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COMMENTS

FORMAL, CATEGORICAL, BUT INCOMPLETE: THE NEED FOR A NEW STANDARD IN EVALUATING PRIOR CONVICTIONS UNDER THE ARMED CAREER CRIMINAL ACT

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Legislative history indicates that the Armed Career Criminal Act (ACCA), which provides for increased sentences for offenders who have three qualifying prior convictions, was intended to be applied narrowly to the smallest possible subset of offenders qualifying as “career criminals.” Any prior conviction must satisfy both a substantive elements requirement and a sentencing requirement. Courts have established a standard for only one of these—the substantive elements requirement. In an attempt to narrow the scope of qualifying prior convictions and ensure national uniformity of application, the Supreme Court has provided a “formal categorical” approach to evaluating prior convictions. This test compares the substantive elements that were proven to a jury in a previous conviction to the elements of the generic offense. While this approach has resulted in greater uniformity in application of ACCA, in the two decades since its establishment, the formal categorical approach has failed to result in either the nationwide consistency or the narrowing of ACCA’s scope that Congress and the courts have intended. An equivalent test for the other requirement a prior conviction must meet—that the underlying conduct constitute a crime “punishable by imprisonment for a term exceeding one year”—would solve many of the problems currently plaguing ACCA. This standard should discount any sentencing enhancements previously applied to prior convictions and would allow consistent evaluation of convictions at the national level, independent of variance in state law. A single,

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nationally-uniform source of sentencing guidelines could come from national averages of the sentence ranges currently existing in the criminal codes of most states, or from the U.S. Sentencing Guidelines Manual. This uniform approach to the sentencing requirement would allow courts to apply ACCA's requirements on a national level consistently and with a narrow scope—reducing disproportionality in sentencing, increasing the deterrent effectiveness of ACCA, and accomplishing Congress's goal of selective incapacitation of the worst, most unrehabilitative of career criminals.

I. INTRODUCTION

Even simple, objective arithmetic becomes tainted with subjectivity when the exercise of discretion governs what is counted. An examination of the current application of the Armed Career Criminal Act,¹ which imposes an enhanced penalty for defendants having at least three prior qualifying convictions, reveals a number of troubling issues regarding the evaluation of such prior convictions. These issues include inconsistency in and among states as to which crimes qualify as predicate offenses and a generally overbroad interpretation of ACCA's predicate conviction requirements. Such problems result in disproportionate sentences,² categorization of non-violent or non-repeat offenders as "violent career criminals,"³ reduced effectiveness of ACCA as a deterrent device,⁴ and contravention of Congress's express intent that ACCA be read as narrowly as possible.⁵

Although Congress has narrowed the scope of ACCA, and although courts have attempted to construct a formal categorical approach to evaluating prior convictions in order to eliminate these problems, neither remedy has entirely solved the problem. In the two decades since its establishment, the formal categorical approach to ACCA's substantive elements requirement for prior convictions has failed to result in either the

¹ 18 U.S.C. § 924(e) (2006).

² See, e.g., *Ewing v. California*, 538 U.S. 11, 19 (2003) (affirming a sentence of twenty-five-years-to-life imprisonment for theft of golf clubs).

³ See, e.g., *United States v. Sperberg*, 432 F.3d 706 (7th Cir. 2005) (finding defendant to have a criminal "career" consisting of theft of lobster tails from a grocery store, verbal threat to a security guard, and convictions for drunk driving); see also Beverly G. Dyer, *Revising Criminal History: Model Sentencing Guidelines §§ 4.1-4.2*, 18 FED. SENT'G. REP. 373, 376 (June 2006) ("[ACCA] has been used to sweep in far too many crimes that present a relatively remote risk of the use of physical force or physical injury.").

⁴ Stephen R. Sady, *ACCA Lessons: The Armed Career Criminal Act—What's Wrong with "Three Strikes, You're Out"?*, 7 FED. SENT'G. REP. 69, 70 (1994) ("The [ACCA] can strike like a lightning bolt, rather than serve as a rational deterrent.").

⁵ See *infra* notes 32-39 and accompanying text (discussing legislative history of ACCA).

nationwide consistency or the reduction of ACCA's applicability that Congress and the courts have intended.

Some courts have implied these continued problems indicate that ACCA as currently written is inherently flawed and requires legislative correction.⁶ However, ACCA already includes a two-pronged test for the evaluation of prior convictions: any prior conviction must satisfy both a substantive elements requirement and a sentencing requirement. Courts have established a standard for only one of the two prongs—the substantive elements requirement.⁷

A uniform, generic standard for application of the sentencing requirement would solve many of the problems currently plaguing ACCA. This standard should discount any sentencing enhancements previously applied to prior convictions and should allow consistent evaluation of convictions at the national level, independent of variance in state law.

Unlike the formal categorical approach to the substantive elements requirement, which takes its generic definitions of offenses from the common law, a formal approach to the sentencing requirement requires a uniform source of sentencing guidelines, as no common law sentences exist for most crimes.⁸ This single, uniform source could come from national averages of the sentence ranges currently existing in the criminal codes of most states, or from the U.S. Sentencing Guidelines Manual.⁹ In either case, this source would allow courts to apply ACCA's requirements on a national level consistently and with a narrow scope—reducing disproportionality in sentencing, increasing the deterrent effectiveness of ACCA, and accomplishing Congress's goal of selective incapacitation of the worst, most unrehabilitative of career criminals.

II. BACKGROUND

First enacted in 1984, the Armed Career Criminal Act subjects individuals convicted of illegal possession of a firearm in violation of 18 U.S.C. § 922(g)¹⁰ and having three or more qualifying prior convictions to a minimum sentence of fifteen years and a maximum sentence of life imprisonment. Congress modified the scope of qualifying convictions by

⁶ *United States v. Duval*, 496 F.3d 64, 84 (1st Cir. 2007).

⁷ See *infra* notes 46-58 and accompanying text.

⁸ See George Fisher, *Plea Bargaining's Triumph*, 109 YALE L.J. 857, 874 & n.41 (2000) (describing Massachusetts law in the early nineteenth century: "Excepting only those very serious crimes that carried mandatory life or death sentences, none of the typical common-law offenses called for a minimum sentence").

⁹ U.S. SENTENCING GUIDELINES MANUAL § 1 (2007).

¹⁰ 18 U.S.C. § 922(g) (2006) (prohibiting convicted felons from possessing a firearm).

amending ACCA in 1986 and 1988.¹¹ Additionally, while ACCA originally made such sentences mandatory, in *United States v. Booker* the Supreme Court declared mandatory minimum sentences unconstitutional under the Sixth Amendment, making the Federal Sentencing Guidelines advisory.¹²

In its current form, ACCA provides in relevant part:

In the case of a person who violates section 922(g) of this title and has three previous convictions by any court referred to in section 922(g)(1) of this title for a violent felony or a serious drug offense, or both, committed on occasions different from one another, such person shall be fined under this title and imprisoned not less than fifteen years, and, notwithstanding any other provision of law, the court shall not suspend the sentence of, or grant a probationary sentence to, such person with respect to the conviction under section 922(g).¹³

ACCA defines “violent felony” as a “crime punishable by imprisonment for a term exceeding one year, or any act of juvenile delinquency involving the use or carrying of a firearm, knife, or destructive device that would be punishable by imprisonment for such term if committed by an adult[.]”¹⁴ Qualifying crimes are burglary, arson, extortion, or any crime involving “conduct that presents a serious potential risk of physical injury to another” or that “has as an element the use, attempted use, or threatened use of physical force against the person of another[.]”¹⁵

Like other statutes targeting recidivists, ACCA has come under fire from critics challenging the constitutionality of the use of prior convictions

¹¹ The 1986 amendment, enacted as part of the Career Criminal Amendment Act of 1986, Pub. L. No. 99-308, 100 Stat. 459 (Supp. IV 1986) expands the range of qualifying convictions to include any “violent felony or serious drug offense.” The 1988 amendment, part of the Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690 § 7056, 102 Stat. 4181, 4462 (1988), restricts the scope of qualifying prior convictions by requiring that each of the three prior convictions be based on “distinct” criminal episodes. Derrick D. Crago, Note, *The Problem of Counting to Three Under the Armed Career Criminal Act*, 41 CASE W. RES. L. REV. 1179, 1182 (1991). The latter amendment inserted the phrase that the three convictions must have been “committed on occasions different from one another.” *Id.* at 1185. For discussion of the significance of the 1988 narrowing of the range of qualifying convictions, see *infra* note 37 and accompanying text.

¹² *United States v. Booker*, 543 U.S. 220, 245-46 (2005) (finding that “the Sixth Amendment is violated by the imposition of an enhanced sentence under the United States Sentencing Guidelines based on the sentencing judge’s determination of a fact (other than a prior conviction) that was not found by the jury or admitted by the defendant” and such mandatory sentencing provisions of the Sentencing Reform Act of 1984, as amended, 18 U.S.C. § 3551 (1984), are “effectively advisory.” (quoting Petition for Writ of Certiorari, *Booker*, 543 U.S. 220 (No. 04-104), pt. I)).

¹³ 18 U.S.C. § 924(e) (2000).

¹⁴ *Id.* § 924(e)(2)(B).

¹⁵ *Id.*

in determining acceptable punishment for later convictions.¹⁶ Despite such criticisms, however, courts have uniformly held that ACCA complies with constitutional prohibitions against double jeopardy, due process, cruel and unusual punishment, and disproportionality.¹⁷ The critical component of the argument for the constitutionality of ACCA and similar recidivism statutes is that the sentencing enhancements qualify as a “sentencing factor” rather than an element of a separate substantive offense, which would have to be proven before a jury.¹⁸

Even assuming ACCA satisfies all constitutional requirements, current application of this statute has led to results inconsistent with the congressional intent behind its enactment. The purpose of ACCA was to provide enhanced penalties for recidivism, with habitual (“career”) criminals who had proven resistant to all previous efforts to curb their repeat offending the intended targets.¹⁹ Evidence that “a small number of repeat offenders commit a highly disproportionate amount of the violent crime plaguing America today” served as a primary motivation for the legislation.²⁰ The report of the Senate Judiciary Committee emphasized the narrow application of ACCA to only “the hard core of career criminals[,]” stating that only a “very small portion” of convictions for the enumerated

¹⁶ Double jeopardy concerns arise out of the fear that recidivism statutes, such as ACCA, punish a defendant once when she is actually convicted of the crime, and again for the same crime when she is convicted of a subsequent crime. See generally Nathan H. Seltzer, Note, *When the Tail Wags the Dog: The Collision Course Between Recidivism Statutes and the Double Jeopardy Clause*, 83 B.U. L. REV. 921 (2004) (focusing on California’s “three strikes” law, addressing disproportionality of sentencing, Eighth Amendment cruel and unusual punishment concerns, and double jeopardy). However, despite these concerns, courts have consistently upheld the constitutionality of recidivism-enhanced-sentencing statutes. See *infra* notes 24-26.

