COMMENT

DEBRIEFING *DESCAMPS*: A COMMENT ON BURGLARY AND THE ARMED CAREER CRIMINAL ACT

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Descamps v. United States *may not have grabbed many headlines when it was decided, but it has proved to be one of the most influential opinions of the Supreme Court's October 2012 Term. This Comment serves two purposes. First, it elucidates how the Supreme Court reached its counterintuitive conclusion that a person convicted of "burglary" in Arizona, California, Idaho, Illinois, Nevada, and Rhode Island has not been convicted of "burglary" for the purposes of the Armed Career Criminal Act. Second, this Comment analyzes the festering question the* Descamps *Court specifically declined to address: whether federal courts should nonetheless treat burglary in these states as "violent felonies" because the perpetrator's conduct necessarily created a "serious potential risk of physical injury to another." Applying the Supreme Court's admittedly murky jurisprudence on this subject, I conclude that residential burglary convictions in these states should be categorized as violent felonies, while burglaries of commercial establishments and other structures should not.*

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INTRODUCTION

Federal law bars convicted felons from possessing firearms.[1] The Armed Career Criminal Act (ACCA) dramatically enhances prison sentences for gun possession by individuals who have previously been convicted of three "violent felon[ies]."[2] A violent felony is "burglary, arson, or extortion," an explosives offense, or a crime that "presents a serious potential risk of physical injury to another."[3] Pitched as a tough-on-crime measure,[4] ACCA has proved remarkably tough on courts. At all levels, jurists have struggled to determine which convictions qualify as violent felonies. The Supreme Court has issued ten opinions interpreting ACCA since 2005. The Ninth Circuit recently noted that "over the past decade, perhaps no other area of the law has demanded more of our resources," in large part because the courts of appeals "have struggled to understand the contours of the Supreme Court's framework."[5]

In *Descamps v. United States*,[6] the Supreme Court buttressed this framework. Addressing a split among the circuit courts, *Descamps* held that when an individual is convicted of burglary under a statute that does not include the element of "unlawful or unprivileged entry," that person has not committed "burglary" for the purpose of a sentence enhancement under ACCA.[7] While it may seem counterintuitive that a conviction called burglary is not actually "burglary," eight Justices joined an opinion explaining that the Court's precedent, the text of ACCA, constitutional considerations, and pragmatic concerns dictated this outcome.

Critically, however, the Court refused to address another festering area of ACCA interpretation: whether a conviction for burglary under a statute that does not have the element of unlawful entry could still trigger a sentence enhancement because the offense involved a "serious potential risk of physical injury."[8] While Descamps's burglary conviction therefore could not be used to enhance his sentence under ACCA, thousands of defendants must continue to litigate in the face of this murky jurisprudence.

In Part I of this Comment, I will explain how the Supreme Court has interpreted and applied ACCA to state convictions for burglary. Part II elucidates

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1. 18 U.S.C. § 922(g) (2013).
2. *Id.* § 924(e)(1).
3. *Id.* § 924(e)(2)(B)(ii).
4. *See, e.g.*, H.R. REP. NO. 98-1073, at 1 (1984).
5. United States v. Aguila-Montes de Oca, 655 F.3d 915, 917 (9th Cir. 2011) (en banc). A simple Westlaw search supports this assertion: in the last ten years, ACCA has been mentioned in more federal courts of appeals opinions than the Patent Act, Lanham Act, and Administrative Procedure Act combined.
6. 133 S. Ct. 2276 (2013).
7. *Id.* at 2283 (quoting Taylor v. United States, 495 U.S. 575, 599 (1990)) (internal quotation mark omitted).
8. *Id.* at 2293 n.6 (quoting 18 U.S.C. § 942(e)(2)(B)(ii)) (noting that the government forfeited that argument in *Descamps*).

the Supreme Court's conclusion in *Descamps* that a conviction for burglary in six states (together comprising twenty percent of the U.S. population) is not, in fact, burglary within the meaning of ACCA. Part III analyzes the question left open by the *Descamps* opinion. I argue that in considering whether to impose a sentence enhancement for a burglary conviction under a state statute that lacks the element of unlawful entry, courts should find that residential burglary is a violent felony under ACCA, while burglary of other structures is not.

I. "GENERIC BURGLARY" AND THE CATEGORICAL APPROACH

ACCA mandates that a person who is convicted in federal court of possessing a firearm after sustaining three "violent felony" convictions serve a minimum of fifteen years in prison.[9] A felony conviction triggers ACCA mandatory minimum if it involves drug trafficking, has an element involving the use of force against another person, or "is burglary, arson, or extortion, involves use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another."[10]

This deceptively simple statutory command has confounded federal courts. Congress did not define "burglary" in ACCA, leaving that task to judges. This Part explains how the Supreme Court has filled that gap.

In *Taylor v. United States*, the Court rejected the notion that Congress intended for sentencing courts to apply an ACCA enhancement whenever a defendant is convicted of a crime labeled "burglary."[11] States use the word "burglary" to refer to both serious and petty criminal conduct,[12] yet ACCA is only supposed to enhance the sentences of violent felons.[13] To effectuate Congress's intent, the Court created a "uniform definition independent of the labels employed by the various States' criminal codes."[14] Drawing on the Model Penal Code and the expertise of criminal treatise authors Wayne R. LaFave and Austin W. Scott, the Court defined the elements of "burglary" as "an unlawful or unprivileged entry into, or remaining in, a building or other structure, with intent to commit a crime."[15] Crimes that match this definition of "generic burgla-

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9. 18 U.S.C. § 924(e)(1).

10. *Id.* § 924(e)(2)(A)-(B).

11. 495 U.S. at 590.

12. *Compare, e.g.*, People v. Pineda, 106 P.2d 25, 26, 28 (Cal. Dist. Ct. App. 1940) (affirming the burglary conviction of a man who broke into a store at night and threatened the sleeping proprietor with a gun and a crowbar), *with* Matthews v. State, 741 P.2d 370, 371 (Idaho Ct. App. 1987) (affirming the burglary conviction of a man who entered a supermarket during business hours to steal "two packages of meat").

13. *See, e.g.*, H.R. REP. NO. 98-1073, at 1 (1984) (noting that a small percentage of offenders commit a large percentage of violent crimes and describing the purpose of the bill as "curb[ing] armed, habitual (career) criminals").

