CATEGORICAL MISTAKES: THE FLAWED FRAMEWORK OF THE ARMED CAREER CRIMINAL ACT AND MANDATORY MINIMUM SENTENCING

Rachel E. Barkow[*]

Congress fundamentally changed the punishment of federal crimes in the 1980s and almost entirely for the worse. The Comprehensive Crime Control Act of 1984[1] (CCCA) cabined the discretion of judges, eliminated parole, and gave greater power to prosecutors (through the use of mandatory minimum sentences, higher maximum sentences, and increased pretrial detention, all of which increased prosecutorial leverage to extract pleas).[2] The Sentencing Reform Act[3] was contained within the larger CCCA, and it created the United States Sentencing Commission, which was initially charged with creating mandatory sentencing guidelines for federal crimes based on its research and data.[4] But before the Commission even had a chance to get started, Congress made its own critical sentencing determinations for a range of crimes by passing sweeping mandatory minimum sentencing laws and harsh penalties for recidivists. This included passing the Armed Career Criminal Act[5] (ACCA) as part of the 1984 package and later amending it in the Anti-Drug Abuse Act of 1986[6] so that the statute imposed a fifteen-year mandatory minimum sentence on recidivist offenders convicted of a federal felon-in-possession offense who had three or more prior "serious drug" or "violent felony" convictions.[7]

---

[*] Vice Dean and Segal Family Professor of Regulatory Law and Policy and Faculty Director, Center on the Administration of Criminal Law, NYU School of Law. I owe a huge thanks to Leah Litman for her constructive comments. I am grateful to Albert Huber and Jonathan Spratley for excellent research assistance and to the editors of the *Harvard Law Review* for their outstanding comments and suggestions.

[1] Pub. L. No. 98-473, tit. II, 98 Stat. 1976 (codified as amended in scattered sections of 18 and 28 U.S.C.).

[2] *See id.*

[3] Pub. L. No. 98-473, tit. II, ch. II, 98 Stat. 1987 (1984) (codified as amended in scattered sections of 18 and 28 U.S.C.).

[4] *See id.* § 217, 98 Stat. at 2017–26.

[5] Pub. L. No. 98-473, tit. II, ch. XVIII, 98 Stat. 2185 (1984) (codified as amended at 18 U.S.C. § 924(e) (2012)).

[6] Pub. L. No. 99-570, 100 Stat. 3207 (codified as amended primarily in scattered sections of 18 and 21 U.S.C.); *see id.* §§ 1401–1402, 100 Stat. at 3207-39 to -40.

[7] 18 U.S.C. § 924(e)(1) ("In the case of a person who violates section 922(g) [criminalizing a felon's possession of a firearm] and has three previous convictions by any court . . . for a violent felony or a serious drug offense, or both, such person shall be . . . imprisoned not less than fifteen years."). The federal felon-in-possession provision, 18 U.S.C. § 922(g), makes it "unlawful for any person" who has been convicted of a felony to "ship or transport . . . or possess . . . any firearm or ammunition."

The members of Congress who voted for these changes believed they would minimize unwarranted disparities in sentencing,[8] make criminal sentences more transparent, and improve public safety.[9] Unfortunately, Congress's approach for achieving these goals was doomed to fail because of mistaken assumptions and premises. First, Congress incorrectly presumed that harsh penalties were merited for all repeat offenders, regardless of the underlying nature of their previous convictions or when they were committed. Yet by lumping together individuals with varying levels of culpability for the same mandatory punishments, Congress created disparities. Thousands of individuals received punishments disproportionate to their offenses because they were treated on par with the worst offenders Congress had in mind when passing its laws. Moreover, Congress ignored the central role played by prosecutors, who decide when and whether crimes with mandatory minimum sentences are charged. Prosecutors have not uniformly sought mandatory minimum sentences, which has led to greater disparities, particularly on the basis of race. These disparities result from a process even less transparent than the one it replaced, because all the action now takes place outside of courtrooms through plea negotiations in prosecutors' offices. Second, Congress erroneously assumed that longer sentences and harsh collateral consequences would produce better safety outcomes, when in fact these policies often undermine public safety. Third, legislators failed to see how the new regime they created conflicted with key constitutional safeguards, paving the way for challenges in the courts that continue to this day.

The ACCA illustrates each of these flaws. Starting from the premise that a small group of repeat offenders were committing a disproportionate share of violent crimes, Congress set out to stop these so-called "career criminals" with a fifteen-year mandatory minimum sentence and a maximum sentence of life imprisonment.[10] But instead of creating a precision regime that pinpointed and targeted the small number of people who repeatedly exhibited a propensity for violence, Congress enacted a sweeping law that ended up including individuals without any violence in their past and lumping them together with individuals who had committed numerous previous acts of violence. All of them were treated as the most dangerous type of repeat offender meriting the harsh minimum

---

[8] 28 U.S.C. § 991(b)(1)(B) (2012) (listing "avoiding unwarranted sentencing disparities" as one of the purposes of creating the United States Sentencing Commission).

[9] *See* HILLEL R. SMITH, CONG. RESEARCH SERV., R45220, THE FEDERAL "CRIME OF VIOLENCE" DEFINITION: OVERVIEW AND JUDICIAL DEVELOPMENTS (2018), https://fas.org/sgp/crs/misc/R45220.pdf [https://perma.cc/GE8S-G6L8] (noting that the CCCA aimed "to restore a proper balance between the forces of law and the forces of lawlessness"); *see also* Leslie Maitland Werner, *Justice Department; Getting Out the Word on the New Crime Act*, N.Y. TIMES, Nov. 16, 1984, at A24 (attributing that quote to Attorney General William French Smith).

[10] *See* 18 U.S.C. § 924(e).

sentence. Further, as with other laws imposing harsh mandatory punishments, the ACCA has been erratically and discriminatorily applied.

In its haste to create a far-reaching new punishment regime for repeat offenders, Congress also set up a host of vexing constitutional and statutory interpretation questions for the courts. Because Congress sought to turn the prosecution of individuals with previous convictions for violent crime into a federal problem, it had to create a regime that accounted for the variety in state laws. Moreover, because Congress wanted to include a range of prior offenses as eligible for triggering the ACCA's mandatory minimum, it used sweeping and imprecise language.

The result has been chaos in the federal courts. The Supreme Court ultimately struck down as "unconstitutionally vague" the catchall residual clause in the ACCA that had included as a "violent felony" any offense that "otherwise involves conduct that presents a serious potential risk of physical injury to another."[11] But even with the residual clause out of commission, federal courts continue to struggle with questions about whether past state convictions meet the ACCA's other definitions for "violent felony." Under one prong of the definition, often referred to as the "elements clause,"[12] a violent felony qualifies under the Act if it "has as an element the use, attempted use, or threatened use of physical force against the person of another."[13] The elements clause thus requires judges to determine what counts as "physical force."[14] Under another prong of the definition, known as the "enumerated-offenses clause,"[15] Congress lists specific crimes as meeting the definition, and includes among the items on the list "burglary, arson, or extortion."[16] This language requires courts to determine if a given state law defining those crimes matches up with the ACCA's understanding of those crimes. Thus, some state burglary laws will qualify and some will not, depending on what the ACCA means when it uses the term "burglary."

Last Term, the Supreme Court provided a window into the issues the ACCA poses for federal courts. The Court had three ACCA cases that demonstrate how, even decades after its passage, the ACCA continues to clog the courts with questions about which state felonies qualify as ACCA predicates for an increased sentence. In *Stokeling v. United States*,[17] the Court had to determine if Denard Stokeling's prior state

---

[11] Johnson v. United States, 135 S. Ct. 2551, 2557 (2015); *see id.* at 2555–56 (quoting 18 U.S.C. § 924(e)(2)(B)(ii)). The Court last Term similarly struck down the residual clause in 18 U.S.C. § 924(c)(3)(B), *see* United States v. Davis, 139 S. Ct. 2319, 2336 (2019), and did the same to the residual clause in 18 U.S.C. § 16(b) during the 2017 Term in *Sessions v. Dimaya*, 138 S. Ct. 1204, 1216 (2018).

[12] *See* Stokeling v. United States, 139 S. Ct. 544, 549 (2019).

[13] 18 U.S.C. § 924(e)(2)(B)(i).

[14] *Id.*

[15] *See* Quarles v. United States, 139 S. Ct. 1872, 1880 (2019) (Thomas, J., concurring).

[16] 18 U.S.C. § 924(e)(2)(B)(ii).

[17] 139 S. Ct. 544.

conviction for robbery satisfied the ACCA's elements clause.[18] Stokeling pleaded guilty to being a felon in possession of a firearm when the police found a gun and ammunition in his backpack while investigating him as a suspect in a burglary of his place of employment.[19] Stokeling would have been subject to the sentencing enhancements in the ACCA only if he had three qualifying predicate felonies.[20] He did not challenge the statute's applicability to his prior convictions for kidnapping or home invasion, but he argued that the third offense necessary for him to qualify, a 1997 robbery conviction under Florida law, failed to meet the ACCA's terms.[21] The Florida robbery statute, as interpreted by the Florida Supreme Court, requires "force sufficient to overcome a victim's resistance," which can be satisfied by minimal force if that is all that is needed to overcome the victim's resistance.[22] The district court concluded that Stokeling did not merit the ACCA sentencing enhancement.[23] The Eleventh Circuit reversed and rejected Stokeling's argument that Florida's robbery law did not require sufficient force to be deemed a "violent felony" under ACCA.[24]

The Supreme Court affirmed Stokeling's ACCA conviction in a decision authored by Justice Thomas and joined by Justices Breyer, Alito, Gorsuch, and Kavanaugh.[25] Justice Thomas's opinion concluded that robbery convictions count as ACCA predicates as long as the relevant law defining robbery requires the defendant to "overcome the victim's resistance,"[26] even if the force necessary to do so is minimal.[27] The Court's opinion relied heavily on the common law definition of robbery as well as an earlier version of the ACCA that expressly listed robbery as a qualifying predicate.[28] Even though robbery was removed in a subsequent amendment to the ACCA, the majority did not interpret that change as an attempt to remove robbery as a qualifying offense, but instead as a way to expand the law's reach.[29]

Justice Sotomayor's dissent, which was joined by Chief Justice Roberts, Justice Ginsburg, and Justice Kagan, relied heavily on the Court's 2010 decision in *Johnson v. United States*,[30] which concluded

---

[18] *Id.* at 549.
[19] *Id.*
[20] *See id.* at 556 (Sotomayor, J., dissenting).
[21] *Id.* at 549 (majority opinion).
[22] *Id.* at 558 (Sotomayor, J., dissenting) (quoting Robinson v. State, 692 So. 2d 883, 887 (Fla. 1997); then citing McCloud v. State, 335 So. 2d 257, 258 (Fla. 1976)).
[23] *Id.* at 549 (majority opinion).
[24] *Id.* at 549–50.
[25] *Id.* at 550.
[26] *Id.*
[27] *See id.* at 553.
[28] *See id.* at 550–52.
[29] *See id.* at 551.
[30] 559 U.S. 133 (2010).

that a Florida battery law failed to qualify as an ACCA predicate because it could be satisfied by nominal contact.[31] *Johnson* emphasized that the force required for a felony to count as an ACCA "violent felony" had to be "violent," "substantial," and "strong."[32] Florida's robbery statute, however, could be satisfied with minimal force, thereby including "glorified pickpockets, shoplifters, and purse snatchers."[33] The dissent thus concluded that the Florida robbery law fell far short of the violent and substantial force the ACCA required for a predicate offense.[34]

In two other ACCA cases, the Court dealt with the meaning of "burglary" in the ACCA's enumerated-offense clause. In *Quarles v. United States*,[35] Jamar Quarles pleaded guilty to being a felon in possession of a firearm after his girlfriend called 911 and said he had threatened her at gunpoint.[36] Quarles had three prior felony convictions,[37] but he argued that his conviction for third-degree home invasion failed to qualify as an ACCA predicate because it did not meet the ACCA's definition of burglary.[38] Specifically, Quarles claimed that the Michigan law did not satisfy the ACCA because it covered situations where a defendant forms the intent to commit a crime at any time while unlawfully remaining in a dwelling, instead of covering only those instances where the intent is formed right at the moment when the defendant first becomes unlawfully present in a dwelling.[39] The district court disagreed and sentenced him to seventeen years.[40] The Sixth Circuit affirmed.[41] The Supreme Court took the case to resolve a circuit split.[42]

Justice Kavanaugh wrote the opinion for a unanimous Court.[43] The Court had already concluded in *Taylor v. United States*[44] that the meaning of "burglary" in the ACCA should be based on "the generic sense in which the term is now used in the criminal codes of most States."[45] The Court in *Taylor* further elaborated that this meant "unlawful or unprivileged entry into, or remaining in, a building or structure, with intent to

---

31 *Stokeling*, 139 S. Ct. at 557 (Sotomayor, J., dissenting) (citing *Johnson*, 559 U.S. at 138–43).

32 *Id.* (quoting *Johnson*, 559 U.S. at 140).

33 *Id.* at 559.

34 *Id.*

35 139 S. Ct. 1872 (2019).

36 *Id.* at 1875–76.

37 All three previous offenses involved altercations with ex-girlfriends. *Id.* at 1876. One conviction was for a home invasion where Quarles attempted to chase down an ex-girlfriend who was seeking refuge in an apartment, and the other two convictions were for assault with a dangerous weapon. *Id.*

38 *Id.*

39 *Id.*

40 *Id.*

41 *Id.*

42 *Id.*

43 *Id.*

44 495 U.S. 575 (1990).

