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Hypothetically Punished: Why the Court Should Heed Justice Thomas's Call in *United States v. Taylor* to End Its "Journey Through The Looking Glass"

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ABSTRACT

Should the location of a crime be the most important factor in determining the sentence of a convicted criminal? Should second-degree murder be categorically excluded from being a crime of violence simply because of the words a state legislature used to define it? Instinctively, much of society would answer "No"—finding that kind of arbitrariness and illogicality distasteful. Yet that is what has resulted from the Supreme Court's categorical approach to statutory interpretation.

The Supreme Court began the federal judiciary's journey of applying the categorical approach by using it to interpret the sentencing enhancement in 18 U.S.C. § 924(e). However, since then, the approach has been used to interpret other subsections of § 924 and sentencing enhancements in other statutes. When a court is determining whether a sentencing enhancement is applicable, the categorical approach requires courts to refrain from looking at the defendant's conduct and instead look only to the statutory elements of the offense. Practically speaking, this means that someone who commits a burglary in one state could be subject to the sentencing enhancement associated with a violent felony. However, if he commits the same burglary in a different state that has adopted a slightly different definition of burglary, his sentence could be decades lighter. In that state, his crime could be categorically excluded from the enhancement, and he would receive a lower sentence. This illogical result is just one illustration of the consequences of applying the categorical approach.

The Court's most recent decision on this issue—*United States v. Taylor*—extended the scope of the categorical approach, illustrating its illogical results in the context of § 924(c). Applying the approach to the statute's elements clause, the Court determined that even a crime where a man is shot and left to die alone in an alley may not constitute a crime of violence. Justice Clarence Thomas, a consistent opponent of the categorical approach, authored a strong dissent to the decision. In it, he identified many problems with the approach and urged the Court to recognize that it is not too late to turn around and retrace its steps. He particularly urged it to reconsider its decision to apply the categorical approach to § 924(c), a decision that resulted in the nullification of the statute's residual clause.

Building upon the problems with the categorical approach articulated by Justice Thomas, this Comment identifies three reasons why the Court must reconsider the categorical approach—beginning with its application to § 924(c). First, the categorical approach is inapplicable to § 924(c), even if it may be applicable in other circumstances, because § 924(c) contains a substantive crime and involves current, not past, conduct. Second, it is inconsistent with a retributivist view of justice and the idea that a person should receive their "just deserts" because, by its nature, the categorical approach does not consider an individual's actual conduct. Finally, applying the categorical approach has led the Court to overstep the bounds of its judicial power by making a prudential judgment about the value of the residual clause. All these factors indicate that the Court should retrace its steps as quickly as possible to lessen the future consequences of stubborn adherence to the categorical approach.

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COMMENT

HYPOTHETICALLY PUNISHED: WHY THE COURT SHOULD HEED JUSTICE THOMAS'S CALL IN *UNITED STATES V. TAYLOR* TO END ITS "JOURNEY THROUGH THE LOOKING GLASS"

Arielle N. Leake[†]

"It's a dangerous business . . . going out of your door . . . You step into the Road, and if you don't keep your feet, there is no knowing where you might be swept off to."

- J.R.R. Tolkien, *The Fellowship of the Ring*[1]

ABSTRACT

Should the location of a crime be the most important factor in determining the sentence of a convicted criminal? Should second-degree murder be categorically excluded from being a crime of violence simply because of the words a state legislature used to define it? Instinctively, much of society would answer "No"—finding that kind of arbitrariness and illogicality distasteful. Yet that is what has resulted from the Supreme Court's categorical approach to statutory interpretation.

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[1] J.R.R. TOLKIEN, THE FELLOWSHIP OF THE RING 72 (1954).

The Supreme Court began the federal judiciary's journey of applying the categorical approach by using it to interpret the sentencing enhancement in 18 U.S.C. § 924(e). However, since then, the approach has been used to interpret other subsections of § 924 and sentencing enhancements in other statutes. When a court is determining whether a sentencing enhancement is applicable, the categorical approach requires courts to refrain from looking at the defendant's conduct and instead look only to the statutory elements of the offense. Practically speaking, this means that someone who commits a burglary in one state could be subject to the sentencing enhancement associated with a violent felony. However, if he commits the same burglary in a different state that has adopted a slightly different definition of burglary, his sentence could be decades lighter. In that state, his crime could be categorically excluded from the enhancement, and he would receive a lower sentence. This illogical result is just one illustration of the consequences of applying the categorical approach.

The Court's most recent decision on this issue—United States v. Taylor—*extended the scope of the categorical approach, illustrating its illogical results in the context of § 924(c). Applying the approach to the statute's elements clause, the Court determined that even a crime where a man is shot and left to die alone in an alley may not constitute a crime of violence. Justice Clarence Thomas, a consistent opponent of the categorical approach, authored a strong dissent to the decision. In it, he identified many problems with the approach and urged the Court to recognize that it is not too late to turn around and retrace its steps. He particularly urged it to reconsider its decision to apply the categorical approach to § 924(c), a decision that resulted in the nullification of the statute's residual clause.*

Building upon the problems with the categorical approach articulated by Justice Thomas, this Comment identifies three reasons why the Court must reconsider the categorical approach—beginning with its application to § 924(c). First, the categorical approach is inapplicable to § 924(c), even if it may be applicable in other circumstances, because § 924(c) contains a substantive crime and involves current, not past, conduct. Second, it is inconsistent with a retributivist view of justice and the idea that a person should receive their "just deserts" because, by its nature, the categorical approach does not consider an individual's actual conduct. Finally, applying the categorical approach has led the Court to overstep the bounds of its

judicial power by making a prudential judgment about the value of the residual clause. All these factors indicate that the Court should retrace its steps as quickly as possible to lessen the future consequences of stubborn adherence to the categorical approach.

CONTENTS

I. INTRODUCTION 307

II. THE BEGINNING OF THE JOURNEY 309
- *A. 18 U.S.C. § 924 & The Categorical Approach* 310
  - 1. 18 U.S.C. § 924 311
  - 2. Crimes of Violence: Categorically Defined 313
- *B. Categorically Applied* 314
  - 1. Initial Application to the Armed Career Criminal Act 314
    - a. The Enumerated Offenses Clause: Taylor v. United States (1990) 315
    - b. The Elements Clause: Borden v. United States 316
    - c. The Residual Clause Part 1: James v. United States 317
    - d. The Residual Clause Part 2: Johnson v. United States 318
  - 2. Expansion to the Residual Clause of § 924(c): *United States v. Davis* 320

III. WHERE WE ARE NOW: *UNITED STATES V. TAYLOR* 323
- *A.* Taylor II 323
- *B. "Through the Looking Glass": Justice Thomas's Dissent* 326

IV. IT'S TIME FOR THE COURT TO JOURNEY BACK TO THE PRE-*DAVIS* ERA 329
- *A. Prior Convictions Are Not Present Conduct* 331
- *B. Justice Dictates That We Punish The Real Man, Not The Hypothetical One* 333
- *C. The Court Stepped Into the Prudential Realm* 337

V. CONCLUSION 340

I. INTRODUCTION

Imagine the impact of a crime's location if one mile could take decades off a defendant's sentence. In Cincinnati, Ohio, that impact is more than hypothetical; there, the impact is a reality. If a crime results in "serious physical harm to another" person, the one mile that spans the Ohio River between Ohio and Kentucky can represent a difference of a decade or more in a defendant's sentence.[2] In Kentucky, committing a crime that "cause[s] serious physical harm to another" person—putting them in the hospital or even killing them—is a "crime of violence" and qualifies the defendant for certain sentencing enhancements.[3] However, those very same actions taken just over the river in Ohio are not a crime of violence and are subject to a lower sentencing range.[4] While it may seem ridiculous that location can play the most significant role in determining a defendant's sentence, these logical inconsistencies are not an isolated phenomenon. In North Carolina, holding a family hostage in their home, beating them, threatening to kill their toddler, and eventually locking them in a closet is not a crime of violence.[5] Similarly, in Virginia, an attempted robbery where the victim is shot and left in an alley to die is not a crime of violence.[6] The culprit behind all of this chaos, which has left lower federal courts with their hands tied and no choice but to issue many logically inconsistent decisions, is a method of statutory interpretation known as the categorical approach.

The Supreme Court embarked on its journey of applying the categorical approach over thirty years ago.[7] Throughout that time, the categorical approach has slowly encroached on more and more statutes used to sentence defendants, culminating in the Court's most recent brush with the

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[2] United States v. Burris, 912 F.3d 386, 408 (6th Cir. 2019) (Thapar, J., concurring); 18 U.S.C. § 924(e).

[3] *Burris*, 912 F.3d at 408 (Thapar, J., concurring).

[4] *Id.*

[5] United States v. Taylor, 142 S. Ct. 2015, 2030 (2022) (Thomas, J., dissenting) (citing Factual Basis for Guilty Plea, United States v. Walker, No. 14-cr-00271 (M.D.N.C. Nov. 3, 2014), ECF No. 13).

[6] *Id.* at 2026 (citing United States v. Taylor, 979 F.3d 203, 205 (4th Cir. 2020)).

