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Mary Frances Richardson
American University Washington College of Law

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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)

MARY FRANCES RICHARDSON*

Courts often use a controversial tool called the "categorical approach" to determine whether a defendant's prior conviction qualifies as a "violent felony" or a "crime of violence." Many federal criminal statutes require the use of the categorical approach because they provide for increased penalties if a defendant has prior convictions for violent crimes. For example, under the Armed Career Criminal Act (ACCA), 18 U.S.C. § 924(e), a defendant who commits a firearms offense and also has three prior convictions for violent felonies or serious drug offenses faces a minimum mandatory sentence and a higher maximum possible sentence than would have been the case had she simply committed the firearms offense without the prior convictions. Because of the significant effect that a conviction for a violent crime can have, the determination of whether an offense falls within the definition of "violent crime" is vital. The Supreme Court has made clear that it is the judge, using the so-called "categorical approach," who determines whether a prior conviction was for a violent felony under the ACCA, or a crime of violence under statutes such as 18 U.S.C. § 16. The categorical approach requires a court to consider the statutory definition of the crime at

* Senior Projects Editor, *American University Law Review*, Volume 68; J.D. Candidate, May 2019, *American University Washington College of Law*; B.A., Sociology, 2015, *Fordham* University. Many thanks to my father, Robert Richardson, and my faculty advisor, Professor Brent Newton, for their meticulous review throughout the writing process. I am also grateful for the hard work of staff of the *American University Law Review* and for the constant support and encouragement from the rest of my family and friends—particularly my grandfather, Walter Landergan, who took the very first LSAT.

issue, rather than the actual facts that gave rise to the conviction, to determine whether the prior conviction qualifies as a violent felony under the ACCA.

In its recent decision in Johnson v. United States, *however, the Court determined that the use of the categorical approach rendered part of the definition of violent felony—the "residual clause"—unconstitutionally vague. Similarly, in* Sessions v. Dimaya, *the Court decided that 18 U.S.C. § 16(b) is unconstitutionally void for vagueness under* Johnson. *However, the Court has not considered whether the categorical approach must be used in determining if an offense is a crime of violence under 18 U.S.C. § 924(c). Section 924(c) provides for a mandatory consecutive sentence for a defendant who uses or carries a firearm during and in relation to a federal crime of violence or drug trafficking crime, or who possesses a firearm in furtherance of such a crime. Section 924(c) thus creates a separate crime that applies in the context of the facts at issue in the case before the court rather than to prior convictions.*

The § 924(c) definition of crime of violence is identical to the definition of crime of violence set forth in § 16. Lower courts are divided as to who should determine whether an offense is a crime of violence under the residual clause of the § 924(c) definition. Some district courts employ the categorical approach, while others suggest that a jury can decide whether the offense satisfies the residual clause of the crime of violence definition. Because the statute does not apply to a prior conviction but instead applies to a particular set of real-world facts that a jury can use to decide whether an offense meets the statute's definition of crime of violence, courts should not employ the categorical approach when determining whether an offense is a crime of violence under the § 924(c) residual clause. Additionally, because § 924(c) applies in the context of facts that a jury can consider during deliberation, the factors that require use of the categorical approach for prior convictions are inapplicable, thus escaping constitutional issues that are implicated under the ACCA and § 16.

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INTRODUCTION

In 2015, the Supreme Court held the so-called "residual clause" of the definition of "violent felony" in the Armed Career Criminal Act (ACCA), 18 U.S.C. § 924(e),[1] to be unconstitutionally vague.[2] The

1. 18 U.S.C. § 924(e) (2012).

2. *See* Johnson v. United States, 135 S. Ct. 2551, 2555–57 (2015) (explaining that the "residual clause" of 18 U.S.C. § 924(e)(2)(B) allows for the statute's definition of "violent felony" to include "any felony that involves conduct that presents a serious potential risk of physical injury to another"). The Ninth Circuit has alternatively called

decision thereby reduced the class of prior convictions that can subject defendants convicted of a federal firearms offense to a mandatory minimum sentence.[3] In 2018, the Court voided similar language in the general federal definition of "crime of violence," 18 U.S.C. § 16, which subsequently reduced the class of prior convictions that can subject a non-citizen to deportation.[4] The language of § 16 is virtually identical to the definition of crime of violence that applies to 18 U.S.C. § 924(c)[5]—a statute that makes it a separate criminal offense to use or carry a firearm while committing a federal crime of violence or drug trafficking crime. However, as argued below, although the Court determined that the residual clause of § 16 is unconstitutional, the identical provision of § 924(c) should survive because a jury, rather than a judge, can decide whether a crime constitutes a crime of violence.[6]

As noted, § 924(c) criminalizes the use or possession of a firearm while committing a crime of violence or a drug trafficking crime.[7] For example, in *United States v. Prickett*,[8] the defendant shot his wife multiple times with a firearm while camping.[9] He conditionally pled guilty to assault with intent to commit murder[10] and a § 924(c) violation and then sought to dismiss the § 924(c) count, but the district court denied his motion.[11] The Eighth Circuit affirmed, employing

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the ACCA's residual clause a "catchall" or "other-wise" clause to describe the effects of the clause. *See* United States v. Mayer, 560 F.3d 948, 960 n.4 (9th Cir. 2009) (explaining the various judicially constructed names describing the residual clause).

3. *Johnson*, 135 S. Ct. at 2557 (holding that the residual clause failed to give fair notice to defendants of which crimes would be covered and invited "arbitrary enforcement by judges").

4. Sessions v. Dimaya, 138 S. Ct. 1204, 1223 (2018).

5. *Compare* 18 U.S.C. § 16(b) (including within the definition of crime of violence, "any other offense that is a felony and that, by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense"), *with* § 924(c)(3)(B) (including in the definition of a crime of violence, "that by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense").

6. Dimaya v. Lynch, 803 F.3d 1110, 1122 (9th Cir. 2015) (Callahan, J., dissenting) (citing Descamps v. United States, 133 S. Ct. 2276, 2281 (2013)) (arguing that one of the key elements of the Supreme Court's analysis in *Descamps* was that the "element-centric" method utilized in categorical approach cases was based on the grounds that it "avoid[ed] Sixth Amendment concerns that would arise from sentencing courts making findings of fact that properly belong to juries"), *aff'd*, 138 S. Ct. 1204 (2018).

7. *See infra* Section I.A. (explaining the purpose and background of 18 U.S.C. § 924(c)).

8. 839 F.3d 697 (8th Cir. 2016) (per curiam).

9. *Id.* at 698.

10. 18 U.S.C. § 113(a)(1) (criminalizing such acts).

11. *Prickett*, 839 F.3d at 698.

the categorical approach in deciding that an assault with intent to commit murder qualifies as a crime of violence.[12]

Courts often use this controversial tool called the "categorical approach" to determine whether a defendant's prior conviction qualifies as a violent felony or a crime of violence.[13] Many federal criminal statutes provide for increased penalties if a defendant has prior convictions for violent crimes.[14] For example, under the ACCA, a defendant who commits a firearms offense and also has three prior convictions for violent felonies or serious drug offenses faces a minimum mandatory sentence and a higher maximum possible sentence than a defendant who commits the same firearms offense with no prior convictions.[15]

The Supreme Court has made it clear that judges using the categorical approach should determine whether a prior conviction was for a violent felony under the ACCA,[16] or a crime of violence under statutes such as 18 U.S.C. § 16.[17] The categorical approach, which has

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12. *Id.* (explaining that *Johnson* determined that one of the significant issues with the "residual clause" of 18 U.S.C. § 924(e) was that it allowed for arbitrary application by judges); *see also* Descamps v. United States, 133 S. Ct. 2276, 2287 (2013) (identifying that one element the court considered when examining a statute was whether it "avoid[ed] Sixth Amendment concerns that would arise from sentencing courts making findings of fact that properly belong to juries"); *infra* Section I.B (explaining the Supreme Court's "categorical approach" in which the Court examines whether the crime of conviction would fit the definition of violent felony as opposed to determining whether the facts specific to an individual case would satisfy such a definition).

13. *See infra* Section I.B (discussing the background of the categorical approach).

14. *See infra* note 15; *infra* note 35 (imposing a scale of increasing sentences for repeat offenders under § 924(c)).

15. 18 U.S.C. § 924(e) (providing that a defendant convicted of possessing a firearm or ammunition under 18 U.S.C. § 922(g) and who has three or more previous convictions for a "serious drug offense," a "violent felony," or some combination of the two, faces a minimum mandatory sentence of fifteen years and a maximum possible life sentence, instead of a maximum sentence of ten years); *see* Welch v. United States, 136 S. Ct. 1257, 1261 (2016) (noting that § 924(e), which does not specify a maximum penalty, carries a maximum possible sentence of life, and establishes a floor of fifteen years minimum in prison and a ceiling of life in prison).

16. *See* 18 U.S.C. § 924(e)(2)(B)(i) (defining a "violent felony" as a crime that has as an element of use, attempted use, or threatened use of violence against a person or property); Taylor v. United States, 495 U.S. 575, 600–02 (1990).

17. *See* Sessions v. Dimaya, 138 S. Ct. 1204, 1211 (2018) (citing Leocal v. Ashcroft, 543 U.S. 1, 7 (2004)); 18 U.S.C. § 16 (defining a crime of violence as an offense with the use, attempted use, or threatened use of physical force against the person or property of another, or that is a felony that by its nature involves a substantial risk that physical force against the person or property of another may be used in committing the offense).

its origins in *Taylor v. United States*,[18] requires a court to consider the statutory definition of the crime at issue, rather than the actual facts that gave rise to the conviction, to determine whether it qualifies as a violent felony under the ACCA.[19]

In its recent decision in *Johnson v. United States*,[20] however, the Court determined that the use of the categorical approach rendered part of the definition of violent felony—the "residual clause"[21]—unconstitutionally vague.[22] Similarly, in *Sessions v. Dimaya*,[23] the Court decided that 18 U.S.C. § 16(b) is unconstitutionally void for vagueness under *Johnson*.[24] The decision in *Dimaya* followed the precedent set in *Leocal v. Ashcroft*,[25] in which the Court determined that lower courts must use the categorical approach to determine whether a person has a prior conviction for a crime of violence under § 16, and therefore has been convicted of an aggravated felony that renders her subject to deportation.[26]

However, the Court has not considered whether the categorical approach must be used to determine whether an offense is a crime of violence under 18 U.S.C. § 924(c).[27] Section 924(c) provides for a

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18. 495 U.S. at 600–02.

19. *See id.* at 588 (contending that due to the particularly violent nature of burglary and robbery, Congress chose to statutorily define the burglary and robbery statutes rather than "le[aving them] to the vagaries of state law"); *see also infra* Section I.B (providing an in-depth analysis of the categorical approach).

20. 135 S. Ct. 2551 (2015).

21. *See* 18 U.S.C. § 924(e)(2)(B)(ii) (defining "violent felony," in part, as a crime punishable by imprisonment for a term exceeding one year that "otherwise involves conduct that presents a serious potential risk of physical injury to another"); *see also Johnson*, 135 S. Ct. at 2555–56 (referring to this part of the definition as the "residual clause").

22. *See Johnson*, 135 S. Ct. at 2557 (deeming the ACCA's residual clause unconstitutionally void for vagueness because it creates uncertainty about how to estimate the risk posed by a crime and how much risk it takes for a crime to qualify as a violent felony).

23. 138 S. Ct. 1204 (2018).

24. *Id.* at 1213 (citing *Johnson*, 135 S. Ct. 2551 (2015)) (finding that the same concerning features that led the court to find the residual clause at issue in *Johnson* to apply equally to the residual clause in *Dimaya*).

25. 543 U.S. 1, 11 (2004) (examining the definition of the term crime of violence in the context of crimes that suggest a "category of violent, active crimes").

26. 8 U.S.C. § 1227(a)(2)(A)(iii) (2012).

27. *See infra* Section II.A (explaining the definition of a crime of violence under § 924(c)). *Compare* 18 U.S.C. § 16 (2012) (defining a crime of violence as any other felony "that by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense"), *with* 18 U.S.C. § 924(c)(3)(B) (defining a crime of violence as a felony "that by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense").

mandatory consecutive sentence for a defendant who uses or carries a firearm during and in relation to a federal crime of violence or drug trafficking crime, or who possesses a firearm in furtherance of such a crime.[28] Section 924(c) thus creates a separate crime that applies in the context of the facts at issue in the case before the court rather than to prior convictions.[29]

The § 924(c) definition of crime of violence[30] is almost identical to the definition of crime of violence set forth in § 16.[31] Lower courts are divided as to who should determine whether an offense is a crime of violence under the residual clause of the § 924(c) definition.[32] Some district courts employ the categorical approach, while others allow the jury to decide whether the offense satisfies the residual clause of the crime of violence definition.[33]

This Comment argues that courts should not employ the categorical approach when determining whether an offense is a crime of violence under the § 924(c) residual clause because the statute does not apply to a prior conviction but instead applies to a particular set of real-world facts that a jury can use to decide whether an offense meets the statute's definition of a crime of violence.[34]

Part I of this Comment discusses the categorical approach and the history that has led some courts to apply the categorical approach to § 924(c) and other courts to reject it. Part II argues that because § 924(c) applies in the context of particular facts that a jury can consider during deliberation, the factors that require use of the categorical approach for prior convictions are inapplicable. Part II also explains how § 924(c) escapes constitutional issues that are implicated under the ACCA and § 16, and recommends jury instructions as to what constitutes a crime of violence under § 924(c). This Comment concludes that courts should not employ the categorical approach when determining whether an offense is a crime of violence under the residual clause of 18 U.S.C. § 924(c).

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28. 18 U.S.C. § 924(c).

29. *See infra* Section I.A (examining § 924(c) in-depth).

30. § 924(c)(3).

31. *Id.* § 16.

32. *See infra* Section I.B (describing the relationship between § 924(c) and the categorical approach).

33. *See infra* Section I.B.

