prohibiting entries into vehicles could indeed fit into federal generic burglary if the element specified that the vehicle was some type of habitation.¹⁰⁰ With this decision, the dicta in *Taylor* and *Shepard* that guided lower courts for decades was fully undone, and with it, any semblance of uniform application.

A textual comparison is a powerful indicator of the nonuniformity in the categorical approach. In *Shepard*, the defendant Reginald Shepard had four state convictions under the following Massachusetts burglary statute:

Whoever, in the night time, breaks and enters *a building, ship, vessel or vehicle*, with intent to commit a felony, . . . shall be punished by imprisonment in the state prison for not more than twenty years or in a jail or house of correction for not more than two and one-half years.¹⁰¹

Compare this to *Mathis*, in which the defendant Richard Mathis had five state convictions under the following Iowa burglary statute:

Any person, having the intent to commit a felony, assault or theft therein, who, having no right, license or privilege to do so, enters an *occupied structure*, such occupied structure not being open to the public, or who remains therein after it is closed to the public or after the person’s right, license or privilege to be there has expired, or any person having such intent who breaks an occupied structure, commits burglary.¹⁰²

An “*occupied structure*” is any building, structure, appurtenances to buildings and structures, *land, water or air vehicle, or similar place adapted for overnight accommodation of persons*, or occupied by persons for the purpose of carrying on business or other activity therein, or for the storage or safekeeping of anything of value.¹⁰³

Two different state statutes triggered two different applications of the categorical approach. First, in *Shepard*, the statute was divisible and the modified categorical approach applied;¹⁰⁴ yet in *Mathis*, the statute was indivisible, and the regular categorical approach applied because the definition of occupied structure detailed different *means*, not *elements*.¹⁰⁵

In summary, the Court’s development of the categorical approach over the past thirty years since *Taylor* has been inconsistent. It created multiple versions of the categorical approach—including the regular,

99. *Shepard v. United States*, 544 U.S. 13, 17–18 (2005).

100. *Stitt*, 139 S. Ct. at 406.

101. Mass. Gen. Laws Ann. ch. 266, § 16 (West 2000) (emphasis added); id. § 18; see also *Taylor*, 495 U.S. at 578 & n.1 (noting that the defendant had two state convictions for burglary, which at the time was defined by seven distinct statutes).

102. Iowa Code § 713.1 (2013) (emphasis added).

103. Id. § 702.12 (emphasis added).

104. *Shepard*, 544 U.S. at 25–26.

105. *Mathis v. United States*, 136 S. Ct. 2243, 2253, 2257 (2016).

modified, and peek approaches—that are triggered by the different ways states may choose to write and design their criminal codes.

Such nonuniform applications also often trigger disparate outcomes based on the technicalities and variations of state law. Consider again a few of the defendants cited in the key cases above. Taylor was convicted under Missouri law for “feloniously and burglariously, forcibly break[ing] and enter[ing] [a] dwelling house and building.”¹⁰⁶ Because of the way Missouri’s burglary statute was drafted, courts applied the modified categorical approach and ultimately applied the enhanced sentence under the ACCA.¹⁰⁷ Shepard was convicted under Massachusetts law for breaking into a “pantry,” the “back room of a store,” and an “apartment.”¹⁰⁸ Shepard’s fate was likely similar to Taylor’s because of the way the Massachusetts burglary law was drafted. Matthew Descamps was convicted under California law for “wilfully, unlawfully and feloniously enter[ing] a building, to-wit: CentroMart[,] . . . a grocery store,”¹⁰⁹ but because of the way California’s law was drafted, the regular categorical approach was applied and he did not receive an enhanced sentence under the ACCA.¹¹⁰ And Mathis was convicted under Iowa law for “entering garages in relation to two of his burglary convictions;”¹¹¹ but because of the way Iowa’s law was drafted, the regular categorical approach was applied and he did not receive an enhanced sentence under the ACCA.¹¹² Descamps and Mathis could both be considered “lucky”¹¹³ that their state burglary offenses were committed in states that drafted burglary statutes that did not sufficiently conform with the federal generic definition of the crime. And while a state’s statutory scheme has nothing to do with these offenders’ moral blameworthiness, dangerousness, just desert, or any other relevant sentencing factor, they were treated differently by the federal government based on the very same “vagaries of state law” the categorical approach was designed to avoid.¹¹⁴

These statutory and factual comparisons lay the categorical approach’s nonuniformity bare. Different applications of the categorical approach are triggered by slight differences in state law. The application

106. *United States v. Taylor*, 932 F.2d 703, 707 (8th Cir. 1991).

107. *Id.* at 708–09.

108. *United States v. Shepard*, 348 F.3d 308, 310 (1st Cir. 2003), *rev’d*, 544 U.S. 13 (2005).

109. *United States v. Descamps*, 466 F. App’x 563, 565 (9th Cir. 2012), *rev’d*, 570 U.S. 254 (2013).

110. *Descamps*, 570 U.S. at 265; *United States v. Descamps*, 730 F.3d 968, 968 (9th Cir. 2013) (mem.) (reversing the imposition of an ACCA sentence).

111. *United States v. Mathis*, 786 F.3d 1068, 1075 (8th Cir. 2015), *rev’d*, 136 S. Ct. 2243 (2016).

112. *United States v. Mathis*, 832 F.3d 876, 876 (8th Cir. 2016) (mem.) (reversing the imposition of an ACCA sentence).

113. See *supra* note 21 and accompanying text.

114. *Taylor v. United States*, 495 U.S. 575, 588, 590 (1990) (implementing a uniform federal definition of crime to avoid the vagaries of state law).

of the modified categorical approach is based on state definitions and statutory structure, and the elements/means distinction that compares only elements to the federal generic version is also based on such nuanced differences.¹¹⁵ For all the effort of the Court to establish uniformity in imposing the ACCA's enhanced criminal sentence, state law rules supreme and triggers different applications and outcomes under the current elements-based categorical approach.

C. *The INA and Immigration Deportation*

Establishing uniformity in immigration law has always been “paramount” to courts because “rarely is the vision of a unitary nation so pronounced as in the laws that determine who may cross our national borders and who may become a citizen.”¹¹⁶ These immigration decisions “touch on foreign relations” because of their impact on foreign nationals, justifying the Court’s mandate that the nation speak “with one voice” in immigration policy decisions.¹¹⁷ For this reason, courts have undertaken great effort to protect uniformity in immigration law, even preempting state encroachment when such encroachment would result in detrimental variations in states’ treatment and enforcement of immigration rights.¹¹⁸

115. Compare *Brown v. Caraway*, 719 F.3d 583, 589–91 (7th Cir. 2013) (holding that a Delaware conviction for arson was not a violent felony because it lacked the necessary mens rea), and *United States v. Webb*, 217 F. Supp. 3d 381, 399 (D. Mass. 2016) (holding that a Massachusetts conviction for arson was not a violent felony because it lacked the necessary mens rea), with *United States v. Misleveck*, 735 F.3d 983, 987–88 (7th Cir. 2013) (holding that a Wisconsin conviction for arson was a violent felony because it included the necessary mens rea), and *United States v. Buie*, No. 1:17-CR-00011, 2018 WL 5619335, at *7–9 (M.D. Tenn. Oct. 30, 2018) (holding that a Tennessee conviction for arson was a violent felony even though the relevant Tennessee statute was nearly identical to the Massachusetts statute in *Webb*, but for the use of the word “or”); see also Barkow, *Categorical Mistakes*, supra note 36, at 237 (“Critics are correct that the application of the categorical approach has resulted in inconsistent treatment of past conduct based on the different wording of state laws.”).

116. *Rosendo-Ramirez v. Immigr. & Naturalization Serv.*, 32 F.3d 1085, 1091 (7th Cir. 1994).

117. *Arizona v. United States*, 567 U.S. 387, 409 (2012); see also *Hines v. Davidowitz*, 312 U.S. 52, 66–67 (1941) (“[T]he regulation of aliens is so intimately blended and intertwined with responsibilities of the national government that where it acts . . . ‘is supreme . . .’” (quoting *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 211 (1824))).

118. See *Graham v. Richardson*, 403 U.S. 365, 382–83 (1971) (emphasizing nationwide uniformity in immigration policy and stating that allowing “state legislatures to adopt divergent laws . . . would appear to contravene this explicit constitutional requirement of uniformity”); *Takahashi v. Fish & Game Comm’n*, 334 U.S. 410, 420 (1948) (limiting the power of states to regulate immigrant rights because power was reserved for Congress, which had the responsibility of dealing with foreign nations). But see *De Canas v. Bica*, 424 U.S. 351, 356 (1976) (stating that “[s]tates possess broad authority under their police powers to regulate the employment relationship to protect workers within the State,” and can therefore regulate the employment of immigrants without legal status); Gerald L. Neuman, *The Lost Century of American Immigration Law (1776–1875)*, 93 *Colum. L. Rev.* 1833, 1835, 1841–80 (1993) (cataloguing how states have historically had more control over immigration policy).

But as the case study below shows, the variances of state law trigger different applications and different outcomes of the categorical approach.

The categorical approach has been a mainstay in immigration law for over one hundred years.¹¹⁹ Since 1875, Congress has enacted laws seeking to exclude and deport noncitizens based on their prior criminal convictions.¹²⁰ And since 1914 when the Second Circuit decided *United States ex rel. Mylius v. Uhl*,¹²¹ courts have used the categorical approach to determine which state crimes should trigger the federal sanction of removal from the country.¹²² Even from its infancy, the *Mylius* court justified the categorical approach as an elements-based test that examines “the nature of the offense,” based on promoting “the interest of a *uniform* and efficient administration of the law.”¹²³ And ever since, immigration decisionmakers have invoked the goal of nationwide uniformity to justify the continued use of the categorical approach.¹²⁴

The categorical approach is currently employed in several areas in immigration law, but chief among them is to determine if a noncitizen should be removed for having previously committed an “aggravated felony.”¹²⁵ This ground for removal was first added to the INA in 1988 and originally only enumerated three qualifying crimes—murder, drug trafficking, and trafficking in firearms or other destructive devices.¹²⁶ The law served to assuage the 1980s moral panic regarding the perceived epidemic of drug abuse and trafficking and helped further champion the War on Drugs, which brought sweeping reform across the immigration

119. *Moncrieffe v. Holder*, 569 U.S. 184, 191 (2013) (“This categorical approach has a long pedigree in our Nation’s immigration law.”).

120. See Derrick Moore, Note, “Crimes Involving Moral Turpitude”: Why the Void-for-Vagueness Argument Is Still Available and Meritorious, 41 *Cornell Int’l L.J.* 813, 820–21 (2008).

121. 210 F. 860, 862–63 (2d Cir. 1914) (using the categorical approach to determine if English libel conviction constituted a deportable offense).

122. See *United States ex rel. Robinson v. Day*, 51 F.2d 1022, 1023 (2d Cir. 1931) (determining whether a conviction in New York for forgery was a deportable offense); see also *United States ex rel. Guarino v. Uhl*, 107 F.2d 399, 400 (2d Cir. 1939) (determining whether a conviction in New York for possession of a “jimmy” was a deportable offense).

123. *Mylius*, 210 F. at 862 (emphasis added).

124. See Alina Das, *The Immigration Penalties of Criminal Convictions: Resurrecting Categorical Analysis in Immigration Law*, 86 *N.Y.U. L. Rev.* 1669, 1749–60 (2011) (citing dozens of cases in which federal courts, the Attorney General, and the Board of Immigration Appeals applied an elements-based categorical approach to determine which state law crimes qualified as predicates for removal).

125. See, e.g., *Moncrieffe v. Holder*, 569 U.S. 184, 190–91 (2013) (“When the Government alleges that a state conviction qualifies as an ‘aggravated felony’ under the INA, we generally employ a ‘categorical approach’ to determine whether the state offense is comparable to an offense listed in the INA.”).

126. See Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, §§ 7342, 7344, 102 Stat. 4181, 4469–71.

and criminal justice systems.¹²⁷ Because the harsh sanction of removal separates noncitizen offenders from their families, their jobs, and all property acquired here in the United States,¹²⁸ with very little hope of ever legally returning,¹²⁹ one Senator made clear during congressional debates that this section would only “focus[] on a particularly dangerous class of ‘aggravated alien felons.’”¹³⁰ But as the country’s taste for tough-on-crime sanctions grew throughout the 1990s, so too did these grounds for removal.¹³¹ Today’s aggravated felony statute is “‘a colossus’ that is ‘breathhtaking’ in scope,”¹³² having grown to enumerate nearly eighty different crimes—both federal and state—that qualify as aggravated felonies.¹³³

As Congress expanded the categories of state crimes that qualified as aggravated felonies, so too did the courts’ categorization responsibilities expand. For example, murder, rape, and burglary all qualify as “aggravated felonies,”¹³⁴ but these enumerated crimes were left undefined by Congress. So courts utilize the categorical approach to determine if a state law’s version of *murder*, *rape*, or *burglary*—as defined by that state’s criminal elements of each respective crime—qualify under what Congress intended when it enumerated *murder*, *rape*, and *burglary* in the INA.¹³⁵

127. During the passage of the Immigration Act of 1990, Pub. L. No. 101-649, 104 Stat. 4978, President George H.W. Bush remarked that the statute would meet the goals of the “war on drugs and violent crime.” See Statement on Signing the Immigration Act of 1990, 2 Pub. Papers 1717, 1718 (Nov. 29, 1990). See generally Kevin R. Johnson, Racial Profiling in the War on Drugs Meets the Immigration Removal Process: The Case of *Moncrieffe v. Holder*, 48 U. Mich. J.L. Reform 967 (2015) [hereinafter Johnson, Racial Profiling in the War on Drugs] (connecting enforcement practices from the war on drugs to current immigration enforcement practices).

128. See *Fong Yue Ting v. United States*, 149 U.S. 698, 740–41 (1893) (Brewer, J., dissenting) (“Every one knows that to be forcibly taken away from home, and family, and friends, and business, and property, and sent across the ocean to a distant land, is punishment, and that oftentimes most severe and cruel.”).

129. See 8 U.S.C. § 1182(9)(A) (2018) (detailing conditions under which a deported person can return to the United States after a ban that ranges from five to twenty years).

130. 134 Cong. Rec. 32,649 (1988) (statement of Sen. D’Amato).

131. See Rachel E. Barkow, Administering Crime, 52 UCLA L. Rev. 715, 748–49 (2005) [hereinafter Barkow, Administering Crime] (linking political incentives in the 1990s with tough-on-crime rhetoric and legislation).

132. Koh, *The Whole Better than the Sum*, supra note 35, at 270 (first quoting Stephen H. Legomsky, *The New Path of Immigration Law: Asymmetric Incorporation of Criminal Justice Norms*, 64 Wash. & Lee L. Rev. 469, 484 (2007); then quoting Adam B. Cox & Cristina Rodríguez, *The President and Immigration Law*, 119 Yale L.J. 458, 516 (2009)).

133. 8 U.S.C. § 1101(a)(43); see also *Sessions v. Dimaya*, 138 S. Ct. 1204, 1222 n.12 (2018) (noting that “[t]he INA lists 80 or so crimes that count as aggravated felonies”).

134. 8 U.S.C. § 1101(a)(43)(A), (G).

135. See, e.g., *Mellouli v. Lynch*, 135 S. Ct. 1986–89 (2015) (applying the categorical approach in determining whether a Kansas conviction for possession of drug paraphernalia constituted an aggravated felony); *Kawashima v. Holder*, 565 U.S. 478, 483 (2012) (determining whether the defendants’ actions involved fraud or deceit under the

The categorical approach's reliance on state criminal elements, however, produces inconsistent and nonuniform results in the immigration context. The Third Circuit, for example, posed a striking hypothetical that cut to the heart of nonuniformity of the categorical approach. Whereas "[a] person convicted of a single offense of simple possession of 30 grams or less of marijuana in North Dakota, where the offense is punishable as a felony," would qualify as an aggravated felon, "a person convicted of the same offense in Montana, where this crime is only a misdemeanor, would not be subject to deportation."¹³⁶

These different applications are more than just hypothetical, however, and have actually been illustrated in several cases that applied the categorical approach differently when dealing with similar New Jersey and Pennsylvania state laws. Starting with *Wilson v. Ashcroft*,¹³⁷ the court considered whether a conviction under New Jersey law for "possession with intent to distribut[e]" could qualify as a "drug trafficking" aggravated felony.¹³⁸ Specifically, the New Jersey statute provided as follows:

[I]t shall be unlawful for any person knowingly or purposely . . . [t]o manufacture, distribute or dispense, or to possess or have under his control with intent to manufacture, distribute or dispense, a controlled dangerous substance or controlled substance analog.¹³⁹

The court held that this New Jersey crime could *not* qualify as "drug trafficking" because the state criminal elements did not require remuneration.¹⁴⁰ The court also declined to apply the modified categorical approach "to explore the underlying record or plea allocation to determine" whether the defendant pleaded to relevant facts that would illuminate the nature of the defendant's distribution.¹⁴¹

But in *Garcia v. Attorney General of the United States*,¹⁴² the same court, triggered by differences in state law, reached a different result after considering whether the similar Pennsylvania law could qualify as a "drug trafficking" aggravated felony.¹⁴³ The Pennsylvania statute provided as follows:

[T]he manufacture, delivery, *or* possession with intent to manufacture or deliver, a controlled substance by a person not registered under this act, or a practitioner not registered or licensed by the appropriate State board, or knowingly creating,

categorical approach per the definition of crime rather than "the specific facts underlying the crime").

136. *Gerbier v. Holmes*, 280 F.3d 297, 312 (3d Cir. 2002) (citations omitted).

137. 350 F.3d 377 (3d Cir. 2003).

138. *Id.* at 379 (alteration in original) (internal quotation marks omitted).

139. N.J. Stat. Ann. § 2C:35-5a(1) (West 2000).

140. *Wilson*, 350 F.3d at 379, 381.

141. *Id.* at 382.

142. 462 F.3d 287 (3d Cir. 2006).

143. *Id.* at 289, 292-93.

delivering or possessing with intent to deliver, a counterfeit controlled substance.¹⁴⁴

Although the court acknowledged that it had reached different results when considering the “similar . . . New Jersey statute[,],” it found that “the Pennsylvania Act is distinguishable.”¹⁴⁵ When determining whether Pennsylvania’s criminal elements required remuneration, the court applied the modified categorical approach since “the Pennsylvania statute describes three distinct offenses: manufacture, delivery, and possession with the intent to deliver or manufacture.”¹⁴⁶ Because the statute was drafted in the “disjunctive,” and because it was not clear if violations under any of these separate crimes necessarily includes remuneration, the court examined the charging instrument, which ultimately uncovered facts that clearly outlined remuneration.¹⁴⁷

Comparing *Wilson* and *Garcia*, the same court (Third Circuit) applied different variations of the categorical approach (regular versus modified) to nearly identical criminal statutes (New Jersey and Pennsylvania). Yet because of slight differences in the wording of these statutes (placement of an “or” that created a disjunctive phrase), the court came to different conclusions on examining the record (not examining versus examining the charging instrument), which resulted in a significant sanctioning disparity.¹⁴⁸

These different applications, caused mostly by the differences in state law, also produce different immigration outcomes for individual defendants, even when their conduct is similar. While Everald Wilson was not ordered by the court to be deported in spite of his possession with intent to distribute an unspecified amount of the marijuana,¹⁴⁹ Belito Garcia was ordered to be deported for attempting to sell marijuana to an

144. 35 Pa. Cons. Stat. § 780-113(a) (30) (2006) (emphasis added).

145. *Garcia*, 462 F.3d at 289.

146. *Id.* at 293 n.9.

147. *Id.* at 293.

148. See *Nijhawan v. Holder*, 557 U.S. 29, 39–40 (2009) (applying the categorical approach that relied on fact-finding when an enumerated crime calls for factual determinations to qualify as an aggravated felony). This hybrid approach has led to many other examples of inconsistencies, such as with convictions for tax offenses. Compare *Lee v. Ashcroft*, 368 F.3d 218, 224–25 (3d Cir. 2004) (holding that a conviction for a tax offense under 26 U.S.C. § 7206 is not an aggravated felony), with *Evangelista v. Ashcroft*, 359 F.3d 145, 153 (2d Cir. 2004) (holding that a conviction for a tax offense under 26 U.S.C. § 7201 is an aggravated felony). This inconsistency can also be seen with convictions for counterfeiting and embezzlement. Compare *Valansi v. Ashcroft*, 278 F.3d 203, 216–17 (3d Cir. 2002) (holding that an embezzlement of over \$10,000 was not an aggravated felony when a conviction did not involve intent to defraud), and *Ming Lam Sui v. Immigr. & Naturalization Serv.*, 250 F.3d 105, 119 (2d Cir. 2001) (holding that possession of counterfeit traveler’s checks over \$10,000 was insufficient to constitute an attempt to pass checks and cause loss), with *In re S-I-K*, 24 I. & N. Dec. 324, 326–29 (B.I.A. 2007) (holding that an unsuccessful attempt and conspiracy to defraud an insurance company of more than \$10,000 was an aggravated felony).