¹⁷ See *United States v. Reynolds*, 215 F.3d 1210, 1214 (11th Cir. 2000), *cert. denied*, 531 U.S. 1000 (2000) (“[E]very circuit to consider the issue has held that [ACCA’s mandatory minimum sentence] is neither disproportionate . . . nor cruel and unusual punishment.”); *United States v. Conner*, 886 F.2d 984, 985 (8th Cir. 1989) (finding that ACCA does not violate Double Jeopardy Clause), *reh’g denied*, No. 89-1541SI, 1989 U.S. App. LEXIS 16482 (8th Cir. Nov. 1, 1989); *United States v. Hawkins*, 811 F.2d 210, 217 (3d Cir. 1987) (finding that ACCA does not violate Equal Protection Clause), *cert. denied*, 484 U.S. 833 (1987); *United States v. Greene*, 810 F.2d 999, 1000 (11th Cir. 1986) (finding that ACCA does not constitute an ex post facto law), *post-conviction proceeding*, 880 F.2d 1299 (11th Cir. 1989), *reh’g denied*, 888 F.2d 1398 (11th Cir. 1989), *cert. denied*, 494 U.S. 1018 (1990).

¹⁸ See *Almendarez-Torres v. United States*, 523 U.S. 224, 236 (1998) (finding recidivism to be a sentencing factor rather than an element of a separate offense); see also *In re Winship*, 397 U.S. 358, 364 (1970) (“[T]he Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged.”).

¹⁹ See *infra* discussion accompanying notes 32-39.

²⁰ S. REP. NO. 97-585, at 3, 20 (1982).

offenses would receive enhanced sentences under ACCA and stressing that the bill “focus[ed] on the very worst robberies, by the very worst offenders with the worst records.”²¹

However, despite these many manifestations of congressional intent with respect to the applicability of ACCA, courts continue to interpret ACCA’s requirements for prior convictions broadly, resulting in punishments that seem absurd at best and unconstitutionally disproportionate or in violation of principles of fundamental fairness at worst.²² Furthermore, despite the 1988 amendment narrowing the range of applicable prior convictions, critics of ACCA and its current application continue to be perplexed by the broad range of criminal convictions that courts declare “violent felonies,” and by the vastly increased punishments arising as a result of such classifications.²³

III. DISCUSSION

A. EMPHASIS ON A “LAST-CHANCE” APPROACH

Based on empirical data regarding the prediction of recidivism and the efficacy of rehabilitation, the label of career criminal should be reserved for the smallest possible subset of offenders. In addition to providing the best chance that ACCA will achieve its ultimate goal of reducing recidivism, a narrow interpretation calms fears of constitutionality regarding the proportionality of sentence to crime and is in line with Congress’s manifest intention.

1. Recidivism as a Basis for Increased Sentences

Consideration of a defendant’s prior criminal history has long been a part of American jurisprudence, “dat[ing] back to colonial times.”²⁴ Today, recidivism statutes exist in all fifty states.²⁵ The Supreme Court has held that such statutes do not violate the constitutional prohibition against double jeopardy, drawing the distinction between heightened penalties for the most recent offense based upon the offender’s repeated criminal conduct (which

²¹ *Id.* at 62-63.

²² See *infra* note 43 and accompanying discussion and examples.

²³ See generally *United States v. Balascsak*, 873 F.2d 673 (3d Cir. 1989) (adopting the approach that the three prior convictions should be required to have originated out of separate, distinct criminal episodes, and, additionally, that each conviction and sentence must have been delivered and served prior to the conduct leading to each subsequent conviction, in an attempt to further narrow the class of criminals whose prior convictions qualify them for recidivism sentencing enhancements under ACCA).

²⁴ *Parke v. Raley*, 506 U.S. 20, 26 (1992).

²⁵ *Parke*, 506 U.S. at 26.

is how the Court views recidivism sentencing enhancements) and additional punishment for the previous crime (which the Court rejects as the motivation for recidivism sentence enhancements).²⁶ Nonetheless, critics continue to question the constitutionality of such provisions. The results reached under a broad interpretation of ACCA call into question not only whether Congress's intent is served, but also whether such broad application effectively serves any theory of punishment.

Critics argue that the disproportionality of the recidivism-enhanced sentence to the instant crime is impermissibly large, meaning not only that the instant crime on its own does not justify such a large punishment, but also that the court is re-punishing the defendant for prior conduct. Further evidence of double jeopardy violations is that sentencing enhancements, like those available under ACCA, can often seem to "substantially overshadow[] the underlying punishment."²⁷

These concerns emphasize the need for rigorous scrutiny of whether specific prior convictions qualify for sentence enhancement purposes. A narrow construction of qualifying convictions reduces the likelihood that courts will routinely aggregate past convictions and reach absurd results.²⁸ If courts do not utilize aggregations of relatively minor convictions to achieve sentences that are grossly in excess of the maximum sentence for those minor convictions themselves, then criminals will be more likely to have the full opportunity for rehabilitation. As a result, ACCA will be viewed less as fundamentally unfair and random, and more as an effective deterrent.

²⁶ *Witte v. United States*, 515 U.S. 389, 400 (1995); see *Graham v. West Virginia*, 224 U.S. 616, 629 (1912) (explaining that the rationale for this distinction is that recidivism "does not relate to the commission of the offense, but goes to the punishment only, and therefore . . . may be subsequently decided."); see also Seltzer, *supra* note 16, at 933 (discussing the Court's analysis in *Witte*).

²⁷ Seltzer, *supra* note 16, at 935-36 (citing *Ewing v. California*, 538 U.S. 11 (2003), as an example). For a discussion of disproportionate results, see *infra* notes 68-87 and accompanying text; see also Seltzer, *supra* note 16, at 946 (arguing that no clear rationale exists for the continued assertion that sentencing enhancements for recidivism do not violate double jeopardy, as the distinction between a sentencing factor and a separate offense is unclear). While some recidivism statutes undoubtedly do not violate double jeopardy, at some point, "the underlying conviction cannot bear the weight of the sentence." *Id.*

²⁸ See *infra* notes 68-87 and accompanying text (discussing how prior convictions for minor offenses being used to enhance sentences to ACCA range results in sentences that seem fundamentally unfair, both in terms of the underlying conduct of the instant offense and when considering both the instant offense and the recidivism factor).

2. *Categorization of Defendants as Career Criminals: A Narrow Approach*

Evidence suggests that enhanced sentences for recidivism may in general decrease its overall occurrence.²⁹ This is logical, given the widely accepted axiom that a relatively small group of individuals commit a disproportionate share of crimes.³⁰ A problem arises, however, when courts apply recidivism sentence enhancements to a broader spectrum of criminals than is necessary to achieve the goals of those enhancements. Furthermore, an overly broad application of ACCA's enhancements has led to inefficacious results.³¹

In addition to evidence that a broad interpretation of ACCA reduces its efficacy at deterring recidivism, legislative history suggests that the authors of ACCA intended for only the most hardened criminals to fall under its enhancement provisions. Influenced by the recommendation of the National Commission on Criminal Justice Standards and Goals of the "need to incarcerate unrehabilitative repeat violent felons for lengthy periods,"³² and by Professor M. Wolfgang's study of repeat juvenile offenders,³³ "[ACCA] was intended to supplement the States' law enforcement efforts against 'career' criminals."³⁴

Congress's intent to deter repeat offenders and selectively incapacitate only those few who remained undeterred and immune to rehabilitative efforts is clear from legislators' descriptions and justifications for the bill. The underlying rationale was that a habitual criminal statute serves:

²⁹ U.S. SENTENCING COMM'N, MEASURING RECIDIVISM: THE CRIMINAL HISTORY COMPUTATION OF THE FEDERAL SENTENCING GUIDELINES 14 (May 2004), *available at* www.ussc.gov/publicat/Recidivism_General.pdf [hereinafter MEASURING RECIDIVISM] (discussing the relationship between sentence length and recidivism) ("The overall trend shows that recidivism has an 'inverted U' shape. Recidivism is comparatively low for the lowest sentences . . . peaks with mid-length sentences . . . then drops for the longest sentences.").

³⁰ See MARVIN E. WOLFGANG ET AL., DELINQUENCY IN A BIRTH COHORT 88 (1972) (finding that, using a sample of 10,000 young males born in Philadelphia in 1945 and examining the criminal conduct committed by that sample, a very small subset (18%) of that group committed over half (51.9%) of the group's criminal offenses); *see also supra* note 20 and accompanying text.

³¹ Sentencing categories under the U.S. Sentencing Guidelines show that sentences received under ACCA are of a magnitude typically requiring much higher levels of past recidivism for non-ACCA crimes. MEASURING RECIDIVISM, *supra* note 29, at 37. In other words, the recidivism risk for the category containing ACCA is significantly lower than for other crimes in the same category, suggesting "that assigning offenders to criminal history category VI, under [ACCA], is for reasons other than their recidivism risk." *Id.*

³² 134 CONG. REC. 15807 (1988).

³³ WOLFGANG ET AL., *supra* note 30; *see also* Sady, *supra* note 4, at 69 (noting that sponsors of the bill were influenced by the Wolfgang study).

³⁴ Taylor v. United States, 495 U.S. 575, 581 (1990).