34. *See infra* Section II.A (contrasting § 924(c) with statutes that require the categorical approach to show why the categorical approach is not necessary when determining whether an offense is a crime of violence under § 924(c)).

I. BACKGROUND

To offer a comprehensive understanding, Part I.A of this Comment will first discuss components of 18 U.S.C. § 924(c) and its legislative history. Parts I.B.1–3 provide an in-depth explanation of the categorical approach, including when and why courts created the categorical approach, the cases that shaped this approach, and the constitutionality of the categorical approach. Lastly, Parts I.B.4–6 explore why many courts currently employ the categorical approach when determining whether an offense constitutes a crime of violence under § 924(c).

A. Section 924(c)

18 U.S.C. § 924(c) provides, in pertinent part, as follows:

> [A]ny person who, during and in relation to any crime of violence or drug trafficking crime . . . for which the person may be prosecuted in a court of the United States, uses or carries a firearm, or who, in furtherance of any such crime, possesses a firearm, shall, in addition to the punishment provided for such crime of violence or drug trafficking crime (i) be sentenced to a term of imprisonment of not less than 5 years; (ii) if the firearm is brandished, be sentenced to a term of imprisonment of not less than 7 years; and (iii) if the firearm is discharged, be sentenced to a term of imprisonment of not less than 10 years.[35]

Congress enacted this statute to keep criminals from owning guns.[36] Defendants can violate § 924(c) in the course of committing both violent crimes and drug trafficking crimes.[37] If a defendant violates § 924(c) in the course of committing a violent or drug trafficking crime, then she is subject to the mandatory minimum sentences provided for in the statute.[38]

Because determining whether the concurrent offense is a crime of violence or a drug trafficking crime is vital in determining whether a defendant has committed a § 924(c) offense, the statute defines both terms.[39] The § 924(c) definition of a "drug trafficking" crime is not relevant to this Comment, but the definition of "crime of violence" reads as follows:

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35. 18 U.S.C. § 924(c).

36. 114 CONG. REC. 22,231 (1968) (providing that Representative Poff's floor amendment proposal "targets upon the criminal rather than the gun" and created a "separate Federal crime" for the possession of a gun during the commission of another felony).

37. § 924(c).

38. *Id.*

39. § 924(c)(2) (defining "drug trafficking crime"); § 924(c)(3) (defining "crime of violence").

> (3) For purposes of this subsection, the term "crime of violence" means an offense that is a felony and—(A) has as an element the use, attempted use, or threatened use of physical force against the person or property of another, or (B) that by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense.[40]

This definition includes both an elements clause[41] and a residual clause.[42] Whether the offense at issue is a crime of violence is an element of the crime, not a sentencing enhancement.[43]

The legislative history of § 924(c) reveals the piecemeal way in which the statute took its current form.[44] Over the past five decades, Congress has amended § 924(c) several times.[45] It was originally part of the Gun Control Act of 1968,[46] which Congress passed to prevent crime by encouraging criminals to leave their guns at home.[47] At this early stage, Congress was eager to support mandatory sentencing because of a

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40. § 924(c)(3).

41. § 924(c)(3)(A) ("a felony [that] . . . has as an element the use, attempted use, or threatened use of physical force against the person or property of another"); *see also* United States v. Robinson, 844 F.3d 137, 141 (3d Cir. 2016) (referring to § 924(c)(1)(A) as the "elements clause"). Some other courts have different shorthand ways of referring to § 924(c)(3)(A), such as the Eleventh Circuit, which called it the "risk-of force" clause in Ovalles v. United States, 861 F.3d 1257, 1263 (11th Cir. 2017), *vacated*, 890 F.3d 1259 (11th Cir. 2018) (Mem.), and the Second Circuit, which called it the "force clause" in United States v. Hill, 890 F.3d 51, 54 (2d Cir. 2018).

42. *See* 18 U.S.C. § 924(c)(3)(B) ("[A] felony . . . that by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense."); *see also* United States v. Hernandez, 228 F. Supp. 3d 128, 133 (D. Me. 2017) (describing 18 U.S.C. § 924(c)(3)(B) as the "residual clause"). As with § 924(c)(3)(A), some other courts have a different shorthand for referring to § 924(c)(3)(B), such as the Second Circuit, which calls it the "risk-of-force" clause in *Hill*, 832 F.3d at 138.

43. *See, e.g.*, United States v. Moore, No. 15-20552, 2016 WL 2591874, at *5 (E.D. Mich. May 5, 2016) (asserting that because a crime of violence is an element of § 924(c) as opposed to a sentencing factor, it must be "submitted to a jury and found beyond a reasonable doubt").

44. *See* United States v. Rentz, 777 F.3d 1105, 1122 (10th Cir. 2015) (citing United States v. Diaz, 592 F.3d 467, 473–74 (3d Cir. 2010)).

45. Wendy E. Biddle, *Let's Make a Deal. Liability for "Use of a Firearm" when Trading Drugs for Guns Under 18 U.S.C. § 924(c)*, 38 VAL. U. L. REV. 65, 68 (2003) (providing a legislative history on the evolution of § 924(c)).

46. *See* Gun Control Act of 1968, Pub. L. No. 90-618, § 102, 82 Stat. 1223 (1968); *see also* United States v. Rawlings, 821 F.2d 1543, 1545 n.6 (11th Cir. 1987) (noting that this law was partly a response to the assassinations of, among others, Martin Luther King Jr. and John F. Kennedy) (citing United States v. Melville, 309 F. Supp. 774, 776 (S.D.N.Y. 1970)).

47. *See supra* note 36 and accompanying text (providing a floor amendment proposed by Representative Poff).

growth in drug-related crimes, which resulted in a general public frustration with the judicial system.[48]

In 1984, Congress amended § 924(c) as part of the Comprehensive Crime Control Act.[49] This amendment mandated a heightened sentence if the defendant committed a crime of violence under § 924(c).[50] After Congress realized that courts were struggling to define what constituted a crime of violence,[51] Congress amended § 924(c) again in 1986.[52] The 1986 amendments included the addition of the current residual clause to the definition of crime of violence.[53] The amendments also expanded § 924(c) to include drug trafficking crimes to "combat the 'dangerous combination' of 'drugs and guns.'"[54]

18 U.S.C. § 924(e) and 18 U.S.C. § 16 have definitions of violent felony and crime of violence that include residual clauses similar to the residual clause contained in the § 924(c) definition of crime of violence; in fact, the § 16 residual clause is virtually identical to the § 924(c) clause.[55] In *Johnson*, the Supreme Court deemed the residual clause of § 924(e) unconstitutional; and in *Dimaya*, the Court adhered to *Johnson* to similarly determine the residual clause of § 16 unconstitutional.[56]

However, the Court has yet to determine whether the § 924(c) residual clause is constitutional. Prior to *Dimaya*, several courts of appeals—the

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48. *See* Biddle, *supra* note 45, at 69–70 (examining the issues of drug-related crimes and their social costs and analyzing the evolution of statutory construction used to combat crimes of that type).

49. Comprehensive Crime Control Act of 1984, Pub. L. 98-473, § 1005(a), 98 Stat. 1837, 2138-39 (1984), *amended by* Violent Crime Control and Law Enforcement Act of 1994, Pub. L. 103-322, § 110102(c)(2), 108 Stat. 1796, 1998 (1994) (amending section 924(c)(1) to include "'or semiautomatic assault weapon,' after 'short-barreled shotgun'").

50. S. REP. NO. 98-225, at 313 (1983).

51. Alan M. Gilbert, *Defining "Use" of a Firearm*, 87 J. CRIM. L. & CRIMINOLOGY 842, 844 (1997) (arguing that to be considered under § 924(c), the firearm at issue must be actively employed in the underlying criminal act).

52. 18 U.S.C. § 924 (2012) (noting that the act's amendments section was amended in 1986 to include the provisions mentioned above).

53. *Id.* § 924(c)(3)(B).

54. Muscarello v. United States, 524 U.S. 125, 132 (1998) (quoting Smith v. United States, 508 U.S. 223, 240 (1993)).

55. *Compare* 18 U.S.C. § 924(c)(3)(B) ("a felony . . . that by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense"), *with id.* § 16(b) ("a felony . . . that by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense"), *and id.* § 924(e)(2)(B)(ii) ("burglary, arson, or extortion, involves use of explosives, *or otherwise involves conduct that presents a serious potential risk of physical injury to another").*

56. Sessions v. Dimaya, 138 S. Ct. 1204, 1223 (2018).

District of Columbia Circuit in *United States v. Eshetu*,[57] the Eleventh Circuit in *Ovalles v. United States*,[58] the Eighth Circuit in *United States v. Prickett*,[59] the Sixth Circuit in *United States v. Taylor*,[60] and the Second Circuit in *United States v. Hill*[61]—had upheld the § 924(c) residual clause as constitutional. Only the Seventh Circuit in *United States v. Cardena*[62] had held the § 924(c) residual clause void for vagueness under *Johnson*.[63]

The courts of appeals that upheld the § 924(c) residual clause prior to *Dimaya*, however, did so by distinguishing the language of the § 924(c) residual clause from the language of the ACCA residual clause, an approach that is no longer tenable given that *Dimaya* extended *Johnson* to the identical language of the § 16 residual clause. Indeed, since *Dimaya*, the District of Colombia Circuit revisited its decision in *Eshetu*, determining that the § 924(c) residual clause is void for vagueness.[64]

Although the § 924(c) crime of violence residual clause is similar to the § 924(e) residual clause and materially identical to the § 16 residual clause, the § 924(c) definition is functionally different because § 924(c)

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57. *See* 863 F.3d 946, 954–55 (D.C. Cir. 2017) (concluding that the § 924(c) residual clause is not unconstitutionally vague because, unlike the ACCA residual clause, it does not have a "'confusing list' of enumerative crimes," requires a different method of risk assessment from the ACCA, and includes the temporal limitation "risk that physical force . . . may be used *in the course of* committing the offense" that the ACCA does not), *vacated in part*, No. 15-3020, 2018 WL 3673907, *2 (D.C. Cir. Aug. 3, 2018) (vacating Defendants' § 924(c) convictions in light of *Dimaya*).

58. *See* 861 F.3d 1257, 1265 (11th Cir. 2017) (refusing to hold that the residual clause in § 924(c) is unconstitutionally void for vagueness), *vacated*, 890 F.3d 1259 (11th Cir. 2018) (Mem.).

59. *See* 839 F.3d 697, 700 (8th Cir. 2016) (per curiam) (upholding § 924(c)(3)(B) against a vagueness challenge because it is narrower than the ACCA residual clause).

60. *See* 814 F.3d 340, 379 (6th Cir. 2016) (using the differences between § 924(c)(3)(B) and the ACCA residual clause—for example, § 924(c)(3)(B) deals with physical force rather than injury—to determine that § 924(c)(3)(B) is not unconstitutionally void for vagueness).

61. *See* 832 F.3d 135, 146 (2d Cir. 2016) (citing Johnson v. United States, 135 S. Ct. 2551 (2015)) (holding that § 924(c)(3)(B) is not unconstitutionally void for vagueness because it "does not involve the double-layered uncertainty present in *Johnson*").

62. *See* 842 F.3d 959, 996 (7th Cir. 2016) (deeming the § 924(c) residual clause unconstitutionally vague in violation of due process because of its similarity to the ACCA residual clause).

63. *Id.* (holding that the statute at issue was "virtually indistinguishable" from the unconstitutionally vague clause in *Johnson*).

64. *See* United States v. Eshetu, No. 15-3020, 2018 WL 3673907, at *1 (D.C. Cir. Aug. 3, 2018) (concluding "that *Dimaya* dictates vacatur of . . . [S]ection 924(c) convictions").

applies to the real-world facts at issue in a pending case, while § 924(e) and § 16(b) apply to prior convictions.[65]

B. The Categorical Approach

The categorical approach is a fundamental tool courts use to determine whether a prior conviction satisfies the definition of crime of violence or violent felony.[66] When a court uses the categorical approach, it examines the statute of conviction rather than the underlying conduct of the defendant.[67] Under the categorical approach, a court assesses only the elements of the statute at issue.[68] A court may only determine that the prior conviction falls under the relevant definition as a matter of law, and may not use the facts of the prior conviction in making its determination.[69]

The categorical approach itself comprises a four-step process.[70] First, a court identifies the definition at issue, such as violent felony in the ACCA or crime of violence in § 16.[71] Second, a court determines the statute of the conviction, and, if the statute is divisible into separate crimes, will use the modified categorical approach[72] to identify which

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65. *Compare* 18 U.S.C. § 924(c) (2012), *with* § 924(e), *and* § 16.

66. *See* César Cuauhtémoc García Hernández, *BIA: Categorical Approach is Circuit-Specific*, CRIMMIGRATION (Feb. 12, 2015, 4:00 AM), http://crimmigration.com/2015/02/12/bia-categorical-approach-is-circuit-specific.

67. *See The "Categorical Approach," "Modified Categorical Approach," and How the Ninth Circuit's* Young v. Holder *Modifies the Immigration Consequences of Criminal Convictions*, BEAN + LLOYD LLP (Sept. 20, 2012), http://www.beancard.com/blog/2012/09/the-categorical-approach-modified-categorical-approach-and-how-the-ninth-circuits-young-v-holder-mod [hereinafter *How Approaches Modify Immigration Consequences*] (providing the example that petty theft would not categorically be a crime of violence, even if the defendant used force or violence to commit the theft, or escape prosecution if that conduct did not lead to any convictions in criminal court).

68. *See* David C. Holman, *Violent Crimes and Known Associates: The Residual Clause of the Armed Career Criminal Act*, 43 CONN. L. REV. 209, 213–14 (2010) (reconciling the difference between a strict categorical approach where the applicability of a clause would be based solely off the category of crime at hand, and the limiting case law surrounding the residual clause which limits its applicability to cases where the crimes "typically involve purposeful, violent, and aggressive conduct").

69. *Id.* at 213.