[7] *See* Taylor v. United States, 495 U.S. 575 (1990).

approach in *United States v. Taylor,* which it decided in June 2022.[8] Part II of this Comment describes the Court's journey by first identifying the categorical approach, how it works, and which statutes and types of clauses the Court applies it to. It then walks through the Court's application of the approach and its expansion over time to encompass more and more statutes—an expansion that eventually even rendered parts of those statutes void for vagueness.

Part III lays out the latest step in the Court's journey and the absurd results it has led to. It provides a summary of *United States v. Taylor,* focusing on Justice Thomas's dissent in which he detailed the issues he sees with the categorical approach and the Court's application of it, particularly in the context of the residual clause of 18 U.S.C. § 924(c)—a sentencing enhancement that also constitutes a separate crime.[9] Comparing the Court to Alice, who found herself in Wonderland in the well-known fairytale, Justice Thomas urged the Court that it is not too late to turn around and retrace its steps.[10] As Alice did, it can leave behind the "many 'strange things'" it has found on its journey.[11]

Part IV builds upon the problems articulated by Justice Thomas and identifies three reasons why the Court needs to reconsider applying the categorical approach to both the elements clause and the residual clause of § 924(c). First, as a substantive crime, § 924(c) is inherently different from the other statutes to which the Court has applied the categorical approach. As a result, the same rationales used to justify applying the approach to those statutes—weak as they are even there—do not apply in the context of § 924(c). Additionally, using the categorical approach is inconsistent with the predominant retributivist view of justice[12] and the idea that a person

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[8] *Taylor*, 142 S. Ct. 2015.

[9] 18 U.S.C. § 924(c).

[10] *Taylor*, 142 S. Ct. at 2026 (Thomas, J., dissenting) (quoting LEWIS CARROLL, THROUGH THE LOOKING GLASS 110 (Project Gutenberg 2008) (1981)).

[11] *Id.*

[12] The retributivist view of punishment is one of the earliest philosophies of justice, and its influence appears in manuscripts such as the Bible and the Code of Hammurabi. *See* Jon'a F. Meyer, *Retributive Justice*, ENCYC. BRITANNICA, https://www.britannica.com/topic/retributive-justice (last visited Sept. 30, 2023). While it has opponents, it is a predominant

should receive their "just deserts" because, by its nature, the categorical approach does not consider an individual's actual conduct. Finally, its commitment to applying the categorical approach has led the Court to overstep the bounds of its judicial power by making a prudential judgment about the value of certain clauses.

II. THE BEGINNING OF THE JOURNEY

The Supreme Court began its journey interpreting criminal sentencing enhancements with the categorical approach in *Taylor v. United States* (*Taylor I*) when it used the approach to interpret 18 U.S.C. § 924(e).[13] Since then, this approach to statutory interpretation has been used to interpret each of the three types of clauses within § 924(e), other provisions of § 924, and other criminal statutes.[14] Starting with the enumerated offenses clause in *Taylor I*, the Court has continued to apply and expand the scope of the approach even when it seemed to be rendering illogical results.[15] After continuing to push ahead with the approach, the Court was eventually faced, in *Johnson v. United States,* with the decision of either abandoning the categorical approach or finding the residual clause of § 924(e)—which had been relied upon for years in hundreds of convictions—unconstitutional.[16] Instead of abandoning the categorical approach, the

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philosophy of justice and it has significantly impacted the American legal system. David Dolinko, *Three Mistakes of Retributivism*, 39 UCLA L. REV. 1623, 1623 (1992); *Developments in the Law: Alternatives to Incarceration*, 111 HARV. L. REV. 1863, 1970 (1998). The retributivist view and its relation to the categorical approach is addressed in greater detail later in this Comment. *See infra* Section IV.B. However, the purpose of this Comment is to address how the categorical approach is inconsistent with this leading justification of punishment and not to provide a full defense of the retributivist view.

[13] U.S. SENT'G COMM'N, PRIMER ON CATEGORICAL APPROACH 1 (2023), https://www.ussc.gov/guidelines/primers/categorical-approach; Taylor v. United States, 495 U.S. 575, 588 (1990); *see also* Shepard v. United States, 544 U.S. 13 (2005) (creating the modified categorical approach).

[14] *See infra* Section II.B.

[15] *See infra* Section II.B.

[16] *See infra* Section II.B.1.d.

Court refused and decided to nullify first the residual clause of § 924(e), and then, in *United States v. Davis,* the residual clause of § 924(c).[17]

A. 18 U.S.C. § 924 & The Categorical Approach

The categorical approach is a method of statutory interpretation used to interpret some federal criminal sentencing enhancements involving either prior convictions or, in some cases, embodying substantive crimes.[18] The approach requires courts to examine "the fact of the prior conviction, the statutory elements of that offense, and, in rare cases" where the court applies a modified categorical approach, "the charging documents, jury instructions, or plea agreements" rather than the defendant's actual conduct.[19] The approach was created by the Supreme Court and applies when the statute of a prior conviction is an "indivisible criminal statute[]," meaning it is a statute without alternative elements.[20] An indivisible statute is one where a conviction results from satisfying a defined set of elements.[21] It is indivisible, even if there are multiple ways of satisfying a specific element, as long as the resulting conviction and penalty are the same each way the element is satisfied.[22] The Court only applies a "modified categorical approach" if the statute is divisible.[23]

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[17] *See infra* Sections II.B.1.d, II.B.2.

[18] U.S. SENT'G COMM'N, *supra* note 13, at 1.

[19] David C. Holman, *Violent Crimes and Known Associates: The Residual Clause of the Armed Career Criminal Act*, 43 CONN. L. REV. 209, 213 (2010). The modified categorical approach was created in *Shepherd v. United States.* U.S. SENT'G COMM'N, *supra* note 13, at 1; *see also* Shepard v. United States, 544 U.S. 13 (2005).

[20] Shelby Burns, *The Johnson & Johnson Problem: The Supreme Court Limited the Armed Career Criminal Act's "Violent Felony" Provision—and Our Children are Paying*, 45 PEPP. L. REV. 785, 799 (2018).

[21] *Id.*

[22] *Id.* at 799–800.

[23] U.S. SENT'G COMM'N, *supra* note 13, at 3. A statute is divisible if it lists "multiple crimes with alternative elements." *Id.*

1. 18 U.S.C. § 924

While the Court has applied the categorical approach to several different statutes, it originally developed within the context of 18 U.S.C. § 924.[24] The purpose of § 924 is "to prevent the carrying and use of firearms in the commission of federal felonies."[25] The categorical approach was first applied, in *Taylor I*, to the Armed Career Criminal Act (ACCA), which is encompassed in § 924(e).[26] The ACCA is a sentencing enhancement that requires a fine and a fifteen-year mandatory minimum for individuals who are both convicted under 18 U.S.C. § 922(g) and have three separate prior convictions that are either violent felonies, serious drug offenses, or a combination of the two.[27] The ACCA includes a definition of both "violent felony" and "serious drug offense."[28]

Eventually, the Court also applied the categorical approach to § 924(c). In contrast to the sentencing enhancement of the ACCA, § 924(c) constitutes a separate crime and is not solely a sentencing enhancement based on prior convictions.[29] It is violated by anyone "who, during and in relation to any crime of violence or drug trafficking crime . . . uses or carries a firearm, or who, in furtherance of any such crime, possesses a firearm."[30] Subsection (c)(3) of the statute provides the definition for the predicate "crime of violence."[31]

The Court has used the categorical approach to interpret three primary categories of clauses within § 924 and several other statutes.[32] The first category is the elements clause, the second is the enumerated offenses

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[24] *See id.* at 1, 15.

[25] United States v. Eagle, 539 F.2d 1166, 1171 (8th Cir. 1976); 18 U.S.C.S. § 924, note to decision (Purpose) (LEXIS through Pub. L. No. 118-13).

[26] *See* Taylor v. United States, 495 U.S. 575, 581–82 (1990).

[27] 18 U.S.C. § 924(e).

[28] *Id.* § 924(e)(2).

[29] *Id.* § 924(c).

[30] *Id.* § 924(c)(1)(A).

[31] *Id.* § 924(c)(3).

[32] *See* U.S. SENT'G COMM'N, *supra* note 13, at 4–8; James v. United States, 550 U.S. 192, 213–14 (2007).

clause, and the third—which the categorical approach eventually rendered invalid—is the residual clause.[33] The ACCA contains an example of all three clauses within its definition of violent felony.[34]

An elements clause, sometimes known as a "force clause," requires that the offense have physical force as an element of the crime.[35] The first clause in the definition of violent felony under the ACCA is a force clause.[36] It says that if the prior felony "has as an *element* the use, attempted use, or threatened use of *physical force* against the person of another," it is a violent felony.[37] The second way the definition of violent felony can be satisfied is if the felony falls within the statute's enumerated offenses clause.[38] The enumerated offenses are extortion, arson, burglary, or crimes involving the use of explosives.[39] In order to satisfy the clause, the felony must not only be one of the enumerated offenses in name, but all its elements must match those set by the Court.[40] Finally, a prior conviction can also fall within the definition of violent felony if it "otherwise involves conduct that presents a serious potential risk of physical injury to another."[41] This final clause is an example of a residual clause, and it encompasses many violent crimes that the first two clauses of the statute do not.[42] While § 924(c)'s definition of "crime of violence" does not contain all three clauses like the ACCA, it does contain both an elements clause and a residual clause.[43]

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[33] *See* U.S. SENT'G COMM'N, *supra* note 13, at 4–8; *James*, 550 U.S. at 213–14; Johnson v. United States, 576 U.S. 591 (2015) (holding the application of the categorical approach to the ACCA's residual clause rendered it vague and unconstitutional); United States v. Davis, 139 S. Ct. 2319 (2019) (holding that the application of the categorical approach also rendered the similarly worded residual clause in § 924(c) vague and unconstitutional).