[A]s a warning to first time offenders and provide[s] them with an opportunity to reform [S]anctions become increasingly severe . . . not so much that [the] defendant has sinned more than once as that he is deemed incorrigible when he persists in violations of the law after conviction of previous infractions.³⁵

Representative Wyden stated at the time, “We simply must put a stop to the career [criminals] [W]e all know that a slap on the wrist won’t be enough to deter these criminals.”³⁶ Statements made during the course of approving the 1988 amendment, which added the requirement that prior convictions carry sentences of greater than one year, further emphasize the desired scope of ACCA as applicable only to those criminals for whom rehabilitation had previously proven futile.³⁷ Finally, the title of ACCA itself can be used as an indicator of congressional intent.³⁸

Legislative history illustrates the careful deliberation Congress undertook through the drafting and revision of ACCA in order to ensure a narrow interpretation of qualifying conduct. A desire to rehabilitate and defer where possible, and to incapacitate for long periods without the possibility for parole only in the direst of circumstances, is apparent from congressional hearings and statements. Furthermore, studies show this approach of selective incapacitation may be the best approach to dealing with true career criminals.³⁹ Yet overly-broad applications of ACCA by courts continue to foster doubt as to its propriety, effectiveness, and constitutionality, suggesting the need for a clearer standard.

B. CONTINUED INCONSISTENCY AND DOUBT IN APPLICATION

In evaluating prior convictions to determine their eligibility for use under ACCA—that is, whether such crime constitutes a “violent felony”⁴⁰—courts look to two requirements laid out by the statute. First, the crime must have been one of several enumerated offenses, one involving

³⁵ Crago, *supra* note 11, at 1194 (citations omitted).

³⁶ Jill C. Rafaloff, Note, *The Armed Career Criminal Act: Sentence Enhancement Statute or New Offense?*, 56 *FORDHAM L. REV.* 1085, 1091 n.42 (1988) (quoting 130 *CONG. REC.* H101551 (daily ed. Oct. 1, 1984)).

³⁷ 134 *Cong. Rec.* 15807 (“[ACCA reflects] the need to incarcerate unrehabilitative repeat violent felons for lengthy periods It is my view that the only way to deal with such hardened criminals is with stiff prison terms with no prospect for parole.”).

³⁸ See *Almendarez-Torres v. United States*, 523 U.S. 224, 234 (1998) (“‘[T]he title of a statute and the heading of a section’ are ‘tools available for the resolution of a doubt’ about the meaning of a statute.” (quoting *Trainmen v. Baltimore & Ohio R. Co.*, 331 U.S. 519, 528-29 (1947))).

³⁹ See generally Note, *Selective Incapacitation: Reducing Crime Through Predictions of Recidivism*, 96 *HARV. L. REV.* 511 (1982) (discussing various studies evaluating the effectiveness of selective incapacitation).

⁴⁰ Though not discussed herein, a prior conviction for a “serious drug offense” would also qualify. 18 U.S.C. § 924(e)(1) (2006).

“conduct that presents a serious potential risk of physical injury to another[.]” or one that “has as an element the use, attempted use, or threatened use of physical force against the person of another”⁴¹ (the “substantive element requirement”). Second, the prior conviction must have been for a “crime punishable by imprisonment for a term exceeding one year, or any act of juvenile delinquency involving the use or carrying of a firearm, knife, or destructive device that would be punishable by imprisonment for such term if committed by an adult”⁴² (the “sentencing requirement”).

In the two decades since ACCA’s enactment, courts have found an extremely broad range of seemingly minor offenses⁴³ to constitute violent felonies under these two requirements, despite clear congressional intent that ACCA be reserved for only the most hardened career criminals.⁴⁴ In response to the realization that the lack of a bright line standard was resulting in over-application and inconsistencies among states, the Supreme Court declared that a “formal categorical approach” must be used in evaluating the substantive element requirement for each prior conviction.⁴⁵ However, to reduce the disproportionality of punishment to conduct, eliminate inconsistencies within and among states, and achieve Congress’s intended goal of selective incapacitation of unrehabilitative career criminals, a similar standard must be adopted for the evaluation of the sentencing requirement as well.

1. Taylor’s Formal Categorical Approach

The formal categorical approach to defining the elements of a prior crime for which a defendant was convicted arose out of a need to avoid two dilemmas: Sixth Amendment concerns and inconsistencies in ACCA application among states.

In essence, the *Taylor* formal categorical approach involves evaluating prior convictions in terms of the generic offense and analyzing whether the

⁴¹ *Id.* § 924(e)(2)(B)(i-ii).

⁴² *Id.* § 924(e)(2)(B).

⁴³ For a discussion of overly broad definitions used to “sweep in far too many crimes that present a relatively remote risk of the use of physical force or physical injury,” see Dyer, *supra* note 3, at 376. Crimes that have qualified include tampering with a motor vehicle (United States v. Bockes, 447 F.3d 1090, 1093 (8th Cir. 2006)); fleeing and eluding (United States v. Richardson, 437 F.3d 550, 556 (6th Cir. 2006)); operating a motor vehicle without the owner’s consent (United States v. Lindquist, 421 F.3d 751, 754 (8th Cir. 2005)); failure to stop for a blue light (United States v. James, 337 F.3d 387, 390-91 (4th Cir. 2003)); and failure to return to a halfway house (United States v. Bryant, 310 F.3d 550, 553 (7th Cir. 2002)). Dyer, *supra* note 3, at 379 n.19.

⁴⁴ See *supra* text accompanying notes 32-39.

⁴⁵ *Taylor v. United States*, 495 U.S. 575, 600 (1990).

elements of such generic offense exist under the particular state law definition of that offense, rather than looking to the actual conduct of the offender.⁴⁶ As the *Taylor* court said, “[ACCA] mandates a formal categorical approach, looking only to the statutory definitions of the prior offenses, and not to the particular facts underlying those convictions.”⁴⁷ If the state definition is more broad than the generic offense (meaning that not all the elements of the generic offense were necessarily met), or if the state definition criminalizes conduct that would not constitute a part of a qualifying generic offense (unless the facts available for the sentencing court’s evaluation conclusively established that all elements of the qualifying offense were met), the prior conviction may not be counted as one of three qualifying prior convictions under ACCA.⁴⁸

The formal categorical approach satisfies the Sixth Amendment’s guarantee of the right to a jury trial and the Fourteenth Amendment’s right to due process because a sentencing court does not evaluate the prior *conduct* of an offender in making its recidivism enhancement determinations, but rather determines whether all the elements of the generic offense are present in the state statutory definition of the previous crime.⁴⁹ By doing so, the sentencing court ensures that all of the elements used to define that offense under ACCA have already been proven to a jury,⁵⁰ preventing unconstitutional violations of due process and jury trial rights that would occur if the court considered facts of the prior conviction that were not proven to a jury beyond a reasonable doubt.⁵¹

The formal categorical approach also addresses the problem of inconsistency in ACCA application among states due to definitional differences in crimes having the same or similar names but varied requirements. For example, “Although the ACCA includes ‘burglary’ among the enumerated violent felonies, *Taylor* nonetheless established that

⁴⁶ *Taylor*, 495 U.S. at 599-602.

⁴⁷ *Id.* at 560.

⁴⁸ See *United States v. Corona-Sanchez*, 291 F.3d 1201, 1203-04 (9th Cir. 2001); see also *United States v. Rivera-Sanchez*, 247 F.3d 905, 908 (9th Cir. 2001) (evaluating the text of a statute to determine whether a conviction for a particular crime qualified as a predicate offense); *United States v. Casarez-Bravo*, 181 F.3d 1074, 1077 (9th Cir. 1999) (explaining that a court must examine the statutory definition of a crime to determine its elements).

⁴⁹ *Taylor*, 495 U.S. at 599.

⁵⁰ See Daniel Doeschner, Note, *A Narrowing of the Prior Conviction Exception*, 71 BROOK. L. REV. 1333, 1338-39 (2006).

⁵¹ See *In re Winship*, 397 U.S. 358, 364 (1970) (“[T]he Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged.”); see also *McMillan v. Pennsylvania*, 477 U.S. 79, 85-86 (1986) (looking to legislative history to determine whether possession of a firearm was intended to be a sentencing factor that a subsequent court could permissibly consider without violating due process).

not all state burglary convictions should be considered predicate felonies under that Act,”⁵² as not all state definitions of “burglary” conform to the accepted generic definition of that crime.⁵³ Courts have generally considered the generic definition of burglary to have the following elements: an unlawful or privileged entry into, or remaining in, a building or other structure, with intent to commit a crime.⁵⁴ Using this generic definition avoids a situation in which identical conduct would be classified as a qualifying predicate offense in one state, but not in another. Using only state law definitions, theft from a vending machine would qualify as a predicate burglary offense in Texas, but not in California.⁵⁵ However, in Michigan, a predicate burglary offense would never occur, as that state does not define any crime as “burglary.”⁵⁶

Such reliance on state law definitions would create obvious inconsistencies in the application of ACCA not only among circuits, but also *within* them. For that reason, the *Taylor* Court noted that “absent plain indication to the contrary, federal laws are not to be construed so that their application is dependent on state law.”⁵⁷ However, the Court’s approach fails to solve either of the problems involved in using state definitions, despite the Court’s insistence that a generic approach not dependent on state law be adopted for analyzing whether prior convictions qualify as one of the three predicate offenses under ACCA, and despite the Court’s attempt to define a formal categorical approach to accomplish this.

This insufficiency arises because the formal categorical approach suggested by the *Taylor* Court only addresses one of the two prongs involved in an ACCA prior conviction analysis—the substantive elements requirement. The *Taylor* Court neglected to consider the other component, the sentencing requirement. As a result, courts are left in continued reliance not only on state law, but also on the discretion of previous judges and

⁵² *United States v. Tighe*, 266 F.3d 1187, 1196 (9th Cir. 2001).

⁵³ *United States v. Alvarez*, 972 F.2d 1000, 1005 (9th Cir. 1992).

⁵⁴ *Taylor*, 495 U.S. at 598; *see also Tighe*, 266 F.3d at 1196 (adopting *Taylor*’s definition of generic burglary).

⁵⁵ *Taylor*, 495 U.S. at 591. *Compare* TEX. PENAL CODE ANN. §§ 30.01-30.05 (1989 and Supp. 1990) (including theft from coin-operated machines and receptacles), *with* CAL. PENAL CODE ANN. § 459 (West Supp. 1990) (not including theft from coin-operated machines in its definition of burglary).

⁵⁶ *Taylor*, 495 U.S. at 591; *see* MICH. COMP. LAWS § 750.110 (1979).