70. *See* U.S. SENTENCING COMM'N, *Categorical Approach: 2016 Annual National Seminar* (2016), https://www.ussc.gov/sites/default/files/pdf/training/annual-national-training-seminar/2016/backgrounder_categorical-approach.pdf.

71. *Id.*

72. Courts use the modified categorical approach when a defendant's prior conviction is for violating a "divisible statute," that is, a statute that sets out one or more crimes in the alternative. Descamps v. United States, 133 S. Ct. 2276 (2013). For example, if one set of elements in a divisible statute defines a crime of violence under the ACCA, but the other

crime is currently at issue.[73] Third, a court identifies the elements of the statute of the conviction.[74] Fourth and last, a court is the elements of the statute of conviction to the definition at issue.[75]

The categorical approach is used in many contexts.[76] For example, in addition to using the categorical approach under the ACCA and § 16, a court uses it when defining prior sexual assault convictions that give rise to higher minimum and maximum possible sentences.[77] It is also a vital tool in immigration law, where courts use it to determine whether a prior conviction is a crime of violence and therefore an "aggravated felony" that can have serious immigration consequences,

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set of elements does not, courts are permitted under the modified categorical approach to consult a limited set of documents to determine which form of the statute underlies the conviction and therefore whether the conviction was for a violent felony. *Id.* at 2281. These documents may include indictments and jury instructions. *Id.*

73. *Id.*; *see also How Approaches Modify Immigration Consequences*, *supra* note 67 (illustrating the difference between the categorical and modified categorical approaches when dealing with instances where there are multiple, distinct methods of violating a single statute, requiring courts to conduct closer analysis of the facts in a case to determine whether the particular method constitutes a crime of violence).

74. *See* U.S. SENTENCING COMM'N, *supra* note 70.

75. *Id.*

76. *See supra* notes 62–67.

77. *See* 18 U.S.C. § 2252(b)(1) (2012) ("[B]ut if such person has a prior conviction under this chapter . . . such person shall be fined under this title and imprisoned for not less than 15 years nor more than 40 years"); *see also* United States v. Geasland, 694 F. App'x 422, 434 (7th Cir. 2017) (concluding that because courts must use the categorical approach when determining whether a defendant's prior conviction is an offense set forth in § 2252(b)(2), what matters is not the underlying facts of the case, such as the age of the victim or the type of abuse, but what the statute requires as proof, thus affirming the district court's decision to subject the defendant to a mandatory minimum of ten years imprisonment).

such as deportation.[78] Career offender[79] and firearm[80] sentencing guidelines also require courts to use the categorical approach.[81]

Federal judges and administrative agencies have varying understandings of the categorical approach, and lower courts are often divided over its use, thus producing inconsistency.[82] This inconsistency frustrates jurists such as Justice Alito, who has stated that the categorical approach breeds "strange and disruptive resul[ts]."[83] According to Justice Alito, these "strange and disruptive result[ts]" include the possibility that defendants who engage in the same conduct may suffer disparate collateral consequences in different states depending on how the state defines its statutes of conviction.[84] Some courts also disfavor the categorical approach because the lack of clarity in the categorical and modified categorical approach leads to many appeals.[85] Courts in favor of the categorical approach argue that this uncertainty is merely a

78. *See* 18 U.S.C. § 16; *see also* 8 U.S.C. § 1101(a)(43) (2012) (providing categories of aggravated felonies for courts to consider when deciding deportation cases, as exemplified by the Third Circuit's analysis in Singh v. Ashcroft, 383 F.3d 144, 147 (3d Cir. 2004)).

79. *See* U.S. SENTENCING GUIDELINES MANUAL §§ 4B1.1–.2 (U.S. SENTENCING COMM'N 2016) (defining a crime of violence as "any offense under federal or state law, punishable by imprisonment for a term exceeding one year, that—(1) has as an element the use, attempted use, or threatened use of physical force against the person of another"); *see also* United States v. Giggey, 551 F.3d 27, 28 (1st Cir. 2008) (en banc) (looking at whether a conviction for a non-residential burglar is categorically a crime of violence under § 4B.1, otherwise known as the Career Offender Sentencing Guidelines).

80. *See* U.S. SENTENCING GUIDELINES MANUAL § 2K2.1 (U.S. SENTENCING COMM'N 2015) (increasing the maximum punishment if a "defendant committed . . . two felony convictions of either a crime of violence . . . or . . . if the defendant committed any part of the instant offense subsequent to sustaining at least two felony convictions of either a crime of violence or a controlled substance offense"); *see also* United States v. Edwards, 836 F.3d 831, 833 (7th Cir. 2016) (vacating the district court's decision because the defendant's burglary convictions could not serve as predicate offenses for sentencing under § 2K2.1, and therefore could not employ the categorical approach).

81. *See supra* notes 79–80 (examining federal sentencing guidelines and related case law requiring that a categorical approach be taken when examining the underlying statutory sections at issue).

82. *See* 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, 261 (2012).

83. *See* Moncrieffe v. Holder, 133 S. Ct. 1678, 1693 n.11 (2013) (Alito, J., dissenting).

84. *Id.*; *see also* United States v. Aguila-Montes de Oca, 655 F.3d 915, 917 (9th Cir. 2011) (en banc) (per curiam) (emphasizing that the categorical approach has created confusion among courts).

85. *See Aguila-Montes de Oca*, 655 F.3d at 917 (citing nine cases from the Ninth Circuit, which explain the categorical approach).

natural result of the method, and whatever disparity it may create is the same as between two defendants whose real-world conduct was identical.[86]

1. The genesis of the categorical approach

The categorical approach has its genesis in *Taylor v. United States*, which provides that courts may only look at the fact of the prior conviction's existence and what the statutory definition of that prior conviction in determining whether the conviction qualifies as a violent felony under the ACCA.[87] The defendant in *Taylor* pled guilty to one felony count of possession of a firearm in violation of 18 U.S.C. § 922(g)(1).[88] At the time he pled guilty, the defendant had four prior convictions: one for robbery, one for assault, and two for second-degree burglary under Missouri law.[89] The ACCA provides for a mandatory minimum sentence of fifteen years as opposed to a maximum sentence of ten years for a defendant convicted under § 922(g) who has at least three prior convictions for violent felonies, including convictions for burglary.[90] Taylor conceded that his robbery and assault convictions qualified as violent felonies, but contended that the burglary convictions did not.[91] The district court disagreed and sentenced the defendant to fifteen years.[92] The Eighth Circuit affirmed, ruling that the word burglary in the ACCA definition of violent felony "means 'burglary' however a state chooses to define it."[93]

The Supreme Court disagreed with the Eighth Circuit's decision.[94] In so doing, the Court rejected the Eighth Circuit's view that the term "burglary" depended on the definition of that term in the state of conviction, finding it implausible that Congress intended for courts to treat identical conduct differently depending on how a particular state defined that crime.[95] The Court also determined that Congress did not intend for courts use the common law definition of burglary in determining whether a conviction qualified as a violent felony, but

86. *See* Taylor v. United States, 495 U.S. 575, 591 (1990) (recognizing that different juries can consider an identical set of facts and reach different conclusions).

87. *Id.* at 600 (basing its holding on the premise that including the facts or circumstances of the conviction could be too prejudicial).

88. *Id.* at 578.

89. *Id.*

90. 18 U.S.C. § 922(g) (2012); § 924(e).

91. Taylor v. United States, 495 U.S. 575, 579 (1990).

92. *Id.* at 579.

93. *Id.*

94. *Id.* at 602.

95. *Id.* at 590–91.

instead intended that courts utilize the broader "generic" definition of burglary found in the Model Penal Code.[96]

The Court then turned to the issue of how a court should determine whether a particular conviction was for "generic burglary."[97] Specifically, the Court considered whether a sentencing court should look only to the statutory definition of the prior offenses, or if it instead could also look at the facts underlying the convictions to determine whether the defendant's conduct qualified as a violent felony.[98]

In determining that courts should use the categorical approach, the Court relied on three considerations.[99] First, the Court found that the language of the ACCA definition applies to a person who has certain previous convictions rather than a person who committed certain crimes.[100] This language suggests that Congress intended courts to look at the elements of the crimes rather than at the facts underlying the convictions.[101] Second, nothing in the legislative history indicated that Congress intended different results for convictions for the same offense depending on a defendant's actual conduct.[102] And third, the Court observed that the practical difficulties in using a factual approach would be "daunting," noting that sentencing courts would have difficulty determining the factual bases for prior convictions.[103] Additionally, a sentencing court's determination that a defendant had committed a prior crime in such a way as to constitute a violent felony might abridge the defendant's right to a jury trial.[104] The Court thus concluded that the only reasonable interpretation of § 924(e)(2)(B)(ii) is that a court must consider only that a prior conviction exists and the statutory definition of the crime of conviction.[105]

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96. *Id.* at 594–95; *see also* MODEL PENAL CODE § 221.1 (AM. LAW INST. 2017) (providing the common law definition of "burglary," which is "enter[ing] a building or occupied structure, or separately secured or occupied portion thereof, with purpose to commit a crime therein").

97. *Taylor*, 495 U.S. at 600.

98. *Id.*

99. *Id.* at 600–01.

100. *Id.*

101. *Id.*

102. *Id.* at 601 (emphasizing that what matters is the conviction and not the facts leading up to the conviction).

103. *Id.*

104. *Id.* at 601–02 (finding that when the facts are introduced at sentencing the judge acts as a quasi-fact finder, which is a job reserved for a jury).

105. *Id.* at 602.

2. The categorical approach avoids mini-trials

The Supreme Court in *Taylor* recognized the practical inconveniences of a fact-based approach to determine whether a predicate offense constitutes a crime of violence, and how the categorical approach avoids these practical inconveniences.[106] For example, under a fact-based approach, if the government introduces trial transcript evidence to prove its assertion that a defendant's prior crime constitutes a violent felony, the introduction of such evidence could be unfair and strain a court's time and resources.[107] Therefore, courts opt to use the categorical approach, which avoids the need for mini-trials to determine the factual basis for a prior conviction.[108]

In *United States v. Krawczak*,[109] in which the Court of Appeals for the Eleventh Circuit considered whether the lower court had correctly applied a guidelines enhancement, the court acknowledged that the guidelines commentary rejected the *Taylor* categorical approach.[110] However, the court still opted to employ the categorical approach because using mini-trials would most likely result in an "elaborate, historical fact-finding process."[111] By applying the categorical approach instead of holding mini-trials for each predicate offense, sentencing courts avoid an "inconsistent and unreliable method" on which to base enhanced sentences.[112] Courts also use the categorical approach instead of mini-trials for administrative efficiency because a fact-based, mini-trial approach would involve evidentiary hearings that attempt to recreate the factual basis for a prior conviction.[113]

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106. *Id.* at 601.

107. *Id.* at 601–02 (holding that the most judicially efficient and just method is to introduce the conviction and not the supporting documents).

108. *See* Rebecca Sharpless, *Toward A True Elements Test:* Taylor *and the Categorical Analysis of Crimes in Immigration Law*, 62 U. MIAMI L. REV. 979, 1032 (2008) (emphasizing that courts consistently adopt the categorical approach to avoid mini-trials).

109. 331 F.3d 1302 (11th Cir. 2003).

110. *Id.* at 1306.

111. *See id.* (citing *Taylor*, 495 U.S. at 601–02, which discusses the impracticability of mini-sentencing trials that include parties sifting through extensive transcripts).

112. *See* United States v. Spence, 661 F.3d 194, 198 (4th Cir. 2011) (citing United States v. Pierce, 278 F.3d 282, 286 (4th Cir. 2002)).

113. *See* United States v. Faust, 853 F.3d 39, 64 (1st Cir. 2017) (determining the categorical approach is both judicially efficient and constitutionally sound); United States v. Nason, No. 00-CR-37-B-S, 2001 WL 123722, at *7 (D. Me. Feb. 13, 2001).

3. The constitutional implications of the categorical approach

a. When it is constitutional to use the categorical approach

It is constitutional for a sentencing court to subject a defendant to an increased minimum mandatory or maximum sentence based on prior convictions, but only if the factual finding that the judge makes is limited to the facts of the prior convictions themselves. *Apprendi v. New Jersey*[114] is a landmark case that provides the constitutional underpinnings of the categorical approach. In *Apprendi*, the Court, relying on *Jones v. United States*,[115] held that any fact that increases the maximum punishment a defendant faces (other than the fact of a prior conviction) must go to a jury to decide, thus reversing the lower court's decision.[116] Later, in *United States v. Alleyne*,[117] the Court extended *Apprendi* to facts that result in the imposition of mandatory minimum sentences. The Court held that "any fact that . . . increases the [mandatory minimum] is an 'element' that must be submitted to the jury."[118]

However, in *Almendarez-Torres v. United States*,[119] the Court confirmed that it is constitutional for a sentencing court to find the fact of a prior conviction to increase the maximum possible penalty that a defendant faces.[120] *Almendarez-Torres* specifically considered whether 8 U.S.C. § 1326(b)(2)[121] merely enhances a sentence or instead creates a separate crime with elements for a jury to consider.[122] Section 1326(a),[123] which defines the crime itself, forbids a deported alien from

114. 530 U.S. 466 (2000).

115. *See* 526 U.S. 227, 252 (1999) (holding that in a trial in which a defendant was convicted of carjacking and possessing a firearm, each element of each offense must be determined beyond a reasonable doubt by a jury).

116. *Apprendi*, 530 U.S. at 497.

117. 133 S. Ct. 2151 (2013).

118. *Id.* at 2155.

119. 523 U.S. 224 (1998).

120. *Id.* at 246.

121. *See* 8 U.S.C. § 1326(b)(2) (2012) ("Notwithstanding subsection (a), in the case of any alien described in such subsection . . . (2) whose removal was subsequent to a conviction for commission of an aggravated felony, such alien shall be fined under such title, imprisoned not more than 20 years, or both . . . [f]or the purposes of this subsection, the term 'removal' includes any agreement in which an alien stipulates to removal during (or not during) a criminal trial under either Federal or State law.").