14. *Taylor*, 495 U.S. at 592.

15. *Id.* at 598 & n.8.

ry" trigger ACCA enhancements regardless of how they are labeled by state legislatures.

The *Taylor* Court admonished federal judges to determine sentence enhancements based on the *elements* of the crimes of prior convictions, not the *facts* underlying those convictions. Under this "categorical approach," sentencing judges compare the elements of generic burglary as defined in *Taylor* with the elements of the defendant's prior conviction.[16] If the crime of conviction contains every element of generic burglary, the court imposes a sentence enhancement. If not, no sentence enhancement is applied. The categorical approach thus requires courts to analyze prior convictions "in terms of how the law defines the offense and not in terms of how an individual offender might have committed it on a particular occasion."[17]

The categorical approach is simple to apply to statutes identical to or narrower than the generic definition of burglary. Burglary in Vermont, for example, has identical elements to generic burglary;[18] every conviction under that state's burglary statute triggers an ACCA enhancement. Likewise, a Virginia statute criminalizes unlawful entry into a building *at night* with intent to commit a crime.[19] The added element—at night—does not change the fact that anyone convicted under that statute necessarily was convicted of all the other elements of generic burglary.

Application of the categorical approach becomes more complicated when a state statute's definition of burglary is broader than the federal, generic definition. For example, in Massachusetts, a person is guilty of burglary if he unlawfully enters a "building, ship, vessel or vehicle" with intent to commit a felony.[20] Thus, simply saying that someone was convicted of "burglary" in Massachusetts doesn't mean that the offense fulfills all the criteria for an ACCA enhancement: it isn't clear whether the person entered a "building or other structure" or only burglarized a car.[21]

To rectify this shortcoming, the Supreme Court authorized sentencing courts to make a "modification" to the categorical approach. In a "narrow range of cases,"[22] the Court directed sentencing judges to look at specific court records to determine "which statutory phrase" a defendant was actually convicted of violating.[23] To apply this "modified categorical approach,"[24] the judge may consult "the statutory definition, charging document, written plea agreement,

16. *Id.* at 600.

17. Begay v. United States, 553 U.S. 137, 141 (2008).

18. VT. STAT. ANN. tit. 13, § 1201 (2014).

19. VA. CODE ANN. § 18.2-89 (2014). Virginia separately criminalizes daytime breaking and entering. *See id.* § 18.2-90.

20. MASS. GEN. LAWS ch. 266, § 16 (2014).

21. *See* Nijhawan v. Holder, 557 U.S. 29, 35 (2009).

22. Taylor v. United States, 495 U.S. 575, 602 (1990).

23. Johnson v. United States, 559 U.S. 133, 144 (2010).

24. *Nijhawan*, 557 U.S. at 41.

transcript of plea colloquy, and any explicit factual finding by the trial judge to which the defendant assented."[25]

Two examples illustrate how judges apply the modified categorical approach. In the first, a defendant's rap sheet shows that he was convicted of violating section 123 of a state's penal code. The judge looks at section 123 and finds that it is divided into two subsections. A conviction under section 123(a) would trigger an ACCA enhancement, while a conviction under section 123(b) would not. The modified categorical approach allows a judge to look at the indictment, plea agreement, or other relevant documents to determine which subsection of section 123 the defendant was convicted of violating.[26]

In the second example, a judge may apply the same procedure to statutes that are not formally divided into subsections but are nonetheless divisible into distinct "statutory phrase[s]."[27] As the Supreme Court noted in *Nijhawan v. Holder*, when a burglary statute criminalizes breaking and entering into a "building, ship, vessel or vehicle," the sentencing court may look at court documents to determine whether the defendant was convicted of entering a building (which would trigger a sentence enhancement) or a vehicle (which would not).[28] In either case, if the official court records fail to reveal which statutory phrase the defendant was convicted of violating, the court cannot impose a sentence enhancement.[29]

This procedure breaks down, however, when the statutory definition of burglary in a particular state is simply missing an element of the generic definition of burglary altogether. In Arizona,[30] California,[31] Idaho,[32] Illinois,[33] Nevada,[34] and Rhode Island,[35] an individual may be convicted of burglary with-

25. Shepard v. United States, 544 U.S. 13, 16 (2005).

26. *See, e.g.*, United States v. Landeros-Gonzales, 262 F.3d 424, 426 (5th Cir. 2001) (applying the modified categorical approach).

27. *Nijhawan*, 557 U.S. at 41.

28. *Id.* at 35 (quoting MASS. GEN. LAWS ch. 266, § 16) (internal quotation marks omitted).

29. *See* Johnson v. United States, 559 U.S. 133, 145 (2010).

30. ARIZ. REV. STAT. ANN. §§ 13-1506(A), -1508 (2014); State v. Madrid, 552 P.2d 451, 452 (Ariz. 1976) (en banc).

31. CAL. PENAL CODE § 459 (West 2014); People v. Barry, 29 P. 1026, 1026-27 (Cal. 1892) (plurality opinion).

32. IDAHO CODE ANN. § 18-1401 (2014); Matthews v. State, 741 P.2d 370, 373 (Idaho Ct. App. 1987).

33. 720 ILL. COMP. STAT. 5/19-1(a) (2014); People v. Durham, 623 N.E.2d 1010, 1013 (Ill. App. Ct. 1993) ("Illinois law is well settled that a building open to the public can be the subject of a burglary.").

34. NEV. REV. STAT. § 205.060 (2014); State v. Adams, 581 P.2d 868, 869 (Nev. 1978).

35. R.I. GEN. LAWS § 11-8-3 (2014); State v. Perry, 372 A.2d 75, 80 (R.I. 1977). Determining which states require unlawful entry has confused some federal courts. In *United States v. Mayer*, three judges of the Ninth Circuit stated that Oregon's burglary statute does not contain the element of unlawful entry, citing *State v. Keys*, 419 P.2d 943 (Or. 1966) (en

out any showing that he committed burglary by means of "unlawful or unprivileged entry." In those states, it is "burglary" both to enter a grocery store during normal business hours to shoplift[36] and to break into a grocery store after hours to steal from the cash registers.[37]

Courts reviewing these "missing elements" statutes struggled to determine whether they triggered ACCA enhancements. Some circuit courts permitted judges to delve into the records of the prior conviction to determine whether the defendant actually did commit burglary by means of an unlawful entry, while others excluded all convictions under these statutes from ACCA's reach.[38] In 2011, the Ninth Circuit charitably described jurisprudence on this question as "a bit of a jumble" and criticized other circuits for issuing opinions that were "ambiguous" and internally contradictory.[39]

Differing interpretations of ACCA threatened equity in the federal criminal justice system: individuals with identical criminal histories faced massive sentence enhancements if caught with a firearm in some judicial districts but not in others. The Supreme Court undertook to resolve this "jumble" in *Descamps v. United States*.