[34] 18 U.S.C. § 924(e)(2)(B).

[35] U.S. SENT'G COMM'N, *supra* note 13, at 5.

[36] *Id.*

[37] 18 U.S.C. § 924(e)(2)(B)(i) (emphasis added).

[38] *Id.* § 924(e)(2)(B)(ii).

[39] *Id.*

[40] *See* Taylor v. United States, 495 U.S. 575, 599 (1990).

[41] 18 U.S.C. § 924(e)(2)(B)(ii).

[42] James v. United States, 550 U.S. 192, 197–98 (2007); *see* 18 U.S.C. § 924(e)(2)(B).

[43] 18 U.S.C. § 924(c)(3).

2. Crimes of Violence: Categorically Defined

In *Taylor I*, the Court used the categorical approach for the first time. It was used to determine whether a defendant's prior burglary conviction met the statutory definition of a violent felony under the ACCA. The Court conducted this analysis because a prior conviction must be either a violent felony or a serious drug offense to qualify for the sentencing enhancement contained in the ACCA.[44] However, the Court determined that a state's definition of burglary is categorically excluded from being a violent felony— under the enumerated offenses clause—if it does not contain all the same elements of burglary as the Supreme Court's generic interpretation of the meaning of "burglary" within the ACCA.[45] It is irrelevant whether a particular offense is labeled "burglary" within a state because definitions that are not "the same as, or narrower than, those of the generic offense" are excluded from being considered "burglary."[46] Instead, courts are required to look "only to the statutory definitions of the prior offenses, and not to the particular facts underlying those convictions."[47]

This idea is the main thrust of the categorical approach. It dictates that when the court is trying to determine the nature of a specific predicate offense, it should refrain from looking at the defendant's conduct and instead look only to the statutory elements of the offense.[48] For example, under the statute interpreted in *Taylor I*, a prior conviction has to categorically be a "violent felony as a matter of law"—regardless of whether it was committed in a violent way—to qualify for the sentencing enhancement.[49] Practically speaking, this means that someone who commits a burglary in one state could be subject to the sentencing enhancement associated with a violent felony. However, suppose he commits the exact same burglary in a different state that has adopted a

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[44] *Id.* § 924(e)(1).

[45] *Taylor*, 495 U.S. at 598. The Court created its generic definition using a combination of the Model Penal Code definition and a definition from a treatise. *Id.* at 598, 598 n.8.

[46] Descamps v. United States, 570 U.S. 254, 257 (2013); *Taylor*, 495 U.S. at 599.

[47] *Taylor*, 495 U.S. at 600.

[48] U.S. SENT'G COMM'N, *supra* note 13, at 2.

[49] Holman, *supra* note 19, at 213; *see Taylor*, 495 U.S. at 600.

slightly different definition of burglary. In that case, his crime could be categorically excluded from the enhancement, and he would receive a lower sentence.[50] Initially, the categorical approach was only used to interpret sentencing enhancements based on prior convictions, but now it is used to interpret the definitions of current offenses as well.[51]

In its Primer on the Categorical Approach, the U.S. Sentencing Commission lays out the process of applying the approach in three steps.[52] First, the court identifies "the relevant federal definition."[53] Then it "identifi[es] the elements of the prior conviction"—which involves deciding about the divisibility of the statute.[54] Finally, it compares the elements of the federal definition to those of the prior conviction to see if the offense is categorically excluded.[55]

B. Categorically Applied

The Court began its "journey Through The Looking-Glass"[56] with the creation and application of the categorical approach in *Taylor I*. From there, it applied the approach to each clause within the definition of "violent felony" and eventually applied it to other portions of § 924 as well.

1. Initial Application to the Armed Career Criminal Act

Starting with the enumerated offenses clause of the ACCA in *Taylor I*, the categorical approach eventually spread to both the elements clause and the residual clause. It was applied to the residual clause until the Court held,

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[50] Robert A. Zauzmer, *Fixing the Categorical Approach "Mess"*, 69 DEP'T JUST. J. FED. L. & PRAC. 3, 4 (2021).

[51] *See Taylor*, 495 U.S. at 600; U.S. SENT'G COMM'N, *supra* note 13, at 3.

[52] U.S. SENT'G COMM'N, *supra* note 13, at 4.

[53] *Id.*

[54] *Id.*; Burns, *supra* note 20, at 799.

[55] U.S. SENT'G COMM'N, *supra* note 13, at 4; Burns, *supra* note 20, at 800 ("If the statute 'criminalizes a broader swath of conduct,' then the crime is not a categorical match—it 'fail[s] to satisfy [the] categorical test'—and does not constitute a violent felony.").

[56] LEWIS CARROLL, THROUGH THE LOOKING GLASS 110 (Project Gutenberg 2008) (1981).

in *Johnson v. United States*, that the approach made the clause unconstitutionally vague.[57]

a. The Enumerated Offenses Clause: *Taylor v. United States* (1990)

In 1988, Arthur Taylor violated § 922(g) and was charged with "one count of possession of a firearm by a convicted felon."[58] He had four previous felony convictions, so the government pursued a sentencing enhancement under § 924(e) [the ACCA].[59] Taylor conceded that his prior robbery and assault convictions counted as two of his three violent felonies under the residual clause of the ACCA.[60] However, he argued that his two convictions for burglary under Missouri law did not qualify as violent felonies and, therefore, the sentencing enhancement did not apply.[61] Taylor ultimately pleaded guilty, and the district court sentenced him in accordance with his conviction under the ACCA.[62] However, his plea was conditioned on his ability to appeal his enhancement under the ACCA.[63]

The Eighth Circuit Court of Appeals found it was not error for the district court to use Missouri's definition of burglary, holding that the word burglary in the enumerated offenses clause of the ACCA "means 'burglary' however a state chooses to define it."[64] But the Supreme Court disagreed.[65] It said that it seemed "implausible that Congress intended the meaning of 'burglary' [in] § 924(e) [the ACCA] to depend on the definition adopted by the State of conviction."[66] The Court reasoned that inconsistency could

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57 *See infra* Section II.B.1.d.

58 Taylor v. United States, 495 U.S. 575, 578 (1990).

59 *Id.* at 578–79.

60 *Id.* at 579.

61 *Id.*

62 *Id.*

63 *Id.*

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

65 *Id.* at 590.

66 *Id.*

result from relying on various state definitions.[67] Instead, the Court determined that burglary must be interpreted using a generic definition drawn from a treatise and the Model Penal Code.[68] It concluded that trial courts can only look at the statutory definition to determine if the offense is categorically excluded and not at the facts of each prior conviction.[69] In other words, courts compare the state's definition of burglary to the generic definition of burglary within the clause to determine if they "correspond[] in substance."[70] If they do, then the crime is categorically included as a violent felony.[71] If not, then it is categorically excluded regardless of how the defendant actually committed the crime.[72]

b. The Elements Clause: *Borden v. United States*

The application of the categorical approach to the enumerated offenses clause was not the end of the Court's journey. Eventually, the Court also applied it to the elements clause of the ACCA.[73] In *Borden v. United States*, the government sought a sentencing enhancement under the ACCA—alleging three of the defendant's prior convictions as predicates—after he pleaded guilty to a "felon-in-possession charge."[74] One of his prior convictions was a conviction in Tennessee for "reckless aggravated assault."[75] The definition of the crime under Tennessee law is "'[r]ecklessly commit[ting] an assault' and either 'caus[ing] serious bodily injury to another' or 'us[ing] or display[ing] a deadly weapon.'"[76] Under the elements clause, one of the elements of Tennessee's conviction must involve the "use, attempted use, or threatened use of physical force against the person of

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67 *Id.* at 590–91.

68 *Id.* at 598, 598 n.8.

69 *Id.* at 601–02.

70 Taylor v. United States, 495 U.S. 575, 599 (1990).

71 *Id.*

72 *See id.* at 602.

73 Borden v. United States, 141 S. Ct. 1817, 1822 (2021).

74 *Id.*

75 *Id.*

76 *Id.* (quoting Tenn. Code Ann. § 39-13-102(a)(2) (2003)).

another" to be categorized as a crime of violence.[77] While it may appear that a reckless aggravated assault easily satisfies the elements clause's definition of a violent felony, the Court reached a different conclusion.

The Court adopted the categorical approach to interpret whether the Tennessee offense satisfied the elements clause.[78] As a result, the facts of the prior conviction were not relevant.[79] Instead, all that mattered was whether the elements were a categorical match.[80] The Court held that an offense with a *mens rea* of recklessness cannot qualify as a "violent felony," thus categorically excluding the Tennessee conviction for a "reckless aggravated assault."[81]

c. The Residual Clause Part 1: *James v. United States*

The categorical approach also reached the residual clause of the ACCA. In *James v. United States*, the government pursued a sentencing enhancement against James under the ACCA.[82] He qualified for the enhancement because he had been convicted under § 922(g) and had three prior felony convictions.[83] However, James contended that his attempted burglary conviction did not satisfy the definition of a "violent felony" under the statute.[84] The parties agreed that it did not satisfy either the elements clause or the enumerated offenses clause—leaving only the residual clause.[85] James argued that the residual clause excluded attempted crimes and therefore did not apply to his conviction.[86]

However, the Court disagreed and extended the application of the categorical approach to the residual clause. When it uses the categorical

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77 18 U.S.C. § 924(e)(2)(B)(i).