122. *Almendarez-Torres*, 523 U.S. at 226.

123. *See* 8 U.S.C. § 1326(a) ("Subject to subsection (b), any alien who (1) has been . . . deported . . . (2) enters, attempts to enter, or is at any time found in, the United States, unless (A) prior to his reembarkation at a place outside the United States . . . the Attorney General has expressly consented to such alien's reapplying for

returning to the United States unless she has special permission, and provides for a maximum prison term of two years for any person who returns unlawfully to the country in violation of the statute.[124] If, however, the defendant was deported after being convicted of an "aggravated felony," the maximum potential penalty increases to twenty years.[125] The defendant in *Almendarez-Torres* argued that because an indictment must include each element of a crime, and because his indictment did not mention his earlier aggravated felony convictions, he could only face up to two years of imprisonment as opposed to the eighty-five months the sentencing court imposed on him.[126] Justice Breyer, writing for the majority, disagreed with this argument because, while an indictment must state every element of the current charge, an indictment does not need to state factors that are only relevant to the offender's possible sentence.[127]

Congress's intent played a major role in the Court's decision in *Almendarez-Torres*.[128] Specifically, the Court decided that it was reasonably clear that Congress intended for § 1326(b)(2) to be a sentencing factor,[129] reasoning that the relevant statutory subject matter is recidivism, and recidivism is a typical example of a sentencing factor.[130] Justice Breyer also pointed out that interpreting § 1326(b)(2) to be a substantive criminal offense poses a risk of unfairness.[131] The Court concluded that § 1326(b)(2) is a sentencing factor and not an element of a crime because recidivism is usually a sentencing factor

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admission . . . shall be fined under title 18, or imprisoned not more than 2 years, or both.").

124. *Almendarez-Torres*, 523 U.S. at 226.

125. *Id.*

126. *See id.* at 227 (citing Hamling v. United States, 418 U.S. 87, 117 (1974)).

127. *Id.* at 228.

128. *Id.*

129. *Id.* at 230.

130. *See id.* (providing examples of other statutes dealing with recidivism that are sentencing factors, such as U.S. SENTENCING GUIDELINES MANUAL §§ 4A1.1, 4A1.2 (U.S. SENTENCING COMM'N 2016), which requires a sentencing judge to consider an offender's prior record in every case; 28 U.S.C. § 994(h) (2012), which instructs the Commission to write Guidelines that increase sentences dramatically for serious recidivists; 18 U.S.C. § 924(e) (2012), which imposes a significantly higher sentence for a felon-in-possession violation by serious recidivists; and 21 U.S.C. §§ 841(b)(1)(A)–(D) (2012), which operates similar to 18 U.S.C. § 924(c) but for drug distribution purposes).

131. *See Almendarez-Torres*, 523 U.S. at 235 (quoting Spencer v. Texas, 385 U.S. 554, 560 (1967)) (concluding that introducing evidence of predicate offenses to the jury "is generally recognized to have potentiality for prejudice").

and introducing evidence of a defendant's prior conviction could greatly prejudice the jury.[132] A decision that a defendant has a certain prior conviction is the only fact that increases the maximum possible sentence that a judge can make without violating *Apprendi*.[133]

b. Constitutional limitations of the categorical approach for prior convictions

In *Shepard v. United States*,[134] the Court clarified the constitutional underpinnings of the categorical approach, emphasizing that judges are not finders of fact. The origins of *Shepard* are briefly discussed in *Taylor*, when the Court considered the practical difficulties and potential unfairness of a practical, rather than categorical, approach.[135] In *Shepard*, the petitioner pled guilty to violating § 18 U.S.C. § 924(g)(1).[136] After the petitioner's guilty plea, the government argued that his sentence should be increased from the thirty-seven-month maximum guidelines sentence to the fifteen-year minimum that the ACCA mandates for felons who have three prior violent felony convictions.[137] However, following *Taylor*,[138] the district court found that Shepard's three prior convictions were not for "generic burglary" and refused to follow the government's request that it consider police reports and complaint applications.[139] The First Circuit vacated this decision and ruled that courts should consider these sources when determining whether a prior conviction was generic burglary, but on remand the district court still refused to enhance the petitioner's sentence.[140]

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132. *Id.*

133. *Id.*

134. 544 U.S. 13 (2005).

135. *See id.* at 24 (citing Taylor v. United States, 495 U.S. 575, 601 (1990)) (posing several questions: Could the government submit the trial transcript or, if no transcript existed, call witnesses? Could the defense call witnesses and suggest the jury might have convicted on something other than generic burglary? "If the sentencing court were to conclude, from its own review of the record, that the defendant actually committed a generic burglary, could the defendant challenge this conclusion as abridging his right to a jury trial?").

136. *See id.* (citing 18 U.S.C. § 922(g)(1) (2012)) (stating that it is unlawful for any person "who has been convicted in any court of, a crime punishable by imprisonment for a term exceeding one year" to possess a firearm).

137. *Shepard*, 544 U.S. at 16.

138. *See Taylor*, 495 U.S. at 602 (allowing courts that are sentencing under the ACCA to consider statutory elements, charging documents, and jury instructions when deciding whether a prior conviction was for "generic burglary" or something else).

139. *Shepard*, 544 U.S. at 17–18.

140. *Id.*

Once *Shepard* reached the Supreme Court, the plurality agreed that the evidence judges may look to under *Taylor* should not be extended to include anything beyond what the categorical approach allows.[141] The plurality acknowledged that the purpose of the decision in *Taylor* was to establish the categorical approach, which allows courts to look only at the fact that a prior conviction exists and the statutory definition of that predicate offense.[142] Applying this reasoning to *Shepard*, the plurality agreed with the First Circuit that guilty pleas can establish predicate offenses under the ACCA, but disagreed with the government's argument for a wider evidentiary scope.[143]

The Court concluded that allowing a sentencing judge to consider evidence such as police reports and complaint applications would in effect allow a sentencing judge to make a disputed finding of fact that impacts the maximum sentence.[144] Since the Sixth and Fourteenth Amendments guarantee that a jury will determine any disputed fact that might increase a defendant's sentence, the plurality held that, although the disputed fact in *Shepard* is a fact about a prior conviction, a judge cannot resolve that dispute.[145]

4. The ACCA and the categorical approach

The ACCA definition of violent felony is similar to the § 924(c) definition of crime of violence, which has caused some courts to employ the categorical approach when determining whether an offense is a crime of violence for purposes of § 924(c). The definition of violent felony for purposes of the ACCA reads as follows:

> [A]ny crime punishable by imprisonment for a term exceeding one year . . . that—(i) has as an element the use, attempted use, or threatened use of physical force against the person of another; or (ii) is burglary, arson, or extortion, involves use of explosives, *or otherwise involves conduct that presents a serious potential risk of physical injury to another* . . . .[146]

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141. *See id.* at 28 (Thomas, J., concurring) (determining that broadening the scope of evidence judges may consider under *Taylor* would "give rise to constitutional error, not constitutional doubt").

142. *See id.* at 17 (majority opinion). *But see Taylor*, 495 U.S. at 602 (providing an exception to the categorical approach for only "a narrow range of cases where a jury was actually required to find all the elements of [a] generic [offense]").

143. *Shepard*, 544 U.S. at 19.

144. *Id.* at 25.

145. *Id.* at 25–26.

146. 18 U.S.C. § 924(e)(2)(B) (2012).

The legislative history of the ACCA's enhancement provision indicates that Congress was focused on career offenders.[147] The categorical approach appears always to have been inherent in the statute. The 1984 statute defined violent felony in terms of "robbery" and "burglary," the definitions of which resembled state "robbery" and "burglary" statutes.[148] In 1986, Congress considered amending the ACCA definition to re-define "robbery" or "burglary," but instead decided whether any property offenses should be considered predicate offenses, and if any should, which ones.[149] The House of Representatives Committee on the Judiciary ultimately compromised to include some property crimes, along with any crimes that "involve conduct that presents a serious potential risk of physical injury to another."[150]

The definition eventually took its current form, which has three parts: (1) the portion of the definition that applies to a felony conviction for a crime that "has [as] an element the use, attempted use, or threatened use of physical force against a person," commonly referred to as the "elements clause"; (2) the portion of the statute that includes convictions for the felony offense of burglary, arson, extortion, and crimes that involve the use of explosives, commonly referred to as the "enumerated offenses clause"; and (3) the portion of the definition that applies to convictions for offenses that "otherwise involve conduct that presents a serious potential risk of physical injury to another," commonly referred to as the "residual clause."[151]

The Supreme Court in *Johnson* held that imposing an increased sentence under the ACCA's residual clause violates due process.[152] The majority found the residual clause unconstitutionally vague for two reasons.[153] First, it created "grave uncertainty" about how to estimate the risk posed by a crime because, under the categorical approach, a

147. *See Taylor*, 495 U.S. at 587 (explaining that the focus on career offenders was due to the fair number of criminals who commit serious crimes as their career, and because that career involves the use of weapons, they pose a potential danger to others).

148. *See* United States v. Hill, 832 F.3d 135, 139 (2d Cir. 2016) (analyzing the conduct necessary for a conviction of the predicate offense).

149. *Taylor*, 495 U.S. at 589.

150. H.R. REP. NO. 99-849, at 3 (1986).

151. *Id.*

152. *See* Johnson v. United States, 135 S. Ct. 2551, 2557, 2562 (2015) (citing *Taylor*, 495 U.S. at 589) (deciding that when determining whether an offense is a crime of violence under the ACCA, courts must only look to the fact that the defendant has previously been convicted of a crime that falls into a particular category instead of looking at the facts underlying the prior conviction).

153. *Id.* at 2557.

court has to assess risk based on "a judicially imagined 'ordinary case' of a crime" rather than based on real-world facts or statutory elements.[154] Second, it created uncertainty as to how much risk it takes for a crime to qualify as a violent felony.[155] The Court observed that "[i]t is one thing to apply an imprecise 'serious potential risk' standard to real-world facts; it is quite another to apply it to a judge-imagined abstraction."[156] The Court noted that inclusion of the enumerated offenses—burglary, arson, extortion, and crimes involving the use of explosives—actually contributed to the problem, as "[t]hese offenses are 'far from clear in respect to the degree of risk that each poses.'"[157] The Court also noted that "this Court's repeated attempts and repeated failures to craft a principled and objective standard out of the residual clause confirm its hopeless indeterminacy."[158]

While determining that the ACCA residual clause "produces more unpredictability and arbitrariness than the Due Process Clause tolerates,"[159] the majority made clear that the decision did not place into constitutional doubt the dozens of state and federal crimes that use risk-based language.[160] To the contrary, the Court stated that "we do not doubt the constitutionality of laws that call for the application of a qualitative standard such as 'substantial risk' to real-world conduct."[161] The Court emphasized that the problem the categorical approach posed was that it required courts to apply the residual clause to an idealized generic case.[162]

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154. *Id.*

155. *Id.* at 2558.

156. *Id.*

157. *See id.* (quoting Begay v. United States, 553 U.S. 137, 143 (2008)).

158. *Id.* An example of how courts construed the ACCA's residual clause before it was deemed unconstitutional in *Johnson* is found in James v. United States, 550 U.S. 192 (2007). In *James*, the Court held that attempted burglary was a crime of violence under ACCA's residual clause because if a homeowner, police officer, or other type of law enforcement were to spot an armed, would-be burglar, then a chase might occur, which could increase the risk of violence. *Id.* at 203. This reasoning conveys how the residual clause leaves room for judges to apply their own impressions of a certain crime, as opposed to real-world facts, to a statute, which leads to unconstitutional unpredictability.

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

160. *Id.* at 2561.

161. *Id.*

162. *Id.*; *see also* Mathis v. United States, 136 S. Ct. 2243, 2252 (2016) (citing Apprendi v. New Jersey, 530 U.S. 466, 490 (2000) and Shepard v. United States, 544 U.S. 13, 25 (2005)) (clarifying that one of the reasons for applying the categorical approach to the ACCA is to avoid a serious Sixth Amendment concern: except for the simple fact of a prior conviction, "only a jury, and not a judge, can find facts that

In *Welch v. United States*,[163] the Supreme Court made clear that its decision in *Johnson* arose because courts were required to use the categorical approach under the ACCA residual clause.[164] The district court in *Welch* sentenced the defendant to fifteen years under the ACCA, based in part on a conviction for a Florida "strong-arm robbery."[165] The defendant contended that the offense was not a violent felony under the ACCA.[166] The district court disagreed and the Eleventh Circuit affirmed, holding that the Florida statute qualified as a violent felony under the ACCA residual clause.[167]

When *Welch* eventually made it to the Supreme Court, the Court's discussion of *Johnson* explained that the ACCA residual clause was unconstitutionally void for vagueness because courts applied it under the categorical approach, which required them to "assess the hypothetical risk posed by an abstract generic version of the offense."[168] And, as it had done in *Johnson*, the Court in *Welch* emphasized that the decision in *Johnson* does not cast doubt on the multitude of other laws that also require the assessment of the riskiness posed by the defendant's conduct during the commission of an offense.[169]

5. Section 16(b) and the categorical approach

Congress enacted 18 U.S.C. § 16(b), the general federal definition of crime of violence, to apply only to a limited scope of particularly heinous offenses with elements that are met by significantly more than the mere intent to commit violence.[170] It reads as follows:

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increase a maximum penalty," so a judge at sentencing "cannot go beyond identifying the [prior] crime of conviction to explore the manner in which the defendant committed that offense").

163. 136 S. Ct. 1257 (2016).

164. *Id.* at 1262.

165. *Id.*

166. *Id.* The relevant Florida statute against "strong-arm robbery" prohibits taking property with the use of force, violence, or assault. The presentence report for *Welch* stated that the defendant punched the victim and forcibly removed his jewelry. *Id.*

167. *Id.* at 1263 (revealing that the 11th Circuit did not rule on whether the conviction at issue qualified as a violent felony under the elements clause, only that it qualified under the residual clause).