II. When Burglary Isn't "Burglary": The *Descamps* Decision

In *Descamps*, the Supreme Court held that a conviction for burglary in six states, together comprising over twenty percent of our nation's population, is not actually "burglary" for the purpose of ACCA. This Part will explain how eight members of the Court arrived at this surprising conclusion.

In 2012, Matthew Descamps was convicted of being a felon in possession of a firearm.[40] At his sentencing hearing, the government contended that

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banc). 560 F.3d 948, 953 (9th Cir. 2009) (Kozinski, C.J., dissenting from denial of rehearing en banc). But *Keys* was superseded by statute in the early 1970s, and a person cannot be convicted of burglary for entering a structure that was "open to the public" with intent to commit a crime therein unless "lawfully directed not to enter the premises." *See* OR. REV. STAT. §§ 164.205(3), .215(1) (2014). Similarly, the Eighth Circuit wrongly held that Arizona's burglary statute requires unlawful entry. United States v. Boaz, 558 F.3d 800, 806-07 (8th Cir. 2009). This erroneous ruling was likely based on the defendant's failure to brief the issue. *See* Appellant's Opening Brief, *Boaz*, 558 F.3d 800 (No. 09-2591), 2009 WL 3043651.

36. *See Barry*, 29 P. at 1026-27; *see also Matthews*, 741 P.2d at 371 (affirming the conviction of a defendant who entered a supermarket during business hours to steal "two packages of meat").

37. *See, e.g.*, People v. Pineda, 106 P.2d 25, 26, 28 (Cal. Dist. Ct. App. 1940) (affirming the conviction of a defendant who, armed with a gun and a crowbar, broke into a grocery store at 1:30 AM).

38. *See* Petition for Writ of Certiorari at 17-21, Descamps v. United States, 133 S. Ct. 2276 (2013) (No. 11-9540) (detailing the extent of the conflict among circuits).

39. United States v. Aguila-Montes de Oca, 655 F.3d 915, 931 (9th Cir. 2011) (en banc).

40. *Descamps*, 133 S. Ct. at 2282.

Descamps's prior convictions justified a sentence enhancement under ACCA. Descamps argued that his conviction for burglary in California in 1978 was not "burglary" under ACCA because California's burglary statute did not contain the element of unlawful entry.[41] The government countered that Descamps had in fact committed burglary by means of unlawful entry.[42] As evidence, the government produced a transcript of Descamps's thirty-five-year-old plea colloquy, during which the prosecutor stated that the factual basis for the conviction was the "breaking and entering of a grocery store."[43] Descamps's counsel at the California proceeding did not object to this statement.[44]

The district court[45] and the Ninth Circuit[46] found that this evidence was sufficient to show that Descamps had committed burglary within the meaning of ACCA. Descamps was sentenced to 262 months in prison.[47] Without the ACCA enhancement, his maximum sentence was 120 months.[48]

The Supreme Court reversed. In an opinion authored by Justice Kagan, the Court held that a conviction under a burglary statute that lacks an element of "generic burglary" is *never* burglary for the purposes of ACCA.[49] It drew a sharp line between cases in which the modified categorical approach is useful to determine which "statutory phrase" the defendant was convicted of violating and cases in which the statute of conviction is missing an element of the federal crime altogether. In the latter circumstance, the "modified approach . . . has no role to play."[50]

As Justice Kagan herself suggested during oral argument, this result is "a little bit insane."[51] A frustrated Justice Breyer noted that "a whole lot" of people who actually committed violent crimes will escape the sanction of ACCA due to the formalities of the modified categorical approach.[52] Yet both of these Justices joined the majority opinion, which explained that four considerations drove this result: the text of ACCA, the Sixth Amendment of the Constitution, practical considerations, and the potential unfairness of a contrary rule.

The Court first found support for its ruling in the text of ACCA. The statute "increases the sentence of a defendant who has three 'previous convictions' for a violent felony—not a defendant who has thrice committed such a

41. *Id.*

42. *Id.*

43. *Id.* (quoting United States v. Descamps, 466 F. App'x 563, 565 (9th Cir. 2012) (per curiam)) (internal quotation mark omitted).

44. *Id.*

45. Findings & Conclusions at 2-4, United States v. Descamps, No. CR-05-104-FVS (E.D. Wash. Jan. 9, 2008).

46. *Descamps*, 466 F. App'x 563.

47. *Descamps*, 133 S. Ct. at 2282.

48. *Id.*

49. *Id.* at 2293.

50. *Id.* at 2285.

51. Transcript of Oral Argument at 21, *Descamps*, 131 S. Ct. 2276 (No. 11-9540).

52. *Id.* at 11.

crime."[53] By using the word "conviction," Congress intended for federal courts to examine the elements of a prior conviction, not the defendant's past conduct, when determining federal sentences. Reinforcing this conclusion, the Court noted that in other statutes Congress has used explicit language to direct federal judges to examine the facts underlying a defendant's prior conviction.[54] The absence of such language in ACCA indicated that Congress meant to proscribe such an inquiry.[55]

Constitutional considerations reinforced this reading of ACCA. In *Apprendi v. New Jersey*, the Court ruled that the Sixth Amendment's right to a jury trial means that "[o]ther 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."[56] Any determination by a sentencing judge that goes "beyond merely identifying a prior conviction" could be forbidden judicial factfinding.[57] While the Court did not say outright that the judicial factfinding engaged in by the Ninth Circuit violated Descamps's Sixth Amendment rights, it applied sub silentio the doctrine of constitutional avoidance to circumvent any ruling on that question.[58]

Third, the Court recognized that allowing sentencing courts to sift through the records of prior convictions would be unnecessarily time consuming. Reexamining prior convictions would require courts "to expend resources examining (often aged) documents" pertaining to long-past crimes.[59] Moreover, these documents might be "downright wrong" because the defendant might have had no incentive to challenge a fact that was irrelevant to an element of her original conviction.[60] A simple hypothetical[61] illustrates this concern: Imagine a defendant accused of breaking into a store to steal a television. In reality, the defendant entered the store during business hours and took the television without paying for it. While this would be a complete defense to the "generic" crime of burglary, the defendant's version of events is irrelevant in states that don't have

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53. *Descamps*, 133 S. Ct. at 2287.