78 *Borden*, 141 S. Ct. at 1822.

79 *Id.*

80 *Id.*

81 *See id.* at 1821–22.

82 James v. United States, 550 U.S. 192, 196 (2007).

83 *Id.* at 195–96.

84 *Id.* at 196.

85 *Id.* at 197.

86 *Id.* at 198.

approach, rather than looking at the defendant's conduct, the Court looks at "whether the *elements of the* [prior] *offense* are of the type that would justify its inclusion within the residual provision."[87] The Florida definition of attempted burglary is "overt conduct directed toward unlawfully entering or remaining in a dwelling, with the intent to commit a felony therein."[88] This definition, the Court said, defines a felony as involving conduct that "'presents a serious potential risk of physical injury to another'" and therefore falls within the residual clause.[89] The Court reasoned that even if every way of committing an attempted burglary does not pose a risk of physical injury, attempted burglary can still categorically pose a "serious potential risk."[90] It concluded that all that is necessary for the crime to satisfy the residual clause is for the crime to pose a serious potential risk by its nature.[91]

d. The Residual Clause Part 2: *Johnson v. United States*

While the application of the categorical approach to the residual clause in *James* seemed to lead to a relatively logical result, it was deceiving. In reality, the majority in *James* prevents something the text of the ACCA allows on its face.[92] It prevents judges from referencing the facts found by the jury or admitted by the defendant when they are looking at a sentencing enhancement.[93] After all, one cannot properly determine whether conduct "presents a serious potential risk of physical injury to another" without looking at the individual's conduct.[94] As a result, in the years following *James*, the district courts struggled to reconcile the seemingly irreconcilable requirements of the categorical approach and the text of the residual

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87 *Id.* at 202.

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

89 *Id.* at 214 (Scalia, J., dissenting); 18 U.S.C. § 924(e)(2)(B)(ii).

90 *James*, 550 U.S. at 208–09.

91 *Id.* at 209.

92 *Id.* at 231. (Thomas, J., dissenting). The residual clause of the Armed Career Criminal Act defines violent felony as one that "involves conduct that presents a serious potential risk of physical injury to another." 18 U.S.C. § 924(e)(2)(B)(ii).

93 *James*, 550 U.S. at 231 (Thomas, J., dissenting).

94 18 U.S.C. § 924 (e)(2)(B)(ii).

clause.[95] The Supreme Court tried to bring some clarity in *Begay v. United States* by holding that the scope of the residual clause is limited to crimes that are similar to those in the preceding enumerated offenses clause.[96] While this is theoretically consistent with the categorical approach, the Court suggested, in both *Begay* and *James*, "that lower courts should examine the 'ordinary' or 'typical' commission of the statutory offense."[97] This created tension with the categorical approach—which requires courts to "'look only to the statutory definitions' . . . of a defendant's prior offenses"[98]—because the fact that a crime is typically committed in a way that involves violence does not necessarily mean that violence is required for a conviction under the statute.[99]

Finally, eight years after *James*, the Court demonstrated its frustration in *Johnson v. United States*.[100] Johnson pleaded guilty to a violation of § 922(g), and the government pursued a sentencing enhancement against him under the ACCA.[101] It argued that he qualified for the enhancement because his three previous felonies, including unlawful possession of a short-barreled shotgun, were violent felonies.[102] Johnson argued that his unlawful possession of the short-barreled shotgun was not a violent felony.[103] However, the district court disagreed, holding that it was a violent felony under the residual clause.[104]

Even though the petitioner did not challenge the vagueness of the statute on appeal, the Supreme Court eventually requested that the parties present

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95 *See* Holman, *supra* note 19, at 213, 220–21; *see, e.g.*, United States v. Dismuke, 593 F.3d 582, 593–94 (7th Cir. 2010).

96 *See* Holman, *supra* note 19, at 214.

97 *Id.*

98 Descamps v. United States, 570 U.S. 254, 261 (2013).

99 Holman, *supra* note 19, at 214.

100 *See* Johnson v. United States, 576 U.S. 591, 606 (2015).

101 *Id.* at 595.

102 *Id.*

103 *See id.*

104 *Id.*

arguments on the issue.[105] This request was made in spite of the fact it had foreclosed the vagueness contention on two different occasions in the years following *James*.[106] Exasperated from its failed attempts to make the categorical approach fit the statute, the Court did away with the residual clause by holding that it was unconstitutionally vague.[107] The Court reasoned that the clause was vague because of the continuing disagreement over its interpretation within the Court and its inconsistent application in the lower courts.[108] It went on to say that "the indeterminacy of the wide-ranging inquiry required by the residual clause both denies fair notice to defendants and invites arbitrary enforcement by judges."[109]

2. Expansion to the Residual Clause of § 924(c): *United States v. Davis*

Only three years after *Johnson* was decided, the Court applied the same rationale to invalidate a similarly worded residual clause in 18 U.S.C. § 16.[110] Section 16 "provides the federal criminal code's definition of 'crime of violence'" and contains both an elements and a residual clause.[111] However, § 924(c) is fundamentally different from both § 16 and the ACCA. Section 924(c) embodies a substantive crime that imposes an enhanced sentence on individuals who possess or use a gun in furtherance of a crime of violence or drug trafficking crime.[112] The ACCA enhancement only applies if the defendant has three or more prior felony convictions that satisfy a certain standard.[113] Section 16 also differs from § 924(c) because it

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105 *Id.*; *id.* at 626–27 (Alito, J., dissenting).

106 Johnson v. United States, 576 U.S. 591, 627 (Alito, J., dissenting).

107 *Id.* at 606. (majority opinion).

108 *Id.* at 601. The lower courts struggled as they inconsistently applied the categorical approach to the residual clause. *Id.* However, in holding that the clause was vague, the Supreme Court disregarded the four times that it had successfully considered and applied the statute in the decades before. *Id.* at 601–02.

109 *Id.* at 597.

110 Sessions v. Dimaya, 138 S. Ct. 1204, 1211 (2018).

111 *Id.*

112 18 U.S.C. § 924(c)(1).

113 *Id.* § 924(e)(1).

does not embody a substantive crime.[114] In contrast, § 924(c) only applies when the defendant commits the crime codified in that subsection of the statute.[115] In other words, it involves present conduct instead of past conduct.

Despite these significant differences, it did not take long for the categorical approach to creep into the Court's interpretation of § 924(c). Only four years after *Johnson* was decided, the Court heard *United States v. Davis*.[116] Davis and his accomplice were arrested after committing a string of violent gas station robberies in Texas.[117] The two men showed up at each gas station in an unmarked car very early in the morning with a short-barreled shotgun.[118] Each time, one of them pointed the shotgun at a female employee and ordered her around while the other robbed the store.[119] They were eventually caught, but only after a dangerous high-speed chase that ended in a wreck.[120] The government charged Davis with one count of Hobbs Act robbery and one count of conspiracy to commit Hobbs Act robbery.[121] The government also pursued additional charges against him under § 924(c), alleging one count with robbery as the predicate and a second count with conspiracy as the predicate.[122] He was convicted of all four of the crimes, and once the mandatory minimums were applied, he was sentenced to over fifty years in prison.[123] The Fifth Circuit Court of Appeals upheld Davis's conviction with robbery as the "predicate crime of violence" because it satisfied the elements clause definition of crime of violence.[124]

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114 *Id.* § 16.

115 *Id.* § 924(c).

116 United States v. Davis, 139 S. Ct. 2319 (2019).

117 *Id.* at 2324.

118 *Id.* at 2338. (Kavanaugh, J., dissenting).

119 *Id.*

120 *Id.*

121 *Id.* at 2324 (majority opinion). 18 U.S.C § 1951(a) is the Hobbs Act and it criminalizes robbery that affects interstate commerce. *Id.*

122 United States v. Davis, 139 S. Ct. 2319, 2325 (2019).

123 *Id.* at 2324–25.

124 *Id.* at 2325.

However, it vacated the conviction that relied on the conspiracy charge because the court found that it was a crime of violence only under the residual clause—which it held was unconstitutionally vague.[125]

The Supreme Court ultimately agreed with the Fifth Circuit. After thirty-three years of the statute's enforcement, leading to "tens of thousands of federal prosecutions," the Court found that a key provision of the statute was suddenly unconstitutional.[126] Seemingly ignoring any distinctions between sentencing enhancements based on prior convictions and those based on substantive crimes, the Court extended the reasoning from *Johnson* to include the residual clause of § 924(c).[127] The government suggested that if the categorical approach was not used to interpret the statute, then the vagueness problem would disappear.[128] In response, the Court readily admitted that looking at real-world conduct would solve the vagueness problem.[129] It also admitted that a conduct-based approach to § 924(c) would not yield the same potential Sixth Amendment concerns that it might under the ACCA and § 16.[130] However, despite these admissions, the Court flatly rejected any reconsideration of whether the application of the categorical approach is required to interpret § 924(c).[131] Instead, the Court went back to comparing the clause to the invalid one in § 16.[132] It concluded that "the statutory text [of § 924(c)] commands the categorical approach."[133] The Court laid out the two meanings of the word "offense": one that is generic and one that means a specific act.[134] Section 924(c) uses "offense" to encompass both the elements clause and the

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125 *Id.*

126 *Id.* at 2337 (Kavanaugh, J., dissenting).