168. *See id.* at 1262 ("The vagueness of the residual clause rests in large part on its operation under the categorical approach.").

169. *Id.* (quoting Johnson v. United States, 135 S. Ct. 2551, 2561 (2015)).

170. United States v. Lucio-Lucio, 347 F.3d 1202, 1205 (10th Cir. 2003); *see also* Mark Bradford, *Deporting Nonviolent Violent Aliens: Misapplication of 18 U.S.C. § 16(B) to Aliens Convicted of Driving Under the Influence*, 52 DEPAUL L. REV. 901, 935 (2003) (citing Oxford American Dictionary and Language Guide (1993)) (pointing out that courts

> The term "crime of violence" means—
>
> (a) an offense that has as an element the use, attempted use, or threatened use of physical force against the person or property of another, or (b) any other offense that is a felony and that, by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense.[171]

Section 16 has an elements clause[172] and a residual clause[173] that are virtually identical to those in § 924(c). The legislative history of § 16 indicates that courts should employ the categorical approach when determining whether an offense is a crime of violence under § 16, rather than utilizing a fact-specific approach.[174] Originally, Congress included the phrase "crime of violence" in a 1970 District of Columbia bail-reform law.[175] Fourteen years later, Congress incorporated the term into the Comprehensive Crime Control Act (CCCA), which is now codified as 18 U.S.C. § 16.[176] When Senator Strom Thurmond, the Chairman of the Senate Committee on the 1984 Judiciary, authored the Senate Report on the CCCA, he described the term "crime of violence" as embracing the same categories of offenses found in the original District of Columbia Code.[177]

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have looked at the plain language § 16(b)'s inclusion of "use" to determine that the specific intent is implied because "use" is defined as "employ," "seek or achieve an end by means of," and "cause to act or serve for a purpose").

171. 18 U.S.C. § 16 (2012).

172. *See id.* § 16(a) ("[A]n offense that has as an element the use, attempted use, or threatened use of physical force against the person or property of another").

173. *Compare id.* § 16(b) ("[T]hat, by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense."), *with id.* § 924(c)(3)(B) ("[T]hat by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense.").

174. *See* S. REP. NO. 98-225 (1983), *as reprinted in* 1984 U.S.C.C.A.N. 3483, 3486–87.

175. *See* District of Columbia Court Reform and Criminal Procedure Act of 1970, Pub. L. No. 91-358, § 23-1331, 84 Stat. 473 (1970) ("The term 'crime of violence' means murder, forcible rape, carnal knowledge of a female under the age sixteen, taking or attempting to take immoral, improper, or indecent liberties with a child under the age of sixteen years, mayhem, kidnapping, robbery, burglary, voluntary manslaughter, extortion or blackmail accompanied by threats of violence, arson, assault with intent to commit any offense . . . or an attempt or conspiracy to commit any of the foregoing offenses . . . if the offense is punishable by imprisonment for more than one year").

176. S. REP. NO. 98-225 (1983), *as reprinted in* 1984 U.S.C.C.A.N. 3182, 3182.

177. *Id.* at 3201.

The Supreme Court has considered Congress's intent and the constitutionality of § 16. On April 17, 2018, in *Sessions v. Dimaya*, the Court held that the § 16 residual clause is void for vagueness under *Johnson*.[178] At issue in *Dimaya* was whether a lawful permanent resident is removable because his California burglary conviction constituted a crime of violence under the § 16 residual clause and is thus an "aggravated felony" for purposes of immigration law.[179] The Court upheld the Ninth Circuit's decision that the § 16 residual clause is unconstitutionally vague.[180]

Specifically in *Dimaya*, the Court noted that, under the decision in *Leocal v. Ashcroft*, a court determining whether an offense is a crime of violence under § 16 must use the categorical approach.[181] The Court further observed that the opinion in *Johnson* recognized that two features of the ACCA residual clause rendered it unconstitutional: (1) uncertainty created by tying the judicial assessment of risk to a judicially-imagined ordinary case of a crime rather than to real-world facts or elements; and (2) uncertainty about how much risk it takes for a crime to qualify as a violent felony.[182] The Court held that the same combination of indeterminate inquiries renders § 16(b)—the § 16 residual clause—unconstitutional.[183]

In reaching this conclusion, the Court rejected the government's efforts to distinguish § 16(b) from the ACCA residual clause.[184] The government argued that "a less searching form of the void for vagueness doctrine applie[d]" because § 16 is a civil, rather than criminal,

178. Sessions v. Dimaya, 138 S. Ct. 1204, 1223 (2018) (finding the residual clause unconstitutionally vague because it requires judges to imagine an "ordinary case" in the determination of a crime of violence).

179. *See id.* at 1210–11 ("The Immigration and Nationality Act (INA) renders deportable any alien convicted of an 'aggravated felony,'" which "includes a crime of violence (as defined in section 16 of title 18.").

180. *Id.* at 1223.

181. *See id.* at 1211 (emphasizing that under § 16 a judge considers the nature of the offense, generally speaking, as opposed to considering whether the "particular facts" that underlie the conviction establish the § 16 definition of a substantial crime or whether the statutes of the crime create a risk of violence).

182. *Id.* at 1213–14 (citing Johnson v. United States, 135 S. Ct. 2551, 2557–59 (2015)).

183. *Id.* at 1215 (pointing out that the government "explicitly acknowledges" that § 16(b) requires a court to identify a crime's "ordinary case" to measure the risk of the crime at hand).

184. *Id.* at 1212.

matter.[185] However, the Court noted that its own precedent established that removal cases call for the most exacting vagueness standard because deportation is a penalty that may be of greater concern than "any potential jail sentence."[186]

Having determined that the same void for vagueness standard applies, the Court turned to whether the § 16 residual clause is "materially clearer than its now-invalidated ACCA counterpart."[187] The Court pronounced that "*Johnson* is a straightforward decision, with equally straightforward application here."[188] The Court determined that the same two features, which combined to render the ACCA clause unconstitutional, exist with respect to § 16 and compel the same result: (1) "grave uncertainty about how to estimate the risk posed by a crime" because it "tie[s] the judicial assessment of risk" to a hypothetical, judge-imagined "ordinary case" of a crime; and (2) uncertainty about the level of risk that makes a crime "violent."[189]

In reaching this conclusion, the Court rejected the government's argument, as well as Chief Justice Roberts's argument in the dissent,[190] that there are three differences between the text of § 16(b) and the ACCA residual clause. The government and Chief Justice Roberts argued that these differences make the § 16(b) residual clause more predictable and easier to apply than the ACCA residual clause.[191] "These textual differences include how the § 16(b) use of the phrase "in the course of" narrows the residual clause; how § 16(b) focuses on "physical force" while the ACCA residual clause focuses on "physical injury"; and how the § 16(b) residual clause is not preceded by a "confusing list of exemplar crimes," while the ACCA residual clause is preceded by such a list."[192] The Court rejected the argument that these distinctions make a meaningful difference.[193] It found that the phrase "in the course of" does little to narrow or focus the statutory inquiry because a court must still assess the "ordinary case" of the crime in

185. *Id.* at 1212–13 (quoting *Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 498–99 (1982)) (arguing that a law that is too vague to support a sentence or a conviction may be sufficient to support deportation).
186. *Id.* at 1213 (quoting Jae Lee v. United States, 137 S. Ct. 1958, 1968 (2017)).
187. *Id.*
188. *Id.*
189. *See id.* at 1213, 1215 (quoting Johnson v. United States, 135 S. Ct 2551, 2557 (2015)).
190. *Id.* at 1236–38.
191. *Id.* at 1218.
192. *Id.* at 1218–21.
193. *Id.* at 1218.

question.[194] The Court also found that evaluating the phrase "physical force" in § 16 requires a court to also evaluate "physical injury" and, thus, "the force/injury distinction is unlikely to affect a court's analysis of whether a crime qualifies as violent."[195] Lastly, the Court held that the absence of enumerated crimes in § 16 still leaves the two flaws that render the § 16 residual clause unconstitutionally vague.[196]

In striking down the § 16 residual clause, the Court noted that the phrase "substantial risk" is not inherently problematic.[197] The Court, following *Johnson*, emphasized that "'we do not doubt' the constitutionality of applying § 16(b)'s 'substantial risk [standard] to real-world conduct.'"[198]

6. Section 924(c) and the categorical approach

a. The influence of § 924(e) and § 16 on courts' decisions to employ the categorical approach under § 924(c)

Since *Johnson*, defendants have argued that the Court's holding should be extended to cases involving other, similar definitions, and that the categorical approach should be used in those cases as well.[199] Many of these cases, such as *Dimaya*, involve immigration cases in which courts use the § 16 crime of violence definition in deciding whether a non-citizen has been convicted of a crime for which she should be deported.[200]

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194. *Id.* at 1221.

195. *Id.*

196. *Id.*

197. *Id.* at 1215.

198. *See id.* (quoting Johnson v. United States, 135 S. Ct. 2551, 2561 (2015) (internal quotation marks omitted)).

199. *See In re* Fields, 826 F.3d 785, 786–87 (5th Cir. 2016) (per curiam) (involving a federal death row prisoner convicted of three counts under § 924(c) who argued that the *Johnson* decision should apply to § 924(c), which the court ultimately rejected); *see also* Gaton v. United States, No. 16-CV-3868, 2017 WL 4082310, at *1–3 (S.D.N.Y. Sept. 13, 2017) (concerning a defendant who was allowed to amend his Complaint, following a petition to withdraw a guilty plea to discharging a firearm in relation to a crime of violence under § 924(c), arguing that his plea should be withdrawn because the *Johnson* decision should extend to § 924(c)); Prado-Sanchez v. United States, No. 1:15-281-1, 2016 WL 6271894, at *3–4 (S.D. Tex. Sept. 16, 2016) (recommending that the court deny the defendant's motion to vacate because the *Johnson* decision does not extend to § 924(c) as the defendant asserts).

200. Kathryn Harrigan Christian, Comment, *National Security and the Victims of Immigration Law: Crimes of Violence After* Leocal v. Ashcroft, 35 STETSON L. REV. 1001, 1018–19 (2006); *see also* Sharpless, *supra* note 108, at 993–94 (discussing whether there is any bright-line rule addressing how judges should treat criminal convictions in immigration law); and Erica Steinmiller-Perdomo, Note, *Consequences Too Harsh for*

Section 924(c)[201] is another statute to which defendants argue *Johnson*'s holding should be extended, but it has created conflict in the district courts. As this Comment noted previously,[202] the § 924(c) residual clause and overall definition of crime of violence is similar to the ACCA's definition of violent felony and is also almost identical to the § 16 definition of crime of violence, which the Supreme Court held in *Leocal*[203] and confirmed in *Dimaya*,[204] requires the use of the categorical approach. Due to these similarities, many circuit courts and defendants have agreed that courts must use the categorical approach when construing the residual clause of § 924(c).[205]

The Seventh Circuit, in a pre-*Dimaya* decision, held that the § 924(c) residual clause is unconstitutional because the Supreme Court held that the § 924(e) residual clause is unconstitutional and some circuit courts have held that the § 16 residual clause is unconstitutional.[206] However, unlike the § 16 residual clause, more circuit courts held, pre-*Dimaya*, that the § 924(c) residual clause is constitutional.[207] These courts did so on the basis that the § 924(c) residual clause is constitutional because it

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Noncitizens Convicted of Aggravated Felonies?, 41 FLA. ST. U. L. REV. 1173, 1177–78 (2014) (considering a narrower interpretation of "aggravated felony" under the Immigration and Nationality Act).

201. *See* 18 U.S.C. § 924(c)(3)(B) (2012) (providing a similar residual clause that reads that a crime of violence means an offense that is a felony and "involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense").

202. *See supra* Section I.A.

203. *See* Leocal v. Ashcroft, 543 U.S. 1, 7 (2004) (considering whether an offense is a crime of violence under § 16 and concluding that courts must "look to the elements and nature of the offense of conviction, rather than to the particular facts relating to the petitioner's crime").

204. *See* Sessions v. Dimaya, 138 S. Ct. 1204, 1217–18 (2018).

205. *See* Mathis v. United States, 136 S. Ct. 2243, 2246 (2016); Holder v. United States, 836 F.3d 891, 892 (8th Cir. 2016) (per curiam); United States v. Fuertes, 805 F.3d 485, 490 (4th Cir. 2015); United States v. Acosta, 470 F.3d 132, 135–36 (2d Cir. 2006). *But see* United States v. Robinson, 844 F.3d 137, 141 (3d Cir. 2016).

206. *See* United States v. Cardena, 842 F.3d 959, 996 (7th Cir. 2016) (holding that because the § 924(c) residual clause has identical language as the § 16 residual clause, it is also unconstitutionally vague under United States v. Vivas-Ceja, 808 F.3d 719, 721 (7th Cir. 2015)).

207. *See supra* Section II.B. (listing the five circuits that have deemed the § 924(c) residual clause not unconstitutionally void for vagueness, compared to only one circuit court that has deemed § 924(c) unconstitutionally void for vagueness).

is narrower than the ACCA's residual clause.[208] However, the Court in *Dimaya* explicitly rejected this reasoning with respect to the identical language of § 16.[209]

b. Inconsistent application of the categorical approach under 18 U.S.C. § 924(c)

Numerous courts employ the categorical approach when determining whether an offense is a crime of violence under § 924(c), including a number of circuit courts.[210] The circuit courts that have done so are the Second,[211] Sixth,[212] Seventh,[213] Eighth,[214] and Tenth[215] Circuits. Before *Dimaya*, the District of Columbia Circuit also employed the categorical approach when determining whether an offense is a crime of violence, but recognized that doing so is problematic.[216] The Fourth Circuit

208. United States v. Taylor, 814 F.3d 340, 394 (6th Cir. 2016) (holding that a number of distinctions between 924(c)(3) and ACCA's residual clause remove 924(c)(3) from the scope of the opinion in *Johnson*).