⁵⁷ *Taylor*, 495 U.S. at 591-92 (“[I]n the absence of a plain indication of an intent to incorporate diverse state laws into a federal criminal statute, the meaning of the federal statute should not be dependent on state law.” (quoting *United States v. Turley*, 352 U.S. 407, 411 (1957))).

prosecutors,⁵⁸ in determining whether a prior conviction qualifies as an ACCA predicate offense. This reliance has resulted in the continued misapplication of previous convictions, inconsistencies among and within the circuits, and has failed to ease constitutional concerns regarding disproportionality, the right to trial by jury, and double jeopardy.

2. Improper Categorization of Prior Convictions for Minor Offenses as Violent Felonies

Although federal sentencing courts do not consider state law definitions of “misdemeanor” and “felony” in determining whether a prior conviction constitutes a “violent felony,”⁵⁹ relying on the formal categorical approach to the substantive elements requirement fails to prevent categorization of minor offenses as violent felonies, resulting in an over-application of the ACCA recidivist sentencing enhancement. Of particular concern are those crimes that could conceivably be tried as either felonies or as misdemeanors, depending on the context of the crime and the choices of the prosecution. In California, such crimes are known as “wobblers” and may be charged as either misdemeanors or felonies at the discretion of the prosecutor, or may be reduced from felony to misdemeanor by the trial court specifically in an effort to avoid California’s “three strikes” law.⁶⁰

A problem arises when a recidivism statute elevates some of these wobblers from the level of misdemeanor to that of felony, with similarly elevated prison sentences, based on the defendant’s prior criminal record.⁶¹ Accordingly, a crime that ordinarily would be punishable by a term of less than one year—therefore escaping being counted under ACCA—may be elevated to a much longer prison term due solely to the defendant’s prior criminal history.⁶² As a result, the crime that would ordinarily be ineligible becomes eligible for use in ACCA enhancement simply because that prior

⁵⁸ In the case of California’s wobblers, a judge or prosecutor can decide whether a particular offense is charged as a felony or as a misdemeanor. See *infra* note 60 and accompanying text. Plea bargaining situations also illustrate this discretion, such as in *United States v. Reeves*, where one of the defendant’s three prior violent felony convictions was classified as a felony rather than a misdemeanor at trial because the plea agreement had provided for such classification. No. CR-05-47-B-W, 2006 U.S. Dist. LEXIS 45721, at *10 (D. Me. July 5, 2006).

⁵⁹ *United States v. Corona-Sanchez*, 291 F.3d 1201, 1210 (9th Cir. 2001) (explaining that a court must look to whether a particular crime meets the definition of “violent felony” under federal sentencing law rather than relying on the state’s label of that crime).

⁶⁰ *Ewing v. California*, 538 U.S. 11, 16-17 (2003) (citing CAL. PENAL CODE ANN. § 17(b)(5), (1) (1999)).

⁶¹ *Id.*

⁶² See Seltzer, *supra* note 16, at 924; see also *Ewing*, 538 U.S. at 16-17 (discussing wobblers).

sentence itself has been enhanced beyond one year due to recidivism. The final effect is that a string of minor offenses is aggregated into a single criminal unit that can be classified as a “violent felony.”⁶³

Furthermore, although the formal categorical approach to the substantive elements requirement does assist in reducing interstate inconsistencies, the same conduct in different states still often leads to a different outcome under ACCA because of sentencing variations among states for the same offense. One such inconsistency surrounds whether a driving under the influence (DUI) conviction can constitute a “violent felony” under ACCA. The Supreme Court in *Leocal v. Ashcroft* found that a DUI does not constitute a violent felony.⁶⁴ Although in *Leocal* the Court evaluated the definition of violent felony for purposes of a different statute, the Immigration and Nationality Act, that statute and ACCA share an emphasis on requiring a risk of “the use of physical force,” suggesting a level of active, affirmative awareness or intent that does not necessarily accompany the act of driving while intoxicated.⁶⁵

Nevertheless, courts are divided as to whether a DUI offense can constitute one of three prior convictions for violent felonies under ACCA.⁶⁶ This inconsistency has persisted even with the introduction of the formal categorical approach to the substantive elements requirement,⁶⁷ suggesting

⁶³ For example, in *Lockyer v. Andrade*, 538 U.S. 63, 66 (2003), two petty thefts of videos from a Kmart store qualified as felonies due to the defendant’s prior burglary convictions, even though each theft totaled less than \$100. When charged as felonies, these two theft incidents violated California’s three strikes recidivism statute, counting as two of the required three offenses. *Id.* at 67-68. The defendant was sentenced to life in prison without the possibility of parole for fifty years as punishment for two petty thefts occurring within a two-week period, simply because of recidivism sentencing enhancements. *Id.* at 66. Although *Lockyer* concerns only the California three strikes law, a similar situation could arise under ACCA based on the same set of facts and could result in a similarly disproportionate sentence.

⁶⁴ *Leocal v. Ashcroft*, 543 U.S. 1, 11 (2004) (“The ordinary meaning of [violent felony], combined with [the statute]’s emphasis on the use of physical force against another person (or the risk of having to use such force in committing a crime), suggests a category of violent, active crimes that cannot be said naturally to include DUI offenses.”).

⁶⁵ *Id.* (emphasis added). Compare *id.* with 18 U.S.C. § 924(e)(2)(B)(i) (2006) (requiring “as an element the use, attempted use, or threatened use of physical force against the person of another”) (emphasis added).

⁶⁶ See *United States v. McCall*, 439 F.3d 967, 972 (8th Cir. 2006) (finding that Missouri’s definition of DUI does not constitute a violent felony). *Contra* *United States v. Sperberg*, 432 F.3d 706, 708 (7th Cir. 2005) (finding that while Wisconsin treats a DUI offense as a misdemeanor, a DUI conviction with a sentence enhanced by recidivism for previous DUI convictions does qualify as a prior conviction for a violent felony under ACCA).

⁶⁷ *Taylor* was decided in 1990. *Taylor v. United States*, 495 U.S. 575 (1990). The DUI debate illustrated by *McCall*, *Sperberg*, and *Leocal*, discussed *supra* notes 64-66, for

that courts would benefit from additional guidance in the form of a sentencing requirement standard.

Enacted with an eye toward increasing consistency on a national level, such a rule would provide courts with an objective, empirical factor to consider in addition to the subjective consideration of whether the elements of the particular offense involve a risk of physical violence and whether, or how much, intent is required on the part of the offender in relation to that violence. In cases such as DUI convictions, where courts' confusion has illustrated that even a formal categorical approach fails to yield a definitive result, a uniform, consistent sentencing standard that examines whether the predicate offense had a sentence of greater than or less than one year maximum imprisonment would provide a second, objective factor for decision-making.

Another compelling argument for the adoption of a sentencing requirement standard is to eliminate the use of previous recidivism-enhanced sentences in the consideration of whether prior convictions qualify as predicate offenses. The resulting doubly-enhanced sentences are often so disproportionate to the actual conduct involved in the instant offense as to appear fundamentally unfair, if not outright unconstitutional. For example, in *United States v. Sperberg*, one of the defendant's three prior convictions qualifying him for sentencing enhancement under ACCA, a DUI conviction, was only countable because it had previously been enhanced by a state recidivism statute.⁶⁸ As a result, a string of misdemeanor DUI offenses combined to form a violent felony due to recidivism, eventually leading to Sperberg being labeled a career criminal and sentenced for nearly twice the maximum amount of time he otherwise could have received.⁶⁹ Sperberg's commission of a number of state misdemeanors, coupled with his attempted theft of lobsters from a local grocery store,⁷⁰ seems to fall far short of making him one of "the most repetitive and violent and dangerous offenders" in America.⁷¹

example, took place in 2003-2005—and has not yet received a definitive resolution from the Supreme Court.

⁶⁸ *Sperberg*, 432 F.3d at 708.

⁶⁹ *Id.* at 707 (stating that the maximum sentence for a felon possessing a firearm is 120 months, but that because of his three previous "violent felony" convictions, Sperberg was sentenced to 210 months).

⁷⁰ Sperberg's other conviction was for verbally threatening a security guard while attempting to steal lobster tails from a grocery store. *Id.* It should be noted that the state court judge imposed a very lenient penalty for this conviction, as "Sperberg had been too drunk and high on other drugs to follow through" with his threats. *Id.* at 708.

⁷¹ *United States v. Balascsak*, 873 F.2d 673, 680 (3d Cir. 1989) ("The [ACCA] was so narrowly drawn to apply to only the most repetitive and violent and dangerous offender, that

Another example of a previous misdemeanor offense acquiring the label of violent felony because of a state sentencing enhancement appears in *United States v. Duval*.⁷² In that case, the First Circuit found Duval's prior conviction for simple assault and battery under Maine law constituted a violent felony under ACCA,⁷³ even though such crime ordinarily fails ACCA's test that a violent felony must be "punishable by imprisonment for a term exceeding one year."⁷⁴ Because Duval had previously been convicted of two misdemeanor assaults, his maximum sentence for the third assault was increased from less than one year to a maximum of five years,⁷⁵ bringing it within the purview of ACCA's sentencing requirement for prior convictions.

The *Duval* court acknowledged that allowing the consideration of recidivism sentencing enhancements could result in qualification as a career criminal for having three prior "violent felony" convictions even if the defendant had only been convicted of two felonies and a misdemeanor offense.⁷⁶ The court went so far as to use "assault" as its example of a misdemeanor, the very crime it goes on to label a "violent felony" in Duval's case.⁷⁷ Not only did the court seem content with labeling Duval's misdemeanor offense a violent felony, it also acknowledged that such a determination goes against the intended purpose of ACCA, that is, that "ACCA should be applied only to hardened criminals . . . who have committed three (rather than two) crimes whose nature is so serious that they are punishable as felonies."⁷⁸ Further, the court acknowledged that this final decision, effectively finding that Duval was convicted of "recidivist assault" rather than "simple assault," relied on reasoning that, while adopted by the Fourth, Fifth, and Seventh Circuits, created a tension between two Supreme Court decisions that would otherwise not exist.⁷⁹ This tension carves a seemingly irreconcilable rift between *Apprendi v. New Jersey*, which states that elements of an offense must be pleaded and proven to a

a life sentence would be justified in any case that could reasonably be expected to be prosecuted under the [ACCA]." (quoting S. REP. NO. 97-585, at 3 (1982))).