45 *Id.* at 598.

commit a crime."[46] Thus, the only question for the Court in *Quarles* was the timing of the intent requirement, and it agreed with the government that such intent could be formed at any time while a defendant is unlawfully present in a building or structure.[47] The Court reached this conclusion based on the ordinary meaning of "remaining in," which refers to a "continuous activity,"[48] as well as the fact that every state appellate court facing this issue when the ACCA was passed concluded as much.[49]

Justice Thomas wrote separately to call into question the Court's approach to the ACCA.[50] The Supreme Court has instructed courts to use what is called a "categorical approach" in deciding whether a predicate offense is a violent felony under either the elements clause or the enumerated-offenses clause.[51] If the case involves the elements clause, courts determine if a given conviction qualifies as a predicate felony by looking to the statutory elements of the offense of which the defendant was convicted, as opposed to looking at whether the defendant's underlying conduct when he or she committed the crime actually involved violence.[52] Similarly, if a case involves one of the enumerated offenses, such as burglary, courts must compare the language in the statute of conviction with the generic definition of burglary that the Supreme Court concluded applies to the ACCA.[53] Justice Thomas called the categorical approach "difficult to apply" and prone to "yield[ing] dramatically different sentences depending on where a burglary occurred."[54] He urged the Court to reconsider "whether its approach is actually required in the first place for ACCA's enumerated-offenses clause."[55]

A third ACCA case of the last Term, *United States v. Stitt*,[56] also raised the question of the meaning of burglary in the enumerated-offenses clause. Victor Stitt and Jason Daniel Sims had consolidated cases before the Court.[57] Both of them had been convicted of being felons in unlawful possession of a firearm, and both raised questions about whether their prior burglary convictions qualified as ACCA predicates.[58] Stitt challenged the ACCA's applicability to a prior conviction for aggravated burglary under Tennessee law because the state statute,

---

[46] *Id.* at 599.
[47] *Quarles*, 139 S. Ct. at 1877.
[48] *Id.*
[49] *Id.* at 1878.
[50] *Id.* at 1880 (Thomas, J., concurring).
[51] *See Taylor*, 495 U.S. at 600–02.
[52] Mathis v. United States, 136 S. Ct. 2243, 2251 (2016); *Taylor*, 495 U.S. at 600; OFFICE OF GEN. COUNSEL, U.S. SENTENCING COMM'N, PRIMER: CATEGORICAL APPROACH 16 (2017).
[53] *Quarles*, 139 S. Ct. at 1877; *Taylor*, 495 U.S. at 599.
[54] *Quarles*, 139 S. Ct. at 1881 (Thomas, J., concurring).
[55] *Id.*
[56] 139 S. Ct. 399 (2018).
[57] *Id.* at 404.
[58] *Id.*

which required burglary of a habitation, defined "habitation" to include a structure or vehicle that had been "designed or adapted for the overnight accommodation of persons."[59] Sims similarly argued that his prior conviction for burglary of a residential occupiable structure under Arkansas law failed to qualify because it included in its definition of "residential occupiable structure" a vehicle, building, or other structure "which is customarily used for overnight accommodation of persons whether or not a person is actually present."[60] In both cases, the issue was "[w]hether burglary of a nonpermanent or mobile structure that is adapted or used for overnight accommodation" qualifies as an ACCA burglary.[61] Both defendants lost in the district court and won on appeal (Stitt in the Sixth Circuit and Sims in the Eighth).[62] The Court granted certiorari because of disagreement in the circuits about the scope of the term "burglary."[63]

Writing for a unanimous Court, Justice Breyer concluded that the burglary of a structure or vehicle that has been adapted or is customarily used for overnight accommodations counts as a qualifying ACCA burglary.[64] The Court again relied on *Taylor* and its admonition to look at the definition of burglary in the criminal codes of the states when the ACCA was passed, and it found that a majority of state burglary statutes included vehicles that had been adapted or customarily used for lodging.[65]

These three ACCA cases from last Term are emblematic of how these state statutory questions end up clogging the federal court dockets, as judges struggle to determine whether various statutes from the fifty states meet the ACCA's definition of "violent felony." The issue comes up frequently and the use of the categorical approach often results in similar crimes being treated differently because of slight differences in state statutory language.[66] Justice Thomas is hardly alone in his criticism of the categorical approach. Other jurists and commentators have criticized the Supreme Court's approach for both being "extremely complicated" and producing inconsistent results that vary based on the state statute at issue.[67] Use of the categorical approach also leads in some

---

[59] *Id.* (quoting TENN. CODE ANN. § 39-14-401(1)(A) (1997)).

[60] *Id.* (quoting ARK. CODE ANN. § 5-39-101(1) (1997)).

[61] *Id.* (alteration in original) (citation omitted).

[62] *Id.*

[63] *Id.*

[64] *Id.* at 407.

[65] *Id.* at 405–06.

[66] *See, e.g.*, United States v. Mayo, 901 F.3d 218, 230 (3d Cir. 2018) (explaining that the categorical approach often produces "unsatisfying and counterintuitive" outcomes because it is "concerned only with the elements of the statute of conviction, not the specific offense conduct of an offender" (quoting United States v. Ramos, 892 F.3d 599, 606 (3d Cir. 2018))).

[67] Rebecca Sharpless, *Finally, a True Elements Test:* Mathis v. United States *and the Categorical Approach*, 82 BROOK. L. REV. 1275, 1277 (2017) (citation omitted); *see also* United States v. Aguila-Montes de Oca, 655 F.3d 915, 917 (9th Cir. 2011) ("[W]e have struggled to understand the

cases to someone who has what appears to be violent behavior in his or her past nevertheless not qualifying under the elements test.[68] Judges bristle at having to "go down the rabbit hole . . . to a realm where we must close our eyes as judges to what we know as men and women."[69]

These criticisms have merit, but the target is misplaced. The fault does not lie with the Supreme Court.[70] The blame for this regime falls squarely on Congress and the statutory framework it elected to adopt. The ACCA and the categorical rule are pieces of a much broader, irrational federal framework put in place in the 1980s that persists to this day. The categorical approach and mandatory minimum punishments both fail to recognize important individual differences in cases. In neither setting do judges have the flexibility they need to match sentences with relevant facts to create proportionate outcomes. The problem in both contexts stems from Congress's desire to strip judges of discretion, to take on a greater institutional role for itself in dictating sentences in individual cases without evaluating data and evidence, and to make the prosecution of violent crime a federal issue instead of leaving it to the states. While Congress instituted these reforms in the name of public safety, its actual policies have ended up making recidivism more likely, while creating glaring disparities and disproportionate sentences.

The ACCA cases last Term show how this regime puts the federal courts in general and the Supreme Court in particular in the almost impossible position of trying to make the ACCA a coherent punishment regime, given the irrational and poorly researched foundation on which it rests. Consider the Court's choices in *Stokeling* in determining whether a robbery statute requiring minimal force should be included as an ACCA predicate. On the one hand, there is the fact that Congress originally listed robbery as one of only two predicate offenses that trigger the ACCA,[71] and the statute in *Stokeling* mirrored the traditional

---

contours of the Supreme Court's framework. Indeed, over the past decade, perhaps no other area of the law has demanded more of our resources."). Justices Thomas and Alito have been particularly vocal critics on the current Court. *See Quarles*, 139 S. Ct. at 1881 (Thomas, J., concurring) ("[T]he categorical approach employed today is difficult to apply and can yield dramatically different sentences depending on where a burglary occurred . . . ."); Mathis v. United States, 136 S. Ct. 2243, 2269–70 (2016) (Alito, J., dissenting) ("A real-world approach would avoid the mess that today's decision will produce." *Id.* at 2269.).

[68] *See, e.g.*, United States v. Davis, 875 F.3d 592, 595 (11th Cir. 2017).

[69] *Id.*; *see also* Sheldon A. Evans, *Punishing Criminals for Their Conduct: A Return to Reason for the Armed Career Criminal Act*, 70 OKLA. L. REV. 623, 643–45 (2018) (describing complaints of courts and agreeing with them by calling the categorical approach "contrived" and "not based in reality," *id.* at 645).

[70] To be sure, the Supreme Court at times exacerbates the problems by stretching the language of the ACCA and failing to apply the rule of lenity in favor of defendants. *See, e.g.*, *infra* pp. 232–35 (explaining the flaws with the majority's approach in *Stokeling* and the expansive reading it gives the ACCA).

[71] *See Stokeling*, 139 S. Ct. at 551 (noting the "two enumerated crimes of 'robbery or burglary'" in the original statute).

common law definition of robbery that Congress likely had in mind.[72] Thus, Congress may well have intended to include an offense as minor as the one in *Stokeling* because it did not take the time to consider the variety in state robbery statutes. On the other hand, as the Court stated in *Johnson* and the dissent reiterated in *Stokeling*, it makes little sense to give a fifteen-year mandatory minimum sentence based on a prior record that includes slightly aggravated pickpocketing and purse snatching.[73] The Court faced the dilemma of which of these arguments should prevail because Congress simultaneously wanted to target the most serious repeat offenders but did not bother to research how best to do that. It ended up using slapdash language that fails to recognize the complexity in the laws of the fifty states and forced the federal courts and ultimately the Supreme Court to work out the details.

While the Court had an easier time reaching unanimous decisions in the two cases that required it to define burglary,[74] that was only because the Court previously settled on the idea that a generic definition of burglary governed and should be based on the dominant approach in the states when the ACCA was passed.[75] Thus, in the burglary cases, applying the ACCA was only a matter of deciding the prevailing approach to burglary and seeing if the state laws at issue in *Stitt* and *Quarles* matched up. But the Justices' unanimity masks broader disagreement in the federal courts about whether judges should take a narrower approach to some of the ACCA's enumerated offenses, precisely because the harsh fifteen-year sentence can be too easily applied to individuals with criminal histories nothing like those of the repeat offenders Congress discussed when it initially passed the ACCA. For example, while Congress may have wanted a broad definition of burglary because it assumed burglaries are "inherently dangerous,"[76] the reality is that more than 97% of burglaries involve no physical harm to anyone.[77] Congress passed a law focused on a crime bearing very little relationship to the violence it sought to prevent, leaving courts to figure out whether they should interpret the scope of that offense narrowly to limit imposition of the mandatory minimum, or whether they should take a more expansive approach based on Congress's flawed premises.

Solving this dilemma is about much more than keeping or jettisoning the categorical rule. The complexity of the ACCA cases does not stem from the Supreme Court's categorical rule but from Congress's failure to wrestle with any of the tough questions that go along with effectively deciding to turn state crimes into federal ones and to impose harsh consequences as a blanket matter. Instead of seeking to discard or limit the

---

[72] *See id.* at 550–52.

[73] *Id.* at 559 (Sotomayor, J., dissenting); *see* Johnson v. United States, 559 U.S. 133, 140–41 (2010).

[74] *Quarles*, 139 S. Ct. at 1875; *Stitt*, 139 S. Ct. at 403–04.

[75] *See* Taylor v. United States, 485 U.S. 575, 598 (1990).

[76] *Stitt*, 139 S. Ct. at 406.

[77] *See infra* p. 231.

categorical rule, as Justice Thomas and others advocate, those who see the problems with the categorical approach should recognize that a true fix to the mess created by the ACCA requires abandoning a legislative framework of punishment that over-federalizes crime, relies on mandatory minimum sentences, and makes assumptions not grounded in fact and research.

Congress should have allowed the Sentencing Commission to use data and evidence to guide sentencing policy and to identify how best to address previous state convictions in the contexts of sentencing people for violating federal crimes, instead of trying to take that task on for itself. A guideline model also has the virtue of giving judges more leeway to make punishments fit the facts before them. Unfortunately, Congress chose a different path and created a regime that is fundamentally flawed because of its own mistaken assumptions. The categorical rule is but one example of its unsound approach.

I. THE FEDERAL PUNISHMENT REVOLUTION OF THE 1980S

To understand how the ACCA fits into a broader federal sentencing landscape, it is necessary to trace the history of the wholesale changes that began in the 1980s. Prior to the 1980s, punishment in the federal system followed a classic indeterminate sentencing model, which gave judges and parole officers discretion in determining an individual's ultimate sentence.[78] In this framework, a judge would have a broad statutory range of punishments from which to choose a sentence and would typically give a defendant an indeterminate sentencing range (say, for example, two to five years) instead of a fixed sentence.[79] A parole official would then determine the defendant's ultimate release date within that range based on the defendant's progress toward rehabilitation.[80]

By 1983, a majority of the members of Congress concluded that this model was a failure. For starters, legislators lost faith in the idea of rehabilitation as an animating principle in setting sentences because, as the Senate report accompanying the Sentencing Reform Act stated, "almost everyone involved in the criminal justice system now doubts that rehabilitation can be induced reliably in a prison setting, and it is now quite certain that no one can really detect whether or when a prisoner is rehabilitated."[81] In addition, some legislators (particularly those on the left) decried the disparities associated with the wide discretion the

---

[78] *See* Williams v. New York, 337 U.S. 241, 247 (1949) (describing the indeterminate sentencing model and the wide discretion it gives judges and parole officials); TWENTIETH CENTURY FUND TASK FORCE ON CRIMINAL SENTENCING, FAIR AND CERTAIN PUNISHMENT 11 (1976) (same).

[79] Rachel E. Barkow, *Administering Crime*, 52 UCLA L. REV. 715, 739–40 (2005).

[80] *Id.*

[81] S. REP. NO. 98-225, at 38 (1983).

indeterminate model gave judges and parole officials.[82] Other legislators (particularly those on the right) criticized judges and parole officials for giving sentences that were not sufficiently severe to prevent crime.[83] These concerns paved the way for fundamental changes to federal criminal law and punishment in the 1980s.

A. Changing the Legal Landscape

President Ronald Reagan and Congress passed a series of sweeping changes in the Comprehensive Crime Control Act of 1984, described as "the most significant series of changes in the federal criminal justice system ever enacted at one time."[84] The CCCA created new federal crimes and mandatory minimum sentences, increased fines and sentences for federal offenses, expanded asset forfeiture, and treated juvenile crime more harshly.[85] In the Bail Reform Act of 1984,[86] one part of the CCCA, Congress expanded the availability of pretrial detention.[87] Congress allowed courts to consider a defendant's risk of danger to the community and did not limit its notion of "danger" to possible violent crimes; instead, Congress expressly contemplated detaining defendants so that they would not engage in drug trafficking, an activity that "constitutes a danger to the safety of any other person or the community."[88] Indeed, the Act created a rebuttable presumption that a defendant is dangerous (and therefore should be detained) if he is charged with a drug violation that carries a maximum penalty of at least ten years.[89] Individuals charged with a drug felony that involved the use or possession of a firearm were also presumed to be dangerous.[90] The goal of the bail reform

---

82 *See* Barbara S. Barrett, *Sentencing Guidelines: Recommendations for Sentencing Reform*, 57 MO. L. REV. 1077, 1079 (1992); Edward M. Kennedy, *Toward a New System of Criminal Sentencing: Law with Order*, 16 AM. CRIM. L. REV. 353, 356–57 (1979).