127 *Id.* at 2336 (majority opinion).

128 United States v. Davis, 139 S. Ct. 2319, 2327 (2019).

129 *Id.*

130 *Id.* One of the Court's initial reasons for creating the categorical approach was to avoid potential Sixth Amendment concerns. United States v. Taylor, 142 S. Ct. 2015, 2033 n.8 (2022) (Alito, J., dissenting); *see* Taylor v. United States, 495 U.S. 575, 601–02 (1990).

131 *Davis*, 139 S. Ct. at 2327.

132 *Id.*

133 *Id.* at 2328.

134 *Id.*

residual clause.[135] A natural reading of the statute would apply the same meaning of "offense" to both clauses within subsection (c).[136] Because "offense" had previously been determined to refer to the generic meaning in the elements clause of the ACCA, the Court assumed that it must also necessarily refer to the generic meaning in the context of § 924(c).[137] As a result, the Court determined that the residual clause did not require the Court to look at the defendant's specific offense or conduct.[138] The Court went on to say that the context and history of the statute also dictate the application of the categorical approach.[139] It dismissed the government's contention that the Court has a "duty to adopt any 'fairly possible' reading of a statute to save it from being held unconstitutional" and proceeded to hold that the residual clause of § 924(c) is unconstitutionally vague.[140]

III. WHERE WE ARE NOW: *UNITED STATES V. TAYLOR*

The Court has continued to forge ahead in the application of the categorical approach despite the confusion it has rendered among lower courts and the disturbing consequences of its journey. Most recently, this absurdity was illustrated in *United States v. Taylor* (*Taylor II*), which the Court decided in the spring of 2022. In *Taylor II*, the Court determined that even a crime where a man is shot and left to die alone in an alley may not constitute a crime of violence.[141]

A. Taylor II

Justin Taylor was a seller and distributor of marijuana in Richmond, Virginia.[142] On August 14, 2003, after failing to obtain marijuana for a retail

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135 *Id.*

136 *Id.*

137 United States v. Davis, 139 S. Ct. 2319, 2328 (2019).

138 *See id.*

139 *Id.* at 2329–30.

140 *Id.* at 2332, 2336.

141 United States v. Taylor, 142 S. Ct. 2015, 2025–26 (2022); *Id.* at 2026 (Thomas, J., dissenting).

142 *Id.* at 2026 (Thomas, J., dissenting).

distributor, Taylor arranged to meet him anyway in hopes of stealing his money.[143] Taylor called a coconspirator, who had a handgun, to go with him to meet Martin Sylvester, the retailer, in an alley.[144] Instead of selling the unsuspecting Sylvester any marijuana, Taylor and his accomplice brandished the handgun and demanded that he hand over his money.[145] Sylvester did not comply, and they shot him before fleeing the alley—leaving him to die.[146]

The government charged Taylor with attempted Hobbs Act robbery and conspiracy to commit Hobbs Act robbery.[147] The Hobbs Act "makes it a federal crime to commit, attempt to commit, or conspire to commit a robbery with an interstate component."[148] Additionally, the government charged him with violating § 924(c), predicated on the attempted Hobbs Act robbery, which it argued satisfied the elements clause definition of "crime of violence."[149] After Taylor pleaded guilty to all of the charges, the district court sentenced him to thirty years in federal prison.[150] Later, Taylor filed a federal habeas petition challenging his § 924(c) conviction.[151] He argued that because *Davis* had nullified the residual clause, and because neither the conspiracy nor the attempted Hobbs Act robbery satisfied the elements clause, they were not crimes of violence.[152] Under Taylor's reasoning, neither offense could have been used as a predicate for his conviction under § 924(c).[153]

Ultimately, the Fourth Circuit Court of Appeals agreed with Taylor, holding that "attempted Hobbs Act robbery does not qualify as a crime of

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143 *Id.*

144 *Id.*

145 *Id.*

146 *Id.*

147 United States v. Taylor, 142 S. Ct. 2015, 2019 (2022).

148 *Id.* (citing 18 U.S.C. § 1951(a)).

149 *Id.* at 2026 (Thomas, J., dissenting).

150 *Id.* at 2019 (majority opinion).

151 *Id.*

152 *Id.*

153 United States v. Taylor, 142 S. Ct. 2015, 2019 (2022).

violence under § 924(c)(3)(A)."[154] It came to this conclusion "because no element of the offense requires the government to prove that the defendant used, attempted to use, or threatened to use force."[155] In doing so, the court acknowledged that it was picking sides in a circuit split, disagreeing with the courts that found otherwise.[156] The Supreme Court granted certiorari and affirmed the Fourth Circuit, holding that attempted Hobbs Act robbery was not a crime of violence under the elements clause.[157]

Before *Taylor II*, the Supreme Court had never specifically addressed the application of the categorical approach to the elements clause of § 924(c).[158] However, relying on the Supreme Court's application of the categorical approach to elements clauses in other segments of § 924, almost all of the circuits had been interpreting the elements clause of § 924(c) using the categorical approach.[159] The Court confirmed in *Taylor* that the categorical approach should apply, but it spent very little time considering the issue.[160] Instead—disregarding the distinction between § 924(c) and sections like the ACCA[161]—it reasoned that the categorical approach was necessary simply because the clause is an elements clause.[162] The Court stated that it had "long understood similarly worded statutes to demand similarly categorical inquiries."[163] Since the Court foreclosed the issue so quickly, it spent the majority of its time analyzing whether attempted Hobbs Act robbery "always requires the government to prove—beyond a reasonable doubt, as

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154 *Id.*

155 *Id.*

156 *See id.* at 2019–20 (citing United States v. Taylor, 979 F.3d 203, 208 (4th Cir. 2020), *aff'd*, 142 S. Ct. 2015 (2022)).

157 *Id.* at 2025–26.

158 *See* U.S. SENT'G COMM'N, *supra* note 13, at 7 n.36; *Taylor*, 142 S. Ct. at 2020.

159 *See* U.S. SENT'G COMM'N, *supra* note 13, at 6–7.

160 *Taylor*, 142 S. Ct. at 2020.

161 *See supra* Section II.B.2.

162 *See Taylor*, 142 S. Ct. at 2020.

163 *Id.*

an element of its case—the use, attempted use, or threatened use of force."[164]

The Court said that a substantial step—one of two elements the government has to prove for attempted Hobbs Act robbery—requires an "unequivocal step."[165] However, that step does not need to be violent.[166] Even though the other element requires "an intention to take property by force or threat," the Court noted the distinction between an intention and actually using, threatening to use, or attempting to use force.[167] While an attempt in a certain case may constitute force, the Court explained that "there will be cases, appropriately reached by a charge of attempted robbery, where the actor does not actually harm anyone or even threaten harm."[168] Expounding upon this idea, the Court used a hypothetical defendant named "Adam" to illustrate a scenario where an individual could be arrested in the midst of an attempted robbery before having an opportunity to harm anyone.[169] The Court seemed unphased by the fact the defendant was not Adam and that his attempted crime led to the death of the victim. In the Court's mind, if there is a possibility that a hypothetical defendant could commit the crime without violence, it is categorically excluded from ever being a crime of violence. The fact that a particular crime may have ended in someone's death is irrelevant.

B. "Through the Looking Glass": Justice Thomas's Dissent

In poignantly descriptive language, Justice Thomas, a consistent opponent of the categorical approach, once again expressed his frustration in his dissent in *Taylor II*. Quoting *Alice in Wonderland and Through the Looking Glass*, he declared, "[t]his holding exemplifies just how this Court's 'categorical approach' has led the Federal Judiciary on a 'journey Through

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164 *Id.* at 2019–20.

165 *Id.* at 2020 (citations omitted).

166 *Id.*

167 *Id.*

168 United States v. Taylor, 142 S. Ct. 2015, 2020–21 (2022) (quoting MODEL PENAL CODE § 222.1 cmt. 2 at 114 (AM. L. INST. 1980)).

169 *Id.*

The Looking-Glass,' during which we have found many 'strange things.'"[170] He went on to say that the Court has "reached this point of absurdity" because of its application of the categorical approach to § 924(c)'s elements clause and its nullification of the statute's residual clause "that would have captured crimes like Taylor's."[171]

Justice Thomas disagreed with the Court's conclusion about the inevitability of nullifying the residual clause in *Johnson*, noting the *Johnson* majority's concession that the residual clause would be constitutional if a conduct-based approach were used instead.[172] He thought the majority's expansion, in *Davis*, of the reasoning behind nullification—which swallowed the residual clause of § 924(c)—was even more ridiculous.[173] Reiterating what the *Davis* dissent said—which he joined—Justice Thomas pointed out that the text of § 924(c) is best understood as calling for a conduct-based approach: "[R]ead properly, the residual clause is as constitutionally sound as any other criminal law applying 'a qualitative standard . . . to real-world conduct.'"[174] All the Court really did, he thought, was further the absurd results of the categorical approach.[175] This left the "prosecutors and the courts in a bind," because application of the categorical approach has rendered the residual clause of § 924(c) unconstitutional, and thus, unavailable for use in charging and sentencing defendants—which has significantly limited the scope of the provision.[176] Justice Thomas went on to say that "[i]n case after case, our precedents have compelled courts to hold that heinous crimes are not 'crimes of violence' just because someone, somewhere, *might* commit that crime without using

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[170] *Id.* at 2026 (Thomas, J., dissenting) (quoting CARROLL, supra note 56, at 110).