149. *Wilson v. Ashcroft*, 350 F.3d 377, 379 (3d Cir. 2003).

undercover officer and possession of additional packets of marijuana.¹⁵⁰ And while no two criminal acts are exactly alike,¹⁵¹ are Wilson's and Garcia's respective crimes so materially different as to justify such disproportionality? Under the current categorical approach, sanctions are not meted out based on criminal conduct, which holds some modicum of reliability to determine continued dangerousness and moral accountability to society;¹⁵² instead, the *most* important factor when deciding whether to impose the harsh sanction of deportation is the morally irrelevant "luck"¹⁵³ of where an offender happened to commit their state criminal offense.

This tale of two jurisdictions, two applications, and two outcomes for Wilson and Garcia is one of many similar stories illustrating the impacts of the categorical approach's nonuniformity in immigration law. Compare, for example, the disparities between *Bedolla-Zarate v. Sessions*¹⁵⁴ and *Pelayo-Garcia v. Holder*,¹⁵⁵ where the differences between Wyoming's sexual abuse laws and California's similar statute resulted in a difference in application and outcome. The defendant convicted under the Wyoming statute could be deported for engaging in sexual contact with a young teenager (thirteen to fifteen years old) when he himself was around twenty-one years old,¹⁵⁶ while the defendant convicted under the California statute was allowed to stay in the country after having sexual intercourse with a young teenager (fifteen years old or younger) when he himself was twenty-one years old or older.¹⁵⁷ Such examples of the categorical approach's nonuniformity in deportation abound, and serve as impactful reminders of the injustices rampant in our system when meting out the sanction of deportation.¹⁵⁸

150. *Garcia*, 462 F.3d at 293.

151. See *infra* note 215 and accompanying text.

152. See Jason A. Cade, *Enforcing Immigration Equity*, 84 *Fordham L. Rev.* 661, 707 (2015) (arguing that criminal history provides the government with information about membership choices, such as dangerousness); Adam B. Cox & Eric A. Posner, *The Second-Order Structure of Immigration Law*, 59 *Stan. L. Rev.* 809, 846–47 (2007) (same).

153. See *supra* note 21 and accompanying text.

154. 892 F.3d 1137 (10th Cir. 2018).

155. 589 F.3d 1010 (9th Cir. 2009).

156. See *Bedolla-Zarate*, 892 F.3d at 1138, 1141 (recording the defendant's age at the time of entering the country and the statutory conditions of the age of the victim).

157. *Pelayo-Garcia*, 589 F.3d at 1014 (outlining the statutory elements of the state crime needed to fulfill the requirements for federal sanctions).

158. For more comparatively disparate outcomes imposing immigration sanctions based on aggravated felonies, compare *Flores-Larrazola v. Lynch*, 840 F.3d 234, 240 (5th Cir. 2016) (holding that an Arkansas conviction for possession of over ten pounds of marijuana was an aggravated felony), with *Arce-Vences v. Mukasey*, 512 F.3d 167, 171 (5th Cir. 2007) (holding that a Texas conviction for possession of over fifty pounds of marijuana was not an aggravated felony). The same disparity is present in vehicle burglary cases. Compare *Santos v. Immigr. & Naturalization Serv.*, No. 98-60492 (5th Cir. Sept. 1, 1998) (*per curiam*) (holding that a Texas conviction for burgling a vehicle was an aggravated felony), with *Lopez-Elias v. Reno*, 209 F.3d 788, 791–92 (5th Cir. 2000) (holding that a Texas

D. *Growing Scrutiny of the Categorical Approach*

Such is the state of nonuniformity caused by the categorical approach's reliance on state law. When the placement of a seemingly inconsequential "or" yields incredibly consequential differences between a regular or enhanced sentence, or between staying in or being banished from the country, it comes time to reconsider the interpretive tools at work. Both the "aggravated felony" categorizations under the INA and the "violent felony" determinations under the ACCA show that different state laws trigger different applications and outcomes of the categorical approach. And these different applications are more than mere circuit splits or doctrinal squabbles between federal judges. Instead, these different applications have all been prescribed by the Supreme Court to apply differently according to the differences in state law that lower courts have encountered.¹⁵⁹

These variations of the categorical approach have triggered judicial critiques that start at the very top. Justice Kennedy, a concurring vote in both *Mathis* and *Descamps*, expressed his concern that dichotomies between divisible and indivisible statutes, or between elements and means, are "not all that clear,"¹⁶⁰ and that the growing "unworkable" distinctions between different state laws that trigger different applications of the categorical approach "should require this Court to revisit its precedents in an appropriate case."¹⁶¹ And while Justice Kennedy has since retired from the Court, Justice Thomas has more recently "question[ed] this [categorical] approach altogether," referencing the "absurdity of applying the categorical approach to the enumerated-offenses clause" of the ACCA because it prohibits sentencing courts from basing such a harsh sentencing enhancement on criminal conduct.¹⁶² Justice Breyer has also criticized the

conviction for burgling a vehicle under the same law was not an aggravated felony), and *Solorzano-Patlan v. Immigr. & Naturalization Serv.*, 207 F.3d 869, 874–75 (7th Cir. 2000) (holding that an Illinois conviction for burgling a vehicle was not an aggravated felony). Another illuminating example is found in comparing cases involving methamphetamine possession and distribution. Compare *United States v. Almanza-Vigil*, 912 F.3d 1310, 1323 (10th Cir. 2019) (holding that a Colorado conviction for "selling or distributing" methamphetamine was not an aggravated felony), with *Perez-Hernandez v. Holder*, 332 F. App'x 458, 462–63 (10th Cir. 2009) (holding that a Utah conviction of "intentional possession of a controlled or counterfeit substance, namely methamphetamine, with the intent to distribute" was an aggravated felony), and *United States v. Gamez-Macias*, No. 2:09-cr-00034-RJ-LRL, 2009 WL 3053701, at *3 (D. Nev. Sept. 18, 2009) (holding that a Nebraska conviction for possession of methamphetamine with intent to distribute was an aggravated felony).

159. See *United States v. Stitt*, 139 S. Ct. 399, 407 (2018) (recognizing that a categorical analysis "rests in part upon state law"); see also *United States v. Howard*, 742 F.3d 1334, 1346 (11th Cir. 2014) (explaining that "[s]entencing courts conducting divisibility analysis in this circuit are bound to follow any state court decisions that define or interpret the statute's substantive elements because state law is what the state supreme court says it is").

160. *Descamps v. United States*, 570 U.S. 254, 279 (2013) (Kennedy, J., concurring).

161. *Mathis v. United States*, 136 S. Ct. 2243, 2258 (2016) (Kennedy, J., concurring).

162. *Quarles v. United States*, 139 S. Ct. 1872, 1880–81 (2019) (Thomas, J., concurring).

various modifications to the categorical approach because they “will unnecessarily complicate federal sentencing law.”¹⁶³

The Court’s categorical approach has created a legal labyrinth. Lower courts continue to struggle with the categorical approach’s application, and this confusion has required the Supreme Court to continually clarify the categorical approach by taking up more than a dozen cases on certiorari in the past dozen years in the immigration and sentencing enhancement contexts alone.¹⁶⁴ In just the past two terms, the Court has taken up six such cases.¹⁶⁵ Yet the confusion of lower courts continues.¹⁶⁶ One court went as far as to say that in the decades since the adoption of the categorical approach, it has “struggled to understand the contours of the Supreme Court’s framework,”¹⁶⁷ and that “no other area of the law has demanded more of [the court’s] resources.”¹⁶⁸ Another court described navigating the difficult application of the categorical approach as going “down several rabbit holes” that amounted to a “Rube Goldberg jurisprudence of abstractions piled on top of one another in a manner that renders doubtful anyone’s confidence in predicting what will pop out at the end.”¹⁶⁹ Another described its “sentencing adventures [as] more complicated than reconstructing the Staff of Ra in the Map Room to locate the Well of the Souls.”¹⁷⁰ Many have noted how these inconsistencies and

163. *Mathis*, 136 S. Ct. at 2259 (Breyer, J., dissenting).

164. See *supra* note 32 and accompanying text.

165. See *supra* notes 32–33 and accompanying text.

166. See, e.g., U.S. Sent’g Comm’n, *Categorical Approach: 2016 Annual National Seminar* (2016), https://www.ussc.gov/sites/default/files/pdf/training/annual-national-training-seminar/2016/background_under_categorical_approach.pdf [<https://perma.cc/GE9Y-AP36>] (stating that “after the Supreme Court’s decision in *Mathis v. United States*, . . . courts continue to grapple with the categorical approach, including the means vs. elements test”).

167. *United States v. Aguila-Montes de Oca*, 655 F.3d 915, 917 (9th Cir. 2011), abrogated by *Descamps v. United States*, 570 U.S. 254, 259–60 (2013).

168. *Id.*; see also *Sykes v. United States*, 564 U.S. 1, 33 (2011) (Scalia, J., dissenting) (speculating that the Court would be analyzing state law under the ACCA “until the cows come home”); *De Lima v. Sessions*, 867 F.3d 260, 268 (1st Cir. 2017) (noting that “[e]ven a single such categorical analysis is an arduous task” that “is often difficult and time consuming”); *United States v. Vann*, 660 F.3d 771, 787 (4th Cir. 2011) (Agee, J., concurring) (complaining that “[t]he dockets of . . . all federal courts are now clogged with [ACCA] cases”).

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

170. *United States v. Perez-Silvan*, 861 F.3d 935, 944 (9th Cir. 2017) (Owens, J., concurring); see also *Begay v. United States*, 553 U.S. 137, 150 (2008) (Scalia, J., concurring) (describing ACCA doctrine as “piecemeal, suspenseful, [and] Scrabble-like”); *Lopez-Valencia v. Lynch*, 798 F.3d 863, 866 (9th Cir. 2015) (“[T]he task of figuring out whether a prior offense qualifies . . . under the [ACCA] or . . . immigration law would seem to be a straightforward undertaking. . . . [H]owever, the classification has been much more nuanced, and courts have spent inordinate amounts of time parsing whether a crime falls into one of these categories.”); *United States v. Mayer*, 162 F. Supp. 3d 1080, 1095 (D. Or. 2016) (labeling the categorical approach “a Byzantine analytical framework”); *Murray v. United States*, Nos. 15-CV-5720 RJB, 96-CR-5367 RJB, 2015 WL 7313882, at *5 (W.D. Wash. Nov. 19, 2015) (describing the categorical approach as “a hopeless tangle”); Kari Hong, *The*

complexities have taxed judicial economy.¹⁷¹ Even the congressional architects of these statutes have lamented that these laws have resulted in “costly and time-consuming litigation at every level of the Federal court system.”¹⁷² All of these concerns have contributed to the growing number of judges who have become more comfortable critiquing the categorical approach while also acknowledging that they are bound by their respect for precedent and the rule of law to follow it.¹⁷³

Scholars are joining this chorus, commenting on the problematic inconsistencies caused by the categorical approach.¹⁷⁴ Even some of the staunchest defenders of the categorical approach have admitted that it “arguably creates some disuniformity” that is “inevitable” when “provisions attempt to map a single federal statute onto various state criminal laws.”¹⁷⁵ “[E]ven lawyers who regularly practice [ACCA cases] can struggle to understand the doctrine and its occasionally perplexing

Absurdity of Crime-Based Deportation, 50 U.C. Davis L. Rev. 2067, 2124 (2017) (acknowledging how much courts struggled to apply the categorical approach pre-*Descamps* and *Mathis*).

171. See Das, *supra* note 124, at 1673, 1735 (“Under a categorical analysis, two people who commit the same offense but are able to secure different plea deals or are prosecuted in jurisdictions that define the offense differently will face different immigration consequences.”); Evans, *Punishing Criminals*, *supra* note 36, at 626; Bennett, *supra* note 36, at 1711–12; Eichten, *supra* note 13, at 1096 (outlining the complexities of aggravated felony determinations caused by differences in state law).

172. 156 Cong. Rec. 22,587 (2010) (statement of Sen. Specter); see also Avi M. Kupfer, Note, A Comprehensive Administrative Solution to the Armed Career Criminal Act Debacle, 113 Mich. L. Rev. 151, 152 (2014) (noting inefficiencies of the ACCA due to increased incentives for criminal defendants to challenge the outcome by exercising their rights to go to trial).

173. See, e.g., *Moreno v. Att’y Gen.*, 887 F.3d 160, 163 n.3 (3d Cir. 2018) (“The categorical approach’s disregard of the actual facts of a conviction fosters inconsonant results, and we would be remiss if we did not note our dismay at having to employ the categorical approach in this case.”); *United States v. Doctor*, 842 F.3d 306, 315 (4th Cir. 2016) (Wilkinson, J., concurring) (“I recognize of course that four is not five, and we have an obligation to follow a strict elements-based inquiry so long as a majority of the Supreme Court adheres to it.”).

174. See Barkow, *Categorical Mistakes*, *supra* note 36, at 237–38; Das, *supra* note 124, at 1673, 1735; Evans, *Punishing Criminals*, *supra* note 36, at 624–27; Bennett, *supra* note 36, at 1711–12; Eichten, *supra* note 13, at 1096 (outlining complexities of aggravated felony determinations caused by differences in state law); see also Lee, *The Future of the Categorical Approach*, *supra* note 22, at 265–66 (highlighting pragmatic critiques adopted by Supreme Court justices, lower courts, and scholars).

175. Koh, *The Whole Better than the Sum*, *supra* note 35, at 297; accord Marouf, *supra* note 35, at 1470 (recognizing that the categorical approach “produces some inconsistency in the sense that two people who engaged in basically the same criminal conduct can be treated differently under the categorical approach because of variations in how state statutes are drafted”); Rebecca Sharpless, Finally, a True Elements Test: *Mathis v. United States* and the Categorical Approach, 82 Brook. L. Rev. 1275, 1278 (2017) [hereinafter, Sharpless, Finally, a True Elements Test] (conceding the variation between state crimes gives prosecutors options in charging crimes, which can result in disparities in immigration deportation).

results,¹⁷⁶ which has led to additional transaction costs for parties involved in these cases.¹⁷⁷

What was intended to be a simple, efficient, and uniform rule¹⁷⁸ has instead become a Cerberus; it is a beast with multiple heads, all gnashing their teeth to prevent judges, scholars, and practitioners from escaping the Hades of its doctrinal morass. The differences in how a state has outlined elements of a crime versus factual means to fulfill such elements can trigger different applications and outcomes under the categorical approach. No longer can the categorical approach be justified through the ideal or practical goal of achieving uniformity. Instead, it has become a threat to uniformity.¹⁷⁹ The very “vagaries of state law”¹⁸⁰ that the categorical approach was meant to mitigate have now become its most controlling factor. So, while many have identified legitimate inconsistencies of the categorical approach, we must deal with the root problem of nonuniformity.

176. Jennifer Lee Koh, Rethinking Removability, 65 Fla. L. Rev. 1803, 1834 (2013) (internal quotation marks omitted) (quoting Doug Keller, Causing Mischief for *Taylor*'s Categorical Approach: Applying “Legal Imagination” to *Duenas-Alvarez*, 18 Geo. Mason L. Rev. 625, 625 (2011)); see also Elissa Bookbinder, Note, The Importance of Being Earnest . . . (ly) Supporting the Categorical Analysis, 55 Willamette L. Rev. 47, 47 (2018) (describing the categorical approach as requiring an “Olympic-level gymnastic legal analysis”).

177. See, e.g., Letter from Lanny A. Breuer, Assistant Att’y Gen., DOJ & Jonathan J. Wroblewski, Dir., Off. of Pol’y & Legis., DOJ, to Patti B. Saris, J., Chair, U.S. Sent’g Comm’n (July 23, 2012), https://www.ussc.gov/sites/default/files/pdf/amendment-process/public-comment/20120815/DOJ_Annual%20Letter_priorities_comment.pdf [<https://perma.cc/NNM6-X7AE>] (disclosing the resources U.S. Attorneys Offices expend litigating the categorical approach under the ACCA); see also *Gonzales-Gomez v. Achim*, 441 F.3d 532, 534 (7th Cir. 2006) (acknowledging the government’s argument of how confusing it is for practitioners to determine if drug crimes qualify as aggravated felonies).

178. See *supra* notes 55, 160 and accompanying text.

179. Rodríguez, Uniformity and Integrity in Immigration Law, *supra* note 15, at 503–04 (citing Cristina M. Rodríguez, Negotiating Conflict Through Federalism: Institutional and Popular Perspectives, 123 Yale L.J. 2094 (2014)) (stating that “Congress actually has erected a regime whose design thwarts uniformity, the courts’ best efforts notwithstanding,” in part because immigration law “incorporate[s] state and local decision-makers into the system” and “makes the system of removal and relief dependent on the reach of state law”); Mary Frances Richardson, Comment, Why the Categorical Approach Should Not Be Used When Determining Whether an Offense Is a Crime of Violence Under the Residual Clause of 18 U.S.C. § 924(c), 67 Am. U. L. Rev. 1989, 2030 (2018) (describing the categorical approach as a “threat to uniformity,” and explaining that since *Taylor*, “inconsistency is . . . what it produced”).

180. *Taylor v. United States*, 495 U.S. 575, 588 (1990).

II. THE CATEGORICAL APPROACH AND TWO UNIFORMITIES

“The question is,” said Alice, “whether you can make words mean so many different things.”

*“The question is,” said Humpty Dumpty, “which is to be master—that’s all.”*¹⁸¹

The irony of uniformity is that it does not have a uniform definition. Uniformity can take on different meanings depending on the context and the underlying policy goals decisionmakers seek to achieve. Courts, for their part, use the term “uniformity” in different ways that generally invoke two different policy outcomes. First, many have justified uniformity in terms of *application*, meaning that the same uniform tools of interpretation are used in every case; according to this logic, uniformity can be achieved as long as the categorical approach is applied the same way to every case.¹⁸² Others have referenced uniformity in terms of *outcomes*, meaning that similar cases should be adjudicated to impose similar sanctions.¹⁸³

Naturally, these two uniformities share significant overlap, and need not be mutually exclusive. Applying the same set of rules to all cases *can* lead to similar outcomes under the right circumstances. But as some scholars have recognized, applying a uniform rule across all jurisdictions is a different policy goal than an alternative that strives for uniform sanctioning outcomes.¹⁸⁴ In fact, the categorical approach’s deep reliance on the varieties of state law inherently leads to disparate outcomes.¹⁸⁵ As Part I illustrates, the categorical approach’s nonuniformity reaches levels near absurdity. Different state laws can and do trigger different applications of the categorical approach.¹⁸⁶ And different state laws can and do trigger different outcomes among offenders who committed similar criminal conduct under the categorical approach.¹⁸⁷ Basing these federal sanctions on the disparity-producing factor of state law is questionable, especially when courts have specifically promised that these sanctions would not respect the differences of state law.

This Part explores the differences of these uniformities and their tensions with theories of punishment and politics. Sections II.A and II.B

181. Lewis Carroll, *Through the Looking-Glass, and What Alice Found There* 99 (Florence Milner ed., Rand McNally & Co. 1917) (1871).

182. See *infra* notes 196–198 and accompanying text.

183. See *infra* note 208 and accompanying text.

184. See Rodríguez, *Uniformity and Integrity in Immigration Law*, *supra* note 15, at 506 (arguing that the consistent application of rules in the field of “immigration federalism” means that courts must “accept[] divergent outcomes as non-threatening, particularly when they are the product of the system Congress has designed”).

185. See *id.*; see also *supra* note 175 and accompanying text.

186. See *supra* notes 101–105, 137–147 and accompanying text.

187. See *supra* notes 106–114, 149–158 and accompanying text.

continue the discussion of uniformity by delineating between uniformity of application and uniformity of outcome respectively. Each uniformity is examined according to the nuanced differences they exhibit when establishing legitimacy in sanctioning regimes and inform how we should think about the inconsistent jurisprudence of the categorical approach. Section II.C advances the analysis by examining these uniformities and their compatibility within the context of state variation in a federal system of government. This section examines whether uniformity is in itself conducive to federalism, or if it is a fool's errand to harmonize the application of federal law across so many separate sovereigns.