54. 8 U.S.C. § 1101(a)(43)(M)(i) (2013), for example, requires the deportation of individuals convicted of fraud-based crimes "in which the loss to the victim or victims exceeds $10,000." In *Nijhawan v. Holder*, the Court recognized that this statutory language authorized federal immigration judges to conduct an inquiry into the facts of the alien's scheme to defraud that led to his conviction. 557 U.S. 29, 36 (2009).

55. *Descamps*, 133 S. Ct. at 2287.

56. 530 U.S. 466, 490 (2000).

57. *Descamps*, 133 S. Ct. at 2288.

58. *Id.* (noting that permitting judges to make findings about the factual basis of a prior conviction "would (at the least) raise serious Sixth Amendment concerns").

59. *Id.* at 2289.

60. *Id.*

61. This hypothetical is roughly based on a hypothetical discussed by the brief of amici curiae National Association of Criminal Defense Lawyers and National Association of Federal Defenders in *Descamps*. *See* Brief for Amici Curiae Nat'l Ass'n of Criminal Def. Lawyers & Nat'l Ass'n of Fed. Defenders in Support of Petitioner at 31, *Descamps*, 131 S. Ct. 2276 (No. 11-9540).

unlawful entry as an element of burglary. The defendant would have no reason to contest this fact.

Finally, the Court noted that allowing a federal sentencing court to engage in any sort of factfinding regarding a defendant's prior convictions would be fundamentally unfair. Many people who committed the generic offense of burglary worked with prosecutors to reach a plea agreement for a lesser offense, such as trespassing or theft. Allowing a court to later reopen that plea bargain, examine statements from the plea colloquy, and determine whether the defendant had actually committed burglary deprives the defendant of the benefit of that bargain.[62]

Justice Alito found these rationales unpersuasive. Writing alone in dissent, he criticized the majority's approach as "highly technical."[63] In his view, limiting the reach of ACCA would frustrate Congress's purpose of incapacitating "violent, dangerous recidivists."[64] While not explicitly calling for an abandonment of the categorical approach, Justice Alito advocated a "practical" approach to evaluating prior convictions that would allow a trial court to decide when it is "clear" that the defendant "necessarily admitted" to committing a predicate offense.[65]

Despite the majority's clear statement that burglary convictions lacking the element of lawful entry can never be burglary within the meaning of ACCA, the Court noted that such a conviction could still trigger an ACCA enhancement if the underlying offense "presents a serious potential risk of physical injury to another."[66] In a footnote, the Court noted that the government forfeited the argument that a conviction for burglary in California should trigger an ACCA enhancement due to its "serious potential risk of physical injury to another," while "express[ing] no view on that argument's merits."[67] Given the prevalence of such convictions, this question will inevitably arise in the near future. The next Part of this Comment addresses how the courts of appeals (and perhaps the Supreme Court) should answer that open question.

III. ASSESSING BURGLARY'S RISK OF VIOLENCE

As noted in Part I, convictions for crimes that "present[] a serious potential risk of physical injury to another" also trigger sentence enhancements under ACCA.[68] This clause has been dubbed the "residual clause" because it encompasses a host of potentially violent felonies that are not specifically named in

62. *Descamps*, 133 S. Ct. at 2289.

63. *Id.* at 2295 (Alito, J., dissenting).

64. *Id.* at 2302.

65. *Id.* at 2295, 2303.

66. 18 U.S.C. § 924(e)(2)(B)(ii) (2013).

67. *Descamps*, 133 S. Ct. at 2293 n.6 (quoting 18 U.S.C. § 924(e)(2)(B)(ii)) (internal quotation mark omitted).

68. 18 U.S.C. § 924(e)(2)(B)(ii).

ACCA.[69] Lower courts have already begun to struggle with the issue left open by *Descamps*: whether the residual clause applies to convictions under burglary statutes that do not precisely match the definition of "generic burglary."[70] Significant litigation on this subject is inevitable.

In this Part, I first outline how the Supreme Court has defined the parameters of the residual clause, a provision that is "not a model of clarity."[71] I then argue that courts applying the Supreme Court's standards should find that residential burglary convictions trigger ACCA enhancements, while burglaries of other structures do not.

A. *The Supreme Court's "Risk of Violence" Jurisprudence*

Although the Supreme Court has repeatedly issued opinions interpreting ACCA's residual clause,[72] it has not yet articulated anything resembling a clear test for lower courts to apply.[73] Two principles, however, animate the Court's residual clause jurisprudence. First, courts applying the residual clause, like the rest of the statute, must follow a "categorical approach." The sentencing court should examine the elements of the prior conviction, evaluating the risk of violence "in the ordinary case."[74] Second, the court should determine whether this ordinary case poses a similar risk of injury to the crimes named in ACCA—burglary, arson, extortion, and explosives offenses.[75] This Subpart explains how the Supreme Court has justified and applied these principles.

Applying the categorical approach to the residual clause is a difficult and subjective task. Looking only at the elements of the prior conviction, judges must determine whether the *ordinary* commission of that offense would risk injury to others. A sentence enhancement is therefore based not on the defendant's actual conduct but on whether a generic offender risked harming others.

This approach obviously risks unfairness to both the government and the offender. Someone who is convicted of felony drunk driving after driving his car the wrong way down an interstate has categorically not been convicted of an offense that involves a serious potential risk of physical injury to another[76]

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69. *See* James v. United States, 550 U.S. 192, 201 (2007).

70. *See, e.g.*, United States v. Mayer, 560 F.3d 948, 954 (9th Cir. 2009) (holding that a conviction for first-degree burglary in Oregon entails a risk of violence to others under the residual clause); United States v. Snyder, 5 F. Supp. 3d 1258, 1264-65 (D. Or. 2014) (holding that a conviction for second-degree burglary in Oregon does *not* entail such a risk).

71. *James*, 550 U.S. at 217 (Scalia, J., dissenting).