[171] *Id.* at 2027.

[172] *Id.* at 2029.

[173] *Id.*

[174] United States v. Taylor, 142 S. Ct. 2015, 2029–30 (2022) (Thomas, J., dissenting) (quoting United States v. Davis, 139 S. Ct. 2319, 2339 (2019) (Kavanaugh, J., dissenting)).

[175] *See id.* at 2029–31.

[176] *Id.* at 2030 (quoting Borden v. United States, 141 S. Ct. 1817, 1835 (2021) (Thomas, J., concurring)).

force."[177] He asserted that the irrational results the categorical approach leads to, such as the result reached in *Taylor II*, could not have been intended by any rational legislature.[178]

Justice Thomas also pointed out examples of other cases illustrating the absurd results of the categorical approach.[179] In a Fourth Circuit federal kidnapping case, *United States v. Walker*, the defendants invaded a family's home, threatened and beat them, held them at gunpoint, threatened to kill their four-year-old child, locked them all in a closet, and ransacked their house.[180] Despite the obvious violence, the Fourth Circuit had no option except to hold that the crime was categorically not a crime of violence.[181] Section 924(c)'s residual clause was not available, and since the court could conceive of a way—though a somewhat outlandish one—that someone could commit a federal kidnapping without the use of physical force, the categorical approach dictated that it was not a crime of violence.[182] Similarly, in *United States v. Tsarnaev*, the federal arson conviction that resulted from the Boston Marathon bombings, was not a crime of violence under the categorical approach.[183] This was despite the fact that the crime resulted in the deaths of three individuals and injured hundreds more.[184] "Like Alice," Justice Thomas said, the Court has "strayed far '[d]own the [r]abbit[-]hole,' and '[c]uriouser and curiouser' it has all become.'"[185]

However, Justice Thomas does not think it is too late for the Court to change its path. Instead, he asserted that the Court needs to overturn *Davis*

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177 *Id.*

178 *Id.* at 2027.

179 *Id.* at 2030–31.

180 United States v. Taylor, 142 S. Ct. 2015, 2030 (2022) (Thomas, J., dissenting); *see also* United States v. Walker, 934 F.3d 375 (4th Cir. 2019).

181 *Taylor*, 142 S. Ct. at 2030 (Thomas, J., dissenting).

182 *See id.* (quoting *Walker*, 934 F.3d at 378–79) ("[T]he Fourth Circuit ultimately vacated Walker's § 924(c) conviction because a criminal could commit the offense by 'inveigl[ing]' a victim and then holding him in captivity with a 'mental restraint.'").

183 *Id.* at 2030.

184 *Id.*

185 *Id.* at 2031 (quoting LEWIS CARROLL, ALICE'S ADVENTURES IN WONDERLAND 3, 9 (Project Gutenberg 2008) (1865)).

because it is a "demonstrably erroneous precedent that veered from the best interpretation of § 924(c)'s residual clause."[186] He went on to say that reviving the residual clause would have fixed the absurdity in *Taylor II*, *Walker*, *Tsarnaev*, and many other cases because they would have been encompassed by the residual clause's definition of "crime of violence."[187] But Justice Thomas did not stop there. Noting several appellate judges who have begun to add their voices to those questioning the categorical approach, he reiterated his thought from a previous dissent that a conduct-based approach is equally better suited to the enumerated offenses clause of the ACCA.[188] He also indicated that he is willing to consider arguments that the elements clause of the ACCA should also be interpreted with a conduct-based approach.[189] He ended his dissent by urging the Court to "welcome briefing on whether a conduct-based approach tacks closer to statutory text and common sense—especially in the elements-clause context."[190] It is clear Justice Thomas believes the Court has made a grave mistake in its categorical approach to jurisprudence, overstepping the bounds of its lawful role and leading the entire federal judiciary into a nonsensical place where criminals do not receive the punishments they deserve.[191]

IV. IT'S TIME FOR THE COURT TO JOURNEY BACK TO THE PRE-*DAVIS* ERA

Whether it comes at the hands of Congress or the Court, unwinding the chaos and contradictions caused by the categorical approach is not only necessary but imperative to the administration of justice. As Judge Amul Thapar on the Sixth Circuit Court of Appeals pointed out: "By 'simply swapp[ing] factual inquiries for an endless gauntlet of abstract legal questions,' the categorical approach requires judges to throw away common

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186 *Id.*

187 *See* United States v. Taylor, 142 S. Ct. 2015, 2031–32 (2022) (Thomas, J., dissenting).

188 *Id.* at 2032 (referring to the sentiments expressed by Judge Amul Thapar and Judge Raymond M. Kethledge of the Court of Appeals for the Sixth Circuit).

189 *Id.* at 2033.

190 *Id.*

191 *See id.* at 2031–32.

sense."[192] Because of this, it has been a nightmare for the lower courts as everyone—from the judges, to the clerks, to the federal probation officers—struggles to understand and apply the complicated, confusing, and nonsensical approach in sentencing defendants or recommending their sentences.[193] The approach requires the judge, in each case where it is applicable, to:

> (1) mull through any number of hypothetical ways to commit a crime that have nothing to do with the facts of the prior conviction; (2) mine electronic databases for state court cases (precedential or not) depicting non-violent ways of commission; and (3) scrutinize those state court cases, some of which are old and predate the categorical approach, to determine their import.[194]

Sometimes, even after this intensive inquiry has been completed and the crime is categorically considered a violent felony, it can be undone. In one case, a conviction was overturned because a state supreme court had once discussed in dicta, over 80 years before, a way the crime could be committed non-violently.[195] That single fact rendered the crime categorically not a crime of violence.[196]

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[192] United States v. Burris, 912 F.3d 386, 409 (6th Cir. 2019) (Thapar, J., concurring).

[193] *See, e.g.*, *id.*; Interview with Yashira Patton, Supervisor, United States Federal Probation, in Wilmington, NC. (Jan. 5, 2023). Yashira pointed out the many difficulties the approach creates for U.S. Probation Officers when they are writing presentence reports which contain detailed analysis of each defendant's sentence and a sentencing recommendation for the Judge. *Id.* Every probation officer who writes these reports must have a firm grasp on this elusive and ever-changing approach. *Id.* However, very few of them, if any, have any type of legal background to assist them. *Id.* As a supervisor, she has found that it is one of the most difficult concepts for her new officers to grasp and many of them, she said, are "scared of it." *Id.*

[194] United States v. Burris, 912 F.3d 386, 409 (6th Cir. 2019) (Thapar, J., concurring).

[195] United States v. White, 24 F.4th 378, 379–80 (4th Cir. 2022). After being convicted under the ACCA with Virginia common law robbery as a predicate, Antonio White maintained on appeal that Virginia common law robbery "can be committed without the actual, attempted, or threatened use of physical force." *Id.* at 379. His only support for his argument was the fact that the Supreme Court of Virginia mentioned, in dicta, in 1939 that it

While this approach may be well suited for those who spend most of their days pondering complex legal questions, as Judge Thapar and U.S. Probation Officer Yashira Patton note, it is a nightmare for the lower federal courts, who find themselves with incredibly large caseloads and actual people—not simply questions on a page—in front of them.[197] The Court needs to start by reconsidering the application of the categorical approach to § 924(c). In particular, it should rethink its nullification of the residual clause after the clause had been relied on and instrumental in determining sentences for over thirty years.[198] There are several factors that weigh in favor of abandoning the categorical approach with respect to § 924(c), including that: § 924(c) creates a separate crime, the essence of retributive justice dictates that a man should be punished for his actual conduct, and the Court brazenly stepped into the prudential realm by nullifying all of the residual clauses—not just the one in § 924(c).

A. Prior Convictions Are Not Present Conduct

Section 924(c) is fundamentally different from the ACCA and other statutes involving sentencing enhancements based on prior convictions because it "creates a separate crime that applies in the context of the facts at issue in the case before the court rather than to prior convictions."[199] In other words, applying a conduct-based approach to § 924(c)—which is what many have suggested should replace the application of the categorical

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might be possible to commit robbery "by accusing the victim of having committed sodomy." *Id.* at 380. As outlandish as this prospect may sound, the Fourth Circuit sent the Supreme Court of Virginia a certified question of law asking: "Under Virginia common law, can an individual be convicted of robbery by means of threatening to accuse the victim of having committed sodomy?" *Id.* at 379. The Supreme Court of Virginia answered in the affirmative and White's original conviction was vacated. *Id.* at 382.

196 *Id.* at 379–80.