A. *Uniformity in Application: Applying the Same Rule to All Cases*

Uniform application of federal law across all of the states has a number of benefits, including promoting the legitimacy of the federal courts and federal law, which might be undermined if the courts interpreted and applied the law inconsistently.¹⁸⁸ Professor Cristina Rodríguez has highlighted this type of uniformity that promotes a uniform *approach* that applies the same rules to all applicable cases; but because of the complexities of federal- and state-law interactions in the contexts of the categorical approach, such a practice of uniform application must confront and be comfortable with different *outcomes*, even among similar cases.¹⁸⁹ Promoting legitimacy through consistent application of a rule shares a natural overlap with its cousin of uniformity in outcomes, but on a more systemic level. A sanctioning regime that applies the same rules in all applicable cases, regardless of the participants involved in each case, does not treat people differently, thus preventing corruption.

The means of the decisionmaking process is what promotes the legitimacy in a system of uniform application. Taking a variety of legal inputs (different defendants, different crimes, different circumstances), putting them through the same meat-grinding process, and producing what may be similar or different outcomes, is the value of the system. Everybody gets put through the same process. Applying the *same* means, regardless of the inputs or outputs, is what legitimizes the process by establishing a level of equity that carries a sense of fairness.¹⁹⁰

188. See Frost, *supra* note 39, at 1570 (“The few scholars who have studied the question assert a number of reasons to promote uniform interpretation of federal law: the legitimacy of the federal court system and the integrity of federal law are undermined by inconsistent interpretations of the same statute . . .”).

189. See Rodríguez, *Uniformity and Integrity in Immigration Law*, *supra* note 15, at 506; see also Gordon et al., *supra* note 27, § 71.05[2][b] (highlighting the importance of employing a “uniform rule” to determine which state convictions qualify as aggravated felonies).

190. See Frost, *supra* note 39, at 1600–01 (discussing predictability as a benefit that other scholars have argued justifies uniformity); see also Evan H. Caminker, *Why Must Inferior Courts Obey Superior Court Precedents?*, 46 *Stan. L. Rev.* 817, 850 (1994) (citing predictability as one of the benefits produced by uniformity).

Uniform application also benefits people by giving them reliable notice.¹⁹¹ When participants in societies know what rules will be applied *ex ante* to given circumstances, those participants can appropriately order their participation.¹⁹² When there are measures of unpredictability inserted into this decisionmaking process, the rule of law naturally loses some of its binding power over society, which in turn affects how participants think about their participation.¹⁹³ This might work out in theory with participants thinking they can get away with more acts of lawlessness, or participants who enjoy hierarchical benefits in society believing different rules will apply to their acts of lawlessness, thus adding levels to the once-level playing field. Under this scenario, those on different levels might perceive the fairness of the system differently, having to follow different rules, which can reinforce and perpetuate such hierarchies and diminish the legitimacy of the system.

The predictability of uniform application also carries with it benefits of economy.¹⁹⁴ The categorical approach strives to be a one-size-fits-as-many-as-possible approach; because it applies to several different areas of law, such as immigration and criminal sentencing, “one approach” and “one body of law” can be cited interchangeably in these different subject matters.¹⁹⁵ Judges continue to lean on this justification, touting the uniform application of the categorical approach as one that provides stability in complicated areas of the law.¹⁹⁶ As one judge described, it is “[c]omplex, to be sure, but at least uniform in application.”¹⁹⁷ And with

191. See Rodríguez, *Uniformity and Integrity in Immigration Law*, *supra* note 15, at 501 (noting that “[u]niformity can advance the elemental principle of fairness by providing parties bound by the law with notice of its content and how it will be applied”).

192. See Michael M. O’Hear, *The Original Intent of Uniformity in Federal Sentencing*, 74 *U. Cin. L. Rev.* 749, 791–804 (2006) (outlining the benefits of predictability paradigms in determinative sentencing).

193. See Frost, *supra* note 39, at 1570 (noting how some scholars argue that without uniformity in the law, “the legitimacy of the federal court system and the integrity of federal law are undermined” and “predictability would suffer”).

194. See Rodríguez, *Uniformity and Integrity in Immigration Law*, *supra* note 15, at 501 (stating that uniformity can hold executive and judicial actors accountable and prevent arbitrary decisions, thus promoting “pragmatic values such as efficient administration by bringing clarity to the law and its implementation”).

195. See *United States v. Torres*, 923 F.3d 420, 424–25 (5th Cir. 2019) (noting the applicability of the categorical approach in ACCA cases, sentencing guideline cases, immigration cases, and cases interpreting 18 U.S.C. § 16(a)–(b) (2018)).

196. See, e.g., *Amos v. Lynch*, 790 F.3d 512, 518 (4th Cir. 2015) (noting that the categorical approach “allows federal laws to be applied uniformly”); see also *Kahn v. Immigr. & Naturalization Serv.*, 36 F.3d 1412, 1414 (9th Cir. 1994) (“The INA ‘was designed to implement a uniform federal policy,’ and the meaning of concepts important to its application are ‘not to be determined according to the law of the forum, but rather require[] a uniform federal definition.’” (quoting *Rosario v. Immigr. & Naturalization Serv.*, 962 F.2d 220, 223 (2d Cir. 1992))); *Gordon et al.*, *supra* note 27, § 71.05[2][b] (“[W]hether a state conviction can be considered an aggravated felony for immigration purposes is best determined according to a uniform rule based on set federal standards.”).

197. *United States v. Mayer*, 560 F.3d 948, 952 (9th Cir. 2009) (Kozinski, J., dissenting).

greater predictability come fewer transaction costs since there will be fewer legal challenges and fewer practitioners and judges trying to make sense of inconsistencies in the process.¹⁹⁸

This brief consideration of the goals of uniform application inform the failure of the categorical approach in the context of uniformly applying state-to-federal sanctions. The categorical approach has not delivered on promoting legitimacy; instead, it has promoted wide-ranging criticisms resulting from its lack of predictability and its burdensome taxation on economy.¹⁹⁹ As Part I shows, the categorical approach has several applications triggered under various circumstances. The *Taylor* and *Mathis* cases illustrate how defendants who commit similar criminal conduct—burgling supply sheds and garages²⁰⁰—received drastically different punishments based on the “uniform” application of the categorical approach.²⁰¹ Taylor himself received a sentence 125% longer than Mathis for committing similar crimes in different jurisdictions.²⁰² Comparing the *Wilson* and *Garcia* cases is another example of how uniformity in application can produce jarring disparities in punishment; whereas both defendants committed similar crimes—being caught with large enough amounts of marijuana to raise suspicion of drug distribution²⁰³—Wilson was *not* deported while Garcia was deported. But proponents of the categorical approach would support these outcomes since the same tripartite categorical approach was applied consistently to both cases.²⁰⁴

This is where the uniform application of the categorical approach comes into conflict with its original design metrics. Without undercutting the benefits of uniformity of application in other contexts, the categorical approach was specifically designed to provide uniform application of a

198. See Frost, *supra* note 39, at 1570 (“[S]cholars . . . assert a number of reasons to promote uniform interpretation of federal law . . . [including that] predictability would suffer, raising the costs of doing business and fostering litigation . . .”).

199. See *supra* notes 166–173 and accompanying text.

200. See *United States v. Mathis*, 786 F.3d 1068, 1075 (8th Cir. 2015); *United States v. Taylor*, 932 F.2d 703, 706–07 (8th Cir. 1991).

201. Compare *Taylor*, 932 F.2d at 704, 709–10 (affirming a fifteen-year (180 month) sentence), with *United States v. Mathis*, 911 F.3d 903, 905, 910 (8th Cir. 2018) (affirming an eighty-month sentence).

202. See Sheldon A. Evans, *In the Shadow of Shular: Conduct Can Unify the Disjointed Categorical Approaches*, 32 *Fed. Sent’g Rep.* 231, 233 (2020) (describing the sentencing disparity between the *Taylor* and *Mathis* cases).

203. See *Garcia v. Att’y Gen.*, 462 F.3d 287, 293 (3d Cir. 2006); *Wilson v. Ashcroft*, 350 F.3d 377, 379 (3d Cir. 2003).

204. See Rodríguez, *Uniformity and Integrity in Immigration Law*, *supra* note 15, at 506 (describing the jurisprudence of Justice Sotomayor as valuing uniformity of application even at the sake of disparate outcomes); see also Koh, *The Whole Better than the Sum*, *supra* note 35, at 297 (justifying the disparate outcomes of the categorical approach through its many benefits); Sharpless, *Toward a True Categorical Elements Test*, *supra* note 35, at 1031–34 (same).

rule *irrespective* of the “vagaries of state law.”²⁰⁵ Therefore, because the categorical approach produces such disparities *because of* the very “vagaries” it set out to ignore, it has failed to provide the type of uniform application the Court envisioned in its original blueprint.²⁰⁶ And in the context of criminal justice, immigration, and the deprivation of liberty, the inconsistencies and inefficiencies of application are all the more detrimental to society because of the rights of individuals at stake.²⁰⁷

B. *Uniformity in Outcome: Applying Similar Sanctions in Similar Cases*

Pursuing uniformity of sanctioning outcomes for similar cases shares many of the same goals as its cousin that promotes a uniform application of legal rules, such as legitimacy, predictability, and economy. But a system ensuring uniform outcomes does so on a more individual level. It is a promise between a sovereign and its individual citizens that everyone is on a fair and equal playing field when it comes to sanctioning outcomes. And courts have long justified the categorical approach with the argument that it preserves this goal of uniformity by ensuring that similar cases will result in similar sanctioning outcomes regardless of the differences of state law.²⁰⁸

Defining what it means to achieve uniform sanctioning outcomes among similar cases is not easy,²⁰⁹ but relevant federal sentencing practices

205. *Taylor*, 495 U.S. at 588, 590.

206. See *id.*

207. See Charles Hobson, *Atkins v. Virginia*, Federalism, and Judicial Review, 11 Widener L. Rev. 23, 23–24 (2004) (arguing that courts should treat punishment—which is a necessary part of the criminal justice system—with extra care due to the life, liberty, and property interests at stake for both the victims and defendants); see also Kevin R. Reitz, *The Federal Role in Sentencing Law and Policy*, 543 *Annals Am. Acad. Pol. & Soc. Sci.* 116, 127 (1996) (“[I]f any governmental function should be diffused and made subject to multiple political and structural constraints, it is the sentencing power. The infliction of criminal penalties is the most extreme form of coercion used by government against its own citizens.”).

208. See, e.g., *Gerbier v. Holmes*, 280 F.3d 297, 299 (3d Cir. 2002) (“We believe that this conclusion properly reflects the policy favoring uniformity in construction of the INA because it subjects aliens to the same treatment regardless of how different states might categorize similar drug crimes.”); *Immigr. Laws—Offenses Involving Moral Turpitude*, 37 *Op. Att’y Gen.* 293, 295 (1933) (advocating for an elements-based categorical approach to promote “uniformity of treatment” of noncitizens who “are shown to have been convicted of the same kind of crime,” and also to ensure “the efficient administration of the immigration laws” (internal quotation marks omitted) (quoting *United States ex rel. Mylius v. Uhl*, 203 F. 152, 153 (S.D.N.Y. 1913))).

209. See Philip Selznick, *The Moral Commonwealth: Social Theory and the Promise of Community* 490 (1992) (discussing the difficulty of defining the legal mantra of treating like cases alike); Josh Bowers, *Legal Guilt, Normative Innocence, and the Equitable Decision Not to Prosecute*, 110 *Colum. L. Rev.* 1655, 1673 (2010) (citing Peter Westen, *The Empty Idea of Equality*, 95 *Harv. L. Rev.* 537, 593 (1982)) (“But what of the principle that like cases should be treated alike? . . . This is no facile question, because the principle lacks fixed content and is, instead, frequently invoked but seldom defined.”); see also Kenneth I. Winston, *On Treating Like Cases Alike*, 62 *Calif. L. Rev.* 1, 17–20 (1974)

are informative. Achieving this goal of uniformity has been an ongoing tug-of-war between determinate and indeterminate sentencing debates going back to the 1970s, which undergirded the sweeping federal sentencing reform of the 1980s that remains in place today.²¹⁰ During these debates, treating like cases alike more specifically meant that similarly situated defendants should receive similar sentences, while differently situated defendants should receive different sentences.²¹¹ And in today's punishment regime that favors retributivism,²¹² conduct-based punishment remains the dominant regime. That is, our system strives to increase the importance of criminal conduct when determining an appropriate sanction. Some legal philosophers prefer such a conduct-based punishment regime because they argue that focusing on an offender's blameworthy conduct "better accounts for common moral intuitions."²¹³ Under this same logic, H.L.A. Hart posited that "the ideal of justice" demands "treating morally like cases alike and morally different ones differently."²¹⁴

This requires examination of what indeed makes two cases sufficiently morally similar or distinct. As Professor Josh Bowers has studied, treating like cases alike can achieve nonsensical results by either oversimplifying material similarities or overscrutinizing immaterial differences.²¹⁵ In other words, all cases are alike if viewed from a certain level of abstraction, but

(challenging the equality principle given that "[c]ases always overflow the boundaries within which rules attempt to confine them").

210. See O'Hear, *supra* note 192, at 753–56 (tracing eight different questions about uniformity that reformers in criminal sentencing have had to confront, illustrating the different goals of various theories of uniformity).

211. Act of Oct. 12, 1984, ch. 58, 98 Stat. 2017, 2018 (codified as amended at 28 U.S.C. § 991(b)(1)(B) (2018)) (specifying the goal of providing certainty and fairness in sentencing and avoiding sentencing disparities); S. Rep. No. 98-225, at 52 (1983), as reprinted in 1984 U.S.C.C.A.N. 3183, 3235 ("A primary goal of sentencing reform is the elimination of unwarranted sentencing disparity."); *id.* at 45–46 (1983), as reprinted in 1984 U.S.C.C.A.N. at 3228–29 (finding that "[s]entencing disparities that are not justified by differences among offenses or offenders are unfair both to offenders and to the public"); see also Rodríguez, *Uniformity and Integrity in Immigration Law*, *supra* note 15, at 501 ("Uniformity also facilitates equal treatment by subjecting the same conduct to the same rules or sanctions, regardless of where or when the conduct occurs.").

212. See Michele Cotton, *Back with a Vengeance: The Resilience of Retribution as an Articulated Purpose of Criminal Punishment*, 37 *Am. Crim. L. Rev.* 1313, 1354–55 (2000) (noting that the Supreme Court has previously made a "most emphatic endorsement of retribution" in *Spaziano v. Florida*, 468 U.S. 447 (1984)); Adam J. Kolber, *The Time-Frame Challenge to Retributivism 2–3* (N.Y. Univ. Sch. of L., Public Law Research Paper No. 18-48, 2018), <https://ssrn.com/abstract=3281979> (on file with the *Columbia Law Review*) (describing time-frame retributivism as the dominant consideration of sentencing judges).

213. See Bowers, *supra* note 209, at 1676 (internal quotation marks omitted) (quoting Dan M. Kahan & Martha C. Nussbaum, *Two Conceptions of Emotion in Criminal Law*, 96 *Colum. L. Rev.* 269, 358 (1996)).

214. H.L.A. Hart, *Punishment and Responsibility: Essays in the Philosophy of Law* 80 (2d ed. 2008).

215. Bowers, *supra* note 209, at 1674.

no two cases are really exactly alike if viewed from a certain level of specificity. But the morality that undergirds notions of equity and fairness in a retributivist system are most often linked back to criminal conduct.²¹⁶ Punishing people equally for committing similar enough *actus reus* with the requisite *mens rea* rings just. But even under current federal sentencing practices, there is a measure of individualizing punishment based on a number of factors that measure a defendant's dangerousness and potential recidivism, and deter the defendant from future criminality.²¹⁷ When exploring the infamous axes of the Federal Sentencing Guidelines, the same conduct can be punished differently based on individualized factors that justify such a disparity.²¹⁸ And with the increase of judicial discretion and departures, these disparities can widen even further.²¹⁹ Yet a conduct-based sanctioning regime still remains one of the bedrock principles of the hybrid federal criminal justice system, and must inform how we define the goal of uniformity.

When discussing these individualized disparities of sanctioning outcomes, many will argue along the lines of moral justness.²²⁰ If Defendant A and Defendant B teamed up and robbed a liquor store together, should they be punished differently if Defendant A has a longer criminal history than Defendant B? There are many on both sides of this debate, but there are interweaving issues of philosophy, morality, and deterrence at play when discussing such a scenario. Should the fact that

216. See Marc O. DeGirolami, *Against Theories of Punishment: The Thought of Sir James Fitzjames Stephen*, 9 *Ohio St. J. Crim. L.* 699, 704 (2012) (citing Michael Moore, *Placing Blame: A General Theory of Criminal Law* 91 (1997)) (describing retributivism approaches that “rely on a universal moral intuition that crime and punishment fit together hand-in-glove”).

217. See Alice Ristroph, *Respect and Resistance in Punishment Theory*, 97 *Calif. L. Rev.* 601, 621 (2009) (describing hybrid theories of retributive and consequentialist punishment that “holds that moral desert specifies a range of permissible penalties, and utilitarian considerations should drive the selection of appropriate penalties within that range”).

218. U.S. Sent'g Guidelines Manual ch. 5, pts. A, H (U.S. Sent'g Comm'n 2018); see also 18 U.S.C. § 3553(a) (2018) (outlining sentencing factors that include individual characteristics and the circumstances of defendants); Wayne A. Logan, *Creating a “Hydra in Government”: Federal Recourse to State Law in Crime Fighting*, 86 *B.U. L. Rev.* 65, 90 (2006) [hereinafter Logan, *Creating a “Hydra in Government”*] (recognizing the goal of Congress in determinative sentencing to eliminate unwarranted disparities, while accepting warranted disparities); O'Hear, *supra* note 192, at 750 (recognizing that “uniformity seeks to eliminate *unwarranted* sentencing disparities, but also to provide for *warranted* disparities. The problem lies in distinguishing the warranted from the unwarranted”).

219. U.S. Sent'g Comm'n, *Demographic Differences in Federal Sentencing Practices: An Update of the Booker Report's Multivariate Regression Analysis* 23–24 (2010) (providing evidence that sentencing disparities increased along racial lines, particularly with increasing sentences for Black men and noncitizens); Crystal S. Yang, *Have Interjudge Sentencing Disparities Increased in an Advisory Guidelines Regime? Evidence from Booker*, 89 *N.Y.U. L. Rev.* 1268, 1315 (2014) (finding that interjudge sentencing disparities doubled since the Federal Sentencing Guidelines became advisory after *United States v. Booker*, 543 U.S. 220 (2005)).

220. See *supra* notes 213–214 and accompanying text.

Defendant B has a more consistent work history, or attained a higher level of education, or enjoys more family support at home color a sentencing disparity?²²¹ Especially when such disparities are proxies for *color*.²²² And then there are the disparities that neither Defendant A nor Defendant B have any control over, such as disparities caused by different judges, different lead and line prosecutors, different public defenders, and a host of other variables, each of which can materially affect sentencing outcomes.²²³ And while such disparities are patently *unfair*, they have been accepted within the ambit of being sufficiently *just*. All criminal and civil sanctioning regimes will have various levels of disparate outcomes. Imperfect administration of the law is an unavoidable byproduct when the administrators themselves are imperfect.

This Article does not seek to draw broad lines between which disparities are warranted versus unwarranted, but utilizes this discussion to determine whether downstream federal sanctioning disparities are warranted when they are based on the differences between state laws. The categorical approach, like all laws, will always have a measure of outcome disparities based on warranted sentencing factors, but different state laws do not share any of the justification of these factors. As one judge noted, this is actually “an impediment to uniformity” since “two defendants who . . . committed identical criminal acts in two different states and have essentially the same criminal history” may receive different sanctioning outcomes, which “depends not on their past criminal conduct but on the

221. See Stephen J. Schulhofer, *Assessing the Federal Sentencing Process: The Problem Is Uniformity, Not Disparity*, 29 *Am. Crim. L. Rev.* 833, 835–36 (1992) (using a similar example to explain “unwarranted disparity” in sentencing).

222. See Bernard E. Harcourt, *Risk as a Proxy for Race: The Dangers of Risk Assessment*, 27 *Fed. Sent’g Rep.* 237, 238–40 (2015) (providing empirical evidence that actuary risk assessment tools in sentencing exacerbate racial disparities, and that criminal history serves as a proxy for race due to discriminatory enforcement priorities against minority communities); Carissa Byrne Hessick, *Race and Gender as Explicit Sentencing Factors*, 14 *J. Gender Race & Just.* 127, 138 (2010) (outlining how the history of explicitly using race and gender as sentencing factors pervades modern race-neutral factors and policy discussions). See generally Sonja B. Starr, *Evidence-Based Sentencing and the Scientific Rationalization of Discrimination*, 66 *Stan. L. Rev.* 803 (2014) (recognizing that other sentencing factors—such as employment status, education, and neighborhoods—can serve as proxies for race and poverty).