72. *See* Sykes v. United States, 131 S. Ct. 2267, 2284 (2011) (Scalia, J., dissenting) ("We try to include an ACCA residual-clause case in about every second or third volume of the United States Reports.").

73. Justice Scalia finds the Court's jurisprudence so muddled that he has argued that the statute should be held "void for vagueness." *See id.*

74. *James*, 550 U.S. at 208.

75. *See id.* at 203.

76. *See* Begay v. United States, 553 U.S. 137, 148 (2008).

despite the obvious danger posed by this conduct. Likewise, any individual who is convicted of fleeing the police by means of a vehicle has been convicted of a "violent felony"[77] even if that individual led the police on a low-speed chase using a motorized wheelchair.

Applying the categorical approach to the residual clause, however, is necessary to avoid the same pitfalls identified in the *Descamps* opinion. Authorizing sentencing judges to engage in case-specific inquiries into the facts of past convictions contravenes ACCA's textual command to evaluate only a defendant's prior "conviction," raises serious constitutional concerns of factfinding by a sentencing judge, and poses significant practical difficulties. The case for a categorical approach under the residual clause is perhaps even stronger than under other parts of the statute: the residual clause may be invoked whenever the prior conviction presents a "serious *potential* risk of physical injury," regardless of whether that injury actually occurred.[78] "Potential risk" is an "inherently probabilistic concept[]."[79] A person who leads police on a vehicle chase or fires a gun toward a crowd of people has clearly created a *potential* risk of injury even if none actually results. Sentence enhancements may therefore be imposed even if the sentencing court does not possess "metaphysical certainty" that the defendant's conduct posed a risk of harm to another person.[80]

The second principle animating the Supreme Court's residual clause jurisprudence puts flesh on the meaning of the phrase "serious potential risk of violence." Sentencing judges should only apply a sentence enhancement when the "ordinary" commission of the crime of conviction poses a risk similar to that of the offenses named in the statute—burglary, arson, extortion, and explosives offenses.[81] Courts should compare the crime of conviction to its "closest analog" in ACCA and determine whether that crime poses a comparable risk.[82] Thus, the term "serious potential risk" is defined by the Court's assessment of the risk posed by "generic" burglary, arson, extortion, and explosives offenses.

The Supreme Court has not cogently articulated how lower courts should make this "inherently probabilistic" assessment, but it has justified its rulings using a range of analytical tools. Empirical data, when available, may be helpful. For example, in *Chambers v. United States*, the Court held that the offense of "failing to report to a penal institution" did not involve a serious potential risk of violence.[83] In support of this conclusion, the Court cited a U.S. Sentencing Commission study that cataloged 160 "failure to report" offenses and found

77. *See Sykes*, 131 S. Ct. at 2270.
78. 18 U.S.C. § 924(e)(2)(B)(ii) (2013) (emphasis added).
79. *James*, 550 U.S. at 207.
80. *Id.*
81. *Id.* at 203.
82. *Id.*
83. 555 U.S. 122, 126-27 (2009).

that not one of the offenses involved violence.[84] Likewise, in *James v. United States*, the Court found a Sentencing Commission recommendation persuasive because it was "presumably" based on a "review of empirical sentencing data."[85]

Whether or not such data are available, the Court has not hesitated to apply its "common sense" to evaluate the crime of conviction.[86] Opinions evaluating the residual clause are replete with Justices' conflicting interpretations of how certain state crimes are ordinarily committed and the risk of violence posed by that conduct. For example, in *Sykes v. United States*, the majority described the potentially ruinous consequences of police chases, noting that people convicted under the statute have made a "determination to elude capture" that risks violence to "pedestrians and other drivers."[87] The dissent emphatically disagreed. It hypothesized that the "mere failure to stop [for the police] does not usually 'presen[t] a serious potential risk of physical injury to another,' any more than normal driving does."[88] The speculation of appellate court judges about the nature of the crime of conviction plays a critical (if seemingly arbitrary) role in residual clause analysis.

Finally, the Court has noted that certain convictions may not qualify for an ACCA enhancement because they do not encompass conduct typically associated with career criminals. *Begay v. United States* raised the question of whether drunk driving, an offense that kills approximately 17,000 people each year, triggers an ACCA enhancement.[89] While recognizing the havoc wreaked by intoxicated motorists, the Court declined to impose an enhancement because drunk driving is not the kind of "purposeful, violent, [or] aggressive conduct" ACCA was designed to punish.[90] Although this distinction has been criticized,[91] the Court continues to maintain that certain "strict liability, negligence, and recklessness crimes" should never trigger ACCA enhancements, regardless of the risk of violence they pose.[92]

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84. *Id.* at 129-30.

85. *James*, 550 U.S. at 206; *see also* Sykes v. United States, 131 S. Ct. 2267, 2274 (2011) (citing a study by the International Association of Chiefs of Police regarding the number of injuries sustained in police pursuits).

86. *See Sykes*, 131 S. Ct. at 2279-80 (Thomas, J., concurring in the judgment) (noting that statistical data regarding an offense's potential risk of violence "merely reinforce common sense and real world experience").

87. *Id.* at 2273 (majority opinion).

88. *Id.* at 2290 (Kagan, J., dissenting) (second alteration in original) (citation omitted) (quoting 18 U.S.C. § 924(e)(2)(B)(ii)).

89. 553 U.S. 137, 139-41 (2008).

90. *Id.* at 1445.

91. *E.g.*, *Sykes*, 131 S. Ct. at 2277 (Thomas, J., concurring in the judgment); *id.* at 2285 (Scalia, J., dissenting).

92. *Id.* at 2276 (majority opinion). The Court's approach to the residual clause has frustrated several of its members. Justice Scalia has argued that the clause is so difficult to interpret that it should be found void for vagueness. *See supra* note 73. Justices Alito and Thomas have likewise expressed frustration, arguing that the clause is "nearly impossible to

B. *Burglary's Risk of Violence in a "Mansion-House" and Walmart*

Courts must soon grapple with the question left open by *Descamps*: Should a conviction for entering a structure with the intent to commit a felony inside trigger an ACCA enhancement under the residual clause when it is impossible to tell whether the entry was "unlawful or unprivileged"? In this Subpart, I argue that courts should apply the residual clause to burglary convictions that involved entering a residential structure but not to convictions that involved entering any other building.