⁷² *United States v. Duval*, 496 F.3d 64 (1st Cir. 2007).

⁷³ *Id.* at 83.

⁷⁴ Under ME. REV. STAT. ANN. tit. 17-A, § 1252(2) (2007), simple assault and battery is a "Class D" misdemeanor, punishable by up to one year in prison. However, under Maine's recidivism offender statute, § 1252 (4-A), Duval's misdemeanor was elevated to a "Class C" offense, increasing the maximum sentence for the same conduct to five years in prison. *Duval*, 496 F.3d at 80-81.

⁷⁵ *Id.* at 81-82.

⁷⁶ *Id.* at 82.

⁷⁷ *Id.*

⁷⁸ *Id.*

⁷⁹ *Id.* at 82-83.

jury,⁸⁰ and *Almendarez-Torres v. United States*, which carves out an exception to the *Apprendi* rule for prior convictions.⁸¹ *Almendarez-Torres* rejected the argument that recidivism creates a separate “recidivist crime” of which recidivism is an element.⁸²

The *Duval* court’s decision to count a conviction for simple assault as a violent felony due to its recidivism-enhanced sentence resulted in Duval receiving a sentence of fifteen years’ imprisonment,⁸³ a 50% increase over the maximum sentence he could have received for his offense without ACCA’s sentencing enhancement.⁸⁴ Here again, as in *Sperberg*, a conviction for a state law misdemeanor carrying a maximum sentence of one year or less was enhanced at the state level due to prior misdemeanor convictions, ultimately earning the defendant the title of career criminal and resulting in vastly increased penalties for their subsequent federal convictions.⁸⁵

Penalties so far in excess of the maximum sentence ordinarily available raise once more the constitutionality questions arising out of such disproportionate sentences.⁸⁶ The current formal categorical approach fails to eliminate these questions. A formal categorical approach to sentencing would have solved the *Duval* court’s dilemma by providing a method of determining whether ACCA’s sentencing requirement was met by Duval’s prior convictions without having to choose whether to consider the state law recidivist sentencing enhancements.⁸⁷ While the formal categorical approach to the substantive elements requirement has helped to reduce inconsistencies, constitutional challenges, and the impression of fundamental unfairness, cases like *Duval*, *Sperberg*, and others demonstrate that additional guidance is necessary.⁸⁸

⁸⁰ *Apprendi v. New Jersey*, 530 U.S. 466, 476 (2000).

⁸¹ *Almendarez-Torres v. United States*, 523 U.S. 224, 243 (1998).

⁸² *Id.*; see also *Apprendi*, 530 U.S. at 489-90 (affirming the reasoning of *Almendarez-Torres*).

⁸³ *Duval*, 496 F.3d at 72.

⁸⁴ *Id.* Duval was convicted of a single count of being a felon in possession of a handgun, in violation of 18 U.S.C. § 922(g)(1) (2006). A violation of this Section without sentencing enhancements carries a maximum sentence of ten years imprisonment. 18 U.S.C. § 924(a)(2) (2006).

⁸⁵ See *supra* notes 68-71 and accompanying text.

⁸⁶ See *supra* note 27 (discussing seemingly disproportionate sentences resulting from recidivism).

⁸⁷ Although it is questionable whether the *Duval* court would have used such a standard even if it had existed, as the court makes no mention or apparent use of the formal categorical approach to ACCA’s substantive elements requirement that has been in existence since *Taylor*.

⁸⁸ See also Thomas W. Hillier, *Comparing Three Strikes and the ACCA—Lessons to Learn*, 7 FED. SENT’G. REP. 78, 78 (1994) (asserting that allowing courts to drift away from

C. A NEW STANDARD FOR PRIOR SENTENCE ANALYSIS UNDER ACCA

1. The Importance of the Sentencing Requirement

In light of the inconsistencies described above, Congress's inclusion of a second factor to assist in this determination is particularly fortuitous.⁸⁹ Creating an objective standard for evaluation of this sentencing requirement would solve many of the problems that the formal categorical approach to the substantive elements requirement was intended to resolve, but that have nonetheless continued to haunt courts for over a decade.⁹⁰ These problems include inconsistencies in application, due process violations, double jeopardy violations, and an unacceptably high rate of false positives in the labeling of career criminals.

Each of these problems is particularly apparent in cases where a prior conviction being considered under ACCA has already received a sentencing enhancement under a state recidivism statute, which makes the actual sentence imposed by the state court seem to fall within the scope of ACCA's sentencing requirement.⁹¹ For example, in *Corona-Sanchez*, the court evaluated for applicability as a predicate offense a prior conviction labeled "Petty Theft with Prior Jail Term for a Specific Offense" by the state court.⁹² The trial court had used the actual sentence imposed by the state court, two years imprisonment, to determine whether such prior conviction qualified as a predicate offense.⁹³ On appeal, the Ninth Circuit properly reversed this holding because the maximum penalty for petty theft alone, without the recidivism sentencing enhancement, was only six

the formal categorical approach is a "slippery slope" toward the use of unreliable, inconsistent information in deciding whether to apply ACCA).

⁸⁹ In addition to the requirement that a prior conviction constitute a "violent felony," such crime must be "punishable by imprisonment for a term exceeding one year." 18 U.S.C. § 924(e)(2)(B) (2006).

⁹⁰ *Taylor* was decided in 1990. *Taylor v. United States*, 495 U.S. 575 (1990). Since then, courts have continued to struggle with, or even dismiss as impossible, the goal of national uniformity in ACCA's application. *See, e.g., United States v. Duval*, 496 F.3d 64, 83 (1st Cir. 2007) (suggesting that national consistency would require additional congressional action and that perhaps federalism concerns trump national consistency in the eyes of legislators).

⁹¹ *United States v. Corona-Sanchez*, 291 F.3d 1201, 1203-04 (9th Cir. 2001). Although this case concerns the crime of being a deported alien in the United States in violation of 8 U.S.C. § 1326(b)(2) (2000) with possible recidivism enhancement pursuant to 8 U.S.C. § 1326(b)(2) instead of concerning ACCA, the court applies ACCA principles and case law by analogy because the requirement that the predicate offense be punishable by at least one year is the same in both statutes. *Corona-Sanchez*, 291 F.3d at 1205, 1217.

⁹² *Id.* at 1206.

⁹³ *Id.* at 1208.

months.⁹⁴ The court correctly noted that under *Taylor*'s formal categorical approach, "Petty Theft with Prior Jail Term for a Specific Offense" is broader than the generic definition of "theft" or "petty theft."⁹⁵ Therefore, on its face, Corona-Sanchez's conviction *without* the recidivism component would not have qualified as an aggravated felony under federal sentencing guidelines.⁹⁶

The Ninth Circuit found that the trial court's consideration of the previous sentence with the recidivism enhancement attached was improper, as such enhancement is a mere sentencing factor that "does not relate to the commission of the offense."⁹⁷ In addition to constitutional concerns arising over the consideration by a sentencing judge of facts not previously proven to a jury, as is the case with sentencing factors, the Ninth Circuit also acknowledged the tension created between such considerations and Congress' goal of ACCA:

Given the profound consequences of the designation and the declared purpose of Congress to target "serious crimes," it is doubtful that Congress intended to include crimes such as petty theft within the ambit of the definition by virtue of state sentencing enhancements imposed for acts that themselves are not aggravated felonies.⁹⁸

Despite the logic of the *Corona-Sanchez* rule prohibiting the consideration of recidivist-based sentencing factors imposed on prior convictions by state courts, the circuits remain split as to whether the actual sentence of the trial court should be determinative of whether prior convictions satisfy ACCA's sentencing requirement, or whether some other standard should be used to evaluate prior sentences.⁹⁹ Currently, the First, Ninth, and Eleventh Circuits take the *Corona-Sanchez* approach, removing recidivist sentence enhancements to evaluate prior convictions, while the Fourth, Fifth, and Seventh Circuits have adopted the approach that only the actual sentence ordered by the trial court can be considered.¹⁰⁰ Although

⁹⁴ *Id.*; see CAL. PENAL CODE § 490 (West Supp. 1990).

⁹⁵ *Corona-Sanchez*, 291 F.3d at 1207.

⁹⁶ *Id.* at 1208.

⁹⁷ *Id.* at 1209 (quoting *Apprendi v. New Jersey*, 530 U.S. 466, 488 (2000)); see also *People v. Bouzas*, 807 P.2d 1076, 1080 (Cal. 1991) (holding that the same enhancement provision at issue in *Corona-Sanchez*'s earlier offense "is a sentencing factor for the court and not a matter for the jury to consider in relation to the present offense on which the defendant is being tried.").

⁹⁸ *Corona-Sanchez*, 291 F.3d at 1209-10.

⁹⁹ See, e.g., *United States v. Duval*, 496 F.3d 64, 81-82 (1st Cir. 2007) (discussing the circuit split as to whether a conviction containing a recidivism-enhanced sentence should be atomized into two separate factors, underlying offense and recidivism enhancement, or whether the conviction as stated as a whole in the trial court should be used).

¹⁰⁰ *Id.*

the Supreme Court has found recidivism sentencing enhancements themselves to be constitutional,¹⁰¹ the question remains as to whether the use of enhancements that do not speak to the conduct of a prior conviction and that are not proven to a jury in a sentencing court's ACCA evaluation similarly satisfies constitutional requirements. The answer to this question appears to be that such consideration is *not* constitutional, meaning that not only is such consideration deleterious to the goals of national consistency and punishment of only the most hardened criminals, it is not even *permissible* as a means of evaluating prior convictions. Even though the prior conviction exception generally satisfies constitutional requirements for recidivism enhancements, consideration of such enhancements when evaluating prior convictions to which they have been attached—such as in *Duval* and other cases refusing to atomize the sentence enhancement from underlying offense—essentially treats the recidivism enhancement as an element of the offense, which would then require proof before a jury.¹⁰²

2. Internal Consistency: Discounting Sentencing Enhancements in Prior Convictions

Considering recidivism as a sentencing factor rather than an element of a separate offense may satisfy constitutional concerns, but without an objective standard for evaluating ACCA's sentencing requirement, issues of fundamental fairness still arise from inconsistencies within the federal circuits. Even within a single state, courts may not evaluate two convictions for the same offense in the same way for ACCA purposes, due to sentencing enhancements previously applied to those convictions.