223. See Gerald W. Heaney, *The Reality of Sentencing Guidelines: No End to Disparity*, 28 *Am. Crim. L. Rev.* 161, 175–208 (1991) (statistically analyzing all relevant sentencing variables and finding that the distribution of average sentences varied from district to district); Michael A. Simons, *Departing Ways: Uniformity, Disparity, and Cooperation in Federal Drug Sentences*, 47 *Vill. L. Rev.* 921, 950 (2002) (noting sentencing guidelines provide bounded discretion and prosecutors develop local practices within the guidelines); Substantial Assistance Staff Working Grp., *U.S. Sent’g Comm’n, Federal Court Practices: Sentence Reductions Based on Defendants’ Substantial Assistance to the Government*, 11 *Fed. Sent’g Rep.* 18, 25 (1998) (observing widely varied substantial assistance practices in eight different districts based on interviews of judges, prosecutors, defense attorneys, and probation officers); see also *supra* note 219 and accompanying text.

phrasing of the different state criminal statutes.”²²⁴ An Iowan burglar received drastically different federal sanctions than a Missourian burglar, even though these sister states share a border.²²⁵ Burgling a building in Iowa or Missouri carries very similar weight when judged on moral, retributivist, or deterrent axes.²²⁶ Should the difference between committing a burglary in Iowa, or driving a few minutes south to commit a similar burglary in Missouri, justify the disparity of receiving a fifteen-year mandatory minimum ACCA sentence? Should the difference between possessing marijuana in North Dakota, or driving a few minutes west and possessing the same amount of marijuana in Montana, justify the disparity of being deported or getting to stay in the United States?²²⁷ These differences in state criminal codes do not confer more or less moral blameworthiness, or denote more or less danger to society, or carry more or less chance of recidivism.²²⁸ Admittedly, a federal judge sitting in Iowa may read the law differently from a federal judge sitting in Missouri during the federal decisionmaking process, but this is true for all laws and is inescapable. What are escapable, however, are unwarranted sentencing factors, which can be changed and redesigned to bring the imposition of federal sanctions *closer* to achieving uniform sanctioning outcomes.

Where an offender commits a state crime is simply not relevant to how the federal government should impose sanctions.²²⁹ To be fair, states do indeed weigh moral decisions when drafting their criminal laws;²³⁰ but the

224. *United States v. Chapman*, 866 F.3d 129, 137 (3d Cir. 2017) (Jordan, J., concurring).

225. See *supra* notes 16–24, 106–114 and accompanying text.

226. But see Jain & Warren, *supra* note 35, at 150 (arguing that such disparities are warranted because they are similar to conduct in different states, which are being punished differently).

227. See *Gerbier v. Holmes*, 280 F.3d 297, 312 (3d Cir. 2002) (“[A]n alien in one state might be ineligible for cancellation of removal even though he committed the same exact crime as an alien in a different state, simply because the two states punish the same crime differently.”).

228. See Eric S. Fish, *The Paradox of Criminal History*, *Cardozo L. Rev.* (forthcoming) (manuscript at 7), <https://ssrn.com/abstract=3441458> (on file with the *Columbia Law Review*) (noting the arbitrariness of using the categorical approach to impose collateral consequences, which “makes the system a minefield that destroys some and spares others, while failing to give the people it processes any morally coherent account of why one must suffer a greater punishment than another”).

229. See Logan, *Contingent Constitutionalism*, *supra* note 26, at 163–64 (recognizing the unfairness of making federal law applicable to the entire nation, while actually having the application of federal law based upon the “particular geographic location” in which that law is triggered).

230. See Joshua M. Divine, *Statutory Federalism and Criminal Law*, 106 *Va. L. Rev.* 127, 189–90 (2020) (discussing how variations in state law often result from preferences of states); Logan, *Creating a “Hydra in Government,” supra* note 218, at 98 (noting the “embedding of state preferences into the federal criminal law”); see also Hobson, *supra* note 207, at 40 (arguing that states should have the freedom to choose what punishments are proportional to a particular state crime because such a process reflects the “moral priorities and [the] sense of justice in the community”).

various applications and disparate outcomes produced by the categorical approach can change on morally irrelevant differences in states' scrivener draftsmanship.²³¹ This is not a morally relevant factor that justifies sanctioning disparities; neither does it serve as a reliable proxy for other relevant factors such as continued dangerousness to the community, recidivism, or the ability to reintegrate into society.²³² So even when measuring the disparate outcomes, the categorical approach has been found wanting because geographical disparities are unwarranted as a matter of predictability, efficiency, and morality.

C. *Nationwide Uniformity and Its Tensions with Federalism*

Establishing nationwide uniformity, whether it be of application or outcomes, is difficult against the backdrop of federalism. One of the foundational principles of United States federalism is the diffusion of power among separate sovereigns to prevent a tyrannical central government.²³³ Federalism is the political reality that makes uniformity under the current elements-based categorical approach unachievable. And the Court has recognized this in different contexts, calling “[n]onuniformity . . . an unavoidable reality in a federalist system.”²³⁴ As long as different states continue to define their criminal laws differently—which is a necessary part of the United States' system of government—uniformity will not and cannot be achieved under the status quo.

There are a variety of different federalism relationships between federal, state, and local actors that each come with unique benefits and detriments. In some policy areas, federal and state governments can work together cooperatively to achieve mutually beneficial policy goals when the sovereigns' respective powers overlap, such as in criminal law and the war

231. See, e.g., *supra* notes 101–103, 137–147 and accompanying text.

232. See Schulhofer, *supra* note 221, at 835 (noting that Congress did not seek to end disparities but merely those that were unjustified because they did not have any “real differences in culpability or other penologically relevant factors”).

233. See Logan, *Contingent Constitutionalism*, *supra* note 26, at 146 (describing federalism as “the decentralizing effect of which preserves the authority of national political subunits to enact and enforce laws, especially relative to police power”).

234. *Danforth v. Minnesota*, 552 U.S. 264, 280 (2008) (describing nonuniformity in the context of the application of federal criminal procedure rules based on variances of state law).

on drugs,²³⁵ immigration policy,²³⁶ and national security,²³⁷ to name just a few. In other areas, there remains tension between the sovereigns competing for powers, sometimes undermining each other rather than cooperating for political and/or economic purposes.²³⁸

These traditional interactions between federal and state sovereigns are different from what we observe in the ACCA, the INA, and other statutes in which the courts utilize the categorical approach. There is no interaction, negotiation, or participation in joint or competitive ventures between federal and state actors. Instead, the federal government, through Congress and the courts, unilaterally established its own criteria for imposing federal sanctions that are triggered by state crimes. This unique incorporation of state law predicates into federal law creates a unique type of federalism interaction.²³⁹

This is the unique uniformity problem created by this federalism interaction. The same sovereign applies the categorical approach differently at the federal-proceeding stage based on the different

235. See Michelle Alexander, *The New Jim Crow: Mass Incarceration in the Age of Colorblindness* 49–55 (2010) (recording the billions of dollars the federal government gave to states to incentivize them to increase drug enforcement); John F. Pfaff, *Locked In: The True Causes of Mass Incarceration and How to Achieve Real Reform* 102 (2017) (detailing nearly thirty-eight billion dollars given from the federal government to states to fund criminal justice enforcement and detention); Rachel E. Barkow, *Our Federal System of Sentencing*, 58 *Stan. L. Rev.* 119, 129–30 (2005) (“The [Violent Crime Control and Law Enforcement] Act provided incentive grants to states that adopted truth-in-sentencing policies that required certain offenders to serve not less than eighty-five percent of their prison sentences.”); Reitz, *supra* note 207, at 117 (detailing how the Violent Crime Control and Law Enforcement Act of 1994 was “tied [to] billions of dollars of funding for state prison construction” if the states implemented truth-in-sentencing laws and redesigned state sentencing structures to look more like the Federal Sentencing Guidelines).

236. See 8 U.S.C. § 1357(g) (2018) (authorizing the DOJ to enter cooperative agreements to deputize states to enforce federal immigration policy); Peter J. Spiro, *Federalism and Immigration: Models and Trends*, 53 *Int’l Soc. Sci. J.* 67, 67–68 (2001) (discussing the general trend of federations moving toward a cooperative federalism model in allowing subnational member states as partners in immigration policy and enforcement).

237. See Samuel H. Clovis, Jr., *Federalism, Homeland Security and National Preparedness: A Case Study in the Development of Public Policy*, *Homeland Sec. Affs.*, Oct. 2006, at 1, 5–9 (applying cooperative, competitive, and coercive theories of federalism to national security in how states can affect preparedness in national emergencies).

238. See, e.g., Jessica Bulman-Pozen & Heather K. Gerken, *Uncooperative Federalism*, 118 *Yale L.J.* 1256, 1271–80 (2009) (discussing the power that states have as “servants” to implement federal policies, which can be used to undermine federal policy in favor of state preferences); Robert A. Mikos, *On the Limits of Supremacy: Medical Marijuana and the States’ Overlooked Power to Legalize Federal Crime*, 62 *Vand. L. Rev.* 1421, 1446 (2009) (exploring the relationship between preemption and anticommandeering doctrines in the context of regulating marijuana).

239. See Divine, *supra* note 230, at 134–37 (describing how “dynamic incorporation” of state law into federal law provides states with the power to exercise sovereignty and influence the application of federal law according to state preferences); Logan, *Creating a “Hydra in Government,” supra* note 218, at 74 (criticizing the merits of federal law’s incorporation of state law due to disparities created by differences in state law).

sovereigns involved at the state-proceeding stage; and the same sovereign imposes different sanctioning outcomes based on the different sovereigns involved at the state-proceeding stage.

The practical hurdles to achieving real uniformity in a federal system have prompted other scholars to consider the value of uniformity, and whether it is still a desirable policy goal. Given the immense variables at play in the criminal justice system, Bowers has called genuine uniformity “illusory.”²⁴⁰ Professor Michael O’Hear has argued that perhaps uniformity has “run its course,”²⁴¹ and others have commented that the alternative of nonuniformity in a federal system is not “all that troubling.”²⁴² After all, the benefits that flow from predictability and efficiency can still be achieved on a jurisdiction-by-jurisdiction basis as long as separate jurisdictions have clearly defined rules that are consistently applied.²⁴³ So even if there is a sweeping federal law being applied, like Title VII or the Bankruptcy Code, each federal and/or state jurisdiction will have clearly defined rules for application, and can achieve uniform outcomes without unwarranted disparities in treatment.²⁴⁴

But for all the reasons stated above, federal sanctioning statutes like the ACCA and INA cannot enjoy this uniformity because of the categorical approach’s reliance on state law. Different state laws will always be incorporated in these statutes. While other forms of federalism may indeed embrace disparate outcomes based on the different sovereigns involved, or may achieve uniform outcomes based on piecemeal applications of federal law, such disparities in criminal justice call for special vigilance. The diffusion of power in a federal system was in part designed to prevent the unilateral and tyrannical consolidation of power that threatened individual liberty.²⁴⁵ This is especially true in criminal justice and immigration since the liberty at stake is the government putting a person in a cage, or banishing them from the land.²⁴⁶ In addition, the

240. See Bowers, *supra* note 209, at 1675.

241. See O’Hear, *supra* note 192, at 816 (examining if uniformity is a worthwhile goal given many different competing theories of uniformity in criminal justice).

242. See Frost, *supra* note 39, at 1606; see also Divine, *supra* note 230, at 188–90 (explaining that some regional variation can be beneficial).

243. Frost, *supra* note 39, at 1606.

244. *Id.* (arguing that piecemeal uniformity within certain regions, federal circuits, or states in respective applications of federal law can still provide benefits of predictability and efficiency provided each jurisdiction has clearly defined rules).

245. See Erwin Chemerinsky, *The Values of Federalism*, 47 Fla. L. Rev. 499, 525 (1995) [hereinafter Chemerinsky, *The Values of Federalism*] (noting that the diffusion of power to states is often cited as one of the primary goals of federalism to protect “citizen[s] against governmental oppression—the ‘tyranny’ that the Framers were so concerned about” (quoting Andrzej Rapaczynski, *From Sovereignty to Process: The Jurisprudence of Federalism After Garcia*, 1985 Sup. Ct. Rev. 341, 380)); Barry Friedman, *Valuing Federalism*, 82 Minn. L. Rev. 317, 402–05 (1997) (arguing similar theoretical and pragmatic benefits of federalism).

246. See *supra* note 207 and accompanying text.

detrimental emotional and economic impacts that ripple out from separating human beings from their families and communities cannot be understated, and may have more generational impact than any other area of federal law.

III. THE CATEGORICAL APPROACH AND MANY PATHS FORWARD

*“When you come to a fork in the road, take it.”*²⁴⁷

As the Court has accepted, “whether for good or for ill, the elements-based approach remains the law.”²⁴⁸ And as one appellate judge pleaded, “Heaven help us.”²⁴⁹ His colleague on the bench, however, stated that he would “be satisfied” with a lower authority “if Congress or the Supreme Court would help us.”²⁵⁰ With the rising tensions in the legal field that question the continued injustices of mass incarceration²⁵¹ and mass deportation,²⁵² and a number of upcoming cases addressing the categorical approach before the Court,²⁵³ now is the time to pave a new path forward. After discussing the nonuniformity of the categorical approach in practice, and determining that the categorical approach also fails to deliver any of the theoretical goals of uniformity, we must consider the most effective avenues toward reform.

Scholars and judges have considered various avenues to reform the categorical approach, and even more broadly the existing state-to-federal sanctioning system. Many advance meritorious arguments that the categorical approach can be fixed through legislative means.²⁵⁴ Commentators that forward these solutions often blame Congress’s poor

247. See Yogi Berra, *The Yogi Book: I Really Didn’t Say Everything I Said!* 64 (1998).

248. *Mathis v. United States*, 136 S. Ct. 2243, 2257 (2016).

249. *United States v. McCollum*, 885 F.3d 300, 314 (4th Cir. 2018) (Wilkinson, J., dissenting).

250. *Id.* at 309 (Traxler, J., concurring).

251. See *supra* note 235 and accompanying text.

252. See generally Daniel E. Martínez, Jeremy Slack & Ricardo Martínez-Schuldt, *The Rise of Mass Deportation in the United States*, in *The Handbook of Race, Ethnicity, Crime, and Justice* 173 (Ramiro Martínez, Jr., Meghan E. Hollis & Jacob I. Stowell eds., 2018) (discussing the rise of a deportation pattern in the United States over the past twenty years).

253. See *supra* note 33 and accompanying text.

254. See, e.g., Matthew Kopp, *Erased: State Burglary Convictions as Violent Felonies Under the Armed Career Criminal Act*, 93 N.D. L. Rev. 425, 448 (2018) (arguing for the redrafting of the ACCA); Shelby Burns, Note, *The Johnson & Johnson Problem: The Supreme Court Limited the Armed Career Criminal Act’s Violent Felony Provision—And Our Children Are Paying*, 45 Pepp. L. Rev. 785, 826–29 (2018) (arguing for states to redraft laws to conform to Federal SORNA definitions); Zachary J. Weber, Comment, *Mathis v. United States: A Repeated Request for Revision of the Armed Career Criminal Act*, 85 U. Cin. L. Rev. 1235, 1254–56 (2017) (arguing for the redrafting of the ACCA and for incentives for states to redraft criminal codes to conform with ACCA definitions); see also Aaron Lang, Note, *An Opportunity for Change? Aggravated Felonies in Immigration Proceedings and the Effect of Moncrieffe v. Holder*, 33 B.U. Int’l L.J. 523, 551–54 (2015) (arguing for states to redraft their laws to conform with federal immigration definitions).

draftsmanship for the inconsistencies of the categorical approach.²⁵⁵ This type of fix would necessitate a legislative solution at the federal or state level.²⁵⁶ Certainly if Congress amended the dozen or more criminal and civil statutes that incorporate state law²⁵⁷—like the INA and the ACCA—courts could abandon the categorical approach.²⁵⁸ Alternatively, if states amended their criminal codes to track more closely to federal law—perhaps if the federal government incentivized them as is common in cooperative federalism policies—the categorical approach *might* become obsolete.²⁵⁹ But any legislative solution faces tremendous political hurdles.²⁶⁰ As Professor Rachel Barkow has highlighted, political accountability often translates into ineffective policy in the criminal justice arena.²⁶¹ Democratically elected decisionmakers will continue to legislate and exercise discretion to respond to community concerns that rarely result in increases in public safety.²⁶² And over the past decade, there has not been sufficient political will to effect the type of drastic legislative reform necessary to remedy the categorical approach.²⁶³ Using

255. See, e.g., Barkow, *Categorical Mistakes*, supra note 36, at 207 (“The blame for this [ACCA] regime falls squarely on Congress and the statutory framework it elected to adopt.”).

256. See, e.g., *Ovalles v. United States*, 905 F.3d 1231, 1258–60 (11th Cir. 2018) (Pryor, J., concurring) (arguing for Congress to rewrite the ACCA to allow federal juries to determine facts to trigger ACCA sentences), abrogated by *United States v. Davis*, 139 S. Ct. 2319 (2019); Evan Lee, *Regulating Crimmigration* 7–9 (Univ. of Cal. Hastings Coll. Of L., Research Paper No. 128, 2015), <https://ssrn.com/abstract=2559485> (on file with the *Columbia Law Review*) [hereinafter Lee, *Regulating Crimmigration*] (outlining the “inventory approach” proposing that Congress create an exhaustive list of all state crimes that could trigger corresponding federal sanctions).

257. See supra notes 45–47 and accompanying text.

258. Weber, supra note 254, at 1254–56.

259. Burns, supra note 254, at 826–29; Lang, supra note 254, at 554.

260. See Lee, *Regulating Crimmigration*, supra note 256, at 8 (explaining that “the biggest obstacle to the inventory approach . . . is political” because it is politically dangerous to appear soft on crime).

261. Rachel Elise Barkow, *Prisoners of Politics: Breaking the Cycle of Mass Incarceration* 1–4 (2019) (arguing that the political process has captured criminal justice policy, leading to inefficient and ineffective outcomes).

262. See *id.* (“[T]he public and politicians react[] to stories or panics about crime with ill-informed laws and punitive policies that extend far beyond the high-profile event that sparked them and without much thought about whether the response will promote public safety.”).

263. See, e.g., *Armed Career Criminal Sentencing Act of 2010*, S. 4045, 111th Cong. § 2 (2010) (seeking to amend the ACCA to fix problems of inconsistent application). The ACCA’s original 1984 sponsor, Senator Arlen Specter, failed to pass this 2010 amendment to fix problems of inconsistent application. See S. 4045 (111th): *Armed Career Criminal Sentencing Act of 2010*, GovTrack, <https://www.govtrack.us/congress/bills/111/s4045#> [<https://perma.cc/RF8X-D4PU>] (last visited Aug. 25, 2020); see also Press Release, Tom Cotton, Senator, U.S. Senate, Cotton, Hatch Introduce the Restoring the Armed Career Criminal Act (Aug. 1, 2018), https://www.cotton.senate.gov/?p=press_release&id=991 [<https://perma.cc/RJB7-UW3E>] (describing senators’ efforts to reform the ACCA with legislative changes). These reforms would base enhanced federal sentences on the term-of-

administrative agencies as vehicles for change, such as expanding the role of the United States Sentencing Commission in the federal decisionmaking process, has also been advanced.²⁶⁴ But the Commission has already been embroiled in these issues when defining sentencing enhancements and has not enjoyed tremendous success.²⁶⁵

Among the different institutions responsible for the categorical approach, looking to the judiciary for a solution seems the most plausible. As one judge noted, “[b]ecause the categorical approach often fails to achieve the goal it was designed for, and because it is a purely judge-made doctrine,” judges are in a unique position to advocate for and implement change.²⁶⁶ A judicial solution is also the most efficient option. The judiciary is the least cost avoider when considering the systemic change of a doctrine utilized solely by courts.²⁶⁷ In a handful of cases over the past five years alone, the Supreme Court has drastically altered the application of the categorical approach,²⁶⁸ and can do the same with one or two strategic grants of certiorari. Further, because of the taxation of judicial resources caused by the nonuniformity of the categorical approach, the

imprisonment of the state offense, and have been thus far unsuccessful in gaining traction in Congress. See S. 1547: Restoring the Armed Career Criminal Act, GovTrack, <https://www.govtrack.us/congress/bills/116/s1547> [<https://perma.cc/D8FA-E4R8>] (last visited Sept. 3, 2020).

264. See Thomas W. Hutchison, Peter B. Hoffman, Deborah Young & Sigmund G. Popko, *Federal Sentencing Law and Practice* § 4B1.2, at 1357 (2014 ed.) (suggesting that the Sentencing Commission could “alleviate” confusion by “providing a listing of which common offenses are, or are not, covered by the [ACCA’s] ‘otherwise clause’”); Kupfer, *supra* note 172, at 166–69 (arguing that a federal agency should be commissioned to create a binding list of all predicate offenses across all state jurisdictions).