83 *See* Barrett, *supra* note 82, at 1079; Donald W. Dowd, *What Frankel Hath Wrought*, 40 VILL. L. REV. 301, 303–04 (1995).

84 Joseph E. diGenova & Constance L. Belfiore, *An Overview of the Comprehensive Crime Control Act of 1984 — The Prosecutor's Perspective*, 22 AM. CRIM. L. REV. 707, 707 (1985).

85 Comprehensive Crime Control Act of 1984, Pub. L. No. 98-473, tit. II, §§ 211–216, 98 Stat. 1976, 1987–2017 (codified as amended in scattered sections of 18 U.S.C.) (outlining a new sentencing regime for federal offenses); S. REP. NO. 98-225, at 3, 66, 105 (describing the CCCA's provisions on bail, sentencing, and fines); diGenova & Belfiore, *supra* note 84, at 714–18, 720–28 (summarizing the CCCA's changes providing for expanded asset forfeiture, harsher penalties for juvenile offenders, and increased sentences for various categories of federal crime).

86 Pub. L. No. 98-473, tit. II, ch. I, §§ 202–209, 98 Stat. 1976, 1976–87 (codified as amended in scattered sections of 18 U.S.C.).

87 18 U.S.C. § 3142 (2012); diGenova & Belfiore, *supra* note 84, at 708–12.

88 S. REP. NO. 98-225, at 12–13 (internal quotation marks omitted).

89 *See* 18 U.S.C. § 3142(e).

90 *Id.* § 3142(e)(3)(B).

provisions was thus to increase dramatically the number of people detained pretrial.[91]

Another major part of the CCCA was the Sentencing Reform Act, which eliminated parole and indeterminate sentencing in favor of a determinate sentencing model.[92] The Sentencing Reform Act also created a Sentencing Commission charged with passing mandatory sentencing guidelines that drastically limited the range of punishments judges could impose.[93]

The ACCA fits within the larger aims of the CCCA to increase punishments for a group of offenders and to strip discretion from judges by establishing a new mandatory minimum punishment — in this case for individuals with certain prior felony convictions charged with possessing a firearm. Senator Arlen Specter initially introduced legislation known as the Career Criminal Life Sentence Act of 1981,[94] which would have treated any robbery or burglary committed by someone in possession of a firearm as a federal crime subject to a mandatory life sentence if the offender had two prior robbery or burglary convictions.[95] Ultimately, after consultation with the Department of Justice, the proposed legislation was changed to impose a fifteen-year mandatory minimum and a maximum possible sentence of life.[96] Because of federalism concerns associated with turning the traditional state crimes of burglary and robbery into federal ones,[97] legislators also amended the proposed law so that individuals with three convictions for burglary or robbery would receive an increased sentence if they violated a federal firearms offense.[98] The House Report accompanying this version of the ACCA (which ultimately passed) cited recidivism research showing that a small number of habitual criminals commit a large number of offenses;[99] thus,

---

91 *See* diGenova & Belfiore, *supra* note 84, at 712 ("Prosecutors can be expected to and should take an aggressive approach in attempting to detain . . . defendants.").

92 *Id.* at 712–13.

93 28 U.S.C. §§ 991–998 (2012). Pursuant to Congress's statutory scheme, the maximum of the guideline range must "not exceed the minimum of that range by more than the greater of 25 percent or 6 months." *Id.* § 994(b)(2).

94 S. 1688, 97th Cong. (1981).

95 *Id.* § 2.

96 S. REP. NO. 97-585, at 76–77 (1982). The shift away from a mandatory life sentence was based on a recognition that there is "a rapid fall off in the rate of offenses committed by career criminals once they reach general age range of thirty or forty years old, [so] a mandatory life sentence could result in unnecessarily extensive incarceration of people who may have reached an age where they might no longer be dangerous." *Id.* at 77.

97 Jenny W.L. Osborne, *One Day Criminal Careers: The Armed Career Criminal Act's Different Occasions Provision*, 44 J. MARSHALL L. REV. 963, 968 (2011).

98 18 U.S.C. § 924(e)(1) (2012) (applying the sentencing enhancement to those who commit offenses under 18 U.S.C. § 922(g)); S. REP. NO. 98-190, at 3, 7–8 (1983).

99 H.R. REP. NO. 98-1073, at 2–3 (1984).

the goal of the law was to target repeat offenders with harsher punishments to incapacitate them.[100]

While the initial version of the ACCA applied to offenders in possession of a firearm who had three or more felony convictions for burglary or robbery,[101] Congress later expanded the predicate felonies. The Career Criminals Amendment Act, part of the Anti-Drug Abuse Act of 1986, produced the version of the ACCA that exists today.[102] In that amendment, Congress changed the relevant predicate offenses that trigger the mandatory minimum to include "a violent felony" or "serious drug offense."[103] A "serious drug offense" is defined by reference to federal drug laws and state drug laws with statutory maximum sentences of ten years or more.[104] A "violent felony" was originally defined in the law as an offense punishable by more than one year that: has "as an element the use, attempted use, or threatened use of physical force against the person of another"; is one of the enumerated felonies in the ACCA, which are burglary, arson, and extortion; or falls within what is known as the residual clause of the Act, which encompasses any offense that "otherwise involves conduct that presents a serious potential risk of physical injury to another."[105] The legislative history indicates that this change was designed to cover more repeat offenders because Congress believed that the law was successfully carrying out its objective and wanted to expand its reach.[106]

The Anti-Drug Abuse Act of 1986 was far broader than just these ACCA amendments. It also imposed a new slate of harsh mandatory minimum sentences for drug offenses and introduced what came to be known as the 100-to-1 ratio between crack and powder cocaine, which

---

100 "If several hundred of the worst career criminals are sentenced to 15-year Federal prison terms, that in itself will prevent tens of thousands of felonies." *Armed Robbery and Burglary Prevention Act: Hearing on H.R. 6386 Before the Subcomm. on Crime of the H. Comm. on the Judiciary*, 97th Cong. 11 (1982) (statement of Rep. Ron Wyden); *see also id.* at 63 (statement of Charles Wellford, Institute of Criminal Justice and Criminology at the University of Maryland) (stating that because "the level of deterrence that we can probably achieve in our system will not be a factor that will slow them down . . . we look to . . . incapacitation").

101 18 U.S.C. app. § 1202(a) (Supp. II 1984). Congress amended this provision in 1986 with the passage of the Firearm Owners' Protection Act, Pub. L. No. 99-308, § 104, 100 Stat. 449, 456–59 (1986) (codified as amended at 18 U.S.C. § 924(e)), which changed the first part of the statute's definitions of burglary and robbery from "any felony" to "any crime punishable by a term of imprisonment exceeding one year," Taylor v. United States, 495 U.S. 575, 582 (1990) (quoting § 104, 100 Stat. at 458).

102 *See supra* notes 5–6 and accompanying text.

103 18 U.S.C. § 924(e).

104 *Id.* § 924(e)(2)(A).

105 *Id.* § 924(e)(2)(B).

106 *Armed Career Criminal Act Amendments: Hearing on S. 2312 Before the Subcomm. on Criminal Law of the S. Comm. on the Judiciary*, 99th Cong. 1 (1986) [hereinafter *ACCA Amendments Hearings*] (statement of Sen. Arlen Specter) (stating that "the experience in the past year-and-a-half with the [ACCA] ha[d] been excellent" and therefore it was "time . . . to expand the [ACCA] to include other offenses, which S. 2312 seeks to do").

required 100 times the quantity of powder cocaine to trigger the same mandatory minimum sentence threshold as crack cocaine.[107] Senator Patrick Leahy described the legislation as taking "a full swing at the drug problem from every angle — at the source, at the border, in enforcement, education, treatment, and rehabilitation."[108] But Congress made these changes without the benefit of the research of its newly created Sentencing Commission because Congress enacted the Anti-Drug Abuse Act before the Sentencing Commission even had a chance to pass its initial guidelines.[109] Congress then passed additional, harsh amendments to the law in 1988 without seeking Sentencing Commission feedback.[110] The 1988 amendments nearly doubled the federal anti-drug budget,[111] imposed even stiffer penalties for drug offenses, and provided that juvenile crimes were to be counted for enhancement purposes under the ACCA.[112] The amendments also imposed new collateral consequences for drug offenses and required revocation of parole, probation, and supervised release for any person who possessed an illicit drug.[113]

The model established in the 1980s continued in subsequent decades. Congress passed a slate of additional mandatory minimums in the 1990s, and it continued to impose tough sanctions on recidivists (including a mandatory life sentence as part of a three-strikes law).[114] In addition, Congress instructed the Sentencing Commission to "specify a sentence

---

107 Pub. L. No. 99-570, § 1002, 100 Stat. 3207, 3207-2 to -4 (1986) (codified as amended at 21 U.S.C. § 841 (2012)).

108 132 CONG. REC. 27,187 (1986) (statement of Sen. Patrick Leahy).

109 The Commission's initial sentencing guidelines were submitted to Congress in April 1987. U.S. SENTENCING COMM'N, SUPPLEMENTARY REPORT ON THE INITIAL SENTENCING GUIDELINES AND POLICY STATEMENTS 1 (1987).

110 *See* CHARLES DOYLE ET AL., CONG. RESEARCH SERV., RL143053, ANTI-DRUG ABUSE ACT OF 1988 (H.R. 5210, 100TH CONGRESS): HIGHLIGHTS OF ENACTED BILL 1–2, 16–18 (1988).

111 *Id.* at 1.

112 Congress also expanded the ACCA's list of predicate offenses to include "any act of juvenile delinquency involving the use or carrying of a firearm, knife, or destructive device that would be punishable by imprisonment for such term if committed by an adult." Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, § 6451, 102 Stat. 4181, 4371 (codified as amended at 18 U.S.C. § 924(e)(2)(B) (2012)).

113 *Id.* § 7303, 102 Stat. at 4464 (codified as amended in scattered sections of 18 U.S.C.).

114 *See, e.g.*, 18 U.S.C. § 3559(c)(1) (mandating a life sentence for those who commit a "serious violent felony" and either have at least two prior serious violent felonies or have at least one prior violent felony and at least one prior serious drug offense); *see also id.* § 844 (mandating enhancements between five years and life for felonies committed with fire or explosives); *id.* § 924(c)(1)(A) (providing for mandatory enhancements of at least five years for drug crimes or drug-trafficking crimes committed with firearms); 21 U.S.C. § 841(b) (2012) (imposing mandatory minimum sentences of ten and twenty years for manufacturing, distributing, dispensing, or possessing with intent to manufacture, distribute, or dispense certain drugs); *id.* § 860(b) (requiring a three-year sentence or the minimum required by § 841, whichever is longer, for a second offense of distributing, possessing with intent to distribute, or manufacturing of a controlled substance near a school or similar facility). *See generally Federal Mandatory Minimums*, FAMILIES AGAINST MANDATORY MINIMUMS (Nov. 10, 2015), https://famm.org/wp-content/uploads/Chart-All-Fed-MMs.pdf [https://perma.cc/CEY7-TJNA] (listing all federal mandatory minimums).

to a term of imprisonment at or near the maximum term" for individuals convicted of "crimes of violence" or drug-trafficking offenses who also have two or more prior felony convictions in either of those categories.[115] Congress also instituted harsh, one-size-fits-all collateral consequences on individuals with felony convictions, particularly drug convictions.[116] For example, Congress passed federal legislation that allowed public housing authorities to refuse public housing to anyone engaged in "any drug-related or violent criminal activity or other criminal activity which would adversely affect the health, safety, or right to peaceful enjoyment of the premises."[117] The individual did not need to be convicted or even charged for the housing authority to evict the entire household.[118] People can be and have been kicked out of their apartments on the basis of complaints by neighbors or anonymous tips that a tenant or guest is using drugs.[119] Congress took a similarly hard line when it came to welfare benefits, passing a law in 1996 that required states to impose lifetime bans on individuals with multiple drug-related felony convictions from receiving federal welfare aid or food stamps.[120] People convicted of drug offenses were also barred from receiving student loans for specified periods of time, and in the case of people with three convictions for drug possession, for life.[121]

While Congress has passed modest reforms in recent years,[122] the fundamental architecture put in place in the 1980s remains. Most of the laws from the 1980s and 1990s are still on the books, and mandatory minimums continue to play an outsized role in filling federal prisons.[123]

---

115 28 U.S.C. § 994(h) (2012).

116 RACHEL ELISE BARKOW, PRISONERS OF POLITICS 89–93 (2019).

117 42 U.S.C. § 13661(c) (2012). Drug-related criminal activity can also justify an eviction. *See id.*; *see also id.* § 1437d(l)(6); Dep't of Hous. and Urban Dev. v. Rucker, 535 U.S. 125, 130 (2002).

118 24 C.F.R. § 966.4(l)(5)(iii)(A) (2019).

119 BARKOW, *supra* note 116, at 89–90.

120 21 U.S.C. § 862(a) (2012). States can take affirmative steps to remove the bans, but people with felony drug convictions continue to be fully or partially excluded from receiving benefits in the majority of states. BARKOW, *supra* note 116, at 91.

121 20 U.S.C. § 1091(r)(1) (2012).

122 *See, e.g.*, First Step Act of 2018, Pub. L. No. 115-391, 132 Stat. 5194 (codified as amended in scattered sections of 18, 21, 34, and 42 U.S.C.) (instituting several reforms, including the reduction of some federal mandatory minimum sentences and the creation of opportunities for people in prison to earn time off their sentences by participating in programming); Fair Sentencing Act of 2010, Pub. L. No. 111-220, § 2, 124 Stat. 2372, 2372 (codified as amended at 21 U.S.C. § 841(b)) (reducing the previous 100:1 ratio between powder and crack cocaine needed to trigger certain federal criminal penalties to 18:1).

123 More than half of the individuals in federal prison as of late 2016 were convicted of an offense carrying a mandatory minimum sentence and more than forty-two percent of all people in federal prison remained subject to a mandatory minimum penalty at sentencing. U.S. SENTENCING COMM'N, OVERVIEW OF MANDATORY MINIMUM PENALTIES IN THE FEDERAL CRIMINAL JUSTICE SYSTEM 6 (2017) [hereinafter 2017 MANDATORY MINIMUM OVERVIEW], https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2017/20170711_Mand-Min.pdf [https://perma.cc/4K8S-GHZ6].