197 *See Burris*, 912 F.3d at 409 (Thapar, J., concurring); Interview with Yashira Patton, Supervisor, United States Federal Probation, in Wilmington, N.C. (Jan. 5, 2023).

198 Clancey Henderson, *Stemming the Expansion of the Void-for-Vagueness Doctrine Under* Johnson, 2019 UTAH L. REV. 237, 237 (2019).

199 Mary Frances Richardson, *Why the Categorical Approach Should Not Be Used When Determining Whether an Offense is a Crime of Violence Under the Residual Clause of 18 U.S.C. § 924(c)*, 67 AM. U. L. REV. 1989, 1994–95 (2018).

approach in almost every instance[200]—would make even more sense than applying it to the ACCA. In the context of § 924(c), it would not require the court to look to facts outside of the present case. A conduct-based approach would allow judges to deem an offense a crime of violence if the underlying conduct was actually violent instead of considering whether there is any way to commit the offense non-violently.

This is significant because, although the Court originally thought that applying the categorical approach would make sentencing easier for judges, the opposite is true.[201] As Judge Thapar pointed out, whatever merit this argument may have held in a world where electronic record-keeping was not commonplace, it is certainly not true now.[202] The endless hypothesizing the Court must engage in as it applies the categorical approach makes the process far harder and strains more resources than considering the defendant's actual conduct.[203] While Judge Thapar was analyzing the application of the categorical approach to the ACCA and the U.S. Sentencing Guidelines,[204] his arguments ring particularly true when applied to sentencing under the clauses of § 924(c). The conduct being considered in § 924(c) is not that of a prior conviction but the facts at issue in the current case. As a result, the facts are readily accessible, and digging through records is not necessary and does not provide an obstacle to a conduct-based approach.

Another reason the Court has given for creating and applying the categorical approach is attempting to avoid potential Sixth Amendment concerns.[205] The Court was concerned that "[i]f the parties could introduce evidence about the defendant's underlying conduct, then sentencing proceedings might devolve into a full-blown minitrial, with factfinding by

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[200] *See Burris*, 912 F.3d at 409 (Thapar, J., concurring); Richardson, *supra* note 199, at 1995; Mathis v. United States, 579 U.S. 500, 541 (2016) (Alito, J., dissenting).

[201] Taylor v. United States, 495 U.S. 575, 601 (1990).

[202] *Burris*, 912 F.3d at 409 (Thapar, J., concurring).

[203] *Id.*

[204] *See id.* at 390.

[205] Sessions v. Dimaya, 138 S. Ct. 1204, 1253 (2018) (Thomas, J., dissenting).

the judge instead of the jury."[206] However, because of its inherent nature, this concern is not relevant in the context of § 924(c). When § 924(c) is implicated, the jury will have already found facts about the present conduct being considered, or the defendant will have accepted the facts in a guilty plea,[207] leaving no room for the proceedings to turn into a "mini-trial" with fact-finding by the judge.

The Supreme Court refused to consider whether—given the differences in purpose and structure between § 924(c) and the ACCA—any section of § 924(c) even merits the categorical approach. Instead, it forged ahead, rendering one of the statute's two definitions of crime of violence unconstitutional.[208] Without the residual clause, the results reached by courts have become even more absurd, such as the one reached in *Taylor II*.[209] As Justice Thomas pointed out, the attempted robbery resulting in a murder in *Taylor II* and other similar crimes would have been captured by the residual clause.[210] If the Court had stopped for a moment to consider the inherent nature of § 924(c), it would have quickly seen that the concerns it expressed regarding the application of a conduct-based approach to statutes involving prior convictions are not relevant in the context of § 924(c). Through this realization, the Court would have been able to lessen the chaos and damage caused by the categorical approach. The federal judiciary can only hope the Supreme Court will soon realize that it is not too late to prevent further damage.

B. Justice Dictates That We Punish The Real Man, Not The Hypothetical One

Merriam-Webster Dictionary defines justice as "the maintenance or administration of what is just especially by the impartial adjustment of

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206 *Id.*

207 United States v. Taylor, 142 S. Ct. 2015, 2029 (2022) (Thomas, J., dissenting).

208 *See supra* Section II.B.2.

209 *See supra* Section III.A.

210 *See Taylor*, 142 S. Ct. at 2027 (Thomas, J., dissenting).

conflicting claims or the assignment of *merited rewards or punishments*."[211] Consequently, it is no surprise that the American system of criminal law is called the criminal "justice" system. In the criminal context, punishment is delivered by a judge through the sentencing process. One of the primary goals of sentencing is retribution,[212] which reflects the leading[213] and, arguably, correct[214] philosophy of justice and punishment: retributivism. Put very simply, the retributivist theory of justice says, "we are justified in punishing because and only because offenders deserve it. Moral responsibility ('desert') . . . is not only necessary for justified punishment, it is also sufficient."[215] This means that even without deterrence or any other societal benefits being achieved, punishing someone because they deserve it is just.[216] It follows from this main tenet of retributive justice that criminals

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[211] *Justice,* MERRIAM-WEBSTER.COM, https://www.merriam-webster.com/dictionary/justice (emphasis added) (last visited Oct. 2, 2023).

[212] *See* Gregg Caruso, *Justice Without Retribution: An Epistemic Argument Against Retributive Criminal Justice*, 13 NEUROETHICS 13, 14 (2020). The Model Penal Code, in its 2017 draft of MPC § 102, listed deterrence as the dominant purpose of sentencing. *Id.* Additionally, 18 U.S.C. § 3553(a) contains the factors that must be considered in issuing a federal sentence. The second § 3553(a) factor is "the need for the sentence imposed" which first includes the need "to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense." 18 U.S.C. § 3553(a). These appearances of the retributivist view indicate the primary position it continues to hold in defining the purpose of sentencing defendants.

[213] *See* Dolinko, *supra* note 12, at 1623 ("retributivism . . . has enjoyed in recent years so great a revival that it can fairly be regarded today as the leading philosophical justification of the institution of criminal punishment."); *Development in Law: Alternatives to Incarceration*, *supra* note 12, at 1970 ("'just deserts' philosophy associated with retributivism has claimed the mantle of penological predominance."); Caruso, *supra* note 212, at 14.

[214] The retributivist view of punishment is one of the earliest philosophies of justice and its influence appears in manuscripts such as the Bible and the Code of Hammurabi. *See* Meyer, *supra* note 12. While it has opponents, it is a predominant philosophy of justice and it has significantly impacted the American legal system. Dolinko, *supra* note 12 at 1623; *Development in Law: Alternatives to Incarceration*, *supra* note 12, at 1970. However, the purpose of this Comment is to address how the categorical approach is inconsistent with this leading justification of punishment and not to provide a full defense of the retributivist view.

[215] MICHAEL S. MOORE, PLACING BLAME 91 (1997).

[216] *See id.*

should be proportionally punished for the crimes they commit, and victims should be compensated.[217] The philosophy is characterized by the principles that wrong acts should be proportionately punished, that it is "intrinsically morally good" if someone with authority distributes a punishment that an individual deserves, and that it is morally wrong for the innocent to be punished or for punishments to be distributed disproportionately.[218]

To answer its critics, who would propose a different philosophy of punishment, "retributive justice must ultimately be justified in a larger moral context that shows that it is plausibly grounded in, or at least connected to, other, deeply held moral principles."[219] It presupposes a world in which individuals have free will[220] and in which morality is objective. If there is no objective morality, then there are no truly wrong actions that would inherently merit that an individual who commits them should receive his "just desert."[221] As C.S. Lewis pointed out, "the concept of Desert is the only connecting link between punishment and justice. It is only as deserved or undeserved that a sentence can be just or unjust."[222] The purpose of this Comment, however, is to expand upon the problems with the categorical approach and not to provide a full defense of the retributivist view of justice, which has been addressed by many scholars.[223] As the predominant view of justice and given the influence it has on punishment in the American criminal justice system, it is important to consider how the

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[217] *See* Meyer, *supra* note 12.

[218] Alec Walen, *Retributive Justice*, THE STANFORD ENCYCLOPEDIA OF PHILOSOPHY (July 31, 2020) https://plato.stanford.edu/entries/justice-retributive/.

[219] *Id.*

[220] *See* Causo, *supra* note 212, at 14–16.

[221] *See* C.S. Lewis, *The Humanitarian Theory of Punishment*, 6 RES JUDICATAE 224, 229–30 (1954).

[222] *Id.* at 225 ("We demand of a deterrent not whether it is just but whether it will deter. We demand of a cure not whether it is just but whether it succeeds. Thus when we cease to consider what the criminal deserves and consider only what will cure him or deter others, we have tacitly removed him from the sphere of justice altogether; instead of a person, a subject of rights, we now have a mere object, a patient, a 'case.'").

[223] Among other sources, those interested in the history of retributivism and a robust defense of retributive justice as a philosophy of punishment should consult: MICHAEL S. MOORE, PLACING BLAME (1997).

categorical approach is inconsistent with the retributive philosophy of justice.