209. *See Dimaya*, 138 S. Ct. at 1219 (explaining that courts should not use "imaginative" thinking when applying § 16, but instead must look at the ordinary case, "which is all that matters under the statue").

210. *See, e.g.*, *Holder*, 836 F.3d at 892; *Fuertes*, 805 F.3d at 49; *Acosta*, 470 F.3d at 135; United States v. Prayer, No. 8:04CR440, WL 318640, at *3 (D. Neb. Jan. 23, 2017); United States v. Standberry, 139 F. Supp. 3d 734, 737 (E.D. Va. 2015).

211. *See* United States v. Hill, 832 F.3d 135, 139 (2d Cir. 2016) (using the categorical approach to determine whether a Hobbs Act robbery categorically constitutes a crime of violence under the § 924(c) residual clause).

212. *See* United States v. Rafidi, 829 F.3d 437, 444 (6th Cir. 2016) (citing United States v. Fuertes, 805 F.3d 485, 497–99 (4th Cir. 2015)) (employing the categorical approach to conclude that assaulting a federal law-enforcement officer is a crime of violence); Evans v. Zych, 644 F.3d 447, 453 (6th Cir. 2011); United States v. Serafin, 562 F.3d 1105, 1107–08 (10th Cir. 2009); United States v. Piccolo, 441 F.3d 1084, 1086–87 (9th Cir. 2006)).

213. *See* United States v. Armour, 840 F.3d 904, 907 (7th Cir. 2016) (using the categorical approach to determine that armed bank robbery qualifies as a crime of violence).

214. *See* United States v. Prickett, 839 F.3d 697, 698 (8th Cir. 2016) (per curiam) (stating that a court must examine the elements of the statute and apply the categorical approach to § 924(c)(3)(B)).

215. *See Serafin*, 562 F.3d at 1107–08 (applying the categorical approach to find that a § 5861(d) violation, which makes it unlawful for a person to engage in the business of selling firearms without a special tax requirement, is not a crime of violence because it does not invoke a disregard of the risk of force or foresee that force might be used in the process of receiving or possessing the firearm).

216. *See* United States v. Eshetu, 863 F.3d 946, 959 (D.C. Cir. 2017) (analyzing the § 924(c) residual clause through what the court describes as being a "troublesome categorical lens" and acknowledging that the § 924(c) residual clause "does not suffer from quite the same amount of 'unpredictability and arbitrariness' as ACCA's residual

employs the categorical approach when determining whether an offense is a crime of violence under § 924(c) as well.[217] Some district courts[218] and appellate briefs[219] also use, or advocate for the use of, the categorical approach when arguing whether an offense is a crime of violence under § 924(c).[220]

On the other hand, the Third Circuit,[221] some appellate briefs,[222] and some district courts[223] take the position that the categorical approach is not necessary when determining whether an offense is a crime of violence under § 924(c). The Third Circuit is distinct from the other circuit courts in particular because it explicitly held in *United States v. Robinson*[224] that the categorical approach does not apply to § 924(c).[225] In *Robinson*, the defendant brandished a firearm while committing a Hobbs Act[226] robbery, a fact that was found by the jury and that raised

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clause"). Since the Supreme Court's decision in *Dimaya*, the District of Columbia Circuit has changed its stance on the § 924(c) residual clause and vacated the sentences of the Defendants in *Eshetu*. *See Eshetu*, No. 15-3023, 2018 WL 3673907, *2 (D.C. Cir. Aug. 3, 2018).

217. *Fuertes*, 805 F.3d at 498.

218. *See, e.g.*, United States v. Prayer, No. 8:04CR440, 2017 WL 318640, at *3 (D. Neb. Jan. 23, 2017); United States v. Standberry, 139 F. Supp. 3d 734, 737 (E.D. Va. 2015).

219. Brief for Appellant at 11, United States v. Young (No. 16-1728), 2017 WL 2200841 (3d Cir. May 11, 2016); Brief of the Appellant at 10–11, United States v. Polhill (No. 16-4419), 2016 WL 6871413 (4th Cir. Nov. 18, 2016); Appellant's Opening Brief at 13, United States v. Brazeal (No. 16-10325), 2016 WL 6820085 (9th Cir. Nov. 14, 2016); Brief for Appellee at 40, United States v. Evans (No. 16-4094), 2016 WL 4253926 (4th Cir. Aug. 8, 2016); Brief of Appellant at 25, United States v. Wilson (No. 16-4002), 2016 WL 691246 (4th Cir. Feb. 17, 2016).

220. *Standberry*, 139 F. Supp. 3d at 737; *Prayer*, 2017 WL 318640, at *3. The *Standberry* court reluctantly applied the categorical approach despite its concerns about the method's "one dimensional" review that does not examine the facts of the case, while the court in *Prayer* seemed to favor the categorical approach precisely because it did not require the sentencing court to re-try the facts of the case. *Id.*

221. *See, e.g.*, United States v. Robinson, 844 F.3d 137 (3d Cir. 2016).

222. *See* Brief for Appellee at 46, 49, United States v. Campbell (No. 15-4281), 2016 WL 2619765 (4th Cir. May 5, 2016) (arguing that "[n]one of the purposes behind the categorical approach apply to § 924(c)(3)(B)").

223. *See* United States v. Wells, No. 2:14-cr-00280-JCM-GWF, 2015 WL 10352877, at *3 (D. Nev. Dec. 30, 2015) (acknowledging that "several district courts have recently stated that the categorical approach should not be used in deciding a pretrial motion to dismiss charges under 18 U.S.C. § 924(c)").

224. 844 F.3d 137 (3d Cir. 2016).

225. *Id.* at 140.

226. The Hobbs Act prohibits the obstruction of commerce by threats of physical violence, robbery, or extortion. 18 U.S.C. § 1951 (2012). A Hobbs Act robbery is "the unlawful taking or obtaining of personal property from the person . . . by means of actual or threatened force, or violence, or fear of injury." *Id.*

the mandatory minimum sentence under § 924(c) to seven years.[227] The court held that when a § 924(c) brandishing case and a Hobbs Act robbery are concurrent and "tried to the same jury," the jury is presented with all the facts necessary to determine whether the Hobbs Act robbery was committed with the "use, attempted use, or threatened use of physical force against the person or property of another" and therefore satisfies the § 924(c) elements clause.[228]

While the Fifth Circuit has not addressed the issue of whether the categorical approach should be applied to § 924(c), it recognizes that § 924(c) is a criminal offense that "requires the ultimate determination of guilt . . . by a jury, in the same preceding."[229] The Eleventh Circuit also has not fully addressed the issue of whether to apply the categorical approach to § 924(c), but opines that the decision in *Johnson* might not extend to § 924(c).[230]

Many district courts do not consider the categorical approach necessary when determining whether an offense is a crime of violence under § 924(c).[231] The district court in *United States v. Wells*[232] recognized that several district courts have not applied the categorical approach to pretrial motions to dismiss certain charges under § 924(c), pointing out that the categorical approach is generally used when dealing with prior convictions that might raise a defendant's sentence.[233] This is not the

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227. *Robinson*, 844 F.3d at 141.

228. *Id.* at 144.

229. *See* United States v. Gonzalez-Longoria, 831 F.3d 670, 673 n.1 (5th Cir. 2016) (asserting that *Taylor* does not distinguish § 924(c)).

230. *See In re* Fleur, 824 F.3d 1337, 1340 (11th Cir. 2016) (stating that "[o]ur Court hasn't decided if *Johnson* applies to § 924(c)(3)(B) and 'the law is unsettled' as to whether *Johnson* invalidates sentences that relied on the § 924(c)(3)(B) residual clause") (quoting *In re* Pinder, 824 F.3d 977, 978–79 (11th Cir. 2016)) (alteration in original).

231. United States v. Chapman, 866 F.3d 129, 133–34 (3d Cir. 2017) (holding that the scope of the violated criminal statute may control whether an offender is deemed a "career" offender); United States v. McCallister, No. 15-0171, 2016 WL 3072237, at *4 (D.D.C. May 31, 2016) (denying the categorical approach because 924(c) does not enhance penalties for prior convictions); United States v. Clarke, 171 F. Supp. 3d 449, 452–53 (D. Md. 2016) (applying a variation of the modified categorical approach); United States v. McDaniels, 147 F. Supp. 3d 427, 435 (E.D. Va. 2015) (holding that, even if the residual clause were held unconstitutionally vague, the defendant could still be found guilty of a crime of violence because a Hobbs Act robbery is categorically a crime of violence under the force clause); United States v. Wells, No. 2:14-cr-00280-JCM-GWF, 2015 WL 10352877, at *3 (D. Nev. Dec. 30, 2015) (explaining that a broadly-sweeping, generic crime law may not count as an ACCA predicate offense).

232. No. 2:14-cr-00280-JCM-GWF, 2015 WL 10352877, at *3 (D. Nev. Dec. 30, 2015).

233. *Id.*

case with respect to § 924(c).[234] Further, some district courts do not apply the categorical approach because they fear it is a way in which repeat offenders can evade sentencing enhancements and forces judges into an "alternative reality."[235] Juries, however, may use real-world facts to determine whether an offense constitutes a crime of violence under § 924(c) because § 924(c)'s definition of crime of violence involves an instant, rather than predicate, offense.[236]

Courts that do use the categorical approach in determining whether an offense is a crime of violence under § 924(c) sometimes reach inconsistent results with respect to similar crimes, such as robbery. For example, in *United States v. Bell*,[237] the district court, confronted with a motion to dismiss a § 924(c) count, used the categorical approach to determine whether the general robbery-of-government-property statute, 18 U.S.C. § 2112, constitutes a § 924(c) crime of violence.[238] The court, relying on the Seventh Circuit's decision in *United States v. Rodriguez*,[239] held that robbery under § 2112 can be committed in a nonviolent way and that it thus sweeps too broadly to qualify categorically as a crime of violence under the § 924(c) elements clause.[240] The court then considered the constitutionality of the § 924(c) residual clause and, finding the Ninth Circuit's decision in *Dimaya* "highly persuasive," determined that the clause is void for vagueness under

234. *See id.* (citing United States v. Standberry, 139 F. Supp. 3d 734, 737 (E.D. Va. 2015); United States v. McDaniels, 147 F. Supp. 3d 427, 432 (E.D. Va. 2015); United States v. Church, No. 1:15-CR-42-TLS, 2015 WL 7738032 (N.D. Ind. Dec. 1, 2015)) (explaining that the utility of the categorical approach is questionable in the context of an obviously violent charge).

235. *See* United States v. Chapman, 866 F.3d 129, 138 (3d Cir. 2017) (describing a scenario in which obviously violent crimes are not characterized as such because of the application of the categorical approach).

236. *See* Holman, *supra* note 68, at 213 (illustrating that an offense may be carried out violently without categorically being a crime of violence through the example that tampering with a witness might not require a violent act, but a defendant might tamper with a witness in a violent manner, such as by murdering the witness in order to prevent that witness from testifying).

237. 158 F. Supp. 3d 906 (N.D. Cal. 2016).

238. *Id.* at 918–21.

239. 925 F.2d 1049 (7th Cir. 1991).

240. *Bell*, 158 F. Supp. 3d at 920–21 (citing *Rodriguez*, 925 F.2d at 1051) (describing the non-violent scenario of grabbing a key chain attached to a belt loop with robbery of government property under § 2112).

Johnson.[241] The court accordingly concluded that § 2112 robbery does not qualify as a crime of violence under § 924(c).[242]

By contrast, in *United States v. McDaniels*,[243] another district court addressed a motion to dismiss two § 924(c) counts, which claimed a Hobbs Act robbery under 18 U.S.C. § 1951 does not qualify as a § 924(c) crime of violence.[244] The court concluded that the categorical approach does not apply to a pretrial motion to dismiss a § 924(c) count on this ground.[245] It ruled that the issue of whether the commission of a specific Hobbs Act robbery constitutes a crime of violence under § 924(c) should be submitted to a jury that has received proper instruction regarding the § 924(c)(3) definition of a crime of violence.[246] Nonetheless, the court also considered whether a Hobbs Act robbery qualifies under the § 924(c) elements clause, and determined that it does.[247]

In the relatively short time since *Dimaya* was decided, courts have continued to employ different means of analyzing the constitutionality of § 924(c)(3)(B). For example, in *United States v. Eshetu*, the District of Colombia Circuit reversed its earlier decision and held that because the categorical approach applies to the residual clause of § 924(c), it necessarily is unconstitutional under *Dimaya*.[248] Similarly, in *United States v. Rossetti*[249] the district court rejected the government's argument that the defendant's actual conduct should be considered under the § 924(c) residual clause and held the provision unconstitutional under *Dimaya*.[250] By contrast, in *Khan v. United States*,[251] the district court agreed with the government's argument that the fact finder should consider the defendant's actual conduct in determining whether the defendant committed a crime of violence under §

241. *Id.* at 921–24.
242. *Id.* at 924–25.
243. 147 F. Supp. 3d 427 (E.D. Va. 2015).
244. *Id.* at 429.
245. *Id.* at 433.
246. *Id.*
247. *Id.* at 433–35 (finding that because the Hobbs Act follows the definition of common law robbery, it is sufficiently analogous to the force clause of § 924(c)).
248. *See* United States v. Eshetu, No. 15-3020, 2018 WL 3673907, at *1 (D.C. Cir. Aug. 3, 2018) (explaining that the court is bound by circuit precedent that the categorical approach must be used when determining whether an offense is a crime of violence under § 924(c)(3)(B)).
249. No. CR 99-10098-RGS, 2018 WL 3748161 (D. Mass. Aug. 7, 2018).
250. *Id.*
251. No. 1:03-CR-296-2 (LMB), 2018 WL 3651582 (E.D. Va. Aug. 1, 2018).