265. See, e.g., *Beckles v. United States*, 137 S. Ct. 886, 892 (2017) (holding that the residual clause in the United States Sentencing Guide, § 4B1.1–4B1.2, is not unconstitutionally vague); Press Release, U.S. Sent’g Comm’n, U.S. Sentencing Commission Publishes for Comment Proposed Amendments to the Federal Sentencing Guidelines (Dec. 13, 2018), <https://www.ussc.gov/about/news/press-releases/december-13-2018> [<https://perma.cc/9YKT-S6MD>] (announcing a proposed amendment to the Guidelines that would “enable the sentencing courts to consider the conduct that formed the basis of the offense of conviction” in light of the “extensive litigation” and “inconsistent sentencing outcomes” that have resulted from the categorical approach).

266. *United States v. Chapman*, 866 F.3d 129, 138 (3d Cir. 2017) (Jordan, J., concurring) (citing *United States v. Faust*, 853 F.3d 39, 60 (1st Cir. 2017) (Lynch, J., concurring)); see also *United States v. Doctor*, 842 F.3d 306, 315 (4th Cir. 2016) (Wilkinson, J., concurring).

267. The “least cost avoider” principle posits that if a problem can be solved by two parties, it is more efficient to place the responsibility on the party who can solve the problem with the least amount of resources. See Guido Calabresi & A. Douglas Melamed, *Property Rules, Liability Rules and Inalienability: One View of the Cathedral*, 85 *Harv. L. Rev.* 1089, 1118–19 (1972) (assessing nuisance liability by determining the least cost avoider). See generally Guido Calabresi & Jon T. Hirschoff, *Toward a Test for Strict Liability in Tort*, 81 *Yale L.J.* 1055 (1972) (arguing that the Learned Hand strict liability test often considers which party is the “cheapest cost avoider” when assigning liability).

268. See *supra* notes 32–33 and accompanying text.

courts are the institution with the most incentive to fix the problem.²⁶⁹ But while many judges and scholars have recognized the court's unique role to change the categorical approach,²⁷⁰ many of these proposals fail to address its core problem of nonuniformity.

Fixing the nonuniformity of the categorical approach brings us to a fork in the road. First, section III.A posits that if uniformities of application and outcomes are to be salvaged, the categorical approach must be appropriately reengineered to fulfill these goals. This section argues that the most effective way to maintain the goals of nationwide uniformity of federal law is to transition away from an elements-based categorical approach to one based on conduct. In addition, uniformity might also be salvaged by keeping the overlapping punishment between the state and federal sovereigns separate. Section III.B, however, considers whether uniformity is achievable and even desirable under our political system of federalism. By considering this separate track, the elements-based categorical approach can still operate as normal, but under a different theoretical justification: that of promoting the necessary diversities of state law in a federalism system. This section also considers a different type of nonuniformity by exploring whether statutes should be tailored according to their specific intentions, with different categorical approaches for different statutes. Finally, section III.C takes account of all of the above analysis to consider whether complete abolition of the categorical approach might be another viable option to move the imposition of federal sanctions in the right direction.

A. *Salvaging Uniformity: Rethinking Criminal Conduct and Federal Sovereignty*

If the benefits of nationwide uniformity of federal law are worth preserving, there are at least two ways to salvage them in the context of the categorical approach. First, transitioning away from the current elements-based categorical approach to a conduct-based approach would ensure that the variations of state law criminal elements would no longer impact the imposition of federal sanctions; rather, a defendant's underlying criminal conduct in the state criminal proceeding would determine

269. See *supra* notes 166–173 and accompanying text.

270. See, e.g., *Chapman*, 866 F.3d at 138 (Jordan, J., concurring); Lynn A. Baker, Putting the Safeguards Back into the Political Safeguards of Federalism, 46 *Vill. L. Rev.* 951, 961–72 (2001) (advocating for additional judicial review of federalism issues); Stephen Lee, De Facto Immigration Courts, 101 *Calif. L. Rev.* 553, 597–99 (2013) [hereinafter Lee, De Facto Immigration Courts] (arguing for more judicial discretion in the immigration context in deciding whether to impose removal based on the severity of state law crimes); Steven G. Calabresi & Lucy D. Bickford, Federalism and Subsidiarity: Perspectives from Law 5 (Nw. L. & Econ., Research Paper No. 12-12, 2011), <https://ssrn.com/abstract=1902971> (on file with the *Columbia Law Review*) (arguing that judicial review is the correct enforcement mechanism to ensure constitutional federalism continues to meet demands of subsidiarity and to exercise judicial nullification to counteract overly harsh collateral consequences).

downstream federal punishment. Second, nationwide uniformity can also be efficiently achieved by keeping the sovereignty of the federal and state governments separate when imposing downstream sanctions. By only allowing the federal government to use previous *federal* convictions to impose downstream *federal* sanctions, this too would excise the need to rely on the variations of state law in a federal punishment regime.

1. *A Conduct-Based Categorical Approach.* — A conduct-based categorical approach is the most viable judicially implemented option that would address the shortcomings of the current elements-based status quo.²⁷¹ And in terms of uniformity, a conduct-based categorical approach could negotiate a compromise between achieving uniform application of a rule across all jurisdictions, while producing uniform outcomes by sanctioning similar criminal conduct similarly.

a. *The Conduct-Based Approach in Practice.* — A conduct-based categorical approach would use a three-step framework that eliminates reliance on state-law elements and instead relies upon an offender's underlying criminal conduct that led to the state criminal conviction. Step One would remain the same as the current system. Courts would continue to apply “*uniform, categorical definitions* to capture all offenses of a certain [type] . . . regardless of technical definitions and labels under state law.”²⁷² Consequently, applying uniform *definitions* of enumerated crimes consistently across all jurisdictions retains all of the benefits of uniform application. To be fair, Step One would not be free of inconsistencies, nor is it under the current categorical approach. Federal courts would, as they do now, occasionally disagree on how to create such definitions²⁷³ and continue to disagree on the elements to be included.²⁷⁴ These inconsistencies, however, are not based on the vagaries of state law;

271. See Evans, Punishing Criminals, *supra* note 36, at 665–67 (arguing that a conduct-based approach would lead to consistent results, save judicial economy, and solve ideological problems); see also Thomas O. Powell, The Armed Career Criminal Act—Proposing a New Test to Resolve Difficulties in Applying the Act's Ambiguous Residual Clause 8 (Mar. 16, 2009) (on file with the *Columbia Law Review*) (unpublished manuscript) (arguing that problems of the categorical approach “seem to be easy to resolve if courts could simply look at the facts and determine whether the defendants actually engaged in any violent or risky activity”).

272. *Taylor v. United States*, 495 U.S. 575, 590 (1990) (emphases added). For examples of this phenomenon, see *United States v. Garcia-Santana*, 774 F.3d 528, 538 (9th Cir. 2014) (creating a generic federal definition for “conspiracy”); *United States v. Juarez-Galvan*, 572 F.3d 1156, 1159–60 (10th Cir. 2009) (considering a generic federal definition for “kidnapping”).

273. Compare *Taylor*, 495 U.S. at 598 (citing Model Penal Code § 221.1 (1980); Wayne R. LaFare & Austin W. Scott, Jr., *Substantive Criminal Law* § 8.13, at 464 (1986)), and *United States v. Fierro-Reyna*, 466 F.3d 324, 327 (5th Cir. 2006) (“To establish the generic contemporary meaning of an enumerated offense, we consider, *inter alia*, the Model Penal Code, Professors LaFare's and Scott's treatises, modern state codes, and dictionaries.”), with *United States v. Alvarez-Jimenez*, 151 F. Supp. 3d 1119, 1122 (S.D. Cal. 2015) (relying on the Model Penal Code alone).

274. See *supra* note 51 and accompanying text.

instead, they are based on the vagaries of federal judges and their respective opinions, which is an inescapable aspect of the judiciary.

Step Two would shed much of the current reliance on state law, and instead determine the offender's underlying criminal conduct at the state-proceeding stage. Federal prosecutors at the later federal-proceeding stage would retain their evidentiary burden to present a record that would support a categorical match between the facts found in the state court and the federal elements established at Step One. There are a number of different ways in which federal prosecutors could do so, including relying on *Shepard* documents—such as a charging document or the plea colloquy—to determine the conduct upon which the offender's state offense was based. For example, if an Iowan burglar admitted in their state plea agreement that they in fact burgled a building, and not a boat or airplane, then the conduct they committed in Iowa would qualify because it comports with the federal generic definition of burglary. The same would be true of a Missourian burglar if the prosecution uncovered reliable records to prove the offender burgled a building. In cases where the *Shepard* documents or other reliable records either cannot be procured by the prosecutor or otherwise do not clearly delineate the state criminal conduct, the government would be unable to meet its burden of proof and the downstream federal sanction would not apply. Thereby, criminal conduct would become the equalizer, regardless of state-law elements.

At Step Three, courts and lawyers would do what they have been trained to do since law school; they would argue and adjudicate whether the state criminal conduct uncovered at Step Two satisfies each federal element established at Step One. If the facts fit the elements, the state criminal conduct would trigger the corresponding federal sanction; if the facts do not fit the elements, then the state criminal conduct would not trigger the corresponding federal sanction.

Admittedly, such a conduct-based approach will create its own challenges and level of disparate outcomes. Different judges will find different facts from the state proceeding reliable, and will apply them differently to the federal elements. But this is no different from the *warranted* disparities in outcomes pervasive throughout the justice system.²⁷⁵ Further, the conduct-based approach has already been in use and proved effective in other contexts.²⁷⁶ Federal courts use a conduct-

275. See *supra* notes 221–223 and accompanying text.

276. Evans, *Punishing Criminals*, *supra* note 36, at 667 (citing similarities between the modified categorical approach and the conduct-based approach); see also *Shular v. United States*, 140 S. Ct. 779, 786–87 (2020) (applying the conduct-based approach under a different section of the ACCA that refers to categorizing crimes “involving . . . manufacturing, distributing, or possessing with intent to manufacture or distribute, a controlled substance”); *Nijhawan v. Holder*, 557 U.S. 29, 40 (2009) (using the conduct-based approach to determine whether a state crime met the requirement under the INA of resulting in at least a \$10,000 loss to victims).

based approach in its three-strike jurisprudence and to punish certain drug crimes.²⁷⁷ The Court has also determined recently that while the elements-based categorical approach applies to certain provisions of the ACCA and the INA, a conduct-based categorical approach applies to different portions of those statutes.²⁷⁸ And as Judge William H. Pryor, Jr., Acting Chair of the U.S. Sentencing Commission,²⁷⁹ and this author have separately catalogued,²⁸⁰ several states—including Indiana,²⁸¹ Alabama,²⁸² Georgia,²⁸³ and California²⁸⁴—employ similar conduct-based categorical approaches in their own sentencing determinations.

277. See, e.g., *United States v. Johnson*, 479 F. App'x 811, 819 (10th Cir. 2012) (holding that the federal three-strikes law “unmistakably requires courts to look to the specific facts underlying the prior offense, not to the elements of the statute under which the defendant was convicted” (internal quotation marks omitted) (quoting *United States v. Mackovich*, 209 F.3d 1227, 1240 (10th Cir. 2000))). Fact-based approaches are also used in SORNA cases, determining which state “sex crimes” trigger the federal requirement to register as a sex offender. See, e.g., *United States v. Hill*, 820 F.3d 1003, 1005 (8th Cir. 2016) (examining the defendant’s specific conduct to determine if it constitutes a sex offense); *United States v. Price*, 777 F.3d 700, 709 (4th Cir. 2015) (applying the circumstance-specific conduct-based approach to determine which state law crimes constituted “sex offenses” under SORNA); *United States v. Gonzalez-Medina*, 757 F.3d 425, 430 (5th Cir. 2014) (finding that “a number of considerations . . . weigh against applications of the categorical approach”); *United States v. Dodge*, 597 F.3d 1347, 1355–56 (11th Cir. 2010) (en banc) (using a plea colloquy from a state crime to determine if it was a “sex offense” for purposes of imposing a federal sanction); *United States v. Mi Kyung*, 539 F.3d 982, 990–94 (9th Cir. 2008) (concluding that the court should apply the noncategorical approach to determine if the age of the victim is relevant for the SORNA provision).

278. See, e.g., *Shular*, 140 S. Ct. at 786–87; *Nijhawan*, 557 U.S. at 40.

279. Judge William Pryor, Ala. L., https://www.law.ua.edu/directory/People/view/Judge_William_Pryor [<https://perma.cc/5GUB-ZJ6T>] (last visited Nov. 6, 2020).

280. See *Ovalles v. United States*, 905 F.3d 1231, 1259–60 (11th Cir. 2018) (Pryor, J., concurring); *Evans*, *Punishing Criminals*, *supra* note 36, at 662–67.

281. *Moore v. State*, 769 N.E.2d 1141, 1145–46 (Ind. Ct. App. 2002); see also *Weiss v. State*, 903 N.E.2d 557, 561 (Ind. Ct. App. 2009) (explaining that the conduct-based approach used in Indiana is based on whether the underlying criminal acts of the out-of-state conviction would have constituted a predicate offense “if they had been committed in Indiana”).

282. *Skinner v. State*, 987 So. 2d 1172, 1175 (Ala. Crim. App. 2006) (“[I]n determining whether an out-of-state conviction will be used to enhance punishment pursuant to the [Alabama habitual-offender statute], the conduct upon which the foreign conviction is based must be considered and not the foreign jurisdiction’s treatment of that conduct.” (internal quotation marks omitted) (quoting *Daniels v. State*, 621 So. 2d 335, 342 (Ala. Crim. App. 1992))).

283. *Walker v. Hale*, 657 S.E.2d 227, 230 (Ga. 2008) (holding that out-of-state crime qualifies as a predicate offense under Georgia’s recidivist statute if “the same offense, if committed in this State, would constitute a serious violent felony” as defined under the statute).

284. *People v. Gallardo*, 407 P.3d 55, 57 (Cal. 2017) (holding that a California court must rely on facts previously “found by a prior jury in rendering a guilty verdict or admitted by the defendant in entering a guilty plea” when determining if an out-of-state conviction would have been a predicate offense under California’s habitual offender statute).

As these applications show, a conduct-based categorical approach can serve as a pragmatic solution that also achieves uniformity of application and uniformity in outcomes within the bounds of warranted disparities. By excising reliance on state criminal elements at Steps Two and Three, the vagaries of state law that the categorical approach was designed to ignore are finally mitigated in the later federal sanction decisionmaking process.

Indeed, such a conduct-based categorical approach also appears to be in line with the Court's framing of federal sentencing goals in the landmark case *United States v. Booker*.²⁸⁵ In the context of applying the Federal Sentencing Guidelines, the Court stressed that "Congress' basic goal in passing the Sentencing Act[,] [which includes the ACCA,] was to move the sentencing system in the direction of increased uniformity."²⁸⁶ And further, the Court specified that such "uniformity . . . consists . . . of similar relationships between sentences and real conduct."²⁸⁷ This guiding principle led the Court to declare the Federal Sentencing Guidelines advisory, "while maintaining a strong connection between the sentence imposed and the offender's real conduct," holding that such "a connection [was] important to the increased uniformity of sentencing that Congress intended its Guidelines system to achieve."²⁸⁸

b. *The Constitutional and Practical Viability of the Conduct-Based Approach.* — Commentators have raised doubts, however, about the constitutional, economic, and moral viability of a conduct-based approach. As a constitutional matter, the Court has long resisted a conduct-based categorical approach because of concerns that it would run afoul of the Sixth Amendment's right to an impartial jury.²⁸⁹ The Court's interpretation and application of this right in the sentencing context most notably started in *Apprendi v. New Jersey*,²⁹⁰ which held that "only a jury, and not a judge, may find facts that increase a maximum penalty [called for in a statute]."²⁹¹ Given this holding, jurists and scholars have argued that the Sixth Amendment would prevent adoption of a conduct-based approach²⁹²

285. 543 U.S. 220 (2005).

286. *Id.* at 253.

287. *Id.* at 253–54.

288. *Id.* at 246.

289. See U.S. Const. amend. VI ("In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law . . .").

290. 530 U.S. 466 (2000).

291. *Mathis v. United States*, 136 S. Ct. 2243, 2252 (2016) (citing *Apprendi*, 530 U.S. at 490).

292. See *id.*; *Descamps v. United States*, 570 U.S. 254, 269–70 (2013) ("The Sixth Amendment contemplates that a jury—not a sentencing court—will find such facts, unambiguously and beyond a reasonable doubt. And the only facts the court can be sure the jury so found are those constituting elements of the offense . . ."); *Taylor v. United States*, 495 U.S. 575, 601–02 (1990) (finding that a sentencing court should look only to the statutory definitions of a defendant's prior offense and not to the facts underlying the

because it would require federal sentencing judges to “find facts” about a criminal offender’s²⁹³ prior state criminal conduct that could boost their sentence above the statutory maximum.²⁹⁴

But *Apprendi* and its progeny²⁹⁵ do not control the state-to-federal sanctioning system.²⁹⁶ That line of cases triggers Sixth Amendment protections in contexts in which sentencing judges act as fact-finders of first review when such facts are material to sentencing a criminal offender outside of a prescribed range of punishment.²⁹⁷ Undergirding this Sixth Amendment protection are concerns about the fact-finding process and its entwinement with guilt and punishment. When fact-finders in the guilt phase of a proceeding must make determinations beyond a reasonable doubt, that guilt carries with it a certain prescribed range of punishment under the applicable criminal statute.²⁹⁸ Therefore, to go outside of that corresponding range of punishment based on judicial fact-finding at a much lower standard of proof seems to nullify much of the protection of the jury right altogether because the jury’s fact-finding of guilt is separable from the corresponding statutory range of punishment.²⁹⁹ However, when facts have been admitted by a defendant, or have been submitted to a jury in a prior proceeding, a judge can consider such facts when sentencing a

defendant’s prior crimes); Sharpless, Finally, a True Elements Test, *supra* note 175, at 1295–98 (arguing that *Apprendi* prevents a purely conduct-based approach); Sharpless, Toward a True Categorical Elements Test, *supra* note 35, at 1024–28 (same).

293. This protection would only extend to criminal federal court proceedings and not to civil immigration proceedings. See U.S. Const. amend. VI.

294. Cf. *Alleyne v. United States*, 570 U.S. 99, 114–18 (2013) (holding that facts that increase the mandatory minimum sentence are considered an “element” of the crime that must be proven to a jury beyond a reasonable doubt).

295. *Hurst v. Florida*, 136 S. Ct. 616, 621–22 (2016) (applying the *Apprendi* rule to judicial fact-finding in the imposition of capital punishment); *Alleyne*, 570 U.S. at 114–18 (applying the *Apprendi* rule to judicial fact-finding that can increase a mandatory minimum sentence); *S. Union Co. v. United States*, 567 U.S. 343, 360 (2012) (applying the *Apprendi* rule to the imposition of criminal fines); *United States v. Booker*, 543 U.S. 220, 264–65 (2005) (declaring the Federal Sentencing Guidelines to be advisory to prevent a Sixth Amendment violation from judicial fact-finding used to enhance sentences); *Blakely v. Washington*, 542 U.S. 296, 304–05 (2004) (explaining that determinate sentencing guidelines must also submit facts to a jury to impose a sentence higher than statutory maximum); *Ring v. Arizona*, 536 U.S. 584, 607–08 & n.6 (2002) (applying the *Apprendi* rule to judicial fact-finding in the imposition of capital punishment).

296. See *Mathis*, 136 S. Ct. at 2258 (Kennedy, J., concurring) (stating that *Apprendi* “does not compel the elements based approach”).

297. See *Apprendi v. New Jersey*, 530 U.S. 466, 484–90 (2000) (explaining the history of case law and analyzing the importance of the context of *Almendarez-Torres*, in which the facts necessary to enhance the sentence were admitted by defendant and not “contested issue[s] of fact”).

298. *Id.* at 481–82.

299. *Id.* at 496 (noting the difference “between accepting the validity of a prior judgment of conviction entered . . . [when] the defendant had the right[s] to a jury trial and . . . to require the prosecutor to prove guilt beyond a reasonable doubt, and allowing the judge to find the required fact under a *lesser* standard” (emphasis added)).

defendant because of the reliability and constitutional protections that validate the findings in the prior criminal proceeding.³⁰⁰ As the Court itself recognized in *Apprendi*, “accepting the validity of a prior judgment of conviction entered in a proceeding in which the defendant had the right to a jury trial and the right to require the prosecutor to prove guilt beyond a reasonable doubt” is vastly different from merely “allowing the judge to find the required fact under a lesser standard of proof.”³⁰¹ As considered in *Almendarez-Torres v. United States*, admissions made during plea bargaining can be accepted when considering downstream federal sanctions.³⁰² Yet there still may be concerns about overzealous prosecutors trying to uncover facts not contained in the state court record. While this point is mitigated by discussion below on the economic exercise of prosecutorial discretion, a rule to limit prosecutors to the existing state court *Shepard* documents would assuage much of this concern. This rule threads the needle between overstepping on prohibited judicial fact-finding under *Apprendi*, while fitting within the exception carved out of *Almendarez-Torres*.