In states whose burglary statutes are missing the element of unlawful entry, there is no "ordinary case" of burglary for courts to analyze. It is true that many defendants convicted of burglary in these states entered a building unlawfully. While it might be tempting to say that this behavior constitutes the ordinary case,[93] no empirical evidence supports such a sweeping generalization. The available evidence instead tends to show that many people convicted of burglary in these states were mere petty shoplifters or committed a crime after being invited into a residence.[94] Unless a court concluded that even shoplifting poses a serious risk of violence to others, attempting to lump this wide range of conduct into a single residual clause inquiry would surely lead to manifest unfairness.

This does not mean, however, that courts are powerless to apply residual clause enhancements to all burglary convictions from states without an unlawful-entry requirement. The modified categorical approach explicitly authorizes sentencing judges to examine court records to determine under which statutory phrase or subsection a defendant was convicted. Courts should apply an enhancement if the defendant was convicted of burglarizing a residential structure but not if he was convicted of burglarizing other (presumably commercial) facilities. The structure of the burglary statutes in every state that does not require unlawful entry permits this sharpened application of ACCA.

As a threshold matter, drawing a distinction between burglaries of residences and burglaries of other structures is quite sensible. At common law, burglary involved only entry of a "dwelling,"[95] and the punishment for that offense was death.[96] Thefts committed in areas other than dwelling houses were

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apply consistently." Chambers v. United States, 555 U.S. 122, 133 (2009) (Alito, J., concurring in the judgment).

93. Transcript of Oral Argument, *supra* note 51, at 10-11.

94. *See, e.g.*, People v. Nguyen, 46 Cal. Rptr. 2d 840, 841 (Ct. App. 1995) (affirming a burglary conviction for using a bad check to purchase goods advertised in newspaper classifieds); Matthews v. State, 741 P.2d 370, 371 (Idaho Ct. App. 1987) (affirming a burglary conviction for entering a supermarket during business hours to steal "two packages of meat").

95. BLACK'S LAW DICTIONARY 238 (10th ed. 2014).

96. Helen A. Anderson, *From the Thief in the Night to the Guest Who Stayed Too Long: The Evolution of Burglary in the Shadow of the Common Law*, 45 IND. L. REV. 629, 637 (2012).

treated as larceny[97] and punished according to the value of the goods stolen, not the risk of violence posed by the offense.[98]

This distinction is alive and well in our judicial system. Twenty-nine states have burglary statutes that punish burglary of a dwelling more severely than burglary of other types of buildings.[99] The U.S. Sentencing Commission applies higher sentences for people who have previously been convicted of residential burglary than for those convicted of other forms of burglary because residential burglary poses an "increased risk of physical and psychological injury."[100] The fact that the common law, state law, and federal law all differentiate between residential and other burglaries lends strong support to the notion that this is not a distinction without a difference.

Applying the Supreme Court's residual clause jurisprudence to residential burglary statutes that do not have the element of unlawful entry demonstrates that sentencing courts should apply enhancements for such convictions. Regardless of whether a residential burglary is committed by means of lawful or unlawful entry,[101] the crime poses a "serious potential risk of physical injury" to others. As the Supreme Court recently noted, the "main risk of burglary" is "the possibility that an innocent person might appear while the crime is in progress."[102] Such an encounter could spark a violent confrontation, initiated by either the aggrieved victim or the surprised burglar. Whether such a confrontation is likely to occur depends on two factors: "the potential for detection" and the "reactions of the victim and perpetrator if the felonious purpose is detected."[103]

By definition, a residential burglary that was actually committed by means of unlawful entry poses a serious risk of potential violence within the meaning of ACCA. This is so because the term "serious potential risk of physical injury" is defined by the risk of violence that occurs during such a generic burglary.[104] A residential burglary committed by means of lawful entry poses a comparable risk.

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97. *See* 3 CHARLES E. TORCIA, WHARTON'S CRIMINAL LAW § 343 (15th ed. 1995).

98. *See, e.g.*, Melia v. State, 247 A.2d 554, 558 n.5 (Md. Ct. Spec. App. 1968).

99. *See* Anderson, *supra* note 96, at 649 & nn.147-51 (collecting state statutes).

100. U.S. SENTENCING GUIDELINES MANUAL § 2B2.1 & cmt. background (2014).

101. It might be tempting to say that residential burglaries are typically committed by breaking and entering, so courts should consider unlawful entry to be the "ordinary case." There are two reasons I eschew this reasoning. First, there is no reliable empirical evidence that points to this conclusion. In fact, some data show that, from 2003 to 2007, approximately 130,000 burglaries committed by means of "unlawful entry" began with someone letting the offender through the front door. *See, e.g.*, SHANNAN CATALANO, U.S. DEP'T OF JUSTICE, VICTIMIZATION DURING HOUSEHOLD BURGLARY 6 (2010). Second, drawing such a conclusion is unnecessary if courts conclude that burglary committed by means of lawful entry poses a comparable risk of violence.

102. James v. United States, 550 U.S. 192, 203 (2007).

103. People v. Salemme, 3 Cal. Rptr. 2d 398, 402-03 (Ct. App. 1992).

104. *See James*, 550 U.S. at 203.

Burglaries committed by means of lawful entry necessarily involve several steps. The criminal first must form the intent to commit a felony in the home of another person.[105] Then the burglar must gain permission to enter that home. Critically, the person granting permission must be unaware of the criminal's felonious intent.[106] Such a factual scenario might be imagined in cases involving real estate open houses, block parties, or perhaps the homes of the unsuspecting friends and family members of the burglar.

The common denominator of these hypothetical scenarios is that the home being burgled is almost always occupied by an innocent person. The risk of detection is at its peak because both the unsuspecting resident and the burglar are present in the same structure. The risk of an interaction between the burglar and the occupant seems far greater than in a case of generic burglary, which could involve the "break-in of an unoccupied structure located far off the beaten path and away from any potential intervenors."[107]

When a burglar has gained permission to enter a residence from its occupant, there is no longer any risk that the homeowner will initiate a confrontation simply due to his surprise that he is not alone in his residence. This situation does not, however, obviate the risk of violence. Rather, the risk of violence in such a scenario exists when the "victim discovers the illegality."[108] At that point, he may be "attacked by the perpetrator,"[109] or he may respond with violence of his own. Untrained in crime prevention, but perhaps bolstered by longstanding notions that a person's home is his "castle" and that a homeowner may "stand his ground" in the face of criminal wrongdoing, the victim may very well escalate the confrontation into a violent encounter.