B. The Hallmarks of Modern Federal Criminal Lawmaking

While the federal criminal legislation of the 1980s and thereafter varies in content, the laws (including the ACCA) share disturbing attributes: first, the lack of research about or empirical support for the policies behind the laws to reduce crime, and second, a tendency to lump together individuals of varying degrees of culpability for the same harsh treatment.

A prime example of Congress's failure to engage in research or empirical analysis before creating sweeping new policies and punishments is its reaction to the emergence of crack cocaine in the 1980s.[124] Viewing crack as a drug of unprecedented danger, Congress decided that the mere possession of five grams of crack should yield a mandatory minimum sentence of five years.[125] Possession of fifty grams of crack (an amount associated with trafficking) yielded a ten-year mandatory minimum.[126] The differential treatment of crack and powder cocaine was based on "sensationalized media stories and anecdotes that suggested crack was more addictive than powder and . . . made people more prone to violence."[127] Instead of researching the issue or seeking expert guidance — for example, by asking the newly created Sentencing Commission to address the topic — Congress set policy based on nothing more than its assumptions drawn from media accounts. As one member of Congress noted about the process: "We initially came out of committee with a 20-to-1 ratio. By the time we finished on the floor, it was 100-to-1. We didn't really have an evidentiary basis for it."[128]

If legislators had consulted any experts or taken more time to study crack, they would have learned that crack and powder have indistinguishable pharmacological effects and that crack is no more addictive than powder cocaine.[129] They also would have learned that individuals taking crack are no more likely to have violent reactions than those who

---

[124] In the wake of media reports characterizing crack as more dangerous than other drugs and after the well-publicized death of basketball star Len Bias in 1986 from what was believed to be a crack cocaine overdose, Congress rushed to pass crack penalties. BARKOW, *supra* note 116, at 74. Representative Thomas P. "Tip" O'Neill Jr., the Speaker of the House from Massachusetts, essentially started a bidding war on crack penalties, in large part because the Boston Celtics had drafted Bias to join the team before his death. *Id.*

[125] Anti-Drug Abuse Act of 1986, Pub. L. No. 99-570, § 1002, 100 Stat. 3207, 3207-2 to -4 (codified as amended at 21 U.S.C. § 841).

[126] *Id.* As noted, one needed 100 times the quantity of powder to trigger that same ten-year mandatory minimum. *See supra* pp. 212–13.

[127] BARKOW, *supra* note 116, at 74.

[128] NAOMI MURAKAWA, THE FIRST CIVIL RIGHT: HOW LIBERALS BUILT PRISON AMERICA 125 (2014) (quoting 156 CONG. REC. H6202 (daily ed. July 28, 2010) (statement of Rep. Daniel E. Lungren)).

[129] *See, e.g.*, Dorothy K. Hatsukami & Marian W. Fischman, *Crack Cocaine and Cocaine Hydrochloride: Are the Differences Myth or Reality?*, 276 J. AM. MED. ASS'N 1580, 1581–83 (1996).

use powder cocaine.[130] And if they had analyzed who would be affected by their crack sentences, they would have learned that there would be large racial disparities between those sentenced for crack and those sentenced for powder. In 2018, 80% of those charged with crack-trafficking offenses were black, but only 6.3% were white.[131] In contrast, blacks comprised only 27.3% of powder cocaine–trafficking offenders, Hispanics made up 66.3%, and whites made up 5.7%.[132]

Even after all this became clear — through Sentencing Commission reports and other research — Congress persisted in its approach to crack sentencing. More than twenty-four years passed before the disparity between crack and powder was reduced, and even then the reduction was not to a 1-to-1 ratio, but to an 18-to-1 ratio.[133] In the absence of hearings or consultation with experts, Congress remained focused on crack as an especially dangerous drug associated with violence, and no other information could break through to change Congress's course.

Congress's approach to drug trafficking in general reflects a similar dynamic.[134] The legislative history of the Anti-Drug Abuse Act of 1986 makes clear that the five-year mandatory minimum sentence in the law was "specifically intended for the managers of drug enterprises" and the ten-year mandatory minimum was designed for "organizers and leaders."[135] Put another way, Congress aimed to create a "two-tiered penalty

---

130 *See, e.g.*, Craig Reinarman, *5 Myths About That Demon Crack*, WASH. POST (Oct. 14, 2007), http://www.washingtonpost.com/wp-dyn/content/article/2007/10/09/AR2007100900751.html [https://perma.cc/W5ZS-FARQ]. If legislators had engaged in an inquiry instead of making assumptions, they would have further learned that Bias had overdosed on powder, not crack, cocaine. U.S. SENTENCING COMM'N, SPECIAL REPORT TO THE CONGRESS: COCAINE AND FEDERAL SENTENCING POLICY 122–23 (1995), https://www.ussc.gov/sites/default/files/pdf/news/congressional-testimony-and-reports/drug-topics/199502-rtc-cocaine-sentencing-policy/CHAP5-8.pdf [https://perma.cc/ER6X-S35E].

131 U.S. SENTENCING COMM'N, QUICK FACTS: CRACK COCAINE TRAFFICKING OFFENSES (2019), https://www.ussc.gov/sites/default/files/pdf/research-and-publications/quick-facts/Crack_Cocaine_FY18.pdf [https://perma.cc/X7CC-2WB3].

132 U.S. SENTENCING COMM'N, QUICK FACTS: POWDER COCAINE TRAFFICKING OFFENSES (2019), https://www.ussc.gov/sites/default/files/pdf/research-and-publications/quick-facts/Powder_Cocaine_FY18.pdf [https://perma.cc/8J2M-ZEGU].

133 Fair Sentencing Act of 2010, Pub. L. 111-220, § 2, 124 Stat. 2372, 2372 (codified as amended at 21 U.S.C. § 841(b) (2012)).

134 *See* Anti-Drug Abuse Act of 1986, Pub. L. No. 99-570, 100 Stat. 3207 (codified as amended primarily in scattered sections of 18 and 21 U.S.C.).

135 United States v. Dossie, 851 F. Supp. 2d 478, 479 (E.D.N.Y. 2012). Senator Robert Byrd, the then–Senate Minority Leader, stated that the ten-year mandatory minimum was "[f]or the kingpins — the masterminds who are really running these operations — and they can be identified by the amount of drugs with which they are involved." *Id.* at 480 (quoting 132 CONG. REC. 27,193 (1986)). Byrd likewise identified "middle-level dealers" as those who should get the five-year penalty. *Id.* (quoting 132 CONG. REC. 27,194).

structure for discrete categories of drug traffickers."[136] Legislators thus had a particular idea of what constituted a drug trafficker — someone fairly high level dealing with large quantities — and then set penalties with that image in mind. These penalties were rushed through with less than three months between the time the Act was initially introduced and its enactment.[137]

In fact, however, the quantity triggers for the mandatory minimums cover anyone involved in the sale of drugs and are not limited to high-level operatives. Most people sentenced under this law are actually low-level members of drug conspiracies.[138] Legislators failed to appreciate how conspiracy law would interact with the mandatory minimum scheme, and they did not ask experts about how their law would play out in practice. If they had, they would have seen that the law they wrote went far beyond the population they aimed to target. Under federal conspiracy law, all the people who participate in a drug-trafficking offense — whether the kingpin or the street peddler or the courier — are deemed equally responsible for the reasonably foreseeable quantities distributed by their organization.[139] But requiring a mandatory minimum meant judges could not distinguish among different people in organizations based on their role in the offense and that prosecutors would instead be deciding the fate of drug-trafficking participants with their charging decisions.[140] These flaws in the federal drug laws prompted a bipartisan task force charged with evaluating federal criminal law to conclude "that the mandatory minimum framework . . . is

---

[136] *Id.* at 479 (quoting U.S. SENTENCING COMM'N, REPORT TO THE CONGRESS: OVERVIEW OF MANDATORY MINIMUM PENALTIES IN THE FEDERAL CRIMINAL JUSTICE SYSTEM 24 (2011) [hereinafter 2011 REPORT TO CONGRESS]).

[137] Brent E. Newton & Dawinder S. Sidhu, *The History of the Original United States Sentencing Commission, 1985–1987*, 45 HOFSTRA L. REV. 1167, 1275 (2017).

[138] Out of all people incarcerated for drug crimes in federal prison, only fourteen percent were identified as being the manager, leader, or organizer that the law's drafters had in mind. CHARLES COLSON TASK FORCE ON FED. CORR., TRANSFORMING PRISONS, RESTORING LIVES 12 (2016). Yet the 55,000 people in federal prison serving time pursuant to mandatory minimums for drug offenses are serving sentences of more than eleven years on average. *Id.* at 11.

[139] *See* 21 U.S.C. § 846 (2012); *see also* United States v. Stoddard, 892 F.3d 1203, 1222 (D.C. Cir. 2018) ("[A] defendant convicted of conspiracy to deal drugs . . . must be sentenced, under § 841(b), for the quantity of drugs the jury attributes to him as a reasonably foreseeable part of the conspiracy. . . ." (quoting United States v. Law, 528 F.3d 888, 906 (D.C. Cir. 2008))).

[140] *See* U.S. SENTENCING COMM'N, MANDATORY MINIMUM PENALTIES FOR DRUG OFFENSES IN THE FEDERAL CRIMINAL JUSTICE SYSTEM 15–16 (2017) (noting that "drug offenses remain the most commonly charged offenses carrying mandatory minimum penalties," *id.* at 16, and that among all drug-related convictions in 2016, the "most frequently reported conviction . . . carrying a mandatory minimum penalty" was for drug-trafficking conspiracy, *id.* at 15).

fundamentally broken" because "judges find their hands tied by an extraordinarily punitive one-size-fits-all structure."[141] The task force recommended maintaining the mandatory minimum only for kingpins but repealing the mandatory minimum penalty for all other drug offenses.[142]

Instead of deferring to expert recommendations on how to address this problem, lawmakers have made only minor modifications to their flawed framework, in part because of a concern that lowering sentences could produce incidents of well-publicized crime by those who receive a lower sentence. Thus, while a so-called "safety valve" has been enacted to allow exceptions from mandatory minimum sentences, it is narrow.[143] It covers only a limited category of low-level drug offenders with no or minimal criminal history, and for an offender to be eligible, the prosecutor must also agree that the individual has provided the government with whatever information he or she has about the drug operation.[144] In 2014, only about 14.5% of offenders qualified under its terms for relief from mandatory minimums, showing the limits of the safety valve's reach.[145] The entire statutory scheme remains skewed toward high-level traffickers even though that group is not who is being sentenced most of the time.

These illustrations are part of a larger pattern. When it is engaged in policymaking in the area of criminal law, Congress repeatedly shows inattention to empirical evidence and disinterest in what the relevant

---

141 CHARLES COLSON TASK FORCE ON FED. CORR., *supra* note 138, at 21.

142 *Id.* at 21–22.

143 *See* 18 U.S.C. § 3553(f) (2012).

144 The revised safety valve, as passed under the First Step Act in 2018, applies to defendants who do not have any prior three-point offense or any prior two-point violent offense and who have fewer than four criminal history points, excluding any criminal history points resulting from a one-point offense. U.S. SENTENCING COMM'N, SENTENCE AND PRISON IMPACT ESTIMATE SUMMARY (2019) [hereinafter IMPACT ESTIMATE SUMMARY], https://www.ussc.gov/sites/default/files/pdf/research-and-publications/prison-and-sentencing-impact-assessments/January_2019_Impact_Analysis.pdf [https://perma.cc/3DDV-6XLC]. Accordingly, defendants are excluded from the safety valve if they have served: a single prior sentence longer than thirteen months for any offense, a single prior sentence of sixty days for a violent offense, or two prior sentences of sixty days for nonviolent offenses.

145 U.S. SENTENCING COMM'N, QUICK FACTS: MANDATORY MINIMUM PENALTIES (2015), https://www.ussc.gov/sites/default/files/pdf/research-and-publications/quick-facts/Quick_Facts_Mand_Mins_FY14.pdf [https://perma.cc/92EM-TJLC]. While the First Step Act expanded the safety valve somewhat, the changes are projected to have only a modest effect, with a little more than 2000 additional people being eligible for it annually. IMPACT ESTIMATE SUMMARY, *supra* note 144. In 2010, almost 20,000 people were convicted of an offense with a mandatory minimum penalty, so the number eligible would be roughly ten percent of that total. 2017 MANDATORY MINIMUM OVERVIEW, *supra* note 123, at 29. During the Obama Administration, the number of people convicted of an offense with a mandatory minimum dropped significantly because of changes to charging practices. *Id.* In 2016, for example, the number dropped to 13,604 offenders, *id.*, so the safety valve expansion making 2000 more cases eligible would cover almost fifteen percent of that total — still modest, but more substantial. But because the Justice Department in the Trump Administration reversed those changes, BARKOW, *supra* note 116, at 192, one can expect a reversion to the higher totals for the number of offenders subject to mandatory minimums.

expert agency (the Sentencing Commission) has to say. The result is that Congress often ends up producing laws that undermine rather than promote public safety and that create more disproportionate and disparate sentences.

II. CONGRESS'S FLAWED ASSUMPTIONS

Because Congress has essentially relied on its members' gut instincts about what makes for good punishment policy instead of seeking to get guidance from real-world data and empirical evidence, it has been prone to making a series of erroneous assumptions that undermine public safety, proportionate sentencing, and constitutional values.

A. Putting People Behind Bars for as Long as Possible Always Makes Us Safer

A central animating principle behind the changes to punishment that began in the 1980s was reducing crime.[146] There were sharp increases in crime and social unrest in the 1960s and 1970s,[147] and Congress sought to tackle these problems through criminal law reform. As Senator Specter stated in supporting the ACCA, the legislation "seeks to improve public safety and reduce violent crime by incapacitating career criminals, through lengthy incarceration."[148] Senator Specter explained the fifteen-year mandatory minimum explicitly in incapacitation terms, noting that the goal was "to incapacitate the armed career criminal for the rest of the normal time span of his career which usually starts at about age 15 and continues to about age 30."[149] While incapacitation appeared as the primary motivator, deterrence also played a key role. Legislators "anticipated that the entry of the Federal Government into the field of

---

146 *See* 129 CONG. REC. 599 (1983) (memorandum of Sen. Arlen Specter) ("Over the past two decades, Americans have suffered a grave and worsening epidemic of violent crime."); U.S. SENTENCING COMM'N, MANDATORY MINIMUM PENALTIES IN THE FEDERAL CRIMINAL JUSTICE SYSTEM i (1991) [hereinafter 1991 MANDATORY MINIMUM REPORT], https://www.ussc.gov/sites/default/files/pdf/news/congressional-testimony-and-reports/mandatory-minimum-penalties/1991_Mand_Min_Report.pdf [https://perma.cc/9YP4-KYQH] (noting that the purpose of the Comprehensive Crime Control Act was "to address the problem of crime in society").