924(c)(3)(B).[252] In fact, since *Dimaya*, the government has taken the position that, to curtail constitutional issues, courts should cease using the categorical approach to determine whether an offense is a crime of violence under the § 924(c) residual clause and instead send the facts to the jury.[253]

Courts are thus split on whether to apply the categorical approach when determining if an offense is a crime of violence under § 924(c). Because § 924(c) is so similar to statutes that require the use of the categorical approach, such as the ACCA and § 16, some courts opt to employ the categorical approach.[254] However, because a § 924(c) conviction depends on a defendant using or carrying a firearm in the course of committing a crime of violence, other courts do not use the categorical approach because § 924(c) is a separate crime based on real-world facts that can be sent to a jury.[255] The next section of this Comment argues that courts should not employ the categorical approach when determining whether an offense is a crime of violence under the § 924(c) residual clause, and that by doing so courts will avoid having the clause held unconstitutional under *Dimaya*.

II. COURTS SHOULD NOT APPLY THE CATEGORICAL APPROACH TO DETERMINE WHETHER AN OFFENSE IS A CRIME OF VIOLENCE UNDER THE § 924(C) RESIDUAL CLAUSE

Section 924(c) is distinguishable from both the ACCA and § 16 as used in the immigration context. A court sentencing a defendant under the ACCA must determine whether a defendant's past criminal convictions qualify as either serious drug offenses or, as relevant here, violent felonies.[256] Similarly, an immigration court must determine whether a non-citizen's prior conviction was for a crime of violence under § 16.[257] By contrast, § 924(c) applies not to past convictions, but instead to real-world facts. A jury considering a case under § 924(c) must determine whether the evidence establishes beyond a reasonable

252. See *id* (finding that the defendant's actual conduct did not constitute a crime of violence).

253. *See, e.g.*, Cross v. United States, 892 F.3d 288, 303 n.1 (7th Cir. 2018) (explaining that the government requested that the Supreme Court return vacate certain judgments because *Dimaya* indicates that a court could avoid constitutional issues by considering the defendant's conduct instead of using the categorical approach).

254. *See supra* Section I.B.6.a.

255. *See supra* Section I.A.

256. *See supra* Introduction.

257. *See supra* Section I.B.

doubt that the defendant used or carried a firearm during and in relation to, or possessed a firearm in furtherance of, either a particular drug trafficking crime or a particular crime of violence.[258] Given the distinctions between § 924(c), the ACCA, and § 16 and the role that a jury already plays in determining whether a defendant charged with § 924(c) has committed a crime of violence, the constitutional problems created by use of the categorical approach under the ACCA can be eliminated by having the jury determine whether the offense at hand qualifies as a crime of violence under the residual clause.

A. Distinctions Between § 924(c) and Statutes that Require the Categorical Approach

1. Distinctions under Taylor

The Supreme Court in *Taylor* devised the categorical approach for sentencing courts to determine whether a prior conviction is a violent felony under the ACCA based on three factors: (1) the language of the ACCA, (2) the ACCA's legislative history, and (3) the practical difficulties in using a factual approach.[259] However, none of the three factors that led the Court to adopt the categorical approach under the ACCA apply in the case of § 924(c). Because both § 16 and § 924(e) involve prior convictions, courts must use the categorical approach when determining whether those prior convictions constitute crimes of violence under *Taylor*.[260] However, § 924(c) involves an instant charge rather than a prior conviction.[261] Therefore, courts should avoid extending the categorical approach beyond its intended purpose to statutes such as § 924(c).[262]

The Court's first reason for using the categorical approach rather than a fact-based approach in *Taylor* was the language of the ACCA itself, which is irrelevant to the § 924(c) residual clause.[263] The court in *Taylor* observed that the ACCA applies to a defendant who has three prior convictions for, rather than a person who may have committed,

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258. *See, e.g.*, Alleyne v. United States, 133 S. Ct. 2151, 2156 (2013).

259. *See supra* Section I.B.1.

260. *Id.*

261. U.S. SENTENCING COMM'N, THE CATEGORICAL APPROACH: A STEP-BY-STEP ANALYSIS (2016), https://www.ussc.gov/sites/default/files/pdf/training/annual-national-training-seminar/2016/slideshow_categorical-approach.pdf (explaining that only the elements of the offense can be used for the instant offense of conviction).

262. United States v. Standberry, 139 F. Supp. 3d 734, 736 (E.D. Va. 2015).

263. Taylor v. United States, 495 U.S. 575, 600–01 (1990).

violent felonies or drug crimes.[264] In contrast, § 924(c) does not deal with prior convictions. The Court in *Taylor* noted that the elements clause of the ACCA violent felony definition focuses on the statutory elements rather than conduct.[265] The Court further reasoned that, in this context, the term "burglary" likely refers to the elements of the offense rather than the underlying conduct of a particular defendant.[266] Section 924(c), by contrast, does not apply to prior convictions, but instead is itself a crime.[267] It applies to a person who uses or carries a firearm during and in relation to, or possesses a firearm in furtherance of, a "crime of violence or drug trafficking crime."[268] Therefore, the language and purpose of the § 924(c) residual clause is distinct from the ACCA residual clause, thus making the categorical approach unnecessary under § 924(c).

The Court's second reason for creating the categorical approach in *Taylor* does not affect § 924(c) because it relied on the legislative history of the ACCA.[269] Looking to the ACCA's legislative history, the Court in *Taylor* concluded that Congress intended for courts to look to the elements of the crimes rather than to the facts underlying convictions made pursuant to ACCA.[270] However, nothing in the legislative history of § 924(c) indicates that Congress had a similar intent.[271] On the contrary, the legislative history of § 924(c) shows that Congress wanted to combat the "dangerous combination of drugs and guns," and therefore was likely more concerned with the facts underlying the convictions than the convictions themselves.[272]

The Court's third reason for using the categorical approach in *Taylor*, which was the threat of practical difficulties and potential unfairness with using a fact-based approach to determine whether a prior conviction was a violent felony, also does not apply to § 924(c).[273] The Court questioned whether the government would be able to produce a trial transcript from the underlying conviction or call

264. *Id.* at 600 (quoting 18 U.S.C. § 924(e)(2)(B) (2012)).
265. *Id.* (explaining that violent felonies are any crimes punishable for over one-year imprisonment that have an element of threat or use of force).
266. *Id.* at 600–01.
267. *Id.* at 601.
268. 18 U.S.C. § 924(c)(1)(A) (2012).
269. *Taylor*, 495 U.S. at 601.
270. *Id.*
271. *See supra* Section I.A (considering the legislative history of § 924(c)).
272. Muscarello v. United States, 524 U.S. 125, 132 (1998) (quoting Smith v. United States, 508 U.S. 223, 240 (1993)).
273. *Taylor*, 495 U.S. at 601–02.

witnesses against the defendant using a fact-based approach, which could be highly inefficient and prejudicial to the defendant.[274] Therefore, one of the Supreme Court's goals in *Taylor* was to avoid mini-trials to determine the factual bases for prior convictions.[275] However, the difficulties that would arise if a sentencing court had to explore the facts underlying prior convictions are not implicated under § 924(c). Unlike analyzing prior convictions retroactively in sentencing hearings, § 924(c) involves an instant, rather than predicate offense, which allows juries to "have the benefit of viewing the evidence as it unfolds."[276] Therefore, § 924(c) would not raise the mini-trial concerns of § 924(e) and § 16 if a jury decides whether the offense at issue is a crime of violence based on the real-world facts that already presented.[277]

2. Crime of violence is an element of § 924(c), not a sentencing enhancement

Section 924(c) includes as an element the commission of a crime of violence or a drug trafficking crime, making it inappropriate to apply the categorical approach because the elements of a crime should be submitted to a jury to find beyond a reasonable doubt.[278] This is distinct from determining whether prior convictions are for violent felonies under § 924(e) or crimes of violence under § 16 because those determinations do not involve the elements of the offenses before the court. Instead, those statutes involve a sentencing enhancement.[279]

Some crimes have the capacity to be committed in a violent manner, and a properly instructed jury could decide whether the manner in which a crime was committed renders it a crime of violence as an element under § 924(c).[280] For example, in *United States v. Hernandez*,[281] the district court determined that conspiracy to commit a Hobbs Act

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274. *Id.*

275. *Id.* at 601.

276. United States v. Wells, No. 2:14-cr-00280-JCM-GWF, 2015 WL 10352877, at *3 (D. Nev. Dec. 30, 2015).

277. *See* United States v. Hernandez, 228 F. Supp. 3d 128, 132 (D. Me. 2017) ("[T]he elaborate fact-finding process that *Taylor* was concerned about is not going to pose the same problems in a contemporaneously charged § 924(c) offense.").

278. *See* Alleyne v. United States, 133 S. Ct. 2151, 2158 (2013) (explaining that any facts which increase the mandatory minimum sentence for a crime are elements and must be found beyond a reasonable doubt).

279. *Taylor*, 495 U.S. at 577.

280. *See Wells*, 2015 WL 10352877, at *3 (finding that the Hobbs Act robbery was a crime of violence under both the categorical and modified categorical approaches).

281. 228 F. Supp. 3d 128 (D. Me. 2017).

robbery under 18 U.S.C. § 1951 does not qualify as a crime of violence under the definition in the residual clause of the § 924(c) definition of crime of violence because a "conspiracy" does not have as an element the use, attempted use, or threatened use of physical force against the person or property of another.[282] Although the court in *Hernandez* did not do this, a court could present the facts of a particular Hobbs Act conspiracy to a jury to determine whether it "involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense."[283] The district court in *Hernandez* only reluctantly employed the categorical approach, noting in part that § 924(c) does not entail the mini-trial concern that *Taylor* addresses.[284]

In short, because the concerns that brought about the categorical approach for sentencing purposes are not present in a § 924(c) case—"crime of violence" is an element of § 924(c)—it does not make sense for courts to apply the categorical approach to § 924(c).[285]

B. Sending Facts to the Jury as Opposed to Applying the Categorical Approach Addresses Constitutional Issues Under the § 924(c) Residual Clause

If courts sent facts to the jury to determine whether an offense is a crime of violence under the § 924(c) residual clause, then possible constitutional issues under the § 924(c) residual clause would be avoided. Some defendants argue that the § 924(c) residual clause is void for vagueness because of its similarity to the ACCA residual clause, which was held unconstitutional in *Johnson*,[286] and because it has identical language to the § 16 residual clause, which the Supreme Court voided for vagueness in *Dimaya*.[287] However, because § 924(c) functions differently from both the ACCA and § 16(b), courts could sidestep the constitutional issue posed by § 924(c) by sending facts to the jury rather than employing the categorical approach.

In *Johnson*'s majority opinion, the Court expressed that applying a phrase like "substantial risk"—used in both § 16(b) and § 924(c)(3)—to real-world conduct is generally not unconstitutionally vague.[288] A

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282. *Id.* at 138.
283. 18 U.S.C. § 924(c)(3)(B) (2012).
284. 228 F. Supp. 3d at 132.
285. *Wells*, 2015 WL 10352877, at *3 (citing United States v. McDaniels, 147 F. Supp. 3d 427, 432 (E.D. Va. 2015)).
286. Johnson v. United States, 135 S. Ct. 2551, 2557 (2015).
287. Sessions v. Dimaya, 138 S. Ct. 1204, 1207–08 (2018).
288. 135 S. Ct. at 2561.

year later, in *Welch v. United States*,[289] the Court indicated that the primary cause of the residual clause's vagueness is the categorical approach.[290] The Court explained that the ACCA residual clause failed "not because it adopted a 'serious potential risk' standard but because applying that standard under the categorical approach required courts to assess the hypothetical risk posed by an abstract generic version of the offense."[291] The Court in *Welch* also clarified that the Court's analysis in *Johnson* does not automatically cast doubt on the multitude of other laws that "'require gauging the riskiness of conduct in which an individual defendant engages on a particular occasion.'"[292] And in *Dimaya*, the Court made clear that applying the § 16(b) "substantial risk" standard would be constitutional if applied to real-world facts.[293]

The decisions in *Johnson*, *Welch*, and *Dimaya* all demonstrate that the categorical approach can present void for vagueness issues, but this result can be avoided under § 924(c) because it applies to real-world facts that can be sent to a jury. The opportunity to sidestep the potential constitutional issue under the § 924(c) residual clause exists because § 924(c) is significantly different from the ACCA and § 16. Both § 924(e) and § 16 require a sentencing judge to determine whether a defendant's prior conviction was for a violent felony or a crime of violence, but § 924(c) requires that a defendant use, carry, or possess a firearm while committing a crime that must be proved to a jury in any event.[294] While the language of the § 924(c) residual clause is similar to that of the ACCA and identical to that of § 16(b), it applies in a very different context. Courts can avoid declaring the residual clause unconstitutionally vague by permitting juries review real-world facts in relation to the clause, as opposed to allowing judges to make a determination based on their imagined version of the "ordinary case" of a crime.[295]

Having a jury decide whether a particular crime satisfies the § 924(c) residual clause also remedies another potential constitutional problem under *Apprendi*.[296] According to the Court in *Apprendi*, a judge cannot

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289. 136 S. Ct. 1257 (2016).
290. *Id.* at 1262.
291. *Id.*
292. *Id.* (quoting *Johnson*, 135 S. Ct. at 2561).
293. Sessions v. Dimaya, 138 S. Ct. 1204, 1215–16 (2018).
294. *See* Munoz v. Thomas, No. CV. 10-407-MO, 2010 WL 3470114, at *2 (D. Or. Aug. 30, 2010) (acknowledging that a § 924(c) conviction is a current conviction, which makes a habeas petitioner "ineligible for early release").
295. *Dimaya*, 138 S. Ct. at 1215–16.
296. Apprendi v. New Jersey, 530 U.S. 466, 490–92, 497 (2000).

make findings about real-world facts that increase a defendant's sentence (except for the fact of a prior conviction), but a jury can.[297] For example, in the case of a Hobbs Act conspiracy, a judge would violate *Apprendi* if she were to make factual findings about the way the crime was committed in determining whether it satisfies the § 924(c) residual clause.[298] However, having a jury perform this function would avoid the *Apprendi* problem.