The risk of such a confrontation between the occupant of a home and an invited guest is not idle speculation. Even in the context of unlawful-entry burglaries, one-third of victims of occupied-home burglaries know the burglar.[110] And when the victim is familiar with the burglar, the burglary is far *more* likely to result in violence than a burglary by an unknown or random perpetrator.[111] It defies intuition to suggest that the risk of violence is dramatically lower when the homeowner, unaware of the burglar's felonious intent, invites the burglar into her home. While the precise risk of a violent confrontation during a burglary committed after a lawful entry is thus not entirely clear, the residual clause does not require "metaphysical certainty." The risk of violence posed by a bur-

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105. *See* People v. Gauze, 542 P.2d 1365, 1369 (Cal. 1975) (en banc) (holding that a person cannot burglarize his own home).

106. *See* People v. Superior Court (*Granillo*), 253 Cal. Rptr. 316, 320 (Ct. App. 1988) (holding that a person who is invited onto property by someone who is aware of and endorses the entrant's felonious intent has not committed burglary).

107. *James*, 550 U.S. at 207.

108. *Salemme*, 3 Cal. Rptr. 2d at 403.

109. *Id.*

110. *See* CATALANO, *supra* note 101, at 8.

111. *See id.* at 1.

glar who gains permission to enter a residence by hiding his felonious intent therefore surely qualifies as serious. And of course, any exception created by *Begay* does not apply: residential burglary is not a "strict liability" or "negligence" crime; it requires a person to enter someone else's home with the specific intent to commit a crime therein.

Applying the same analytical framework to nonresidential burglary yields the opposite result. When a burglary statute does not contain the element of unlawful entry, both breaking into a closed commercial structure and stealing from a store during normal business hours constitute burglary. The first scenario is generic burglary and carries all of the attendant risks of violence. Were this the "ordinary case" of commercial burglary, courts would be justified in applying ACCA enhancements under the residual clause. There is no evidence, however, that burglary of this type is the ordinary case. Data on the frequency of such unlawful-entry burglary convictions are unavailable, but appellate reporters are replete with stories of defendants convicted of burglary for criminal activity committed after entering a structure lawfully, including taking meat from a grocery store,[112] stealing a jacket from a department store,[113] and even attempting to withdraw money from a bank using a stolen ATM card.[114]

In the absence of compelling evidence demonstrating that nonresidential burglary by means of unlawful entry is the ordinary commission of the offense, applying a sentence enhancement under the residual clause is only justified if a court concludes that nonresidential burglary committed after lawful entry poses a serious risk of violence. It does not.

To begin, the risk of detection of crimes committed in commercial establishments may be lower than law-abiding citizens might surmise. Many retail establishments employ a multitude of antitheft measures, such as video cameras, store detectives, and radio frequency tags. Despite these precautions, the losses from shoplifting amount to over $12 billion each year,[115] reflecting the fact that many shoplifters can and do succeed in absconding with merchandise undetected. Survey data indicate that shoplifters are only apprehended approximately one out of every fifty times they engage in shoplifting.[116] In *Sykes v. United States*, the Supreme Court noted that slightly over three percent of resi-

112. Matthews v. State, 741 P.2d 370, 371 (Idaho Ct. App. 1987).

113. State v. Embree, 633 P.2d 1057, 1058 (Ariz. Ct. App. 1981).

114. People v. Ravenscroft, 243 Cal. Rptr. 827, 827 (Ct. App. 1988), *overruled by* People v. Davis, 958 P.2d 1083 (Cal. 1998). In *People v. Davis*, the California Supreme Court clarified that mere insertion of an ATM card into a machine does not constitute "entry." *See Davis*, 958 P.2d at 1089-90. But this does not change the fundamental proposition that ATM machines are spaces protected by the burglary statute.

115. Kathy Grannis, *National Retail Security Survey: Retail Shrinkage Totaled $34.5 Billion in 2011*, NAT'L RETAIL FED'N (June 22, 2012), https://nrf.com/news/loss-prevention/national-retail-security-survey-retail-shrinkage-totaled-345-billion-2011.

116. *Shoplifting Statistics*, NAT'L ASS'N FOR SHOPLIFTING PREVENTION, http://www.shopliftingprevention.org/whatnaspoffers/nrc/publiceducstats.htm (last visited Feb. 23, 2015).

dential burglaries committed by means of unlawful entry result in injury;[117] if shoplifting is only *detected* two percent of the time, it can only pose the same risk of violence as generic burglary if detection of shoplifting carries a special risk of violence.

No such special risk exists. Most retail companies employ strict policies instructing their employees to contact authorities rather than confront shoplifters, firing those employees who attempt to stop crimes in progress.[118] For good reason: in addition to being financially liable for injuries to their own employees, companies may be held liable for a shoplifter's injuries if an overzealous employee uses unreasonable force on the suspected criminal.[119] Even in the rare instances when an employee does choose to intervene during a shoplifting incident, the risk of violence is minimized by two factors. First, unlike the average homeowner, employees authorized to detain a shoplifting suspect are likely to have at least some training in how to minimize the risk of a violent confrontation. Second, the retail store setting is not likely to inspire the same feelings of surprise and betrayal as an invasion of a person's "castle." To the contrary, retail stores (and perhaps their employees) view losses to criminal activities as an inevitable cost of doing business; theft losses are, in fact, tax deductible.[120]

This analysis of the risk of nonresidential burglary is reinforced by the fact that states punish it far less severely than residential burglary. Most states designate the act of stealing from a commercial establishment during business hours as simple theft or shoplifting.[121] When theft from a retail establishment is punished more severely than simple theft, the increased criminal sanction is justified by the pervasive economic losses caused by shoplifting, not by the increased danger of violence from theft in such a structure.[122] In California, burglary of a commercial establishment is considered a "wobbler" offense, which

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117. 131 S. Ct. 2267, 2274 (2011).