147 *See* Ted Gest, *The Evolution of Crime and Politics in America*, 33 MCGEORGE L. REV. 759, 759 (2002) (describing the increase in the violent crime rate from 161 per 100,000 people in 1960 to 191 per 100,000 people in 1964); *see also* DAVID GARLAND, THE CULTURE OF CONTROL 90–92 (2001) (describing the relationship between increasing crime rates, social unrest, and harsher punishments).

148 S. REP. NO. 97-585, at 8 (1982). Representative William Hughes likewise stated that "[b]oth Congress and local prosecutors around the Nation have recognized the importance of incapacitating these repeat offenders." 130 CONG. REC. 28,095 (1984) (statement of Rep. William J. Hughes).

149 S. REP. NO. 97-585, at 7; *see also* S. REP. NO. 98-190, at 9 (1983) (stating that the goal of the legislation was "to incapacitate the armed career criminal for the rest of the normal time span of his career").

prosecuting violent street crime will have a substantial deterrent effect."[150] One sees a similar emphasis on deterrence in support of the drug laws in the 1980s and thereafter, with legislators "hoping to deter the would-be drug trafficker from getting involved in drug trafficking."[151] These legislators believed crime would be reduced through incapacitation and deterrence.

While the laws drastically increased the federal prison population — increasing it by a whopping thirty-two percent by 1986 and spurring the largest federal prison construction effort in history[152] — they have largely failed to deliver the deterrent or incapacitative effects that their proponents predicted.

Although some politicians who supported the laws assumed that they would deter crime, the empirical evidence on mandatory minimum laws suggests they do not increase deterrence.[153] Although these laws increased sentence lengths, empirical studies show that sentence length has little deterrent effect.[154] Both the National Resource Council and the President's Council of Economic Advisers have issued reports concluding that longer sentences are not the best method for deterring crime and summarizing research that "longer sentences are unlikely to deter prospective offenders or reduce targeted crime rates."[155] In addition, although proponents of mandatory minimum punishments believed they would be particularly good deterrents because they would increase the certainty of punishment, in practice they have had the opposite effect. The rigidity of mandatory sentences leads prosecutors to circumvent their application through plea agreements, charging decisions, and substantial assistance departures.[156] The uneven application "dramatically reduce[s] certainty" and ultimately "thwart[s] the deterrent value of mandatory minimums."[157] And when these mandatory minimum sentences are applied, they "chew up scarce capacity," which means those resources

---

150 S. REP. NO. 97-585, at 8.

151 132 CONG. REC. 22,731 (1986) (statement of Rep. Richard H. Lehman).

152 Ronald J. Ostrow, *1984 Crime Control Act Leads to 32% Rise in Prisoners*, L.A. TIMES (Jan. 9, 1986, 12:00 AM), https://www.latimes.com/archives/la-xpm-1986-01-09-mn-14186-story.html [https://perma.cc/PQ4Y-EVM7].

153 Michael Tonry, *The Mostly Unintended Effects of Mandatory Penalties: Two Centuries of Consistent Findings*, 38 CRIME & JUST. 65, 95 (2009) ("No individual evaluation has demonstrated crime reduction effects attributable to enactment or implementation of a mandatory minimum sentence law."); *see also* GREG NEWBURN & SAL NUZZO, JAMES MADISON INST., MANDATORY MINIMUMS, CRIME, AND DRUG ABUSE: LESSONS LEARNED, PATHS AHEAD 8–9 (2019) (noting the lack of a deterrent effect for mandatory minimum drug laws in New York, Michigan, and Florida).

154 *See* BARKOW, *supra* note 116, at 42–44.

155 COUNCIL OF ECON. ADVISERS, EXEC. OFFICE OF THE PRESIDENT, ECONOMIC PERSPECTIVES ON INCARCERATION AND THE CRIMINAL JUSTICE SYSTEM 37 (2016); *see also* NAT'L RESEARCH COUNCIL, THE GROWTH OF INCARCERATION IN THE UNITED STATES: EXPLORING CAUSES AND CONSEQUENCES 134 (2014).

156 1991 MANDATORY MINIMUM REPORT, *supra* note 146, at 57–61.

157 *Id.* at ii–iii.

cannot be used to bring actions against other people, thus creating an environment (contrary to all the literature on what works for deterrence) where we trade certainty for severity and create "randomized draconianism."[158] Moreover, mandatory minimums can only deter if would-be offenders are aware of their existence, but according to a 1992 Bureau of Alcohol, Tobacco, and Firearms (ATF) study, the ACCA's mandatory minimums (to take one example) went largely unnoticed by their intended audience.[159]

Politicians also overestimated the incapacitative benefits.[160] They largely failed to consider how individuals' rates of offending decrease as they age,[161] so many of the long sentences the statutes require are incapacitating people who would no longer be committing crimes in any event. Even more fundamentally, legislators failed to consider the ways in which long sentences could themselves be criminogenic because of how difficult they make reentry once the individual comes out of prison.[162] Studies show longer sentences lead to *increased* recidivism after release,[163] potentially outweighing any incapacitative benefit. One researcher summarizing the weak evidence of an incapacitation effect and the negative tradeoffs of long sentences on reentry has thus concluded that "incapacitation should not be relied on as a primary motivation for a broad-based incarceration regime."[164]

A rational discussion of sentencing would thus factor in these costs of longer sentences (as well as other costs, such as the negative effects on third parties[165]) and not reflexively assume longer sentences are always good for public safety. But because most politicians have no expertise or training in criminal justice policy, they may be unaware of the downsides and tradeoffs of more punitive policies. They are setting criminal justice policies as a general matter and are often responding to particularly heinous cases or press accounts, which they often discuss at

---

158 Mark Kleiman, *How to Have Less Crime and Less Punishment*, THE ATLANTIC (Aug. 9, 2010), https://www.theatlantic.com/national/archive/2010/08/how-to-have-less-crime-and-less-punishment/61123 [https://perma.cc/G5H2-5A3M].

159 An ATF survey of 100 prisoners incarcerated under the ACCA revealed that only seven percent had been aware that "possession of a firearm could subject them to a mandatory sentence." BUREAU OF ALCOHOL, TOBACCO & FIREARMS, U.S. DEP'T OF THE TREASURY, PROTECTING AMERICA: THE EFFECTIVENESS OF THE FEDERAL ARMED CAREER CRIMINAL STATUTE 13 (1992), https://www.ncjrs.gov/pdffiles1/Digitization/137208NCJRS.pdf [https://perma.cc/GF3R-RDTE].

160 *See, e.g.*, 134 CONG. REC. 15,806–07 (1988) (statement of Sen. Arlen Specter) (noting the policy goal of "incapacitating the truly dangerous criminal," *id.* at 15,807).

161 *See* Travis Hirschi & Michael Gottfredson, *Age and the Explanation of Crime*, 89 AM. J. SOC. 552, 565 (1983) ("The empirical fact of a decline in the crime rate with age is beyond dispute.").

162 BARKOW, *supra* note 116, at 44–47.

163 *Id.*

164 Shawn D. Bushway, *Incapacitation*, *in* 4 REFORMING CRIMINAL JUSTICE 37, 52 (Erik Luna ed., 2017).

165 BARKOW, *supra* note 116, at 47–48.

length in their floor debates and discussions of proposed laws.[166] The result, as Professor Douglas Berman has observed, is that lawmakers may lack "context for assessing and passing judgments on the actual persons who will come to violate various criminal prohibitions; they can really only consider criminal offenders as abstract and nefarious characters."[167] And with those "nefarious characters" in mind, they support sentences that are far too long for the many other people who get swept up in their laws.

The results are laws that economists have concluded pose costs that outweigh their benefits.[168] There are better, more cost-effective ways to target crime, but Congress has failed to consider them because it is dedicated to an approach that relies on longer sentences in general and mandatory minimum sentences in particular.[169]

B. Disparities Can Be Checked with Mandatory Minimums and Guidelines

A second fundamental flaw in Congress's approach was its assumption that its reforms would address sentencing disparities. The Senate Report on the CCCA cited a 1974 study that asked fifty federal judges from the Second Circuit to indicate the sentences they would give in twenty different cases, and it commented that "[t]he variations in the judges' proposed sentences in each case were astounding."[170] Congress noted that "[s]entences that are disproportionate to the seriousness of the offense create a disrespect for the law," and those that are disproportionately harsh "create unnecessary tensions among inmates and add to disciplinary problems in the prisons."[171] It approvingly cited the research by the National Academy of Sciences on local sentencing reform efforts that heralded the Minnesota sentencing commission model.[172]

But Congress ultimately failed to heed those findings. While it created a sentencing commission and directed it to create a guideline regime just as the Minnesota model had, it failed to follow that model in several key

---

166 *See supra* p. 215 and note 124.

167 Douglas A. Berman, *A Common Law for This Age of Federal Sentencing: The Opportunity and Need for Judicial Lawmaking*, 11 STAN. L. & POL'Y REV. 93, 107 (1999).

168 BARKOW, *supra* note 116, at 49 ("When economists have studied the full range of costs and benefits associated with incarceration, they have concluded that the costs of incarceration and sentencing typically outweigh the benefits."); *see also* JONATHAN P. CAULKINS ET AL., RAND DRUG POLICY RESEARCH CTR., ARE MANDATORY MINIMUM DRUG SENTENCES COST-EFFECTIVE? 1 (1997) (concluding that mandatory minimums are "not justifiable on the basis of cost-effectiveness at reducing cocaine consumption or drug-related crime").

169 The same flawed reasoning lies behind Congress's expansion of pretrial detention and collateral consequences of convictions, and those policies likewise undermine rather than promote public safety. *See generally* BARKOW, *supra* note 116, at 57–61, 88–102.

170 S. REP. NO. 98-225, at 41 (1983).

171 *Id.* at 46.

172 *Id.* at 62.

respects. Whereas the Minnesota sentencing commission (like just about every other state commission) is charged with keeping sentences within the existing resource capacity,[173] the federal equivalent operates with no such constraint. The result is that state sentencing agencies have been better able than their federal counterpart to create regimes with proportionate sentencing; the resource constraint acts as a rationalizing influence on the political process, which otherwise can get out of hand.[174]

More fundamentally, a guideline model cannot effectively create a rational, proportionate sentencing regime if the legislative body ignores the sentencing agency's research and data and instead imposes mandatory minimums on the basis of no empirical evidence. That is, of course, precisely what Congress did, and in that respect, its approach bears no resemblance to the guideline model it approvingly cited when it created the Federal Sentencing Commission. When Congress hastily imposed mandatory minimum sentences for drug offenses in the Anti-Drug Abuse Act of 1986 — before the Sentencing Commission had promulgated its initial set of sentencing guidelines — it prompted the Commission to anchor its drug guidelines to the mandatory minimum sentences that it had already established.[175] As a consequence, like Congress, the Commission created a sentencing regime driven largely by drug quantity.[176] For example, if a drug quantity triggers a five-year mandatory minimum under the statutory scheme, the Commission has that same quantity trigger a guideline range of fifty-one to sixty-three months.[177] "[N]o other decision of the Commission," the Commission has noted, "has had such a profound impact on the federal prison population."[178] Indeed, it was the Commission's decision to base its guidelines around what Congress had decided (without any empirical backing) that drove much of the increase in the number of people in federal prison.[179]

---

173 Rachel E. Barkow, *Sentencing Guidelines at the Crossroads of Politics and Expertise*, 160 U. PA. L. REV. 1599, 1603 (2012).

174 *Id.* at 1604–06; Barkow, *supra* note 79, at 809–12.

175 *See supra* pp. 212–14.

176 Barkow, *supra* note 173, at 1614.

177 U.S. SENTENCING COMM'N, AMENDMENTS TO THE SENTENCING GUIDELINES 22 (2014), https://www.ussc.gov/sites/default/files/pdf/amendment-process/reader-friendly-amendments/20140430_RF_Amendments_0.pdf [https://perma.cc/PL6T-BW5L]. Initially, the guideline range was sixty-three to seventy-eight months, but the Commission reduced all drug sentences by two levels in 2014. *Id.*

178 U.S. SENTENCING COMM'N, FIFTEEN YEARS OF GUIDELINES SENTENCING: AN ASSESSMENT OF HOW WELL THE FEDERAL CRIMINAL JUSTICE SYSTEM IS ACHIEVING THE GOALS OF SENTENCING REFORM 49 (2004).

179 *Id.* at 76 ("Given that drug trafficking constitutes the largest offense group sentenced in the federal courts, the two-and-a-half time increase in their average prison term has been the single sentencing policy change having the greatest impact on prison populations.").

Congress's mandatory minimums and the Commission's decision to key its guidelines off them are also leading factors in creating racial disparities among the federal prison population.[180] The Commission concluded that "sentencing guidelines and mandatory minimum statutes . . . have a greater adverse impact on Black offenders than did the factors taken into account by judges in the discretionary system" that Congress dismantled in the 1980s.[181]

One reason the disparities are so great is that prosecutors retain discretion to decide whether to charge mandatory punishments and also whether defendants qualify for relief from a mandatory minimum by offering substantial assistance to the government.[182] The evidence shows enormous differences in how prosecutors exercise that discretion, with substantial variation by district.[183] For example, the Sentencing Commission has found "significant variation" among prosecutors in charging mandatory minimum enhancements under federal law for individuals who have prior offenses.[184] In fiscal year 2016, one district sought enhancements 74.6% of the time, whereas nineteen districts never sought them.[185]

C. Congress Has Unlimited Flexibility to Control Sentencing

A final key flaw in Congress's operating assumptions was its view that it could tinker with sentencing laws without constitutional limits. When Congress passed the CCCA, the biggest constitutional question mark surrounded the creation of the Sentencing Commission. Congress placed the Commission inside the judicial branch and required the appointment of judges to its membership, but it gave the body powers that looked legislative: the statutory authority to pass binding guidelines.[186] While many district court judges initially held that the Sentencing Commission violated the Constitution's separation of powers, the Supreme Court concluded otherwise in *Mistretta v. United States*.[187]

But while the Sentencing Commission survived a constitutional challenge, its mandatory Federal Sentencing Guidelines ultimately did not.[188] For years, the Court seemed content to permit legislation that identified various sentencing factors and required judges to increase

---

180 *See id.* at 132 ("This one sentencing rule contributes more to the differences in average sentences between African American and White offenders than any possible effect of discrimination.").