In sum, resting the decision of whether an offense is a crime of violence under the § 924(c) residual clause on real-world facts (as opposed to judge-imagined abstractions) would address the *Johnson* void for vagueness concern, and relying on a jury make this decision instead of a judge would address the *Apprendi* concern.

C. Policy Considerations

1. Courts should construe § 924(c) in a way that avoids finding the statute unconstitutional

Courts should avoid constitutional concerns when there are alternative plausible interpretations of a provision.[299] An alternative plausible interpretation of § 924(c) is that the jury should determine whether a defendant committed a crime of violence under the § 924(c) residual clause. It is true that in *Dimaya* the Court reasoned that the § 16(b) text "demands a categorical approach," in part based on the inclusion of the term "by its nature," given that "[a]n offense's 'nature' means its 'normal and characteristic quality.'"[300] The § 924(c) residual clause contains this language as well. However, the Supreme Court has on other occasions interpreted statutes in such a way as to avoid holding them unconstitutional. For example, in *United States v. Booker*,[301] the Court held that the mandatory federal sentencing guidelines were unconstitutional under *Apprendi* because they authorized a sentencing judge to find facts that increased a defendant's maximum sentence.[302] However, rather than holding the guidelines unconstitutional,

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297. *Id.* at 481–83, 490–92.

298. *Id.*

299. *See* Warger v. Shauers, 135 S. Ct. 521, 529 (2014) (finding that alternative plausible interpretations of a provision do not matter in the absence of ambiguity).

300. *Dimaya*, 138 S. Ct. at 1217–18 (quoting WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1507 (2002)).

301. 543 U.S. 220 (2005).

302. See *id.* at 245–46 (favoring excision of provisions making the guidelines mandatory over "engraft[ing] onto the existing system . . . [the] Sixth Amendment 'jury trial' requirement").

the Court excised the statutory language making the guidelines mandatory, thereby rendering them advisory.[303]

In the wake of *Dimaya*, applying the categorical approach to the § 924(c) residual clause would render the statute void for vagueness. Having a judge determine whether an offense was a crime of violence under the residual clause would also violate *Apprendi*. Both results can be avoided by having the issue resolved by the jury based on the actual facts of the proposed crime of violence.

2. Applying the categorical approach to § 924(c) is a threat to uniformity

The categorical approach is also a threat to uniformity, making it dangerous for courts to apply the categorical approach to § 924(c).[304] Although the Supreme Court crafted the categorical approach to avoid inconsistency among courts, inconsistency is exactly what it produced.[305] Since the Court in *Taylor* created the categorical approach over twenty years ago, courts have struggled to understand its complexities.[306]

The Ninth Circuit has even asserted that the categorical approach might be the area of the law that is most demanding of the circuit's

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303. *See, e.g.*, *id.* at 222 (finding that Federal Sentencing Guidelines must be considered during sentencing but can be tailored in light of statutory concerns).

304. *See, e.g.*, Mathis v. United States, 136 S. Ct. 2243, 2267–68 (2016) (Alito, J., dissenting) (pointing out that while Congress enacted the ACCA to ensure that repeat offenders committing offenses such as "burglary" are subject to an increase in their maximum punishment for crimes of violence in a consistent manner, burglary is often dismissed as a crime of violence under the categorical approach).

305. *See* United States v. Aguila-Montes de Oca, 655 F.3d 915, 917 (9th Cir. 2011) (per curiam) (explaining that the court has utilized many resources in order to better understand the categorical approach and avoid further inconsistencies by citing: United States v. Strickland, 601 F.3d 963, 967–71 (9th Cir. 2010) (en banc)); Marmolejo-Campos v. Holder, 558 F.3d 903, 912–13 (9th Cir. 2009) (en banc); United States v. Snellenberger, 548 F.3d 699, 700–02 (9th Cir. 2008) (en banc) (per curiam); Estrada-Espinoza v. Mukasey, 546 F.3d 1147, 1159–60 (9th Cir. 2008) (en banc); United States v. Vidal, 504 F.3d 1072, 1086–90 (9th Cir. 2007) (en banc); Navarro-Lopez v. Gonzales, 503 F.3d 1063, 1073 (9th Cir. 2007); United States v. Grisel, 488 F.3d 844, 847–48, 851–52 (9th Cir. 2007) (en banc); Fernandez-Ruiz v. Gonzales, 466 F.3d 1121, 1132–35 (9th Cir. 2006) (en banc); United States v. Corona-Sanchez, 291 F.3d 1201, 1211–13 (9th Cir. 2002) (en banc)).

306. *See Aguila-Montes de Oca*, 655 F.3d at 917 (citing *Strickland*, 601 F.3d at 967–71; *Marmolejo-Campos*, 558 F.3d at 912–13; *Snellenberger*, 548 F.3d at 700–01; *Estrada-Espinoza*, 546 F.3d at 1159–60; *Vidal*, 504 F.3d at 1086–90; *Navarro-Lopez*, 503 F.3d at 1073; *Grisel*, 488 F.3d at 847–48, 851–52; *Fernandez-Ruiz*, 466 F.3d at 1132–35; *Corona-Sanchez*, 291 F.3d at 1211–13).

resources.[307] For example, in the case *United States v. Strickland*,[308] the Ninth Circuit struggled to determine if the modified categorical approach must be used when a non-categorical state statute is broader than the federal definition of a predicate offense.[309] Similarly, in the case *Estrada-Espinoza v. Mukasey*,[310] the Ninth Circuit tackled the issue of whether a twenty-year-old man's sexual relationship with a sixteen-year-old girl categorically qualifies as "sexual abuse of a minor" under the modified categorical approach, although it does not categorically constitute a "sexual abuse of a minor" under the categorical approach.[311] If the categorical approach were an easier tool for courts to use, courts of appeals such as the Ninth Circuit would not see as many cases like *Strickland* and *Estrada-Espinoza*.[312] Since § 924(c) does not require the categorical approach because it applies to real-world facts, courts would save both time and resources by allowing juries to determine whether the defendant committed a crime of violence.

When courts employ the categorical approach to § 924(c), they are risking inconsistent results. The case *United States v. Chapman*[313] illustrates the inconsistency that the categorical approach fosters by providing an example of two defendants who committed identical crimes, but in different states.[314] Although the two defendants had fundamentally the same criminal history, the applicability of the ACCA to their convictions depended on the language of their states' criminal statutes, leading to inconsistent sentences.[315] Similarly, the court in *Bell* held that a § 2112 robbery does not qualify as a crime of violence for § 924(c) purposes,[316] while the court in *McDaniels* held that a Hobbs

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307. *See Aguila-Montes de Oca*, 655 F.3d at 917 (citing *Strickland*, 601 F.3d at 967–71); *Marmolejo-Campos*, 558 F.3d at 912–13; *Snellenberger*, 548 F.3d at 700–01; *Estrada-Espinoza*, 546 F.3d at 1159–60; *Vidal*, 504 F.3d at 1086–90; *Navarro-Lopez*, 503 F.3d at 1073; *Grisel*, 488 F.3d at 847–48, 851–52; *Fernandez-Ruiz*, 466 F.3d at 1132–35; *Corona-Sanchez*, 291 F.3d at 1211–13) (showing that the court has utilized multiple applications of the categorical approach for years without avail as to its proper application).

308. 601 F.3d 963 (9th Cir. 2010).

309. *Id.* at 967.

310. 546 F.3d 1147 (9th Cir. 2008).

311. *Id.* at 1150, 1159.

312. *Strickland*, 601 F.3d at 967; *Estrada-Espinoza*, 546 F.3d at 1159.

313. 866 F.3d 129 (3d Cir. 2017).

314. *See id.* at 136–37 (Jordan, J., concurring) (emphasizing that a slight difference in state criminal statutes could lead to identical defendants being treated very differently under the ACCA, and arguing that Congress could not have intended this arbitrariness).

315. *Id.*

316. United States v. Bell, 158 F. Supp. 3d 906, 924–25 (N.D. Cal. 2016).

Act robbery does qualify.[317] Thus, two defendants could engage in virtually identical conduct—for example, they could both point a gun at their victims and threaten to shoot the victims if they did not hand over money—yet if one were charged under § 2112 and the other charged under the Hobbs Act robbery, only the latter could also be charged with a § 924(c) offense.

Therefore, when courts apply the categorical approach to § 924(c), there is a substantial chance that a defendant in one state will receive a completely different sentence than a defendant who committed an identical crime in another state. Courts can remedy this inconsistency when determining whether an offense is a crime of violence under § 924(c) by sending facts to a jury to decide as opposed to utilizing the categorical approach.

3. Recommended jury instructions

According to the law set forth in the discussion above, in a trial where the jury must determine whether an offense is a crime of violence under the § 924(c) residual clause, proper jury instructions would include reading to the jury the § 924(c) definition of a crime of violence[318] as well as the definition and elements of the federal crime of violence involved.[319] This is proper because it is common and constitutional for juries to consider such factors.[320]

The judge might also elaborate on the definition of a crime of violence depending on the attorneys' proposals. For example, a court might instruct the jury to consider factors such as the risk that an

317. United States v. McDaniels, 147 F. Supp. 3d 427, 435 (E.D. Va. 2015).

318. *See supra* Section I.A (providing the § 924(c) definition of a crime of violence).

319. An example of a possible federal crime of violence involved that is often seen in § 924(c) cases is the Hobbs Act robbery. 18 U.S.C. § 1951(a) (2012) ("Whoever in any way or degree obstructs, delays, or affects commerce or the movement of any article or commodity in commerce, by robbery or extortion or attempts or conspires so to do, or commits or threatens physical violence to any person or property in furtherance of a plan or purpose to do anything in violation of this section shall be fined under this title or imprisoned not more than twenty years, or both.").

320. *See* Jurek v. Texas, 428 U.S. 262, 271–73 (1976) (explaining that juries must be allowed to consider aggravating and mitigating factors when determining whether the death penalty should be imposed, including factors such as the likelihood that the defendant would be a "continuing threat to society," severity of prior criminal conduct, age of the defendant, whether the defendant was acting under duress, the defendant's mental or emotional state, and insanity).

innocent party might appear during the commission of the offense;[321] whether the defendant's conduct was "purposeful, violent, and aggressive";[322] and whether the defendant was indifferent to the possibility of violent collateral consequences of her offense.[323] In the case of a conspiracy to commit a crime with the element the use, attempted use, or threatened use of physical force against a person or property of another, the jury could consider the likelihood that the crime would have been carried out.[324]

CONCLUSION

Courts should not employ the categorical approach when determining whether an offense is a crime of violence under the residual clause of 18 U.S.C. § 924(c). Section 924(c) is distinguishable from statutes that require the categorical approach when determining whether an offense underlying a prior conviction is a crime of violence. Statutes that require the categorical approach—such as the ACCA and § 16—do so because a crime of violence applies to predicate offenses, which enhance the sentence and not just an element of the statute. In those statutes, if a defendant has committed a certain number of crimes of violence in the past, then a sentencing judge might increase the minimum and maximum possible sentence. However, whether an offense is a crime of violence is an element of § 924(c), not a sentencing enhancement. Section 924(c) also deals with a current charge rather than a prior conviction, and would thus avoid the inefficiency of mini-trials when using a fact-based approach to determine whether an offense constitutes a crime of violence. Therefore, courts should not employ the categorical approach when determining whether an offense is a crime of violence under § 924(c).

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321. *See* James v. United States, 550 U.S. 192, 203 (2007), *overruled by* Johnson v. United States, 135 S. Ct. 2551 (2015) (suggesting that the main risk of burglary arises from "the possibility that an innocent person might confront the burglar during the crime").

322. *See* Begay v. United States, 553 U.S. 137, 145 (2008), *abrogated by Johnson*, 135 S. Ct. 2551 (concluding that driving under the influence falls outside the scope of a crime of violence because it is not a "purposeful, violent, and aggressive" crime).

323. *See* Sykes v. United States, 564 U.S. 1, 8–9 (2011), *overruled by Johnson*, 135 S. Ct. 2551 (holding that vehicular flight constitutes a crime of violence because when a perpetrator flees in a police car, she creates a situation that is dangerous to others).

324. United States v. Turner, 501 F.3d 59, 67 (1st Cir. 2007).

Instead, courts should send facts to the jury to decide whether a certain offense is a crime of violence.[325]

Sending facts to the jury as opposed to applying the categorical approach also fixes the possible void for vagueness issue under the § 924(c) residual clause. The Court in *Johnson* deemed the ACCA residual clause, which is similar to the § 924(c) residual clause, unconstitutional.[326] The Court in *Dimaya* also deemed the § 16 residual clause, which is identical to the § 924(c) residual clause, unconstitutional.[327] Although § 924(c) is similar to § 924(e) and identical to § 16, sending facts to the jury as opposed to employing the categorical approach would fix the constitutional issues under § 924(c). The constitutional issues under the ACCA and § 16 arise because they deal with predicate, rather than current, offenses. Because § 924(c) is a stand-alone crime that applies to real-world facts, juries can assess those facts to determine whether the particular offense constitutes a crime of violence. Courts should construe statutes in a way that makes them constitutional, so sending the underlying facts to the jury to determine whether the offense is a crime of violence would relieve § 924(c) of the constitutional issues that § 924(e) and § 16 face under both *Johnson* and *Apprendi*.[328]

Because the categorical approach concerns instant offenses, rather than predicate offenses, it raises unconstitutional issues when applied under § 924(c). To avoid the issues presented by the categorical approach, courts should instead send facts to the jury to determine whether an offense is a crime of violence under § 924(c).

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325. *See supra* Section II.A (contending that § 924(c) is distinct from statutes that require the categorical approach, thus making the categorical approach unnecessary under § 924(c)).

326. *Johnson*, 135 S. Ct. at 2562–63.

327. Sessions v. Dimaya, 138 S. Ct. 1204, 1207–08 (2018).

328. *See supra* Section II.B (reasoning that sending facts to the jury avoids constitutional issues under § 924(c)).