118. *See, e.g.*, Michelle Nicks, *Home Depot Employees Fired for Pursuing Shoplifting Suspects*, WFMJ, http://www.wfmj.com/story/16518324/home-depot-employees-fired-for-pursuing-shoplifting-suspects (last visited Feb. 23, 2015). While police may have violent confrontations with shoplifters, this risk hardly justifies an ACCA enhancement. By this logic, every arrestable offense would trigger ACCA liability, as any suspected criminal might turn violent at the moment of his arrest.

119. *See, e.g.*, Jim Phillips, *Area Man Sues Wal-Mart over Shoplifting Bust*, ATHENS NEWS (June 22, 2011), http://www.athensnews.com/ohio/article-34273-area-man-sues-wal-mart-over-shoplifting-bust.html.

120. *See* I.R.C. § 165 (2013).

121. States that do punish shoplifting as a felony do so based on the value of the goods stolen. *See, e.g.*, TENN. CODE ANN. § 39-14-105 (2014) (defining the theft of goods valued at $500 or less as a misdemeanor and the theft of goods valued at more than $500 as a felony).

122. *See, e.g.*, Craig v. State, 410 So. 2d 449, 453 (Ala. Crim. App. 1981) (describing shoplifting as a "costly problem"); People v. James, 499 N.E.2d 1036, 1037 (Ill. App. Ct. 1986) (noting that the legislature could choose to punish shoplifting more strictly than other theft offenses due to shoplifting's "detriment to the State's economy").

means that the judge may unilaterally choose to reduce the charge to misdemeanor burglary at any point during the proceedings.[123]

Finally, although entering a store with the intent to commit a crime inside is "purposeful," it is not the type of "violent" and "aggressive" crime that Congress was targeting with ACCA. To the contrary, psychological research frequently finds a link between shoplifting and depression.[124] Rather than being the culmination of a violent plan, shoplifting provides depressed or bored individuals with a temporary thrill or rush. This objective simply does not correspond with the violent and aggressive ends of so-called "armed career criminals."[125]

Indeed, federal courts have already drawn such a distinction in the immigration context. Certain immigration statutes render an alien automatically deportable if she committed a crime that "involves a substantial risk that physical force against the person or property of another may be used."[126] Applying a similar analysis to the one I have proposed, these courts have found that convictions for residential burglary under a statute that does not require unlawful entry entail a "substantial risk" of violence, while other burglary convictions do not.[127] Applying the same distinction to the residual clause would be consistent with this precedent.

Federal sentencing courts that adopt the distinction I have proposed will have little difficulty applying this rule to state convictions in the six states that do not require unlawful entry as an element of burglary. Arizona and California differentiate between residential burglary and burglary of other structures by placing those offenses in different statutes.[128] A sentencing judge need only

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123. CAL. PENAL CODE § 17(b) (West 2014).

124. *See* Elizabeth Yates, *The Influence of Psycho-Social Factors on Non-Sensical Shoplifting*, 30 INT'L J. OFFENDER THERAPY & COMP. CRIMINOLOGY 203, 203 (1986).

125. It is of course possible that thefts from retail or commercial establishments during business hours might be achieved through purposeful or aggressive means. However, if a criminal takes property from another by using force or the threat of force, this could properly be charged as robbery, which is clearly a violent felony within the meaning of ACCA. *See* 18 U.S.C. § 924(e) (2013). Such violent offenders would therefore easily be segregated from the shoplifters who should not fall within the ambit of ACCA.

126. *Id.* § 16(b).

127. *Compare* Lopez-Cardona v. Holder, 662 F.3d 1110, 1112 (9th Cir. 2011) (holding that a first-degree burglary conviction in California is a "particularly serious crime" for immigration purposes (quoting 8 U.S.C. § 1231(b)(3)(B)) (internal quotation marks omitted)), *with* Ye v. INS, 214 F.3d 1128, 1133 (9th Cir. 2000) (holding that a second-degree burglary conviction in California does not "involve[] a substantial risk that physical force against the person or property of another may be used in the course of committing the offense" (quoting 8 U.S.C. § 1101(a)(43)(F)) (internal quotation mark omitted)).

128. ARIZ. REV. STAT. ANN. § 13-1506 (2014) (nonresidential); *id.* § 13-1507 (residential); CAL. PENAL CODE § 460(a) (West 2014) (specifying that burglary of an inhabited dwelling house is first-degree burglary); *id.* § 460(b) (specifying that every other kind of burglary is second-degree burglary).

determine the applicable section of the state's penal code and apply an ACCA enhancement accordingly.

Idaho, Illinois, Nevada, and Rhode Island criminalize burglary of residences and other structures in a single statute.[129] However, these statutes are "divisible" into distinct "statutory phrases." As the Supreme Court outlined in *Johnson v. United States*, this means that sentencing judges can apply the traditional modified categorical approach (which was not altered by *Descamps*) to determine whether a defendant's conviction was for the entry of a residence.[130]

CONCLUSION

Neither ACCA nor the Supreme Court's interpretations of it are models of clarity. Lawyers and judges alike struggle to understand this statutory regime. Yet applying the statute properly has enormous consequences: a finding that the defendant is an "armed career criminal" results in a mandatory minimum sentence of fifteen years in federal prison. For defendants who have already sustained three felony convictions, such a long sentence could be tantamount to a life term.

In *Descamps*, the Supreme Court brought some clarity to the statute, adhering strictly to its categorical approach. Eschewing judicial factfinding, it directed sentencing courts to remain focused only on the elements of prior convictions. This counterintuitive outcome was a necessary byproduct of the text of the statute, constitutional considerations, and pragmatic concerns.

Yet a strict categorical approach does risk results that are, to borrow the words of Justice Kagan, "a little bit insane." Violent criminals currently escape sentence enhancements based only on the technical aspects of their state's statutes. In this Comment, I suggest an approach that can remedy a bit of this insanity. ACCA's residual clause can fairly be applied to residential burglary because, regardless of how it is committed, that offense risks violence in a way that burglary of other structures does not. Exempting convictions for burglaries of nonresidential buildings from ACCA's reach ensures that shoplifters and petty thieves are not drawn into the statute's draconian ambit simply because a state has chosen to label these individuals burglars. Making this distinction will bring much-needed clarity to this area of the law.

129. IDAHO CODE ANN. § 18-1401 (2014); 720 ILL. COMP. STAT. 5/19-1 (2014); NEV. REV. STAT. § 205.060 (2014); R.I. GEN. LAWS § 11-8-3 (2014).

130. 559 U.S. 133, 144 (2010).