181 *Id.* at 135.

182 BARKOW, *supra* note 116, at 51–55.

183 2011 REPORT TO CONGRESS, *supra* note 136, at 112.

184 U.S. SENTENCING COMM'N, APPLICATION AND IMPACT OF 21 U.S.C. § 851: ENHANCED PENALTIES FOR FEDERAL DRUG TRAFFICKING OFFENDERS 6 (2018).

185 *Id.* at 22.

186 *See* Mistretta v. United States, 488 U.S. 361, 368–70, 388–89 (1989).

187 488 U.S. 361, 390.

188 *See* United States v. Booker, 543 U.S. 220, 226–27 (2005).

defendants' punishments whenever they found that those factors existed by a preponderance of the evidence, rather than treating such factors as offense elements to be proven to a jury at trial.[189] But that changed in 2000. In *Apprendi v. New Jersey*,[190] the Court concluded that any fact aside from a prior conviction that increases a defendant's statutory maximum penalty must be treated as an offense element and proven to a jury beyond a reasonable doubt.[191] The Supreme Court later concluded that the logic of *Apprendi* applied to mandatory sentencing guidelines as well,[192] and in 2005 it concluded that the Federal Sentencing Guidelines ran afoul of the Constitution's Sixth Amendment jury guarantee.[193] The Court's remedy was to make the Guidelines advisory,[194] which gives judges far greater freedom to vary from them. Judges have largely used that freedom to give sentences lower than what the Guidelines recommend.[195]

In 2013, the Supreme Court concluded that the Sixth Amendment issues it recognized in *Apprendi* applied to statutory punishment floors as well as statutory ceilings.[196] It thus held that facts that trigger a mandatory minimum sentence must also be treated as offense elements that juries must find beyond a reasonable doubt.[197] This change prompted the Department of Justice under the Obama Administration to change its mandatory minimum charging practices and reserve those punishments for more serious cases.[198] The Trump Administration reversed that policy,[199] and although the threat of a mandatory minimum punishment gives federal prosecutors great leverage in plea negotiations, *Alleyne v. United States*[200] means that at least some defendants may credibly test the government's proof at trial and can use that option to gain a somewhat stronger negotiating position than they would have had before *Alleyne*.

The mandatory minimum regime has thus far had greater success withstanding Eighth Amendment challenges. In the death penalty context, the Supreme Court rejected the use of mandatory capital punishment for certain offenses because it "treat[ed] all persons convicted of a designated offense not as uniquely individual human beings, but as

---

189 *See* Nancy Gertner, *A Short History of American Sentencing: Too Little Law, Too Much Law, or Just Right*, 100 J. CRIM. L. & CRIMINOLOGY 691, 704–05 (2010).
190 530 U.S. 466 (2000).
191 *Id.* at 476, 490.
192 Blakely v. Washington, 524 U.S. 296, 313–14 (2004).
193 *Booker*, 543 U.S. at 226–27.
194 *Id.* at 245–46.
195 BARKOW, *supra* note 116, at 191.
196 Alleyne v. United States, 133 S. Ct. 2151, 2155 (2013).
197 *Id.*
198 BARKOW, *supra* note 116, at 191–92.
199 *Id.* at 192.
200 133 S. Ct. 2151.

members of a faceless, undifferentiated mass."[201] The Court believed that "the fundamental respect for humanity underlying the Eighth Amendment requires consideration of the character and record of the individual offender and the circumstances of the particular offense as a constitutionally indispensable part of the process of inflicting the penalty of death."[202] Although it is hard to see why this logic applies with any less force when the sentence is placing an individual in a cage for years,[203] the Court has not concluded that mandatory minimum sentences violate the Eighth Amendment as a categorical matter. And although many of the mandatory minimums as applied seem grossly disproportionate given the individual circumstances, those sentences have also survived Eighth Amendment scrutiny.[204]

If the Court were to take more seriously the requirements of the Eighth Amendment and the Sixth Amendment, it might conclude that the imposition of mandatory minimum sentences in many cases is "cruel and unusual,"[205] or alternatively, that a prosecutor threatening a much longer punishment when a defendant seeks to go to trial is placing an "unconstitutional condition" on the right to a jury.[206] Additionally, as explained below, some of the laws passed by Congress failed to adhere to due process requirements because they provided insufficient notice of what was being criminalized.[207] The framework established by Congress therefore poses challenges to many constitutional guarantees even if Congress failed to give them much attention.

---

201 Woodson v. North Carolina, 428 U.S. 280, 304 (1976) (plurality opinion).

202 *Id.* (citation omitted).

203 Rachel E. Barkow, *The Court of Life and Death: The Two Tracks of Constitutional Sentencing Law and the Case for Uniformity*, 107 MICH. L. REV. 1145, 1178 (2009) ("On what basis does the 'fundamental respect for humanity underlying the Eighth Amendment' not apply to a situation in which an individual is locked in a cell?" (quoting *Woodson*, 428 U.S. at 304)).

204 *See, e.g.*, United States v. Fenner, 600 F.3d 1014, 1024–25 (8th Cir. 2010) (rejecting defendant's Eighth Amendment challenge to a mandatory life sentence for conspiracy to distribute fentanyl and cocaine base); United States v. Reynolds, 215 F.3d 1210, 1214 (11th Cir. 2000) ("[E]very circuit to have considered this issue has concluded that [ACCA's mandatory minimum sentence] is neither disproportionate . . . nor cruel and unusual punishment."); United States v. Ramirez, 35 F.3d 573, 1994 WL 482059, at *2 (9th Cir. 1994) (unpublished table decision) (rejecting defendant's Eighth Amendment challenge to a mandatory ten-year sentence for possession with intent to distribute cocaine).

205 BARKOW, *supra* note 116, at 188–89, 194–95 (noting that the Court has "effectively ceded [its] authority" in the "substantive review of punishment" under the Eighth Amendment, *id.* at 188, but arguing that "some movement is being made and more could be done in the Eighth Amendment context," *id.* at 194).

206 *Id.* at 187–88, 193–94 (explaining that while "the Supreme Court has made clear that the government cannot condition the exercise of other constitutional rights on concessions to the government," *id.* at 188, the Court has done little to discourage prosecutors from threatening mandatory minimums and long sentences to extract guilty pleas).

207 *See infra* section III.C, pp. 236–38.

III. THE ACCA EXEMPLIFIES CONGRESS'S FLAWED APPROACH TO PUNISHMENT

The ACCA bears all the hallmarks of Congress's flawed approach: imposing excessive sentences on an overbroad category of offenders, exacerbating instead of limiting disparities, and testing constitutional limits. Moreover, the Court continues to deal with the aftermath of Congress's problematic choices. It has struggled to decide how much it should do to try to improve the implementation of the ACCA and address its disparities and complications. The ACCA cases this past Term put the Court's dilemma about its role on display and reveal how Congress's flawed architecture is to blame for the Court's uneven ACCA jurisprudence.

A. The ACCA's Excessive Sentencing Framework

Congress overshot the mark of the intended population of offenders that it sought to target in the ACCA. It passed the ACCA to impose long sentences on individuals with multiple past convictions. State and local authorities testified that, although these offenses were traditionally in their domain, they were struggling to find the resources to impose sufficiently long sentences.[208] To supply the federal hook for a sentencing enhancement targeting repeat offenders, Congress focused on the unlawful possession of a firearm as the current offense, which provided the interstate commerce element.[209] Congress then drastically increased the sentence for that crime based on a defendant's criminal record. But the ACCA has no requirement that a defendant used a gun in any of the predicate offenses or even that he or she used it in the instant offense.[210] The offense that triggers the mandatory minimum is a mere possession offense.[211] Thus, someone with the requisite felony record who has a gun for hunting or recreational use or who keeps it solely for self-defense can get the mandatory minimum sentence of fifteen years.[212] To put that fifteen-year sentence in broader perspective, the median amount of prison time served for people who commit murder in the United States

---

[208] *Career Criminal Life Sentence Act of 1981: Hearings on S. 1688, S. 1689, and S. 1690 Before the Subcomm. on Juvenile Justice of the S. Comm. on the Judiciary*, 97th Cong. 34 (1981) (statement of William Cahalan, Prosecuting Attorney, Wayne County, Michigan); *id.* at 39 (statement of Kenneth Conboy, Deputy Comm'r for Legal Matters, New York Police Department); *id.* at 139 (statement of Hon.

Newman Flanagan, District Attorney, Suffolk County, Massachusetts); S. REP. NO. 98-190, at 7 (1983).

[209] 18 U.S.C. § 922(g) (2012) ("It shall be unlawful for any person . . . who has been convicted in any court of[] a crime punishable by imprisonment for a term exceeding one year . . . to ship or transport in interstate or foreign commerce, or possess in or affecting commerce, any firearm . . . .").

[210] Stephen R. Sady, *The Armed Career Criminal Act — What's Wrong with "Three Strikes, You're Out"?*, 7 FED. SENT'G REP. 69, 69–70 (1994).

[211] *Id.* at 70.

[212] *Id.*

is 13.4 years.[213] The median amount of time served for violent offenses other than murder is a little more than two years.[214] In California, the maximum penalty for rape of an adult is eight years.[215] So the fifteen-year mandatory minimum is far beyond the average sentences for other violent offenses.

The impetus for the ACCA was research showing that a relatively small number of individuals commit a disproportionate share of the most violent crimes,[216] and the goal was to target the "most dangerous, frequent and hardened offenders."[217] But the actual legislation that Congress passed has failed to meet its target. Start with the fact that Congress set the fifteen-year mandatory minimum in the ACCA based on an assumption that individuals would begin a criminal career around age fifteen and age out around age thirty.[218] But there was no proof in the record to suggest that most of the people covered by the ACCA would have started committing crimes or would have racked up the necessary three prior convictions at such a young age, such that they would need another fifteen years of imprisonment to age out of the behavior. In fact, people sentenced under the ACCA are often much older,[219] and thus many, if not most, of the individuals covered by the law would age out of their criminal behaviors before fifteen years had passed.

The law also used an inadequate standard for identifying the high-frequency offenders it sought to target — the individuals who commit dozens, if not hundreds, of crimes over a career.[220] It takes only three prior convictions to trigger the mandatory minimum. A record of three

---

213 DANIELLE KAEBLE, BUREAU OF JUSTICE STATISTICS, TIME SERVED IN STATE PRISON, 2016, at 2 tbl.1 (2018), https://www.bjs.gov/content/pub/pdf/tssp16.pdf [https://perma.cc/7ZJ5-N2SJ].

214 *Id.* at 2.

215 CAL. PENAL CODE § 264(a) (West 2019).

216 Taylor v. United States, 495 U.S. 575, 581 (1990). One study that members of Congress referenced repeatedly was MARVIN E. WOLFGANG ET AL., DELINQUENCY IN A BIRTH COHORT (1972), in which the authors found that "6 percent of the study group committed 61 percent of all homicides, 76 percent of all rapes, 73 percent of all robberies, and 65 percent of all aggravated assaults perpetrated by members of the group." H.R. REP. NO. 98-1073, at 2 (1984); *see also* H.R. REP. NO. 99-849, at 1–2 (1986); 130 CONG. REC. 28,095 (1984) (statement of Rep. William J. Hughes). The legislative history notes that the authors of another study, MARK A. PETERSON ET AL., RAND CORP., DOING CRIME: A SURVEY OF CALIFORNIA PRISON INMATES (1980), "extrapolated that immediately preceding their arrests and convictions, 100 of these offenders may have committed 490 armed robberies; 720 burglaries and approximately 4,000 other serious offenses." H.R. REP. NO. 98-1073, at 2.

217 S. REP. NO. 97-585, at 5 (1982).

218 James G. Levine, Note, *The Armed Career Criminal Act and the U.S. Sentencing Guidelines: Moving Toward Consistency*, 46 HARV. J. ON LEGIS. 537, 546 (2009) (noting that legislators set the mandatory minimum based on the fact that "career criminals commit many fewer offenses after age thirty").

219 *See* BUREAU OF ALCOHOL, TOBACCO & FIREARMS, *supra* note 159, at 6 ("The median age of a prisoner in [a study of inmates sentenced under the ACCA] is 40.39.").

220 Evans, *supra* note 69, at 630 (citing legislative history pointing out that the law was to apply only "to a 'very small portion' of 'hard core . . . career criminals'" (citations omitted)).

prior convictions is a poor marker for identifying which people will go on to commit many additional crimes and which individuals are already at the tail end of their criminal offending. In addition, for some crimes, particularly drug offenses, an individual who is incarcerated is likely to be quickly replaced by someone else, so the overall effect on crime is negligible or nonexistent.[221]

There is also no limit on how old prior offenses can be to qualify as predicate offenses. But if an offense is followed by conviction-free behavior for many years, that offense is less predictive of future dangerousness.[222] Likewise, juvenile convictions can count as predicates,[223] even though brain science has established that people change dramatically as they get older, making those youthful decisions far less probative of adult recidivism.[224] If the focus is future dangerousness, the Act should target more recent offenses and crimes committed when an individual is an adult.

Congress's list of substantive offenses is also overexpansive, allowing individuals with no violence in their background and even no prison time to be prosecuted under the ACCA.[225] In 1986, Congress lumped in people with prior drug convictions as eligible for the ACCA's mandatory minimum without any requirement that the prior drug offense involved violence.[226] Then-Representative Ron Wyden, who supported the addition of drug offenses, claimed that "[a]ll the evidence . . . we have seen in our investigation indicates that drugs and violent crime go hand-in-hand."[227] That evidence largely consisted of a survey sent to federal and local prosecutors who felt "that [including drug offenses was] a logical and natural extension" of the legislation.[228] But despite the feelings and intuitions of prosecutors and legislators, drug offenses rarely involve violence.[229] A study of crimes committed in 2010 found that only 1.06% of drug violations involved physical injury to the victim.[230] People with drug-only convictions also pose a far different recidivism risk than people with convictions for crimes involving violence in their background.