Under ACCA's recidivism sentencing enhancement, the requirement for three predicate offenses is phrased in terms of prior convictions, rather than in terms of an offender's past conduct.¹⁰³ The Supreme Court relied heavily upon this distinction in its holding that ACCA does not violate

¹⁰¹ See *supra* notes 24-26 and accompanying text.

¹⁰² *Apprendi*, 530 U.S. at 490 ("Other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt."); see also Rafaloff, *supra* note 36, at 1097 (establishing that prior convictions must be proven at trial if they are considered an element of the offense, while sentencing enhancements need only be established at the sentencing hearing).

¹⁰³ *Taylor v. United States*, 495 U.S. 575, 600 (1990) ("[ACCA] mandates a formal categorical approach, looking only to the statutory definitions of the prior offenses, and not to the particular facts underlying those convictions."). Although § 924(e) mentions "conduct that presents a serious potential risk of physical injury to another," 18 U.S.C. § 924(e)(2)(B)(ii) (2006), the emphasis is still on the need for "three previous *convictions* by any court referred to in § 922(g)(1) of this title for a violent felony or a serious drug offense." 18 U.S.C. § 924(e)(1) (emphasis added).

constitutional prohibitions on double jeopardy or denial of due process.¹⁰⁴ Nonetheless, without an objective standard for evaluation of ACCA's sentencing requirement, courts may qualify or disqualify as predicate offenses prior convictions to which sentencing enhancements have been previously applied.¹⁰⁵ These enhancements are often based on the offender's recidivism or upon the previous sentencing court's exercise of discretion concerning the degree of harm or level of severity of the offender's conduct.¹⁰⁶ By considering these enhancements when deciding whether to further enhance under ACCA, a court evades the constitutional requirements explained by the Supreme Court. Instead, the court makes distinctions among prior convictions for the same offense based on conduct that has not been proven to a jury, either in its current analysis *or* in the course of the trial for the previous offense.¹⁰⁷

In addition to questions of constitutionality, such consideration results in inconsistent application of ACCA within states. For example, in *Duval*, the defendant's prior conviction of simple assault and battery was considered a qualifying predicate offense under ACCA due to that conviction's sentence enhancement as a result of previous misdemeanor assault convictions in *Duval's* criminal history.¹⁰⁸ Another person convicted of simple assault and battery under circumstances otherwise identical to those in *Duval* except for the prior misdemeanor convictions

¹⁰⁴ See Doeschner, *supra* note 50, at 1356 (discussing the three rationales for the prior conviction exception—that a prior conviction does not have to be proven to a jury: (1) recidivism is a sentencing factor that speaks only to punishment, not to the crime itself (articulated in *Almendarez-Torres v. United States*, 523 U.S. 224, 234 (1998)); (2) a defendant receiving a recidivism-enhanced sentence has already received a jury trial and due process for each conviction at the time that conviction was received (articulated in *Jones v. United States*, 526 U.S. 227, 248-49 (1999)); and (3) the exception for prior convictions does not create a presumption of guilt (articulated in *McMillan v. Pennsylvania*, 477 U.S. 79, 87 (1986))).

¹⁰⁵ See *supra* notes 68-87 and accompanying text (discussing various cases in which recidivism enhancements to prior convictions qualified those convictions for use under ACCA, when they otherwise would not have met the sentencing requirement).

¹⁰⁶ See *Jones*, 526 U.S. at 256-57 (Kennedy, J., dissenting) ("[H]arm from a crime—including whether the crime, after its commission, results in the serious bodily injury or death of a victim—has long been deemed relevant for sentencing purposes."); see also *Almendarez-Torres*, 523 U.S. at 230 (naming recidivism as possibly the most common basis for sentence enhancement).

¹⁰⁷ See *United States v. McCaffrey*, 437 F.3d 684, 690 (2006) (holding that even after *United States v. Booker*, 543 U.S. 220 (2005), not all sentence enhancements must be proven to jury beyond a reasonable doubt). Cf. Doeschner, *supra* note 50, at 1334 ("[S]entencing courts that broadly interpret the prior conviction exception tend to violate the very rationales that justify it.").

¹⁰⁸ *United States v. Duval*, 496 F.3d 64, 82-83 (1st Cir. 2007); see *supra* notes 72-86 and accompanying text.

would not have had this conviction counted as a predicate offense. Without the recidivist enhancement, the maximum penalty allowed for simple assault and battery in Maine is less than ACCA's minimum sentencing requirement.¹⁰⁹ This may not seem inherently unjust considering Duval's prior convictions were for offenses that carry violent connotations (assault), but the substance of those prior convictions had no bearing on whether the state law recidivism enhancement applied. Had Duval's prior convictions been for a nonviolent misdemeanor, for example, parking violations,¹¹⁰ the result would have been the same.¹¹¹

Furthermore, such prior state-level enhancements are often for repeated convictions or conduct that would not qualify under ACCA and to which ACCA is not designed to apply, such as for misdemeanors, non-violent conduct, the results of plea bargaining, and the discretion of prosecutors and judges.¹¹²

Despite the inequities obvious in considering recidivism enhancements in prior convictions, some courts have expressed misgivings about ignoring them.¹¹³ The reason for this apprehension is that a crime considered a felony at the state level may be considered a mere misdemeanor under ACCA, an inconsistency that troubles some courts and commentators.¹¹⁴

¹⁰⁹ *Id.* at 80-81 (noting that under ME. REV. STAT. ANN. tit. 17-A, § 1252(2) (2007), simple assault and battery is a "Class D" misdemeanor, punishable by up to one year in prison).

¹¹⁰ See *Rummel v. Estelle*, 445 U.S. 263, 288 (1980) (citing the example of overtime parking violations being used for recidivism sentencing enhancements). Although *Rummel* stands for the proposition that a life sentence should not result from such violations due to disproportionality, *id.* at 288 n.11, the *Duval* sentence enhancement at the state level was not for life, but rather for a maximum of five years, and ACCA only requires that the sentence be punishable by over one year. Therefore, Duval's sentence could conceivably have been increased under the Maine recidivism statute for parking violations in such a way so as to bring such sentence within the scope of ACCA, later subjecting him to fifteen years to life imprisonment. The same result deemed preposterous by the *Rummel* Court is therefore possible under ACCA through the considerations of sentences for prior convictions that have already been enhanced, without examination of the crimes for which those enhancements were given.

¹¹¹ See ME. REV. STAT. ANN. tit. 17-A, § 1252(4-A).

¹¹² See *Ewing v. California*, 538 U.S. 11, 16-17 (2003) (noting that in cases of wobblers, prosecutors have the discretion to charge an offense as either a misdemeanor or a felony); *Duval*, 496 F.3d at 84 (applying recidivism enhancement at state level for prior misdemeanors); *United States v. Fernandez*, 121 F.3d 777, 780 (1st Cir. 1997) (holding that state crime of assault may consist of either violent or non-violent conduct); *United States v. Reeves*, No. CR-05-47-B-W, 2006 U.S. Dist. LEXIS 45721, at *10 (D. Me. July 5, 2006) (recognizing that defendant's prior conviction was tried as a felony due to agreement in plea bargain).

¹¹³ *Duval*, 496 F.3d at 84.

¹¹⁴ *E.g., id.* ("It would be unusual if a court could not consider Duval's conviction as a felony for ACCA when Maine law would recognize it as such for state-law purposes.").

However, definitional differences are common from state to state and from state law to federal law.¹¹⁵ It is not immediately obvious why such an inconsistency between a particular circuit and one of the states contained therein would be worse than an inconsistency between circuits, or even an inconsistency within circuits as a result of differences in states' laws inside that circuit.

The only alternative that courts have to discounting any sentencing enhancements already applied to prior convictions is to examine the actual conduct that led to the prior conviction and the actual sentence received.¹¹⁶ However, this would require the sentencing judge to hold a "mini-trial" to evaluate that prior conduct. No court has allowed the use of this method, favoring a categorical approach instead.¹¹⁷ Courts' reluctance to deviate from the formal categorical approach to ACCA's substantive elements requirement, and the reasons for such apprehension, would apply to the application of a formal categorical approach to the sentencing requirement as well.¹¹⁸ Such a sentencing requirement, which would instruct courts to discount any prior enhancements to predicate offenses, would result in even, consistent application of ACCA to offenders who have been convicted of the same generic offense, but who may have had disparate maximum sentence possibilities due to factors outside the scope of ACCA.

3. Achieving Nationwide Consistency in ACCA Applicability

The same inconsistency seen within individual states and circuits is even more pronounced on a national level. This inconsistency arises for two reasons. First, actual differences in substantive state law vary the penalties available for a particular offense.¹¹⁹ Second, the circuits are split as to how such state law should be applied or considered in relation to ACCA.¹²⁰ For example, in Maine, simple assault carries a maximum penalty of less than one year, disqualifying it as a possible predicate offense

¹¹⁵ See *infra* Part III.C.3.

¹¹⁶ Carlton F. Gunn, *Reconsidering Prior Convictions: So Many Crimes, So Little Time: The Categorical Approach to the Characterization of a Prior Conviction Under the Armed Career Criminal Act*, 7 FED. SENT'G. REP. 66 (1994).

¹¹⁷ *Id.* at 66.

¹¹⁸ See *supra* Part III.B.1.

¹¹⁹ See *Duval*, 496 F.3d at 83 (discussing sentencing differences among the states and their effects on the application of ACCA).