In the context of a conduct-based categorical approach, facts that have been submitted to a jury or to which the offender admitted during the state proceeding have sufficient reliability and constitutional protections to be relied upon by a sentencing judge during a later federal proceeding. Evidentiary rules, due process, and other protections at the state level legitimize factual findings from that proceeding.³⁰³ And because around ninety-five percent of state criminal proceedings are resolved through plea bargaining,³⁰⁴ these facts underlying the state conviction are

300. See, e.g., *People v. Gallardo*, 407 P.3d 55, 59–65 (Cal. 2017) (holding that *Apprendi* applied to protect a jury trial, but does not apply when jury rights are waived through the plea-bargaining process).

301. *Apprendi*, 530 U.S. at 496 (distinguishing *Almendarez-Torres v. United States*, 523 U.S. 224, 230, 244 (1998)).

302. *Almendarez-Torres*, 523 U.S. at 247–48 (upholding the federal recidivist sentence enhancement because the offender admitted that previous crimes were aggravated felonies); see also *United States v. Ruiz*, 536 U.S. 622, 628–29 (2002) (observing that, by pleading guilty, the defendant “forfeits not only a fair trial, but also other accompanying constitutional guarantees,” including the Sixth Amendment right to a jury trial).

303. Due Process rights have strengthened since the inception of the categorical approach, providing additional protections for criminal and noncitizen defendants. See, e.g., Fed. R. Crim. P. 11(b) (requiring the court to determine voluntariness and the factual basis of the plea on the record); *Lafler v. Cooper*, 566 U.S. 156, 170–74 (2012) (extending the *Strickland* ineffective assistance of counsel standards to erroneous legal advice given at the plea-bargaining stage); *Missouri v. Frye*, 566 U.S. 134, 143–49 (2012) (same); *Padilla v. Kentucky*, 559 U.S. 356, 366–69 (2010) (requiring defense counsel to properly advise noncitizen criminal defendants of the potential immigration consequences of guilty pleas); *Brady v. United States*, 397 U.S. 742, 748 (1970) (holding that a guilty plea operates as a waiver of important rights and is valid only if done voluntarily, knowingly, and intelligently, “with sufficient awareness of the relevant circumstances and likely consequences”).

304. See *Frye*, 566 U.S. at 143 (“Ninety-seven percent of federal convictions and ninety-four percent of state convictions are the result of guilty pleas.”); Lindsey Devers, DOJ, Plea and Charge Bargaining 1 (2011), <https://bja.ojp.gov/sites/g/files/xyckuh186/files/>

often conceded in a plea colloquy and potentially in a final judgment finding guilt.³⁰⁵ So while Sixth Amendment protections may indeed be necessary in a single criminal proceeding, they are arguably inapposite in the context of separate state and federal proceedings.

But even if Sixth Amendment protections under *Apprendi* may not apply, additional procedures can also serve to mitigate constitutional scrutiny. For example, bifurcating federal procedures into a guilt phase and a sentencing phase can serve this purpose. A jury can preside over both phases and consider questions of guilt separately from facts necessary to impose a heightened sentence. This procedure also avoids unnecessary prejudice at the guilt phase of the proceeding, since the jury need not consider any facts of an offender's prior criminal convictions.³⁰⁶ Instead, it would only consider and find such facts during the sentencing phase to potentially trigger an enhanced sentence. This added process, however, comes at the expense of judicial resources and jurors' time.

This discussion on the constitutionality of a conduct-based approach and judicial fact-finding must also include considerations of how plea bargaining might be affected. In the current elements-based system, state prosecutors retain imbalanced bargaining power in a charge-based pleading system.³⁰⁷ An offender can only hope to negotiate a plea deal

media/document/PleaBargainingResearchSummary.pdf [https://perma.cc/DNE8-ASGR] (“[S]cholars estimate that about 90 to 95 percent of both federal and state court cases are resolved through [the plea bargaining] process.”); Jed S. Rakoff, *Why Prosecutors Rule the Criminal Justice System—And What Can Be Done About It*, 111 Nw. U. L. Rev. 1429, 1432 (2017) (“In 2015, only 2.9% of federal defendants went to trial, and, although the state statistics are still being gathered, it may be as low as less than 2%.”).

305. See *Blakely v. Washington*, 542 U.S. 296, 303 (2004) (applying *Apprendi* and holding that a judge may impose any sentence authorized “on the basis of the facts reflected in the jury verdict or admitted by the defendant” (emphasis omitted)).

306. See, e.g., *Conner v. State*, 138 So. 3d 143, 151 (Miss. 2014) (holding that a sentencing hearing must be separate from trial on the principal charge, but the facts at the sentencing hearing still must be proven beyond a reasonable doubt). Indiana also separates the indictment into two documents. See *Lawrence v. State*, 286 N.E.2d 830, 835 (Ind. 1972) (“In the first the particular offense . . . should be set forth, and this should be upon the first page . . . and signed by the prosecuting officer. In the second part former convictions should be alleged, and this should be upon the second page[,] . . . separable from the first page and [also] signed” (internal quotation marks omitted) (quoting *State v. Ferrone*, 113 A. 452, 457 (Conn. 1921))). For an argument calling for postconviction hearings for every crime to determine whether a particular conviction qualified as a crime of violence, see R. Daniel O'Connor, *Defining the Strike Zone—An Analysis of the Classification of Prior Convictions Under the Federal “Three-Strikes and You’re Out” Scheme*, 36 B.C. L. Rev. 847, 883–85 (1995).

307. See Andrew Manuel Crespo, *The Hidden Law of Plea Bargaining*, 118 Colum. L. Rev. 1303, 1316–32 (2018) (outlining the prosecutorial tactic of “piling on”). See generally Cynthia Alkon, *Hard Bargaining in Plea Bargaining: When Do Prosecutors Cross the Line?*, 17 Nev. L.J. 401 (2017) (outlining prosecutorial negotiation tactics in plea bargaining, including threats to add charges, exploding offers, or threats to seek sentencing enhancements).

that requires admission to a lesser crime that does not contain elements that categorically match a federally enumerated crime.

A conduct-based system would change this dynamic. The charge-based power that state prosecutors retain in the negotiating process would still be potent, but less so when considering downstream federal sanctions. State prosecutors at the state proceeding have different incentives than federal prosecutors at the later federal proceeding; the former are merely looking to convict the offender of a state crime, and are not so concerned with including the perfect colloquy of underlying conduct. In fact, many *Shepard* documents—such as indictments and plea colloquies—do not outline the exact state criminal conduct at all, or do so sparsely.³⁰⁸ This illustrates how little state prosecutors prioritize capturing such information that would cut in favor of defendants. Thus, when federal prosecutors at the federal stage seek to impose federal sanctions, they may not be able to meet their burden of proof based on *Shepard* documents alone.

A conduct-based categorical approach would also remedy an existing problem by properly accounting for *Alford* and no-contest pleas, in which a defendant in a state proceeding never admits guilt but merely accepts the government's ability to meet its burden of proving criminal elements beyond a reasonable doubt.³⁰⁹ Yet another shortcoming of the current plea bargaining regime is that such pleas in state proceedings can serve as the basis for downstream federal sanctions because the offender has technically been "convicted" of a crime without ever admitting guilt.³¹⁰ A conduct-based categorical approach would fix this inconsistency because without any proof or admission of criminal conduct in the state proceeding, there can be no finding necessary to impose a downstream federal sanction. Such a rule may encourage gamesmanship by criminal defendants to enter more *Alford* or no-contest pleas by bargaining for more state punishment in return for the future avoidance of federal

308. See Fish, *supra* note 228, at 20–22 (noting that the court in a standard criminal case does not always record a "factually rich narrative account of what the defendant actually did," and sometimes state court documents will not be available or will be scant); see also Lindsay M. Kornegay & Evan Tsen Lee, Why Deporting Immigrants for "Crimes Involving Moral Turpitude" Is Now Unconstitutional, 13 *Duke J. Const. L. & Pub. Pol'y* 47, 88 (2017) (noting that many documents outlining "real conduct" or "actual facts" underlying state criminal convictions are unavailable or sparse).

309. See *North Carolina v. Alford*, 400 U.S. 25, 37 (1970).

310. See, e.g., *United States v. Mitchell*, 743 F.3d 1054, 1066–67 (6th Cir. 2014) ("Convictions based on *Alford*-type pleas can be predicate convictions under the ACCA if the qualifying crime is inherent in the fact of the prior conviction . . ." (internal quotation marks omitted) (quoting *United States v. McMurray*, 653 F.3d 367, 381 (6th Cir. 2011)); *Harrington v. United States*, 689 F.3d 124, 127 (2d Cir. 2012) (accepting an *Alford* plea as a predicate for an ACCA sentence); *United States v. Salean*, 583 F.3d 1059, 1061 n.3 (8th Cir. 2009) ("*Alford* pleas are indistinguishable from other guilty pleas for purposes of [applying the ACCA].").

sanctions.³¹¹ But this practice does not seem particularly problematic if defendants are trying to avoid harsh federal sanctions applied at a later date. This is yet another plea-bargaining tactic that adds just a mite in a defendant's favor against the overwhelming bargaining leverage held by the government.

It is true, as a practical matter, that few public defenders have the time or resources to research and consider how a state plea deal will impact a *potential* federal sanction; such a federal proceeding may never come. Nevertheless, due process protections demand that state defense counsel must advise their clients of such downstream federal sanctions.³¹² Offenders at the state proceeding are also likely to prioritize the instant sanction from the state court, with little thought to the possibility they could run afoul of federal law at a later date that would justify a later federal sanction. Nevertheless, by placing importance on criminal conduct, this is yet another bargaining chip that can be used by savvy and strategic attorneys in the favor of defendants.

This is the robust nature of plea bargaining in the adversarial system. Every change, every expansion of rights, every push or pull will get a reaction from the opposing party until practices of both sides eventually reach a new systemic equilibrium.³¹³ A change to a conduct-based categorical approach is no different. It arguably gives defendants at the state proceeding more control over their potential destiny in a later federal proceeding; but with such a pull, there will be an equal push by state prosecutors to account for the power shift.

Judicial economy is another critique raised by commentators, often arguing that a conduct-based approach will require federal courts to conduct “mini-trials” in order to adequately uncover the criminal conduct outlined in previous state proceedings.³¹⁴ But there are many reasons to believe that such mini-trials would be uncommon and might even lead to an overall reduction in judicial taxation. The first has previously been mentioned in discussing the impacts a conduct-based categorical app-

311. Such is the case in many deportation cases; state offenders who are noncitizens would gladly bargain to accept more state punishment in exchange for the prosecution not challenging an *Alford* plea so that they can avoid the even harsher federal sanction of deportation. See, e.g., *Lee v. United States*, 137 S. Ct. 1958, 1961 (2017) (noting that more state defendants will choose to go to trial and throw a “Hail Mary” if there is the chance of success to avoid a downstream federal sanction of deportation).

312. See *supra* note 303 and accompanying text.

313. See, e.g., *Padilla v. Kentucky*, 559 U.S. 356, 373 (2010) (noting the interplay of negotiation in the plea-bargaining process, and that new rights and considerations in the process can cut for or against either adversary—sometimes based on counsel “creativ[ity]”).

314. See *Das*, *supra* note 124, at 1738–39 (arguing that the categorical approach promotes judicial efficiency); Koh, *The Whole Better than the Sum*, *supra* note 35, at 295–99 (observing that the categorical approach relieves the burden of “individualized factfinding” and promotes efficiency); Sharpless, *Toward a True Categorical Elements Test*, *supra* note 35, at 1032–34 (discussing how the categorical analysis avoids “mini-trials” and thereby increases efficiency).

roach would have on state and, later, federal plea bargaining. Plea bargaining presents far from a perfectly reliable record of state criminal conduct,³¹⁵ but, for most cases, would give federal prosecutors enough reliable evidence of conduct to meet their burden of proof.

In the relatively rare federal proceedings in which an offender contests state criminal conduct, heightened burdens on the prosecution to procure adequate records may result in an economic exercise of prosecutorial discretion. If a rational federal prosecutor is assessing his or her chances of successfully imposing a federal sanction, a lack of evidence will often result in prosecutorial discretion not to seek the sanction in the first place or to abandon efforts to impose the sanction.³¹⁶ The change to a conduct-based categorical approach would place a heightened evidentiary burden on federal prosecutors, as well as require additional prosecutorial resources to track down the necessary documents or witnesses to support a federal sanction; as a matter of practice, this will often be more difficult for line prosecutors than the current elements-based categorical approach that only requires finding a record of conviction. Whereas a record of a state conviction is relatively easy to find, the corresponding record of actual criminal conduct is not.³¹⁷

As in most criminal cases, the tremendous prosecutorial resources required to sustain a trial—or in this case, even a “mini-trial”—would give offenders more leverage and bargaining power.³¹⁸ Even the *threat* of asserting an offender’s right to a “mini-trial” may be enough to prevent overzealous prosecutors from pursuing unnecessary or unjust downstream federal sanctions.

Finally, all of these arguments are strengthened in the context of the status quo, which already unnecessarily taxes judicial economy. Judges and

315. See generally Thea Johnson, *Fictional Pleas*, 94 *Ind. L.J.* 855 (2019) (outlining several avenues in which defendants can plead guilty to crimes and conduct that are not accurate reflections of the actual facts).

316. See, e.g., Stephanos Bibas, *Rewarding Prosecutors for Performance*, 6 *Ohio St. J. Crim. L.* 441, 442–44 (2009) (recognizing that conviction or case-processing rates are often the most visible of the limited metrics available to assess prosecutors’ performance); Michael A. Simons, *Prosecutorial Discretion and Prosecution Guidelines: A Case Study in Controlling Federalization*, 75 *N.Y.U. L. Rev.* 893, 932–33 (2000) (discussing the incentives of federal prosecutors, including prosecuting high-profile cases, competing with other U.S. Attorneys for favorable prosecution statistics, and maintaining relationships with federal law enforcement).

317. See Fish, *supra* note 228, at 20–23, 30–31 (outlining the difficulty of determining prior criminal conduct when compared with the ease of finding electronic “rap sheets” that makes applying recidivist sentencing enhancements feasible).

318. See Scott Baker & Claudio Mezzetti, *Prosecutorial Resources, Plea Bargaining, and the Decision to Go to Trial*, 17 *J.L. Econ. & Org.* 149, 166 (2001) (examining the relationship between prosecutorial resources, plea bargaining, and the decision to go to trial); William M. Landes, *An Economic Analysis of the Courts*, 14 *J.L. & Econ.* 61, 98 (1971) (assuming that prosecutors maximize the number of convictions subject to budget constraints).

practitioners have acknowledged this for years.³¹⁹ Decades of the practice merit, at minimum, consideration that a conduct-based approach may not actually impose a net loss in judicial economy. Rather, for many of the reasons stated above, there is reason to believe it could actually result in a net gain given the rarity of mini-trials and the economic considerations guiding prosecutorial discretion.

Defenders of the current elements-based categorical approach acknowledge that their support is in part based on what they prefer in terms of normative outcomes; practitioners and scholars who are esteemed members of the defense bar recognize that oftentimes an elements-based categorical approach breaks in favor of their clients.³²⁰ While some may believe that relying more heavily on state criminal conduct would result in federal courts applying more federal sanctions, such a claim has never been empirically studied or supported. Instead, such evidence is largely anecdotal or based on practitioners' general experiences.³²¹ Accordingly, a conduct-based approach has potential to expand rights and yield beneficial outcomes for defendants when compared to the status quo.

2. *Uniformity Through a Separate Sovereign Approach.* — While a conduct-based categorical approach is the most viable path to salvage uniformity, constitutional and practical scrutiny justify exploration of a full menu of options, including a new sanctioning regime that keeps the state and federal sovereigns separate. Under this approach, confusion and disparate impacts would be mitigated by creating wholly separate sanctioning regimes, where state sovereigns could impose downstream sanctions based upon only their own state crimes, and the federal sovereign could impose federal sanctions only based on its own federal crimes. The current state-to-federal sanctioning regime would be no more; instead, it would be replaced by state-to-state and federal-to-federal sanctioning regimes.

This reconfiguration could operate under either an elements-based or conduct-based system; the value is not between elements or conduct but arises out of eliminating federal reliance on the varieties of state law. And while the conduct-based categorical approach does so in a more efficient

319. See *supra* notes 164–173 and accompanying text.

320. See *United States v. Doctor*, 842 F.3d 306, 316 (4th Cir. 2016) (Wilkinson, J., concurring) (describing the categorical approach as a messy yet “particularly glorious goo, because the confusion almost inevitably helps our clients” (quoting Steven Kalar & Jodi Linker, Fed. Defs. Servs. Off., *Glorious Goo: The Taylor/Shepard Categorical and Modified Categorical Analyses 2* (2012))); *id.* at 315 (citing ten cases in which criminal offenses that would seem to be covered by the ACCA’s “violent felony” provision—such as knowingly discharging a firearm into an occupied building or raping a mentally disabled person—do not qualify as predicates due to technicalities of specific state law elements).

321. See Lee, *The Future of the Categorical Approach*, *supra* note 22, at 269–70 (arguing that a fact- or conduct-based approach will increase the number of ACCA sentences imposed on defendants, using *Mathis* as an anecdotal example).

manner that could be implemented through a smoother transition from the status quo, a separate sovereign approach could also achieve uniformity by excising federal reliance on state law. A uniform categorical approach based on federal elements or underlying criminal conduct could continue; and while there will always be a degree of nonuniform outcomes because of circuit splits or differences in federal sentencing judges, the differences could be ironed out in the federal judiciary without carrying the inherent nonuniformity necessitated by accounting for the varieties of state law.

A separate sovereign sanctioning regime would require a significant dismantlement of the current system, but such a transition could ultimately produce a higher fidelity of uniformity than even the conduct-based categorical approach. As mentioned above, the conduct-based categorical approach still relies heavily on the reliability of court records, which will inevitably cause disparity arising from how different states draft, publish, and maintain such records.³²² Because there will always be indirect state control in a federal sanctioning system that follows a state-to-state or federal-to-federal dependency model, the only way to purge dependency completely is to keep the interaction between sovereigns separate.

The biggest impact a separate sovereign approach would have is an extreme narrowing of the pool of defendants eligible for downstream federal sanctions. Much of the rampant federalization of criminal law is constitutionally justified through the Commerce Clause, which gives Congress the ability to regulate crimes that might affect interstate commerce.³²³ The Commerce Clause has undergone historical expansions and contractions,³²⁴ but has always required some relationship—however tenuous—with interstate commerce.³²⁵ For many federally defined crimes, this comes in the form of an interstate element of some sort, usually requiring that whatever murder, kidnapping, burglary, drug possession, or firearm possession crime be accompanied by some type of interstate travel of people, goods, or services.³²⁶ But most crimes are committed purely

322. See Fish, *supra* note 228, at 21–22 (noting differences in state and local practices of record keeping, electronic records, and the ordering process to obtain such records).

323. Gerald G. Ashdown, *Federalism, Federalization, and the Politics of Crime*, 98 *W. Va. L. Rev.* 789, 790–91 (1996) (citing the Commerce Clause as the source of federal power in the process of creating federal criminal laws).

324. Rachel E. Barkow, *Federalism and Criminal Law: What the Feds Can Learn from the States*, 109 *Mich. L. Rev.* 519, 521, 527–29 (2011) [hereinafter Barkow, *Federalism and Criminal Law*] (comparing Court decisions that expanded and broadened federal power in criminal law).

325. See *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. 519, 536 (2012) (discussing the general rule that Congress's Commerce Clause powers are limited to regulating channels of interstate commerce, persons or things in interstate commerce, and activities that might substantially affect interstate commerce).