---

221 Bushway, *supra* note 164, at 40.

222 Levine, *supra* note 218, at 551–53; *see also* Sady, *supra* note 210, at 69 (highlighting the irrationality resulting from the lack of a recency requirement).

223 18 U.S.C. § 924(e)(2)(B) (2012).

224 Levine, *supra* note 218, at 553–54.

225 David M. Zlotnick, *The Future of Federal Sentencing Policy: Learning Lessons from Republican Judicial Appointees in the Guidelines Era*, 79 U. COLO. L. REV. 1, 52–53 (2008).

226 Anti-Drug Abuse Act of 1986, Pub. L. No. 99-570, § 1402(b), 100 Stat. 3207, 3207-39 to -40 (codified as amended at 18 U.S.C. § 924(e)(2)).

227 *ACCA Amendments Hearings*, *supra* note 106, at 5 (statement of Rep. Ron Wyden).

228 *Id.* at 4.

229 Shima Baradaran, *Drugs and Violence*, 88 S. CAL. L. REV. 227, 278–81 (2015).

230 Evan Tsen Lee et al., *Which Felonies Pose a "Serious Potential Risk of Injury" for Federal Sentencing Purposes?*, 26 FED. SENT'G REP. 118, 119 tbl.1 (2013).

A Bureau of Justice Statistics study concluded that a person with a former drug-possession conviction is rearrested for a violent felony only 1.1% of the time.[231] When someone has a former drug-trafficking charge, only 1.6% of the time are they rearrested for a violent felony.[232] These percentages are lower than the average for all people with convictions, where 1.9% of the time they are rearrested for a violent felony.[233]

The Sentencing Commission's 2016 study of individuals sentenced as career offenders under the Sentencing Guidelines, which similarly lump together those who have prior convictions for crimes of violence with those who have prior convictions for drug trafficking, found "clear and notable" recidivism differences between the two groups.[234] Those with only drug-trafficking priors had a lower recidivism rate than those with some violence in their background, and those in the former group were also rearrested for less serious offenses.[235] The Commission concluded based on this evidence that "drug trafficking only offenders generally do not warrant similar (or at times greater) penalties than those career offenders who have committed a violent offense"[236] and urged Congress to amend the law "to more effectively differentiate between career offenders with different types of criminal records."[237] Congress, however, acted without the benefit of this kind of empirical research, and it instead grouped together people with drug convictions and people with violence in their backgrounds on the basis of erroneous assumptions about the nature of drug trafficking.

Congress's enumerated felonies meeting the ACCA requirement for "violent" crimes also fail to capture those who present the greatest risk of future violence.[238] From its initial version in the 1984 legislation, Congress has consistently included burglary as a triggering prior conviction.[239] The legislative history indicates that burglary was included because, "[w]hile burglary is sometimes viewed as a non-violent crime, its character can change rapidly, depending on the fortuitous presence of the occupants of the home when the burglar enters, or their arrival while he is still on the premises."[240] At a 1986 congressional hearing on

---

231 Shima Baradaran & Frank L. McIntyre, *Predicting Violence*, 90 TEX. L. REV. 497, 561 tbl.3 (2012).

232 *Id.*

233 *Id.*

234 U.S. SENTENCING COMM'N, REPORT TO THE CONGRESS: CAREER OFFENDER SENTENCING ENHANCEMENTS 8 (2016) [hereinafter CAREER OFFENDER SENTENCING ENHANCEMENTS].

235 *Id.* at 42 fig.21.

236 *Id.* at 27.

237 *Id.* at 8.

238 *See* 18 U.S.C. § 924(e)(2)(B)(ii) (2012) (listing "burglary, arson, [and] extortion" under the definition of "violent felony" offenses that qualify as predicates for an ACCA sentencing enhancement).

239 *See* Sentencing Reform Act of 1984, Pub. L. No. 98-473, 98 Stat. 1987, 2185.

240 S. REP. NO. 98-190, at 4 (1983).

the "career criminal" legislation, the Department of Justice representative testified that "even though injury is not an element of the offense, [burglary] is a potentially very dangerous offense."[241] A representative from the National District Attorneys Association similarly linked burglary with violence, noting: "Although I am a seasoned prosecutor, I was then, and still am today, deeply distressed by the overwhelming number of victims who have been raped, robbed or killed by offenders with extensive criminal records which included the crime of burglary."[242]

Congress thus relied on the statements of prosecutors drawing specious associations regarding people who commit burglaries and other violent crimes, as well as its own intuition that burglaries pose a significant risk of resulting in violence. But the overwhelming majority of burglaries involve no physical contact with anyone.[243] It is not mere fortuity that no one is there; burglars seek out places where no people are present so they will not get caught.[244] Studies show that burglary involves no physical injury in more than 97% of cases.[245] Even in cases involving the burglary of a dwelling, violence is rare, with 93% of cases involving no forms of violence.[246] Based on this research, the Sentencing Commission removed burglary from its list of enumerated violent offenses that trigger the career offender guideline.[247] The Commission pointed out that courts remain free to give longer sentences in the minority of burglary cases that do involve violence;[248] but because the vast run do not, it makes little sense to lump in burglary with more serious offenses. The Commission advised Congress to "avoid an overinclusive definition given the substantially enhanced penalties provided by recidivist provisions."[249]

Congress's addition of arson and extortion suffers from the same lack of empirical support tying those crimes to physical violence. The

---

[241] *Armed Career Criminal Legislation: Hearing on H.R. 4639 and H.R. 4768 Before the Subcomm. on Crime of the H. Comm. on the Judiciary*, 99th Cong. 26 (1986) [hereinafter *1986 Armed Career Criminal Legislation House Hearing*] (statement of James Knapp, Deputy Assistant Att'y Gen., Criminal Division, United States Department of Justice).

[242] *Id.* at 51 (statement of Ronald D. Castille, District Attorney, Philadelphia).

[243] RICHARD F. CULP ET AL., IS BURGLARY A CRIME OF VIOLENCE? AN ANALYSIS OF NATIONAL DATA 1998–2007, at 29–30 (2015).

[244] *See id.* at vii, 19.

[245] *See id.* at 29–30 (showing that between 1998 and 2007, burglary co-occurred with a violent crime 7.6% of the time, and physical injury was reported in only 2.7% of all burglaries during that time).

[246] SHANNAN CATALANO, BUREAU OF JUSTICE STATISTICS, NATIONAL CRIME VICTIMIZATION SURVEY: VICTIMIZATION DURING HOUSEHOLD BURGLARY 1 (2010) (finding that a victim of a burglary was also a victim of some form of violence in 7.2% of all burglaries of dwellings from 2003 to 2007).

[247] *See* CAREER OFFENDER SENTENCING ENHANCEMENTS, *supra* note 234, at 53–54.

[248] *Id.* at 54.

[249] *Id.* at 55.

Department of Justice urged Congress to include these offenses as enumerated predicate crimes in the ACCA because "these crimes against property [namely, burglary, arson, extortion, and various explosives offenses] . . . are inherently dangerous."[250] In fact, however, arson and extortion (like burglary) have remote ties to physical injuries and violence. A study using data from 2010 found that 4.41% of cases involving extortion resulted in the victim getting physically injured, and only 1.11% of cases of arson did.[251]

Congress needed to list offenses like burglary, arson, and extortion specifically because they otherwise would not be covered by the ACCA's elements clause, which includes any offense that "has as an element the use, attempted use, or threatened use of physical force against the person of another."[252] The addition of these enumerated crimes beyond the elements clause shows that Congress was actually going beyond its targeted concern with violent crime to address a different set of issues. It advanced little to no support to explain why giving the same drastic punishment to people with vastly different prior offenses, as measured by culpability and harm, was proportional. The expansive approach in the ACCA led one commentator to observe that "[t]he broad reach of the ACCA creates a deep gulf between the statute's literal purpose — incarcerating dangerous career criminals — and its sweep."[253]

The elements clause is potentially well suited to address the physical force that Congress spent most of the legislative history discussing. But the elements clause will work to target the most serious class of prior offenses only if the term "physical force" is given a meaning that fits the context of this statutory provision and its concern with violence. In 2010, the Supreme Court noted that, "in the context of a statutory definition of '*violent* felony,' the phrase 'physical force' means *violent* force — that is, force capable of causing physical pain or injury to another person."[254] Given the fifteen-year mandatory minimum penalty attached, this interpretation makes sense.

But this past Term, in *Stokeling v. United States*, the Court walked back on that interpretation of "physical force" in the elements clause. Five Justices concluded that a Florida robbery statute fell within this

---

[250] *1986 Armed Career Criminal Legislation House Hearing*, *supra* note 241, at 15 (statement of James Knapp, Deputy Assistant Att'y Gen., Criminal Division, United States Department of Justice).

[251] Lee et al., *supra* note 230, at 119 tbl.1.

[252] 18 U.S.C. § 924(e)(2)(B)(i) (2012).

[253] Sady, *supra* note 210, at 69.

[254] Johnson v. United States, 559 U.S. 133, 140 (2010).

provision even though it defined "force" as requiring only minimal resistance by the victim.[255] Justice Thomas's majority opinion reached this conclusion by noting that the original version of the ACCA listed robbery as a qualifying predicate offense and defined robbery to mean "any felony consisting of the taking of the property of another from the person or presence of another by force or violence."[256] That definition, in turn, mirrored the common law definition of robbery, and the majority concluded that common law robbery included an act that "physically overcame a victim's resistance, 'however slight' that resistance might be."[257] The majority believed that the use of "physical force" in the elements clause should be read the same way because it could "think of no reason to read 'force' in the revised statute to require anything more than the degree of 'force' required in the 1984 statute."[258] The majority believed it would be "anomalous to read 'force' as *excluding* the quintessential ACCA-predicate crime of robbery."[259] Because approximately thirty to forty states define "force" in their robbery statutes as overcoming the resistance of the victim,[260] a ruling that excluded Florida's robbery statute from the predicate offenses in the ACCA would have covered those states as well.

The majority distinguished its previous decision in *Johnson v. United States*, in which the Court had concluded that Florida's battery law was not an ACCA predicate offense, because the statute at issue there required only an "actual[] and intentional[] touching"[261] and did not require force necessary to overcome a victim's resistance.[262] The Court found such resistance inherently violent "because robbery that must overpower a victim's will — even a feeble or weak-willed victim — necessarily involves a physical confrontation and struggle."[263]

Justice Sotomayor's dissent disagreed with the majority that the statute at issue in *Johnson* could be distinguished from the Florida robbery law. It quoted *Johnson* at length, particularly its many references to the fact that "physical force" required violence and a "heightened degree of

---

[255] *See Stokeling*, 139 S. Ct. at 550; *id.* at 563 n.3 (Sotomayor, J., dissenting) ("[T]his case presents only the narrower question whether a robbery offense that has as an element the use of force sufficient to overcome a victim's resistance — even if that resistance is minimal — necessitates the use of 'physical force' within the meaning of the ACCA.").

[256] *Id.* at 550 (majority opinion) (emphasis omitted) (quoting 18 U.S.C. app. § 1202(c)(8) (Supp. II 1984)).

[257] *Id.* (citation omitted).

[258] *Id.* at 551.

[259] *Id.*

[260] *Id.* at 552.

[261] Johnson v. United States, 559 U.S. 133, 138 (2010) (quoting State v. Hearns, 961 So. 2d 211, 218 (Fla. 2007)).

[262] *Stokeling*, 139 S. Ct. at 552–53.

[263] *Id.* at 553.

force."[264] The dissent also pointed out that the majority's use of the common law definition of robbery was misplaced because "the Court in *Johnson* expressly rejected the common law's definition of 'force'" and instead gave the word its ordinary and contextual meaning of requiring violence.[265] The dissent chastised the majority for concluding that "physical force" should be given its common law meaning when the crime at issue is robbery, but not, as the Court said in *Johnson*, when the crime at issue is battery.[266] The dissent noted that "physical force" in the elements clause could not be interpreted to mean two different things at the same time without embarking on a "brave new world of textual interpretation."[267]

Even putting aside *Johnson*'s force as precedent, the dissent explained why the Florida law did not fit within the underlying rationale for the ACCA. The ACCA "does not look to past crimes simply to get a sense of whether a particular defendant is generally a recidivist; rather, it looks to past crimes to determine specifically 'the kind or degree of danger the offender would pose were he to possess a gun.'"[268] The dissent concluded that "[t]he lower grade offenders whom Florida still chooses to call 'robbers' do not bear the hallmarks of being the kind of people who are likely to point a gun and pull the trigger," nor have they "committed the more aggravated conduct — pointing a weapon, inflicting bodily injury — that most people think of when they hear the colloquial term 'robbery.'"[269] The "glorified pickpockets, shoplifters, and purse snatchers" covered under Florida's law were not the kind of people who merited the steep fifteen-year mandatory minimum required by the ACCA.[270] The dissent disagreed that its view would preclude at least thirty-one robbery statutes from qualifying as ACCA predicates because it was unclear how many of those state statutes permitted a showing of resistance based on minimal force, as Florida's did.[271] And even if this reading did place those state statutes beyond the scope of the ACCA, Congress could address that issue, should it wish to include those laws, by once again listing robbery as an enumerated offense.[272]

---

[264] *Id.* at 555 (Sotomayor, J., dissenting); *see also id.* at 556–57, 560–63.

[265] *Id.* at 560.

[266] *Id.* at 559–65.

[267] *Id.* at 560. The dissent also criticized the majority for relying on the prior definition of robbery contained in the 1984 version of the ACCA when Congress made the decision to delete robbery as a listed offense while retaining its "former neighbor, 'burglary.'" *Id.* at 561. The dissent noted that "if Congress had wanted to retain the old statute's specific emphasis on robbery, the natural reading is that it would have accomplished that goal the same way it did with burglary: by making it an enumerated offense. That it did not do so is telling." *Id.* at 562.

[268] *Id.* at 559 (quoting Begay v. United States, 553 U.S. 137, 146 (2008)).

[269] *Id.*

[270] *Id.*

[271] *Id.* at 563.

[272] *Id.* at 564 n.4.