¹²⁰ *Id.* at 81-82 (describing a current split in the circuits over whether a recidivism sentencing component should be atomized from the underlying offense when considering whether the sentence available would qualify the prior conviction as a predicate offense under ACCA; the following circuits atomize: First, Ninth, and Eleventh; the following circuits use the actual sentence imposed: Fourth, Fifth, and Seventh).

under ACCA.¹²¹ In Massachusetts, however, the same conduct would result in a conviction that *does* qualify as a predicate offense because Massachusetts applies a sentence of up to 2.5 years for assault.¹²²

One way courts have tried to justify the existence of this non-uniformity is by arguing that Congress was aware that such inconsistencies would arise out of the language they chose to use in ACCA but determined that federalism concerns outweighed these inconsistencies.¹²³ While such a view is certainly convenient and easier to implement, legislative history suggests otherwise: one of the main goals of having a federal recidivism sentencing enhancement is to avoid the inconsistencies arising when federal courts are forced to interpret and apply state law.¹²⁴ “In terms of fundamental fairness, [ACCA] should ensure, to the extent that it is consistent with the prerogatives of the States in defining their own offenses, that the same type of conduct is punishable on the Federal level in all cases.”¹²⁵

The *Taylor* court acknowledged both the need for federal uniformity in the application of a federal law and the need for states to be able to define their own offenses.¹²⁶ *Taylor*’s formal categorical approach actually does not impede federalism goals at all, and a corollary standard for ACCA’s sentencing requirement would be similarly acceptable. States would remain free to define and apply offenses and sentencing enhancements; ACCA does not modify or re-define a prior conviction, it merely allows courts to consider that prior conviction for sentence enhancement purposes during the course of sentencing a later offense.¹²⁷

While the *Taylor* approach to establishing national consistency is sound, the Court did not take this approach far enough to ensure actual uniformity. In *Taylor*, the Court violated its own mandate that “absent plain indication to the contrary, federal laws are not to be construed so that their application is dependent on state law.”¹²⁸ The formal categorical approach the Court provided still left a portion of ACCA dependent on state law, namely, the sentencing requirement. Applying the Court’s formal

¹²¹ ME. REV. STAT. ANN. tit. 17-A, § 207(3) (2006).

¹²² MASS. GEN. LAWS ch. 265, § 13A(a) (2008).

¹²³ *Duval*, 496 F.3d at 83 (“Congress implicitly accepted such inconsistencies in the application of the ACCA because it was concerned about federalism and wanted to preserve the state’s role in defining, enforcing, and prosecuting essentially local crimes . . .”).

¹²⁴ See H.R. REP. NO. 98-1073, at 5, *reprinted in* 1984 U.S.C.C.A.N. 3661, 3665. One of the rationales for ACCA-type sanctions was the alleviation of the difficulties “encountered by Federal courts in applying State robbery and burglary laws in Federal prosecutions.” *Id.*

¹²⁵ S. REP. NO. 98-190, at 20 (1983).

¹²⁶ *Taylor v. United States*, 495 U.S. 575, 582 (1990).

¹²⁷ *Id.*

¹²⁸ *Id.* at 591-92.

approach to the sentencing requirement as well as the substantive elements requirement would achieve the national uniformity that the *Taylor* Court desired, but that was never satisfactorily realized.¹²⁹ Currently, in evaluating a prior conviction under ACCA, a court has no guidance as to how to analyze whether that prior conviction satisfies ACCA's sentencing requirement. Some courts look to the actual sentence given by the state court, while others look to the state law's maximum penalty for the particular offense without any enhancements for prior convictions.¹³⁰ In either case, the court depends on state law, a reliance that is inherently detrimental to nationwide consistency.¹³¹

Some courts have posited that the only possible solution to this dilemma is congressional amendment of ACCA.¹³² However, Congress has already provided a two-pronged test for evaluating prior convictions independent of state law.¹³³ The first prong, the substantive elements requirement, has been clarified by *Taylor*'s formal categorical approach. The second prong, the sentencing requirement, could be used in its current form and without additional congressional action, in conjunction with the substantive elements requirement, to make prior conviction analysis under ACCA completely independent of state law.¹³⁴ Accomplishing this requires the creation of an equivalent formal standard for the sentencing requirement. Furthermore, to resolve confusion among the circuits, a formal standard for evaluating ACCA's sentencing requirement must indicate whether state sentencing law or a new, generic source of sentencing standards should set the guideline; and whether the actual sentence imposed by the trial court should be considered, as opposed to the allowable range without any sentencing enhancements that may have been available.

4. Avoiding False Positives to Maximize ACCA Effectiveness and Achieve Congress's Stated Goals

A final reason to create a formal approach to the sentencing requirement of ACCA is to maximize ACCA's effectiveness at achieving

¹²⁹ See *supra* Part III.C.2 (citing examples of non-uniformity even after *Taylor*).

¹³⁰ See *supra* notes 99-100 and accompanying text (describing the current circuit split regarding consideration of prior sentencing enhancements).

¹³¹ See, e.g., *United States v. Duval*, 496 F.3d 64, 83-84 (1st Cir. 2007).

¹³² See *Duval*, 496 F.3d at 84 ("If Congress finds fault in the pattern of inconsistent sentences mandated by the ACCA, it is within its power to amend it.").

¹³³ See *supra* notes 41-42 (defining the "substantive elements requirement" and the "sentencing requirement" of ACCA).

¹³⁴ Or, if not completely independent of state law, the analysis would at least apply state law in a more, if not completely, consistent manner nationwide.

its stated purpose of incapacitating only society's worst criminals who have repeatedly proven themselves unresponsive to attempts at rehabilitation.¹³⁵

While the sentencing requirement may seem at first glance to be far removed from any standard of predicting recidivism, studies actually suggest otherwise.¹³⁶ Emphasizing the length of imprisonment as one way to narrow the scope of qualifying predicate convictions could actually result in far fewer "false positives" than the current system.¹³⁷ Rather than being an arbitrary threshold, length of imprisonment is actually correlated to the risk of future recidivism: criminals with prior convictions for crimes that carry smaller sentences statistically have a lower risk for future recidivism.¹³⁸

Therefore, when evaluating whether prior convictions demonstrate such a high risk of recidivism as to necessitate the label of career criminal, the sentencing requirement gains critical importance. Any convictions punishable by less than one year do not suggest a high rate of recidivism and should not be used to identify the convicted person as a career criminal.¹³⁹ Prior convictions with artificially enhanced sentences that bring them within the scope of ACCA—even though the crime itself would ordinarily warrant a "small sentence"—means that offenders who are at a very low risk of recidivism become grouped with true career offenders, resulting in decreased deterrent effect,¹⁴⁰ inefficacy,¹⁴¹ and contravention of congressional intent.¹⁴²

¹³⁵ See *supra* notes 32-39 and accompanying text.

¹³⁶ See generally MEASURING RECIDIVISM, *supra* note 29 (discussing the relationship between sentence length and recidivism).

¹³⁷ See Sady, *supra* note 4, at 70 (suggesting that ACCA is so "loosely written" and unnecessarily broad that reaching a result consistent with its purpose is the exception rather than the rule). Subsequent amendments have helped to narrow ACCA in the ways Sady suggests, but courts' application continues to suffer the problems mentioned.

¹³⁸ MEASURING RECIDIVISM, *supra* note 29, at 14.

¹³⁹ *Id.*

¹⁴⁰ In other words, an overly broad interpretation of ACCA requirements results in uncertainty as to what constitutes a triggering event. Foreseeability is a prerequisite to deterrence, for a criminal cannot be deterred from something of which they have no knowledge.

¹⁴¹ MEASURING RECIDIVISM, *supra* note 29, at 37; see also *supra* note 31 (citing statistics showing those labeled recidivists under ACCA are actually at a much lower risk for recidivism than others grouped in the same criminal history category).

¹⁴² See, e.g., *United States v. Balascsak*, 873 F.2d 673, 682 (3d Cir. 1989) ("These are the people who have demonstrated, by virtue of their definition, that locking them up and letting them go doesn't do any good. They go on again, you lock them up, you let them go, it doesn't do any good, they are back for a third time. At that juncture we should say, 'That's it; time out; it is all over. We, as responsible people, will never give you the opportunity to do this again.'" (citing *Armed Career Criminal Act: Hearing on H.R. 1627 and S. 52 Before*

D. SOURCE OF SENTENCING STANDARDS

Having established the need for a formal standard for application of ACCA's sentencing standard, the question remains as to where courts should look for a uniform source of sentencing guidelines for use in evaluating whether a prior conviction satisfies ACCA's sentencing requirement. Unlike the formal categorical approach to the substantive elements requirement,¹⁴³ the sentencing standard cannot arise out of the common law or some generic definition. While the common law does provide elements of a generic offense, such as the generic offense of burglary,¹⁴⁴ no such generic or common law sentence for burglary exists.¹⁴⁵ Available penalties for a given offense are established by law or sentencing guidelines at either the state or federal level. While there are advantages and disadvantages to both state and federal sentencing standards, the ideal solution to the problems plaguing courts in application of ACCA compels a federal source of sentencing.

1. State Law Sentences: A Simpler, but Incomplete, Solution

The simplest, but ultimately imperfect, standard for ACCA's sentencing requirement would be to evaluate sentences for prior convictions in terms of the maximum sentence available for that conviction under state law, without any additional sentencing enhancements. This is the approach taken in *Corona-Sanchez*, where the court held that the recidivism enhancement must be separated from the underlying offense.¹⁴⁶ As a result of discounting all prior sentence enhancements applied to prior convictions, the scope of ACCA would be much narrower.¹⁴⁷ The only crimes that

the Subcomm. On Crime of the House Comm. On the Judiciary, 98th Cong., 2d Sess. 6 (1984) (statement of Stephen Trott, Assistant Attorney General, Criminal Division))).

¹⁴³ See *United States v. Corona-Sanchez*, 291 F.3d 1201, 1204 (9th Cir. 2001) (describing two methodologies employed to define the generic offense under the formal categorical approach: if a traditional, common law crime exists for a particular offense, the prior conviction is defined "in terms of its generic, core meaning"; if no traditional common law crime exists, the plain meaning of the statutory words are used).

¹⁴⁴ See *Taylor v. United States*, 495 U.S. 575, 598 (1990) (declaring the elements of generic crime of burglary to include "an unlawful or unprivileged entry into, or remaining in, a building or other structure, with intent to commit a crime").

¹⁴⁵ See Fisher, *supra* note 8, at 874 & n.41 (describing Massachusetts law in the early nineteenth century: "Excepting only those very serious crimes that carried mandatory life or death sentences, none of the typical common-law offenses called for a minimum sentence").

¹⁴⁶ *Corona-Sanchez*, 291 F.3d at 1210.