326. See Ashdown, *supra* note 323, at 802 (listing fourteen examples of federal crimes that are based in part on interstate criminal activity).

intrastate, which explains why states continue to dominate the criminal enforcement justice system.³²⁷ As a result, the separate sovereign approach would mandate that downstream federal sanctions could only be applied to the small percentage of those convicted who committed federal crimes related to interstate activity. But those convicted of intrastate crimes would not escape due punishment; instead, such punishment would be left to the state sovereigns to apply their own version of downstream state sanctions.³²⁸

Some could argue that such a narrowing of federal sanctions defeats the purpose of imposing them at all, since their primary benefit is to increase public safety by drawing on the criminal classifications already made by the states. What makes state predicate crimes so impactful is their sheer breadth. When comparing states to the federal government, the former are far more involved in criminal justice and consequently are responsible for approximately eighty-seven percent of the incarcerated population in the United States.³²⁹ States have more law enforcement officers on the ground enforcing their own state laws,³³⁰ and these state agents are also sometimes federally deputized to enforce federal law as well.³³¹ By basing federal sanctions on state crimes, the federal government creates an enforcement windfall by benefiting from the states' expenditure of resources and expertise in identifying dangerous people who should be incapacitated and deterred.³³² This could lead to a few reactive responses from the federal government, such as greater enforcement of low-level federal crimes to increase the pool of federal offenders, or even further legislative expansion of federal criminal laws. But the most likely outcome

327. See *infra* notes 329–331 and accompanying text.

328. This would be especially impactful for immigration purposes. For over one hundred years, the Court has preempted the states from deporting immigrants, or from even denying immigrants certain rights and access to state resources that would incentivize immigrants to move. See *supra* note 118 and accompanying text.

329. See E. Ann Carson, Bureau of Just. Stat., DOJ, NCJ 251149, Prisoners in 2016, at 3 (2018), <https://www.bjs.gov/content/pub/pdf/p16.pdf> [<https://perma.cc/5UEN-ZW75>] (indicating that federal prisoners made up thirteen percent of the total U.S. prison population, with states holding the rest).

330. Compare Brian A. Reaves, Bureau of Just. Stat., DOJ, NCJ 233982, Census of State and Local Law Enforcement Agencies, 2008, at 1 (2011), <https://www.bjs.gov/content/pub/pdf/cslea08.pdf> [<https://perma.cc/P9J9-55R6>] [hereinafter Reaves, Local Law Enforcement Agencies] (reporting that states employ 251 officers per 100,000 residents), with Brian A. Reaves, Bureau of Just. Stat., DOJ, NCJ 238250, Federal Law Enforcement Officers, 2008, at 1 (2012), <https://www.bjs.gov/content/pub/pdf/fleo08.pdf> [<https://perma.cc/6EUQ-TLYN>] [hereinafter Reaves, Federal Law Enforcement Officers] (reporting that the federal government only has forty officers per 100,000 residents).

331. See, e.g., 8 U.S.C. § 1357(g) (2018) (authorizing the deputization of states to enforce federal immigration policy).

332. See Adam B. Cox & Eric A. Posner, Delegation in Immigration Law, 79 U. Chi. L. Rev. 1285, 1289–91 (2012) [hereinafter Cox & Posner, Delegation in Immigration Law] (explaining the benefits of the principal–agent theory in federal government, relying on the expertise of private and public state actors in enforcing federal policy).

also happens to be somewhat desirable; the federal government would likely pursue fewer harsh downstream sanctions than it currently does.

A separate sovereign approach might also negate the benefits of public safety that federal sanctions were originally designed to improve. Downstream sanctions in the context of criminal sentencing enhancements and immigration deportation are premised on the goal of promoting public safety through retributive punishment, incapacitating the especially dangerous, and specifically and generally deterring the offender and others from the same path.³³³ These goals have stood as stalwart justifications of the state-to-federal sanctioning system; certain classes of those convicted of crimes should be eligible for downstream sanctions based on their dangerousness and their inability to integrate into society as law-abiding citizens. This indication of dangerousness to the community is something that the conduct-based categorical approach accurately captures, but the elements-based categorical approach and a separate sovereign approach often miss. If a person commits criminal conduct that indicates that they are a danger to the community or in need of rehabilitation, what should it matter which sovereign punishes them or whether state elements match federal elements of an enumerated crime? For purposes of determining federal punishment, the jurisdiction of the conduct should be less important than the conduct itself; crimes are indeed just proximate measurements of dangerousness and a broken membership promise to a community. Therefore, the federal sovereign should be able to determine dangerousness based on the conduct of crimes committed in and punished by the states.

While a separate sovereign system may bring us closer to uniformity, it still remains less viable than a conduct-based categorical approach even from an institutional standpoint. A separate sovereign approach would require congressional action to rewrite over a dozen laws that explicitly allow downstream federal sanctions to rely on previous state criminal predicates. And in the current political climate, coupled with Congress's previous failures to amend the ACCA,³³⁴ there is little hope for such legislative action that could be perceived as being soft on crime and carry political backlash.³³⁵

B. *Accepting Nonuniformity: Promoting Federalism and Tailoring Statutory Goals*

While transitioning to a conduct-based categorical approach does provide a viable path forward to salvage uniformity, nationwide federal uniformity may not be a desired goal in the current national climate. In

333. See Schulhofer, *supra* note 221, at 835 (recognizing warranted sentencing factors that justify a “real difference in culpability or other penologically relevant factors”).

334. See *supra* note 263 and accompanying text.

335. See, e.g., Barkow, *Administering Crime*, *supra* note 131, at 747–49 (linking political incentives in the 1990s with tough-on-crime rhetoric and legislation).

this vein, requiring federal sanctions to rely on state law may serve as a check against a potential tyrannical federal government, which is especially dangerous in the criminal and civil sanctioning contexts.³³⁶ This check against central authority is one of the bedrock political principles behind our federal system of government.³³⁷ If the status quo of state variety is to be championed in the categorical approach, the strengths of federalism must be embraced. Instead of “papering over” the rampant nonuniformity of the categorical approach,³³⁸ courts could acknowledge it as a necessary aspect of state sovereignty and highlight its benefits. The status quo can be maintained, but with the express understanding that nonuniformity is an accepted cost to maintain a state-to-federal sanctioning regime.

While embracing federalism would serve to justify the current elements-based categorical approach and maintain the status quo, so too could a more tailored categorical approach amongst different statutory regimes. The ACCA and the INA are two different statutes with different policy goals governing different segments of society. Such differences may indeed justify thoughtful tailoring, potentially applying different categorical approaches that are appropriate to fulfill the goals of each statute. Under this experiment, it is likely that the state variety of the elements-based categorical approach could maintain its place under the ACCA in the criminal context where states have traditionally held sway, but perhaps see change under the INA where federal prerogatives are more salient.

1. *Accepting Nonuniformity: The Federalism Benefits of the Categorical Approach.* — As long as state-to-federal sanctioning regimes exist, there will always be a measure of nationwide nonuniformity because of powers retained by the states and—sometimes more so—local governments.³³⁹ So while nationwide uniformity is a worthwhile goal to

336. See Hobson, *supra* note 207, at 23–24, 26 (recognizing that states should address crime through their own sentencing choices without the Supreme Court intruding upon a state’s moral priorities in such choices).

337. See Robert L. Bish, *Federalism: A Market Economics Perspective*, 7 *Cato J.* 377, 380 (1987) (citing constitutional federalism as a solution to restraining Hobbes’s Leviathan); Chemerinsky, *The Values of Federalism*, *supra* note 245, at 525 (noting that the primary goal of federalism is to prevent tyranny of the central government); Friedman, *supra* note 245, at 402–05 (exploring the diffusion of power to states as a check to prevent federal tyranny).

338. See Wayne A. Logan, *Criminal Justice Federalism and National Sex Offender Policy*, 6 *Ohio St. J. Crim. L.* 51, 119–20 (2008) (stating that “efforts to impose uniform rules risk creation of a mere false appearance of uniformity” that merely “serves to paper over this diversity” amongst states).

339. See Cox & Posner, *Delegation in Immigration Law*, *supra* note 332, at 1332–34 (recognizing that “immigration law in practice varies from state to state” based in part on the categorical approach’s heavy reliance on state law); Heather K. Gerken, *Foreword: Federalism All the Way Down*, 124 *Harv. L. Rev.* 4, 11–21 (2009) (discussing the ongoing influence and importance of local and sublocal actors in the federalism power dynamic); Logan, *Contingent Constitutionalism*, *supra* note 26, at 155–56 (discussing the influence of

pursue,³⁴⁰ it still faces an uphill battle that may warrant keeping the elements-based categorical approach under a different justification.

The most salient justification for maintaining the elements-based status quo rests in the theoretical and practical benefits of federalism and its respect for state sovereignty. Diffusing power among different sovereigns is an intentional design to prevent tyranny, protect individual rights, promote community mores, and facilitate experimentation.³⁴¹ Yet in the wake of the expansive federalization of criminal law³⁴² and the plenary immigration powers of the federal government,³⁴³ there are more and more overlaps of power that can produce cooperative results.³⁴⁴ Express acceptance of state power and influence in the state-to-federal sanctioning system would only be a concession of an already obvious practice.³⁴⁵

If federalism is to be the new theoretical justification for the categorical approach, there may be merit in going even further to fully embrace state sovereignty. While federalism can be used to justify the disparities that would come from maintaining the elements-based categorical approach, a more efficient option may be to simply start over and accept whatever the state label of a particular crime may be. As discussed above, this “state-labeling” approach was considered but rejected by the Court in *Taylor*, reasoning that such an approach would

local governments in the application of federal criminal procedural rights); Edward L. Rubin & Malcolm Feeley, *Federalism: Some Notes on a National Neurosis*, 41 *UCLA L. Rev.* 903, 919–20 (1994) (arguing that the primary benefits of federalism and cooperative agreements would come from the local level). See generally Cristina M. Rodríguez, *The Significance of the Local in Immigration Regulation*, 106 *Mich. L. Rev.* 567 (2008) (recognizing differences in state and local implementation and enforcement of federal immigration policy).

340. See Das, *supra* note 124, at 1733–34 (cataloguing case law and scholarship regarding the importance of the uniform administration of immigration law); Frost, *supra* note 39, at 1580 n.34 (discussing Supreme Court decisions from various points in history that reflect an objective of promoting uniformity); Larry E. Ribstein & Bruce H. Kobayashi, *An Economic Analysis of Uniform State Laws*, 25 *J. Legal Stud.* 131, 138–40 (1996) (discussing the perceived benefits of uniformity among state law).

341. See Erwin Chemerinsky, *Empowering States When It Matters: A Different Approach to Preemption*, 69 *Brook. L. Rev.* 1313, 1324–25 (2004) (cataloguing benefits traditionally associated with federalism); see also David L. Shapiro, *Federalism: A Dialogue* 75–106 (1995) (same).

342. See *supra* note 44 and accompanying text.

343. For a discussion of these “phantom norms” that serve as the foundation of immigration law, see generally Hiroshi Motomura, *The Curious Evolution of Immigration Law: Procedural Surrogates for Substantive Constitutional Rights*, 92 *Colum. L. Rev.* 1625 (1992) (explaining why reliance on plenary power prevented constitutional norms in immigration law from taking root); Hiroshi Motomura, *Immigration Law After a Century of Plenary Power: Phantom Constitutional Norms and Statutory Interpretation*, 100 *Yale L.J.* 545 (1990) (detailing the difficulty of establishing constitutional limits in immigration after courts have relied on the unmitigated plenary power doctrine).

344. See *supra* notes 235–237 and accompanying text.

345. See *supra* note 339 and accompanying text.

destroy the stated goal of establishing nationwide uniformity in the application of later federal sanctions.³⁴⁶ But if the ideal of uniformity is to be abandoned, such a state-by-state labeling approach would no longer be anathema. Given the tremendous inefficiencies exhibited in the cumbersome and complex elements-based categorical approach,³⁴⁷ it is likely judicial economy would benefit from extending the inquiry only as far as giving credit to whatever crimes a particular state defined as “burglary.” If an offender were convicted of “burglary” of any degree as that state defined and labelled the offense, then this state conviction would qualify as a “burglary” predicate for ensuing federal sanctions. And while Iowa may define burglary differently than its sister state of Missouri,³⁴⁸ giving full credit to the prerogative of states to define and label their criminal laws as they see fit would fully embrace state sovereignty in a way that respects the diversity among states encouraged by federalism.

But accepting disparate applications and outcomes in state-to-federal sanctions on the basis of federalism may be inconsistent with actual practice. The benefits of federalism primarily come from states and local communities making conscious decisions on the rights and regulations it bestows upon its citizens. The strength in this diverse patchwork of laws comes from the actual consciousness of diversity. When state lawmakers and local executives actively engage in the decisionmaking process to consider moral, economic, and public health policies, they are serving the unique needs of their communities according to state and local mores.³⁴⁹ But as Part I of this Article shows, disparate application and outcomes under the categorical approach are not triggered by the conscious decisionmaking process of these state and local officials; instead, these disparities are often triggered by mere scrivener draftsmanship.³⁵⁰ Writing a criminal statute in a disjunctive clause, cross-referencing another statute that clarifies defined terms, or the mere placement of an “or” can and does create nonuniformity under the existing elements-based categorical approach. Therefore, disparity based on scrivener draftsmanship lacks much of the federalism benefits that might justify disparity among states making conscious and weighty decisions on how to define and punish those convicted of felonies according to the unique community needs and mores.

Another critique often cited when upholding disparity according to the prerogative of states and local communities is the penchant for racism, xenophobia, and discrimination within the justice system. Fear rightfully abides when empowering local governments because local preferences

346. See *supra* notes 85–90 and accompanying text.

347. See *supra* Part I.

348. See *supra* notes 16–24 and accompanying text.

349. See *Divine*, *supra* note 230, at 188 (arguing that allowing for the nonuniform implementation of national law may actually be the intent of Congress to promote variance according to regional preferences).

350. See, e.g., *supra* notes 101–114, 137–147 and accompanying text.

have historically been associated with discriminatory laws and their application.³⁵¹ Scholars have increasingly highlighted the repugnant racial disparities and discrimination suffered by communities of color at the hands of local law enforcement³⁵² and prosecutorial discretion.³⁵³ Professors Richard Briffault and Roderick Hills, Jr. have also levied similar critiques against localism, arguing that local power is often hijacked by the affluent, or those living in the suburbs, and can be wielded to forward nefarious policy outcomes.³⁵⁴ The unfortunate reality is that giving state and local communities more power and discretion nearly always results in increased racial disparities in the enforcement, application, and outcomes of criminal justice. This would be no different under any increase in state and local power in the state-to-federal sanctioning system.

This critique carries merit, but does not appreciate the opposite danger. It would be even more problematic if such racism and xenophobia were nationalized. Scholars have shown that when states and local communities are constrained from regulating an area because of federal preemption, these local concerns have been nationalized in political debates.³⁵⁵ Local preferences can have such an uproarious impact as to

351. See, e.g., Amanda Armenta, *Racializing Crimmigration: Structural Racism, Colorblindness, and the Institutional Production of Immigrant Criminality*, 3 *Socio. Race & Ethnicity* 82, 82–84 (2017) (recognizing the role that immigration law enforcement plays in criminalizing race for Latinx Americans); Johnson, *Racial Profiling in the War on Drugs*, *supra* note 127, at 969 (arguing “that the racially disparate impacts of the criminal justice system exacerbate the racially disparate impacts of the modern immigration removal system”).

352. See Lee, *De Facto Immigration Courts*, *supra* note 270, at 591 (“Police forces have embraced order-maintenance policing in our nation’s most populous cities. . . . This approach to policing has met its share of criticism. Some opponents focus on its subordinating effects on communities of color.”); see also Huyen Pham, *The Constitutional Right Not to Cooperate? Local Sovereignty and the Federal Immigration Power*, 74 *U. Cin. L. Rev.* 1373, 1400–01 (2006) (“[I]f local authorities start enforcing immigration laws without proper training, they are prone to engage in racial profiling or other abuses of authority.”); Michael J. Wishnie, *Laboratories of Bigotry? Devolution of the Immigration Power, Equal Protection, and Federalism*, 76 *N.Y.U. L. Rev.* 493, 509–10 (2001) (“[N]oncitizens, and especially permanent resident aliens, are indeed a discrete and insular minority, one that unquestionably has been subjected to historical discrimination.”).

353. See, e.g., Jeffrey T. Ulmer, Megan C. Kurlychek & John H. Kramer, *Prosecutorial Discretion and the Imposition of Mandatory Minimum Sentences*, 44 *J. Rsch. Crime & Delinq.* 427, 450–51 (2007) (using a case study in Pennsylvania courts to conclude that prosecutorial discretion led to people of color receiving more mandatory minimums and being charged more often with habitual offender sentencing enhancements).

354. See Richard Briffault, *Our Localism: Part I—The Structure of Local Government Law*, 90 *Colum. L. Rev.* 1, 19–22 (1990); Richard Briffault, *Our Localism: Part II—Localism and Legal Theory*, 90 *Colum. L. Rev.* 346, 349–56 (1990) (warning against the dangers of discrimination when giving local communities more power); Roderick M. Hills, Jr., *Romancing the Town: Why We (Still) Need a Democratic Defense of City Power*, 113 *Harv. L. Rev.* 2009, 2009 (2000) (book review); see also Nestor M. Davidson, *The Dilemma of Localism in an Era of Polarization*, 128 *Yale L.J.* 954, 976–78 (2019).

355. See Spiro, *supra* note 236, at 71 (recognizing that anti-immigrant bias at its peak is usually “geographically concentrated,” but “[w]here central government control is

trigger national legislation and executive action.³⁵⁶ Such is the dilemma of the American experience: racism and xenophobia are so ingrained in American ideals³⁵⁷ that they show up on both sides of a political argument. They can be used to justify or argue against a strong central government, and they can also be used to argue for or against a stronger state and local government.

In some sense, the odious effects of racism and xenophobia in the criminal justice and immigration systems are unavoidable because those very regulatory systems were built on racist and xenophobic foundations. Diffusing power to contain such loathsome policies to the local level will at least serve to quarantine these cancers, and allow affected peoples exit options to vote with their feet.³⁵⁸ There is no winning, no true escape for minorities and people of color.³⁵⁹ Because many communities of color and communities of lower socioeconomic status are often targets of overpolicing, arbitrary enforcement, and increasingly false positive identification of criminal behavior, maximizing exit options to minimize such treatment is key.³⁶⁰ Therefore, accepting these diseases as they are, the best option is to quarantine the worst cases within jurisdictional lines and expand options for minorities and immigrants. Racism and xenophobia appear to be less problematic at the local level than nationalized at the federal level.

exclusive, localised anti-alien sentiment is channelled into the central government, even though it may not reflect national majorities”).

356. See, e.g., *id.* (“Two major bouts of extreme restrictionism in the United States, one at the end of the nineteenth century (exemplified by the Chinese Exclusion laws), the other in the mid-1990s, can . . . be tied to anti-immigration politics in California. . . . California was able to effect its anti-alien preferences through national legislation.”).

357. See generally Ibrahim X. Kendi, *Stamped from the Beginning: The Definitive History of Racist Ideas in America* (2016) (cataloguing the history of racist ideology and white supremacy from colonial times through the present day).

358. See James M. Buchanan & Richard A. Musgrave, *Public Finance and Public Choice: Two Contrasting Visions of the State* 179 (1999) (acknowledging the “exit option” for “individuals, as resource owners and as residents If there is an exit option, if there is a chance to leave, this necessarily imposes discipline on those who would exploit [citizens] through a political structure”); Roderick M. Hills, Jr., *Federalism and Public Choice*, *in* *Research Handbook on Public Choice and Public Law* 207, 207–33 (Daniel A. Faber & Anne Joseph O’Connell eds., 2010) (explaining exit-based justifications of federalism when voters reveal preferences for different policies among different jurisdictions through voluntary migration); Wayne A. Logan, *Fourth Amendment Localism*, 93 *Ind. L.J.* 369, 404–08 (2018) (describing the promise of increasing exit options as a check against local government power, but acknowledging the practical difficulties of exercising such options).

359. David Cole, *Foreword: Discretion and Discrimination Reconsidered: A Response to the New Criminal Justice Scholarship*, 87 *Geo. L.J.* 1059, 1081–82 (1999) (recognizing in the context of local law enforcement, “someone will always be the loser . . . and . . . the losers will generally be those without effective political power”).

360. See generally Faye Taxman, James M. Byrne & April Pattavina, *Racial Disparity and the Legitimacy of the Criminal Justice System: Exploring Consequences for Deterrence*, 16 *J. Health Care Poor & Underserved* 57 (2005) (identifying legal and extralegal variables that contribute to the overrepresentation of racial minorities in the criminal justice system).

2. *A Different Nonuniformity: Tailoring the Categorical Approach.* — Thus far, this Article addresses uniformity in the context of applying a uniform rule and producing uniform outcomes across jurisdictions; but there is a different type of uniformity that should be analyzed in the context of applying the categorical approach across different policy areas. While the categorical approach is clumsily applied the same way across these two different areas of law,³⁶¹ there seems to be little justification in why that should be the case. Some judges have defended this as a matter of efficiency,³⁶² but many others in the judiciary disagree.³⁶³ For purposes of further exploration of the full suite of options left for the categorical approach, there is merit to tailoring the categorical approach according to the unique policy and language in different statutes. And these different approaches may indeed justify different approaches to uniformity.