If punishment is justified because one is culpable for his actions and is entitled to his "just deserts," then retributive justice is only satisfied if the individual is punished for his own crimes. Punishing an individual for someone else's crimes is the antithesis of retributivism and would be unjust.[224] However, the categorical approach, particularly in the context of § 924(c), requires judges to do exactly that. Instead of allowing judges to look to the defendant's actual conduct, it requires them to look only to the elements of the conviction.[225] Judges have to come up with countless hypotheticals, like that of "Adam"—which was discussed in *Taylor II*[226]—to determine if an offense is categorically excluded from being a crime of violence. Even if a crime results in brutal injury or death, if there is any way that the offense can be committed non-violently, it is not a crime of violence—even under violent circumstances.[227] What the defendant actually did is "categorically" ignored. It is impossible for someone to get their "just desert" if those with authority to punish them are not allowed to even consider their conduct.

In a concurring opinion, where he took issue with the categorical approach, Judge Thapar pointed out that "one must accept some level of arbitrariness with any law, but not the amount [achieved by applying the categorical approach], which a fact-based approach would avoid."[228] There is certainly no place for arbitrariness under a retributivist view of justice. For a defendant to receive his just desert and bear a punishment proportional to his crime, the punishment cannot fluctuate on some arbitrary metric, such as the wording a state legislature chooses to use for a particular crime. Instead, it should be based on the criminal actions of the defendant and the proportional punishment merited by the defendant's actions. Particularly in the context of § 924(c), which embodies a

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224 *See* MOORE, *supra* note 215, at 91.

225 *See* U.S. SENT'G COMM'N, *supra* note 13, at 1.

226 United States v. Taylor, 142 S. Ct. 2015, 2021 (2022).

227 *See id.* at 2029 (Thomas, J., dissenting).

228 United States v. Burris, 912 F.3d 386, 409 (6th Cir. 2019) (Thapar, J., concurring).

substantive crime, the arbitrariness of the categorical approach stands in direct opposition to justice when it is properly understood as each individual receiving their just desert.

C. The Court Stepped Into the Prudential Realm

As every American should learn in high school civics, the separation of powers is a vital part of the American system of government.[229] Each branch has a role it must play without infringing on the jurisdiction of any other branch so that the system operates effectively. It is no different between the judicial and political branches. As former Chief Justice of the Supreme Court John Marshall said before he became a Justice:

> By extending the judicial power to all cases in law and equity, the constitution ha[s] never been understood to confer on that department any political power whatever. To come within this department a question must assume a legal form for forensic litigation and judicial decision. There must be parties to come into court, who can be reached by its process, and bound by its power; whose rights admit of ultimate decision by a tribunal to which they are bound to submit.[230]

One way the distinction between these two branches has been framed is as a distinction between the judicial and the prudential.[231] Prudential or political questions belong to either the executive branch or the legislative branch—depending on the type of consideration at issue—and the resolution of judicial questions belongs to the judicial branch.[232] It is within Congress's power to make laws, but it cannot enforce them; it is not within the

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[229] *See, e.g.*, THE FEDERALIST NO. 51 (James Madison).

[230] CALVIN MASSEY & BRANNON P. DENNING, AMERICAN CONSTITUTIONAL LAW 108–09 (Rachel E. Barkow et al. eds., 6th ed. 2019).

[231] Jeffery C. Tuomala, The Casebook Companion pt. 2, ch. 7, at 1 (Aug. 20, 2020) (unpublished manuscript) (on file with author).

[232] *Id.* They belong to the judicial branch except for the few places enumerated in the Constitution or certain laws where questions that are judicial in nature are delegated to another branch. *Id.* at 2.

judiciary's power to make laws, but it is the judiciary's duty to give effect to the laws Congress has made by applying them faithfully.[233]

Time and applicability are the two elements central to the distinction between judicial and legislative power.[234] Prudential or political power is inherently forward-looking, and judicial power is inherently backward-looking.[235] This means that prudential power is concerned with making value judgments that take the form of "formulating rules *best* designed to achieve some lawful object of government."[236] It "looks to the future and changes existing conditions by making a new rule, to be applied thereafter to all or some part of those subject to its power."[237] Prudential determinations affect everyone who is subject to the power of the legislature.[238] Judicial power, on the other hand, "investigates, declares, and enforces liabilities as they stand on present or past facts and under laws supposed already to exist."[239] It has limited applicability because it affects only the limited group of people involved in the adjudication.[240] Alexander Hamilton described the nature of judicial power as follows:

> In a government in which they [the three branches of government] are separated from each other, the judiciary, from the nature of its functions, will always be the least dangerous to the political rights of the Constitution; because it will be least in a capacity to annoy or injure them . . . . [T]he judiciary . . . has no influence over either the sword or the purse; no direction either of the strength or of the wealth of the society; and can take no active

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233 *See* U.S. CONST. art. I; *see* U.S. CONST. art. II.

234 Jeffery C. Tuomala, The Casebook Companion pt. 2, ch. 2, at 16 (Aug. 20, 2020) (unpublished manuscript) (on file with author).

235 *Id.* at 17.

236 *Id.* at 16 (emphasis added).

237 Prentis v. Atlantic Coast Line Co., 211 U.S. 210, 226 (1908).

238 Tuomala, *supra* note 234, at 16–17.

239 *Prentis,* 211 U.S. at 226.

240 Tuomala, *supra* note 234, at 16.

> resolution whatever. It may truly be said to have neither FORCE nor WILL, but merely judgment . . . .[241]

The judiciary is tasked only with applying the laws in a manner faithful to Congress's intent and has stepped outside of its jurisdiction when it takes it upon itself to determine what the law should be.

The Supreme Court stepped into the prudential realm when it found that applying the categorical approach to the residual clause of § 924(c) rendered that clause unconstitutionally vague.[242] The Court made this determination in *United States v. Davis*.[243] Ironically, when speaking about adopting a conduct-based approach, the majority in *Davis* said, "[w]ere we to adopt [a conduct-based approach], we would be effectively stepping outside our role as judges and writing a new law rather than applying the one Congress adopted."[244]

In reality, the Court did exactly that by forcing the categorical approach to work when the statute, on its face, was not unconstitutionally vague. The text of the residual clause says that an offense is a crime of violence if it "is a felony . . . that by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense."[245] Under a conduct-based approach, it is easy to look at a set of facts and determine whether the defendant's conduct in committing the crime inherently involves a "substantial risk" that physical force will be used.[246] Even the majority acknowledged that a conduct-based approach to interpreting the residual clause of § 924(c) would "avoid" the unconstitutional vagueness the majority insisted was present.[247] However, the majority refused to consider whether any other approach was merited

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241 THE FEDERALIST NO. 78, at 402 (Alexander Hamilton) (Gideon ed., 2001).

242 *See* United States v. Davis, 139 S. Ct. 2319, 2336 (2019).

243 *Id.*

244 *Id.* at 2324.

245 18 U.S.C. § 924(c).

246 *Davis*, 139 S. Ct. at 2339 (Kavanaugh, J., dissenting).

247 *Id.* at 2336.

by the statute, despite the nature of § 924(c) as a substantive criminal offense.[248]

The Court possesses the power of judicial review as a check on Congress's actions,[249] but the majority in *Davis* made a prudential judgment. The Court looked at the statute and the categorical approach before eventually determining that preserving the categorical approach, at all costs, was more valuable than the statute Congress was within its jurisdiction to write. Congress passed § 924(c) with the intention of punishing violent gun crimes, and the residual clause is a key provision affecting those who put others in serious danger through their actions.[250] Now, in contravention of Congress's rightfully exercised "will," the violent offenders who would have been sentenced under the residual clause of § 924(c) will serve substantially shorter amounts of time than Congress intended.[251] As the dissent pointed out, "the Court has explained multiple times [that] criminal laws that apply a risk standard to a defendant's conduct are not too vague, but instead are perfectly constitutional."[252] However, in this instance, the Court implicitly indicated that it was more committed to the categorical approach than to considering whether it was acting within its jurisdiction or instead stepping into the prudential realm.

V. CONCLUSION

It is a concerning place to be when arbitrary metrics like the location of a crime, what a state supreme court said decades ago in dicta, or what words a legislature chose to define a crime become the determining factors of a defendant's sentence.[253] In the interest of justice, it is imperative to reconsider the steps that have led us to this place. The Court has created an approach that is more focused on what a defendant "hypothetically" could have done than what the defendant actually did. Its unwavering

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248 *Id.*

249 Tuomala, *supra* note 234, at 5.

250 *Davis*, 139 S. Ct. at 2337 (2019) (Kavanaugh, J., dissenting).

251 *Id.*

252 *Id.* at 2339.

253 *See supra* Section I; *see supra* Section IV.

commitment to the approach has even forced it to overstep the bounds of its judicial power. All the factors discussed indicate that the Court should retrace its steps, as quickly as possible, to lessen the future consequences of stubborn adherence to the categorical approach. As Justice Thomas recommends, the Court should start by reconsidering the application of the approach to § 924(c).

The Court set out on a well-intentioned journey applying an approach that sounded good in theory but has wreaked havoc in practice. Despite the roadblocks it has encountered, the Court has continued to forge ahead without stopping to consider whether it has veered off the correct path. In the future, before the Court sets out on another "journey Through The Looking-Glass,"[254] it would be wise to heed the advice shared between two friends who were about to set out on a hazardous journey: "if you don't keep your feet, there is no knowing where you might be swept off to."[255]

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[254] *See* CARROLL, supra note 56, at 110.

[255] J.R.R. TOLKIEN, THE FELLOWSHIP OF THE RING 72 (1954).