¹⁴⁷ A narrow reading of the prior conviction exception allows the court only to consider the fact of the existence of the prior conviction itself instead of any facts that may be incidental to that conviction. Doeschner, *supra* note 50, at 1371-72. The only determinations of fact the court must then make are that the prior conviction exists and that it belongs to the defendant. *Id.*

would qualify as predicate offenses are those that states consider sufficiently severe as to merit large sentences *on their own*, without regard to past criminal history or other enhancement criteria.¹⁴⁸

Such a standard, if implemented on a national level, would reduce many of the problems currently plaguing the application of ACCA. First, apparent disproportionality of sentencing would be reduced because convictions for minor offenses would not trigger ACCA enhancement, regardless of prior sentence enhancements. Second, inconsistencies within states and among circuits resulting from differing state law sentence enhancements and prosecution choices would be lessened, as convictions for a certain offense would always receive the same treatment regardless of previous choices by prosecutors and judges. Third, the rate of false positives would be lower because minor offenders would not experience random lightning strikes of ACCA liability. Finally, Congress's goal of applying ACCA enhancements to only the very worst felons would be more closely achieved.

However, although this formal approach to the sentencing requirement would partially solve many of the problems inherent in ACCA's current application, consideration of the maximum sentence available under state law for a particular offense is not a complete solution to one of the most critical issues: reliance upon state law.¹⁴⁹ Because of this persisting problem, consideration of state sentence ranges as a formal approach to the sentencing requirement is not a viable solution at all. Although providing slightly more guidance to courts in interpretation of the sentencing requirement than was provided by *Taylor*, the ultimate result still violates the rationale behind *Taylor*'s formal categorical approach.¹⁵⁰

Furthermore, even though a standard prohibiting consideration of sentence enhancements unrelated to the underlying offense would make ACCA's application more foreseeable,¹⁵¹ the inconsistencies that would still arise between states and within circuits would continue to impede any deterrent effect. In order to avoid falling within the scope of ACCA, an offender would have to take into account location of each offense and the varying laws existing in each jurisdiction, rather than simply being aware of ACCA itself.¹⁵²

¹⁴⁸ See, e.g., *Corona-Sanchez*, 291 F.3d at 1209 (describing felonies "with reference to the offense, rather than separate sentencing enhancements").

¹⁴⁹ See *supra* note 57 and accompanying text (discussing the need for independence from state law in application of federal law).

¹⁵⁰ See *supra* notes 126-28 and accompanying text.

¹⁵¹ See discussion of random (lightning bolt) applicability, *supra* note 4.

¹⁵² In addition to variations among states, the problems of wobblers would still exist under this standard because the federal sentencing court is still looking to state law for

2. Uniform Source of Sentencing Guidelines: One National Source

Because of the problems existing with a state-law-dependent standard of ACCA's sentencing requirement,¹⁵³ a uniform, national standard completely independent of state law is the only true solution. Only then could the standard for the sentencing requirement be on par with the formal categorical approach to the substantive elements requirement.¹⁵⁴ However, since there is no generic source of sentencing under the common law for specific offenses,¹⁵⁵ the final question is where this federal source of sentencing standards can be found.

One possibility would be to utilize a national average of the maximum sentences allowable for a given crime. This approach is consistent with *Taylor* and allows for the determination of a generic sentence in addition to the generic elements of an offense.¹⁵⁶ Furthermore, the *Taylor* court suggested that such a national survey of state laws is actually what Congress may have had in mind when it drafted the ACCA requirements.¹⁵⁷ While such a source of maximum penalties would provide a nationally uniform standard, consistent application, a narrow scope of qualifying convictions, and avoidance of constitutional concerns related to the use of sentencing enhancements in evaluation of prior convictions, there may be some degree of discomfort or question of practicability regarding the actual implementation of such a standard by federal courts.¹⁵⁸ To address this issue, such national averages could be promulgated by, or used in tandem with other materials currently provided by, the U.S. Sentencing Commission, which already provides sentencing guidelines for use by federal courts.¹⁵⁹

determining eligibility under the federal law; *see, e.g.*, *Ewing v. California*, 538 U.S. 11, 30-31 (2003) (applying California's three strikes law, rather than ACCA, but with the same result that a wobbler constitutes one of three prior felony convictions).

¹⁵³ *See supra* Part III.D.1.

¹⁵⁴ *See Taylor v. United States*, 495 U.S. 575, 588-89 (1990) (discussing the need for a generic definition of the offense that is not dependent upon state definitions).

¹⁵⁵ *See supra* note 145.

¹⁵⁶ *See Taylor*, 495 U.S. at 598.

¹⁵⁷ *Id.* ("Congress meant by 'burglary' the generic sense in which the term is now used in the criminal codes of most States." (citing *Perrin v. United States*, 444 U.S. 37, 45 (1979); *United States v. Nardello*, 393 U.S. 286, 289 (1969))). If Congress meant the definition of crimes enumerated in ACCA should be determined using a national average, it follows that the sentences for such crimes should also arise from a similarly uniform source.

¹⁵⁸ The *Taylor* Court did not seem bothered by this question of practicability, suggesting that *definitions* of crimes could be determined by national averages. Maximum penalties, being numerical, are in fact much more conducive to averaging than the elements of an offense would be. *See Taylor*, 495 U.S. at 598.

¹⁵⁹ *See U.S. SENTENCING GUIDELINES MANUAL* (2007).

The U.S. Sentencing Guidelines (USSG) are, in fact, the second possible source of uniform, determinate sentencing ranges. Promulgated by the U.S. Sentencing Commission, the USSG were designed to address many of the issues currently facing sentencing analysis of prior convictions under ACCA, including “disparity in sentencing, certainty of punishment, and crime control.”¹⁶⁰ Although originally intended as a source of guidance to courts for use in actually sentencing offenders for certain crimes, the USSG could also be used as a guideline under ACCA to define sentencing ranges for prior convictions. In effect, the USSG would provide an ideal, uniform set of standards even more objective, and just as generic, as the formal categorical approach is for the substantive elements requirement.¹⁶¹ A federal sentencing court could evaluate each prior conviction to determine whether its maximum sentence meets ACCA’s sentencing requirement by calculating the sentencing range for that conviction’s “generic offense” under the USSG, using the base offense level and any increases related to the elements of that offense.

For example, assault is one offense where ACCA applicability is a “close call,” and the maximum penalty varies greatly from state to state.¹⁶² Under the USSG, minor assault has a base offense level of 7,¹⁶³ which is then mapped onto the USSG Sentencing Table and combined with the offender’s Criminal History Category to determine the sentence range, given in months.¹⁶⁴ Under the USSG, a career criminal can be assigned to criminal history category VI regardless of the number of previous convictions,¹⁶⁵ which would result in a sentence range for minor assault of fifteen to twenty-one months. This would be well within the acceptable range under ACCA’s sentence requirement, meaning that any conviction for minor assault, regardless of state definitions or sentencing ranges, and regardless of previous enhancements to that particular conviction, qualifies as a predicate offense under ACCA.

However, studies have shown the automatic categorization in category VI to be overly harsh, resulting in a high level of false positives—that is,

¹⁶⁰ OFFICE OF PUBLISHING AND PUBLIC AFFAIRS, UNITED STATES SENTENCING COMMISSION. AN OVERVIEW OF THE UNITED STATES SENTENCING COMMISSION 1 (2005), http://www.ussc.gov/general/USSCoverview_2005.pdf.

¹⁶¹ See *United States v. Booker*, 543 U.S. 220, 253 (2005) (“Congress’[s] basic goal in passing the Sentencing Act was to move the sentencing system in the direction of increased uniformity.”).

¹⁶² See *supra* notes 120-23 (discussing variance among states in maximum penalties available for assault convictions).

¹⁶³ U.S. SENTENCING GUIDELINES MANUAL § 2A2.3(a)(1).

¹⁶⁴ See *id.* ch. 5, pt. A.

¹⁶⁵ MEASURING RECIDIVISM, *supra* note 29, at 37.

encompassing those who are not “true” recidivists.¹⁶⁶ Therefore, a better approach would be to determine which prior convictions the offender had at the time in order to place him or her in a criminal history category, rather than automatically placing him or her in category VI. Under this method, criminals with three or fewer “criminal history points” would not have a minor assault qualify as a predicate offense under ACCA, but all others would.

Yet another approach would be to remove the recidivism factor from the sentencing table entirely, which would result in classification of minor assault as a “Zone A” offense, with a sentence of zero to six months.¹⁶⁷ Therefore, a minor assault conviction would *never* qualify as a predicate conviction under ACCA. Given the problems arising from double-consideration of recidivism, this may be the best approach to evaluation using the USSG.

Regardless of the method used to determine an offender’s criminal history category, the USSG is an existing, uniform source of sentencing guidelines that courts can use to evaluate whether an offender’s prior convictions satisfy ACCA’s sentencing requirement. Guidelines for any crimes that are not already defined by the USSG could be created either through the national averages approach suggested by *Taylor* or by the U.S. Sentencing Commission.¹⁶⁸

IV. CONCLUSION

A national standard for application of the sentencing requirement would solve many, if not all, of the problems currently plaguing ACCA. This standard should discount any sentencing enhancements previously applied to prior convictions, and should allow consistent evaluation of convictions at the national level, independent of variance in state law. While the easiest way to evaluate prior sentences would be merely to consider the maximum penalty allowable for a given offense under state law, less any state-law sentencing enhancements, such a standard presents the same dilemma the *Taylor* Court tried to avoid: dependence on state law.¹⁶⁹ Therefore, a better source of national sentencing guidelines must be identified.

¹⁶⁶ *Id.*

¹⁶⁷ U.S. SENTENCING GUIDELINES MANUAL ch. 5, pt. A.

¹⁶⁸ See 28 U.S.C. § 994 (2000 & Supp. V 2005) (listing the duties and procedural requirements of the Sentencing Commission in promulgating guidelines).

¹⁶⁹ See *Taylor v. United States*, 495 U.S. 575, 591-92 (1990) (“[I]n the absence of a plain indication of an intent to incorporate diverse state laws into a federal criminal statute, the meaning of the federal statute should not be dependent on state law.” (quoting *United States v. Turley*, 352 U.S. 407, 411 (1957))).

This single, uniform source could come from national averages of sentence ranges currently existing in the criminal codes of most states, or from the U.S. Sentencing Guidelines Manual. In either case, such a source would allow courts to consistently apply ACCA's requirements on a national level and with a narrow scope, reducing disproportionality in sentencing, increasing the deterrent effectiveness of ACCA, and accomplishing Congress's goal of selective incapacitation of the worst, most unrehabilitative career criminals.