First, we must juxtapose the interests of criminal sentencing with those of immigration law. Criminal punishment theory is a robust area that justifies the sovereign imposing penalties and depriving those under its jurisdiction of liberty based on a violation of law. Much has been written on the dizzying complexity of theory justifying that punishment.³⁶⁴ Immigration law, on the other hand, has often been used as a tool to mold national identity through various theories of membership.³⁶⁵ Since nearly the founding of this nation, nationwide immigration laws have been used to shape political, religious, racial, and economic identities that have relied on excluding undesirables who do not fit within what at any given time in the history of this country was considered American, are unable to assimilate to American culture, or are undesirable to be weaved into American culture.³⁶⁶ Consequently, it is not clear that the different policy goals of justifying punishment versus establishing national identity through membership are sufficiently similar to justify using the same categorical approach to impose downstream federal sanctions.

The federal sanctions themselves are also uniquely different. Long has the Court strained to separate criminal sentencing from immigration as a matter of punishment. While the federal and state sovereigns imposing a penalty for violating criminal law is considered punishment for constitutional purposes, the sometimes more impactful deprivation of

361. See *United States v. Mayer*, 560 F.3d 948, 952 (9th Cir. 2009) (Kozinski, J., dissenting) (explaining the application of the categorical approach across the ACCA, the INA, and the Federal Sentencing Guidelines).

362. See *id.*

363. See *supra* notes 166–173 and accompanying text.

364. See DeGirolami, *supra* note 216, at 701–06 (outlining and categorizing the breadth of punishment theories).

365. See *supra* note 152 and accompanying text.

366. See T. Alexander Aleinikoff, David A. Martin, Hiroshi Motomura, Maryellen Fullerton & Juliet P. Stumpf, *Immigration and Citizenship: Process and Policy* 2–23 (8th ed. 2016) (recording the history of immigration laws motivated by political, religious, and racial differences among immigrants).

liberty imposed through federal deportation is considered a mere civil penalty.³⁶⁷ Consequently, noncitizens facing deportation in immigration court do not enjoy the same level of constitutional protection as criminal defendants.³⁶⁸ Whereas both the citizen criminal offender and noncitizen criminal offender often face similar state punishment in the form of a prison sentence, fines, probation, and other deprivations of liberty, the noncitizen faces the additional federal sanction of deportation, which is materially different than the sanction of a federal sentencing enhancement.

Further, the traditional scope of state and federal power in these policy areas is different. While federal criminal law stretches back centuries, the federalization of criminal law exploded only in the past generation, with a large percentage enacted in the past fifty years alone.³⁶⁹ And even with the exponentially increased involvement that federal law enforcement has taken in criminal law in the past thirty years, the states remain the primary arbiter of criminal justice.³⁷⁰ Yet in immigration, the federal government has firmly established its unilateral power to deport noncitizens for over a century, preempting such state action.³⁷¹ The Court has often stressed the importance that, in immigration law, the nation speak with one national voice that signals one uniform national sentiment on the treatment of foreign nationals.³⁷² Traditionally, then, the states have always maintained more influence over criminal justice and sentencing, while the federal government has maintained its unilateral power to deport under immigration law.

367. See, e.g., *Fong Yue Ting v. United States*, 149 U.S. 698, 730–31 (1893).

368. See *Aguilera-Enriquez v. Immigr. & Naturalization Serv.*, 516 F.2d 565, 568 (6th Cir. 1975) (setting the test for determining if the process is sufficient in deportation proceedings based on congressional intent); see also *Tupacypunqui-Marin v. Immigr. & Naturalization Serv.*, 447 F.2d 603, 606 (7th Cir. 1971) (holding that noncitizens have no right to counsel provided by the government in deportation proceedings based on the civil-criminal distinction); *Murgia-Melendrez v. Immigr. & Naturalization Serv.*, 407 F.2d 207, 209 (9th Cir. 1969) (same).

369. See Barkow, *Federalism and Criminal Law*, supra note 324, at 523–24 (counting over 4,000 federal criminal laws, with forty percent of such laws passed after the Civil War enacted between 1970 and 1998).

370. See, e.g., Carson, supra note 329, at 3 (noting that the overwhelming majority of those incarcerated are held in state prison systems for violating state crimes). State law enforcement officers outnumber federal law enforcement officers by nearly six-to-one. Compare Reaves, *Local Law Enforcement Agencies*, supra note 330, at 1, with Reaves, *Federal Law Enforcement Officers*, supra note 330, at 1.

371. See *Graham v. Richardson*, 403 U.S. 365, 382–83 (1971) (preempting states from affecting certain rights of noncitizens); *Takahashi v. Fish & Game Comm'n*, 334 U.S. 410, 420 (1948) (preempting states from regulating immigrant rights because the power was reserved for the federal government).

372. See *Arizona v. United States*, 567 U.S. 387, 409 (2012) (discussing the need for sole federal power in the immigration sphere to speak with “one” voice for the purposes of foreign relations).

These differences in policy, sanctions, and traditional scope of power require consideration of different approaches. In criminal sentencing, imposing punishment according to social mores, coupled with the long-standing tradition and practice for states to maintain their power and influence in criminal sentencing, favor a federalism approach. In the context of a state-to-federal system, this would rationalize nonuniformity in applying downstream criminal penalties based on the influence that state laws play in the criminal justice system. But the long-standing federal control over the immigration system and the unique deprivation of liberty at stake, would rationalize a different approach in which nationwide federal uniformity is more in line with the policy goals and tradition at play in this legal context. This very well may justify different categorical approaches: one that accepts nonuniformity when applying downstream criminal penalties, and one that maximizes nationwide uniformity when applying downstream immigration sanctions.

This interesting divide in tradition, theory, and purpose of the criminal sentencing and immigration contexts leaves open further questions for future work. But within the scope of this Article's consideration of different paths to address the nonuniformity of the categorical approach, the possibility that the categorical approach should be applied differently in these materially different contexts is intriguing. And given the extensive and still expanding scope of the categorical approach,³⁷³ this path of tailoring nonuniformity of the categorical approach based on the legal context has wide implications that is worth future scholarly attention.

C. *A Novel Reset*

Yet another path forward that is worthy of consideration is to fully abandon the categorical approach and the statutes themselves upon which it was fashioned to interpret.³⁷⁴ This Article explores a panoply of different solutions based on the policy goals desired moving forward. But as this Article shows, there is no perfect fix. There is no magic formula. There is no one-size-fits all elements- or conduct-based approach. And although the latter provides the benefits of uniformity in federal law, there is not an immaculate solution that would be left unstained by countering policy concerns. There seldom are in any area of the law that holds even a modicum of complexity.

One such avenue would be considering these statutes³⁷⁵ as unconstitutionally vague. Grounded in the Fifth Amendment, courts use the void for vagueness doctrine to strike down criminal laws that are "so vague that [they] fail[] to give ordinary people fair notice of the conduct

373. See *supra* notes 45–47 and accompanying text.

374. See *supra* note 45 and accompanying text.

375. See *id.*

it punishes, or so standardless that it invites arbitrary enforcement.”³⁷⁶ Some have found that the standard for unconstitutional vagueness is itself vague, “devoid of objective tests.”³⁷⁷

Striking down the enumerated clauses of the ACCA, the INA, and other federal statutes—for example, the statutory sections that list undefined state convictions like “burglary” to trigger federal sanctions³⁷⁸—using the void for vagueness doctrine has merit. In *Johnson v. United States* and *Sessions v. Dimaya*, both decided in just the past five years, the Court struck down residual clauses in the ACCA and the INA that based federal punishments on state crimes that involve conduct or an offense that presents serious or substantial potential risks of physical injury to another.³⁷⁹ In detailing some of the persuasive factors that indicated vagueness, the Court cited confusion among lower courts to apply a consistent standard in spite of the Court’s efforts to clarify.³⁸⁰ Therefore, the inability of future courts to “impart . . . predictability” that should come from previous precedent is an important factor.³⁸¹ In *Johnson*, the Court noted that after trying to iron out a workable rule—deciding four cases in eight years on the subject—“the failure of persistent efforts . . . to establish a standard can provide evidence of vagueness.”³⁸²

But while *Johnson* and *Dimaya* have breathed new life into the void for vagueness doctrine,³⁸³ it is unlikely that this will expand into other areas of the ACCA and the INA that list enumerated—yet vague and undefined—crimes like “burglary.”³⁸⁴ Courts have expressly rejected vagueness

376. *Johnson v. United States*, 135 S. Ct. 2551, 2556 (2015) (citing *Kolender v. Lawson*, 461 U.S. 352, 357–58 (1983)).

377. John F. Decker, Addressing Vagueness, Ambiguity, and Other Uncertainty in American Criminal Laws, 80 *Denv. U. L. Rev.* 241, 243 (2002) (describing the doctrine of unconstitutional vagueness as an “I know it when I see it” test that lacks objectivity (internal quotation marks omitted) (quoting *Jacobellis v. Ohio*, 378 U.S. 184, 197 (1964) (Stewart, J., concurring))).

378. See, e.g., 8 U.S.C. § 1101(a)(43)(G) (2018); 18 U.S.C. § 924(e)(2)(B)(ii) (2018).

379. *Sessions v. Dimaya*, 138 S. Ct. 1204, 1211 (2018) (quoting 8 U.S.C. § 1101(a)(43)(F); 18 U.S.C. § 16(b)); *Johnson*, 135 S. Ct. at 2555–56 (quoting 18 U.S.C. § 924(e)(2)(B)(ii)).

380. *Johnson*, 135 S. Ct. at 2559–60 (holding the residual clause void for vagueness based upon “pervasive disagreement about the nature of the inquiry one is supposed to conduct and the kinds of factors one is supposed to consider”).

381. *Id.* at 2562.

382. *Id.* at 2558 (quoting *United States v. L. Cohen Grocery Co.*, 255 U.S. 81, 91 (1921) (quotation marks omitted)).

383. See Jennifer Lee Koh, Looking Ahead at Vagueness Claims in the Immigration Context Post-*Dimaya*, 48 *Sw. L. Rev.* 525, 528–29 (2019) (examining the ways the *Dimaya* decision could impact immigration law going forward considering vagueness doctrine); Kornegay & Lee, *supra* note 308, at 86–92 (arguing that the *Johnson* decision updates the law regarding vagueness as it might apply to moral turpitude).

384. See, e.g., 8 U.S.C. § 1101(a)(43)(G); 18 U.S.C. § 924(e)(2)(B)(ii); see also Koh, *Crimmigration*, *supra* note 48, at 1133 (arguing that the void for vagueness doctrine

challenges in the ACCA and the INA. For example, the Court has consistently held, for over sixty years, that deportations based on the enigmatic term “crimes involving moral turpitude” were not void for vagueness.³⁸⁵ Given this precedent, there is little chance for a term like “burglary,” or other terms with a more defined scope, to be deemed void for vagueness. While the enumerated clauses of the ACCA and the INA are indeed vague—failing to give adequate notice to ordinary citizens that results in confusion and taxation of lower court judicial economy—the categorical approach as a set of rules does not rise to the level of arbitrariness or “judge-imagined abstraction.”³⁸⁶

Another related avenue is to slowly degrade the harsh bite of many of these statutes by applying the rule of lenity. Historically, vagueness and lenity shared connective tissue since a natural avenue to avoid declaring a criminal statute as unconstitutional was to apply the rule of lenity.³⁸⁷ This tool of statutory interpretation is triggered when “an ambiguous criminal statute . . . sets out multiple or inconsistent punishments,”³⁸⁸ or sets out some other material ambiguity as to the scope of the law or punishment.³⁸⁹ In such a case, the statute³⁹⁰ should be interpreted in favor of the criminal defendant for the more lenient interpretation.³⁹¹ This canon is one of last resort, and only triggered when a court applies all other traditional canons of statutory interpretation but is still left with an ambiguous criminal statute.³⁹²

supports the current elements-based categorical approach, and that the conduct-based approach would be struck down by courts).

385. *Jordan v. De George*, 341 U.S. 223, 231–32 (1951) (rejecting the void for vagueness challenge to the moral turpitude deportation standard under the INA).

386. *Johnson*, 135 S. Ct. at 2558.

387. *Id.* at 2567–68 (Thomas, J., concurring) (describing historical developments of the rule of lenity and vagueness standards); see also Hessick, *Johnson v. United States*, *supra* note 48, at 163 (analyzing the aforementioned Thomas concurrence).

388. See Rule of Lenity, Black’s Law Dictionary (11th ed. 2019) [hereinafter Lenity, Black’s Law Dictionary].

389. *Moskal v. United States*, 498 U.S. 103, 108, 111 (1990); see also *Bifulco v. United States*, 447 U.S. 381, 387 (1980) (“[The rule of lenity] applies not only to interpretations of the substantive ambit of criminal prohibitions, but also to the penalties they impose.”).

390. The rule of lenity also has application in the immigration context, although technically the INA is civil in nature. See *Immigr. & Naturalization Serv. v. St. Cyr*, 533 U.S. 289, 320 (2001) (affirming *Cardoza-Fonseca*’s immigration version of the rule of lenity); *Immigr. & Naturalization Serv. v. Cardoza-Fonseca*, 480 U.S. 421, 449 (1987) (referring to “the longstanding principle of construing any lingering ambiguities in deportation statutes in favor of the [noncitizen]”); see also Stephen H. Legomsky, *Immigration and the Judiciary: Law and Politics in Britain and America* 156 (1987) (describing the immigration rule of lenity as “[t]he most important rule of statutory interpretation peculiar to immigration”); Brian G. Slocum, *The Immigration Rule of Lenity and Chevron Deference*, 17 *Geo. Immigr. L.J.* 515, 516–17 (2003) (outlining Court precedent establishing the immigration rule of lenity to protect against the drastic penalty of deportation).

391. See *United States v. Santos*, 553 U.S. 507, 514 (2008); see also Lenity, Black’s Law Dictionary, *supra* note 388.

392. *United States v. Shabani*, 513 U.S. 10, 17 (1994).

One of the many criticisms of the rule of lenity is that the concept of ambiguity is itself ambiguous, making the application of the rule difficult to ascertain.³⁹³ Courts have generally held that even when a statute like the ACCA or the INA bases penalties on undefined terms like “burglary,” this does not raise to the level of ambiguity necessary to trigger lenity.³⁹⁴ The ambiguous standard for ambiguity to trigger lenity is high. The mere “existence of some statutory ambiguity . . . is not sufficient to warrant [its] application,”³⁹⁵ but instead there must be “a grievous ambiguity or uncertainty in the language.”³⁹⁶

This high burden is staunchly protected by the courts, having already been rejected several times in the ACCA’s and the INA’s jurisprudence. In both *Taylor* and *Shular*, the doctrinal bookends of current ACCA jurisprudence, the Court expressly rejected that the rule of lenity should apply to construe ambiguity in the ACCA in favor of defendants. First, in *Taylor*, the court found that the term “burglary” in the ACCA was not ambiguous because it has a “generally accepted contemporary meaning” the Court could rely upon.³⁹⁷ In *Shular*, the Court was confident that the text of the ACCA left “no doubt” as to its meaning.³⁹⁸ Many circuit courts have followed suit, routinely denying favorable interpretation of the ACCA for defendants on lenity grounds.³⁹⁹

This Article, however, argues a slightly different point of nuance. The statutes themselves may not be ambiguous, but the categorical approach is.⁴⁰⁰ And while legislative reform can be fruitful to fill in gaps in statutory definitions, the ambiguity and nonuniformity of the categorical approach may not be enough to trigger the rule of lenity. In short, both the rules

393. See Richard M. Re, Clarity Doctrines, 86 U. Chi. L. Rev. 1497, 1499–500 (2019) (determining whether a statute is ambiguous is itself an ambiguous decisionmaking process); Brian G. Slocum, The Importance of Being Ambiguous: Substantive Canons, Stare Decisis, and the Central Role of Ambiguity Determinations in the Administrative State, 69 Md. L. Rev. 791, 806–07 (2010) (explaining the difficulty of consistently applying the rule of lenity).

394. *United States v. Walker*, 720 F.3d 705, 708–09 (8th Cir. 2013) (quoting *Chapman v. United States*, 500 U.S. 453, 463 (1991)); *United States v. Pacheco*, 225 F.3d 148, 153 (2d Cir. 2000) (declining to apply the rule of lenity because the lack of a statutory definition is not enough to establish sufficient ambiguity).

395. *Muscarello v. United States*, 524 U.S. 125, 138–39 (1998).

396. *Walker*, 720 F.3d at 708–09 (internal quotation marks omitted) (quoting *Chapman*, 500 U.S. at 463).

397. *Taylor v. United States*, 495 U.S. 575, 596 (1990) (citing *Perrin v. United States*, 444 U.S. 37, 49 n.13 (1979)).

398. *Shular v. United States*, 140 S. Ct. 779, 786–87 (2020).

399. See, e.g., *United States v. Eason*, 919 F.3d 385, 392 (6th Cir. 2019) (denying the application of the rule of lenity when interpreting the ACCA regarding the distribution of methamphetamines); *Perez v. United States*, 885 F.3d 984, 991 (6th Cir. 2018) (declining to apply the rule of lenity regarding the New York conviction trigger of an enhanced sentence under the ACCA because New York law itself was clearly in line with the ACCA), cert. denied, 139 S. Ct. 1259 (2019).

400. See *supra* notes 166–170 and accompanying text.

governing unconstitutional vagueness and the statutory canon of lenity require a high level of *statutory* ambiguity, as opposed to *methodological* ambiguity. And while the ACCA, the INA, and other federal statutes are rife with uncertainty, the categorical approach as the method of interpretation is the real centerpiece of ambiguity that may put both of these novel resets out of reach for the foreseeable future.

While the short analysis here does little justice to these robust doctrines, this is commensurate with the relative chance either avenue has of success. Because the Court has rejected these arguments in the past, there is little hope for judicial intervention along these avenues. But, as the Court has said before, past experience in embarking “upon a failed enterprise” can sway precedent.⁴⁰¹ And in the rare case, it can serve as an overriding factor even in the face of *stare decisis*.⁴⁰² It took the Court nine years of failure trying to create a consistent test for the ACCA’s residual clause before it gave up in *Johnson*, for example.⁴⁰³ There is hope, then, that the more failures courts experience using the categorical approach to interpret federal statutes, the higher the probability that the judiciary will abandon the current elements-based approach.

CONCLUSION

The categorical approach and uniformity can no longer be used to reinforce one another. They are not compatible, and cannot be reconciled without significant revision of one or the other. Any state-to-federal sanctioning system in which these phases are governed by separate sovereigns will not and cannot achieve uniformity because of the respect each sovereign must pay to the other’s law. The categorical approach is no different, as illustrated by the ACCA and the INA. Committing a burglary in Iowa will have different federal sanctioning outcomes than if that same burglary were committed in Missouri. The difference between staying in the United States or being deported can come down to the differences between how states define respective crimes, or sometimes the differences of an “or.” Such harsh sanctions should not be based on the morally irrelevant factor of state draftsmanship; and such sanctions should not produce these types of troubling disparities in a federal sanctioning system that seeks to promote nationwide uniformity.

Opportunities for change abound, and such change would be broadly felt. The categorical approach has a wide sweep and is implemented across at least a dozen different federal statutes and similarly mimicked by the states. And while the nonuniformity problems of the categorical approach

401. *Johnson v. United States*, 135 S. Ct. 2551, 2560 (2015).

402. *Id.* at 2562 (“The doctrine of *stare decisis* allows us to revisit an earlier decision where experience with its application reveals that it is unworkable.” (citing *Payne v. Tennessee*, 501 U.S. 808, 827 (1991))).

403. *Id.* at 2560 (“Nine years’ experience trying to derive meaning from the residual clause convinces us that we have embarked upon a failed enterprise.”).

are perhaps most impactful in the sentencing enhancement and immigration contexts, any change that fixes nonuniformity in these contexts can be readily exported to benefit the larger territory governed by the categorical approach. A conduct-based categorical approach remains the most viable option to preserve uniformity, while abandoning nationwide uniformity and embracing federalism principles remains the most viable option to preserve the current categorical approach.

“It has been said that the life of the law is experience.”⁴⁰⁴ If the life of the categorical approach renders any experience, it is that of a failed experiment that falls under the weight of its own goals of uniformity. And with several upcoming cases before the Court this term,⁴⁰⁵ and undoubtedly in terms to come, the time for change is now.

404. *Id.* at 2560 (declaring the residual clause of the ACCA unconstitutionally vague).

405. See *supra* note 33 and accompanying text.