A big part of the disagreement between the majority and dissent was thus how much work the Court should do to try to turn the ACCA into a coherent punishment regime and what such a regime should look like given the choices Congress has made. The majority seemed to believe that Congress would likely want most state robbery statutes included and therefore stretched the reading of physical force in the statute, as well as the language of its own precedents, to find a way to include as many of those statutes as possible.[273] The dissent, in contrast, seemed to think the goal of the ACCA was not the inclusion of any particular offense, but instead a targeting of the most serious prior offenses, of which Florida's robbery statute clearly was not one.[274]

The dissent also seemed to recognize that even in the absence of the ACCA's applicability, a defendant would still face more punishment based on his or her record. Prior offenses are still factored in as part of a defendant's criminal history and can be used to increase a defendant's sentence.[275] Whether the ACCA applies is thus not a question of whether that prior conduct will result in greater punishment, but is instead a question of how much greater that punishment will be. Given that the fifteen-year mandatory minimum sentence is out of proportion to how other, more serious violent offenses are generally treated, taking a narrower approach that better aligns with the text, as the dissent did, seems to be both more consistent with the traditional role of courts and with the evidence on punishment and public safety.

B. The ACCA's Exacerbation of Disparities

The textually faithful and narrower approach to the ACCA in the *Stokeling* dissent has an additional virtue: it would help to cabin prosecutorial discretion in the ACCA's use. Like the other mandatory punishment laws passed by Congress in the 1980s and 1990s, the application of the ACCA did not eliminate discretion but instead transferred it to prosecutors. When the ACCA's scope was expanded in 1986, supporters noted that "it brings to bear a new kind of leverage into the process" for the prosecution.[276] Prosecutors have used that leverage inconsistently. In fiscal year 2016, for example, black defendants constituted 70.4% of

---

[273] *See id.* at 552 (majority opinion) ("Where, as here, the applicability of a federal criminal statute requires a state conviction, we have repeatedly declined to construe the statute in a way that would render it inapplicable in many states.").

[274] *See, e.g.*, *id.* at 565 (Sotomayor, J., dissenting) ("[T]his Court should not allow a dilution of the term in state law to drive the expansion of a federal statute targeted at violent recidivists. . . . The Court today does no service to Congress' purposes . . . in deeming [Florida robberies] to be 'violent felonies' — and thus predicates for a 15-year mandatory-minimum sentence in federal prison.").

[275] *See id.* at 559.

[276] *ACCA Amendments Hearings*, *supra* note 106, at 4 (statement of Rep. Ron Wyden).

those subject to the ACCA,[277] and almost half of all the ACCA prosecutions came from a handful of districts in the South and Midwest.[278] In many districts, there were no ACCA cases at all.[279] The use of the ACCA is not always correlated with higher rates of violent crime, as some districts with little violent crime use the ACCA extensively while other areas with greater rates of urban violence use it sparingly.[280] Moreover, prosecutors' charging decisions, plea agreements, and substantial assistance departures also result in uneven application of the ACCA.[281] So while prosecutors lament the categorical rule as creating disparities between different states,[282] the disparities created by prosecutorial discretion are a far greater problem in the ACCA's use, and anything that limits its sweep thus helps to minimize the opportunities for prosecutors to inconsistently use their leverage.

C. The ACCA's Push Against Constitutional Boundaries

As with other aspects of the federal criminal legislation of the 1980s and thereafter, the ACCA is also a prime example of the ways in which Congress's efforts to expand the reach of its federal punishment regime and give federal prosecutors expansive tools end up pushing against constitutional limits. Litigants have successfully challenged the ACCA on vagueness grounds. In particular, the ACCA's catch-all residual clause to cover prior offenses that involved "conduct that presents a serious potential risk of physical injury to another" raised critical questions of what fell within its scope.[283] The Supreme Court struggled over

---

277 U.S. SENTENCING COMM'N, MANDATORY MINIMUM PENALTIES FOR FIREARMS OFFENSES IN THE FEDERAL CRIMINAL JUSTICE SYSTEM 38 (2018).

278 *See id.* at 37 ("In fiscal year 2016, nine districts reported almost half (48.0%) of the ACCA cases: Middle Florida (10.9%, n=33); Southern Florida (8.2%, n=25); Eastern Missouri (6.3%, n=19); Eastern Tennessee (5.3%, n=16); Northern Ohio (3.6%, n=11); Minnesota (3.6%, n=11); Western North Carolina (3.6%, n=11); Western Missouri (3.3%, n=10); and South Carolina (3.3%, n=10).").

279 *See id.* ("Thirty-one districts reported no ACCA cases, while 19 districts reported one.").

280 *See* Sady, *supra* note 210, at 70.

281 1991 MANDATORY MINIMUM REPORT, *supra* note 146, at 48–89 ("For 45 percent (138 of 309) of drug defendants for whom weapons enhancements were found appropriate, no gun charges were filed. . . . For 85 of 135 (63%) defendants for whom increased punishments were possible due to prior felony convictions, increased minimums were not sought or obtained." *Id.* at 57. "The proportion of cases sentenced at or above the indicated minimum varies considerably by drug type. . . . [D]efendants involved in cocaine and cocaine base offenses are more frequently charged and convicted under mandatory minimum provisions, while marijuana and methamphetamine defendants receive greater reductions at the conviction/plea stage." *Id.* at 69.).

282 For an example, see Letter from David Rybicki, Deputy Assistant Att'y Gen., Criminal Div., U.S. Dep't of Justice, to Honorable William H. Pryor, Jr., Acting Chair, U.S. Sentencing Comm'n (Aug. 10, 2018) (on file with author) [hereinafter DOJ Letter], which complains about the "serious problems and disparities created by the categorical approach" and characterizes such disparities as "unsustainable."

283 18 U.S.C. § 924(e)(2)(B)(ii) (2012), *invalidated by* Johnson v. United States, 135 S. Ct. 2551 (2015). *Johnson* addressed only the residual clause in that provision, leaving the enumerated-

the years to determine whether this clause applied to various convictions for state crimes,[284] and finally concluded in 2015 in *Johnson v. United States*[285] that the language of the residual clause "fails to give ordinary people fair notice of the conduct it punishes" and is "so standardless that it invites arbitrary enforcement."[286]

Much of the appellate litigation surrounding the ACCA now revolves around the categorical approach and whether a given state law qualifies as a predicate.[287] Critics are correct that the application of the categorical approach has resulted in inconsistent treatment of past conduct based on the different wording of state laws.[288] It is also true that some individuals have not been covered by the ACCA despite having multiple instances of violent criminal conduct in their past because the statutes under which they were convicted failed the categorical approach and covered conduct falling beyond the ACCA's definitions for predicate offenses.[289]

But while critics seem to think the problem is the categorical approach,[290] the deeper problem is the way in which Congress set up this punishment regime. As the Supreme Court explained in *Taylor*, Congress thought of prior offenses in generic terms without spending much time thinking about how its law would actually apply on the ground.[291] It is remarkable that Congress would so cavalierly disrupt

---

offenses clause intact. *See Johnson*, 135 S. Ct. at 2563 ("Today's decision does not call into question application of the Act to the four enumerated offenses . . . .").

[284] *See, e.g.*, Sykes v. United States, 564 U.S. 1 (2011); Chambers v. United States, 555 U.S. 122 (2009); Begay v. United States, 553 U.S. 137 (2008); James v. United States, 550 U.S. 192 (2007) (5-4 decision).

[285] 135 S. Ct. 2551.

[286] *Id.* at 2556 (citing Kolender v. Lawson, 461 U.S. 352, 357–58 (1983)).

[287] *See* United States v. Vann, 660 F.3d 771, 787 (4th Cir. 2011) (Agee, J., concurring in the judgment, concurring in the en banc majority opinion, and concurring in the opinion of Keenan, J.) ("The dockets of our court and all federal courts are now clogged with [ACCA] cases."); Letter from Lanny A. Breuer, Assistant Att'y Gen., U.S. Dep't of Justice, and Jonathan J. Wroblewski, Dir., Office of Policy and Legislation, U.S. Dep't of Justice, to Hon. Patti B. Saris, Chair, U.S. Sentencing Comm'n (July 23, 2012) (on file with author) (reflecting on substantial resources U.S. Attorneys' Offices expend litigating the issue of whether specific statutes are predicate ACCA offenses).

[288] *See* DOJ Letter, *supra* note 282, at 9 (cataloguing circuit splits that result in inconsistent treatment of past conduct depending on the location of the conviction); *see also Quarles*, 139 S. Ct. at 1881 (Thomas, J., concurring) ("Because the categorical approach employed today is difficult to apply and can yield dramatically different sentences depending on where a burglary occurred, the Court should consider whether its approach is actually required in the first place for ACCA's enumerated-offenses clause.").

[289] *See, e.g.*, United States v. Mayo, 901 F.3d 218, 224, 230 (3d Cir. 2018) (holding that a defendant who was convicted of an aggravated assault and two robberies involving his threatening to use a firearm against his victims was not eligible for enhancement under the ACCA because Pennsylvania's statutes did not require "physical force"); United States v. Titties, 852 F.3d 1257, 1262, 1272 (10th Cir. 2017) (ruling that a defendant's conviction for aiming a pistol at and threatening his victim's life did not qualify as a predicate "violent felony" for ACCA purposes because Oklahoma's law criminalizing pointing a gun at another person could apply to violent or nonviolent acts).

[290] *See* sources cited *supra* note 288.

[291] Taylor v. United States, 495 U.S. 575, 592–96 (1990).

what has traditionally been a local matter and impose such a harsh punishment regime without pausing to think about or analyze how its new regime would have to adjust to fifty-one different jurisdictions and the ways they define crime. Congress simply decided as a matter of gut instinct that it wanted longer sentences and the blunt instrument of a mandatory minimum, which means there is no play in the joints for judges to adjust based on the facts of particular cases. And because Congress tried to make its new regime ever more sweeping with amendments and expansion, it ended up with a residual clause that was unconstitutionally vague. The ACCA is thus a prime example — and a cautionary tale — of what happens when criminal justice policy is created without research or attention to how it will actually apply.

CONCLUSION

Critics of the categorical approach have valid complaints about how the ACCA applies on the ground. But those who think that abolishing the categorical approach will create a better punishment scheme are missing the broader regime of which the categorical approach is just one part. Disparities will not be eradicated if the categorical approach is abandoned. Instead, even more people will find themselves subject to a law with a mandatory minimum that is overbroad and inconsistently used.

Additionally, those who would eliminate the categorical approach would replace it with an individualized inquiry to determine if a defendant's prior offense involved violence.[292] They assume this inquiry would be straightforward because they often see cases where the facts are not in dispute. But they are ignoring the many cases where it will be quite labor intensive to find out what really happened. As the Court noted in *Taylor*, "the practical difficulties and potential unfairness of a factual approach are daunting."[293] Most previous convictions would be the result of pleas, not trials,[294] so there would often be no reliable record to assess the circumstances of an offense.[295] And even in cases involving

---

[292] *See, e.g.*, *Quarles*, 139 S. Ct. at 1880–81 (Thomas, J., concurring) (arguing for a fact-intensive inquiry by trial courts and collecting prior cases where he offered a similar solution).

[293] *Taylor*, 495 U.S. at 601.

[294] *See, e.g.*, U.S. SENTENCING COMM'N, FISCAL YEAR 2018: OVERVIEW OF FEDERAL CRIMINAL CASES 8 (2019) (noting that 97.4% of federal offenders pleaded guilty in 2018); *see also* BRIAN A. REAVES, BUREAU OF JUSTICE STATISTICS, STATE COURT PROCESSING STATISTICS: FELONY DEFENDANTS IN LARGE URBAN COUNTIES, 2009 — STATISTICAL TABLES 24 tbl.21 (2013) (finding that, in 2009, the vast majority of felony convictions in the seventy-five largest counties came via plea).

[295] *Taylor*, 495 U.S. at 601–02. Although the Court uses so-called *Shepard* documents, Shepard v. United States, 544 U.S. 13 (2005), to determine if a defendant committed a qualifying offense under a divisible statute, that inquiry is limited to determining which subsection of a statute formed the basis of conviction. *Id.* at 26. It would require far more probing analysis to determine the

trials, there may not be a transcript or way of knowing what the jury found. As the Court noted in *Descamps v. United States*,[296] statements of fact in plea colloquies or arrest records might be "downright wrong" because a defendant "often has little incentive to contest facts that are not elements of the charged offense — and may have good reason not to."[297] "The categorical approach avoids the unfairness of allowing inaccuracies to 'come back to haunt the defendant many years down the road.'"[298] And relitigating these issues years later seems both unreliable and unwieldy.

This approach would also raise Sixth Amendment concerns because it would allow judges to increase sentences based on facts that, if not tied to an elements analysis, would not have been found beyond a reasonable doubt by a jury.[299] If, to address this concern, the facts underlying a defendant's prior convictions were to be put before juries, the consideration of these facts would make trials that much more cumbersome in the cases that go to trial. And in the vast run of cases where defendants plead, those facts would further increase prosecutorial leverage because that fifteen-year mandatory minimum would hang in the balance.

None of this is to deny the real problems created by the categorical approach. Those issues are real, but they run much deeper. The categorical approach is part of a much larger pattern in federal law where Congress, with little analysis or research, creates blunt instruments of punishment resulting in inconsistent applications and disproportionate sentences that do not match the harms involved in the offense.

There is a better way, which Congress at one time seemed to recognize when it positively cited the Minnesota sentencing framework.[300] Under this model, Congress would acknowledge that it is ill suited to make blanket judgments about sentencing policy and instead allow an expert agency to set punishments on the basis of data and other empirical evidence. This means an elimination of mandatory minimums — including the ACCA mandatories — and instead an exclusive reliance on a guideline regime based in empirical studies of what is actually happening in the commission of crimes and in sentencing. Unlike Congress, which

---

actual facts of a case to know if they involved violence, and that might not be apparent from the charging document, terms of a plea agreement, or a transcript of the plea colloquy.

[296] 570 U.S. 254 (2013).

[297] *Id.* at 270; *see also* United States v. Davis, 139 S. Ct. 2319, 2325 (2019) (reiterating the constitutional issue of having judges make these determinations about prior convictions).

[298] *Davis*, 139 S. Ct. at 2344 (Kavanaugh, J., dissenting) (quoting Mathis v. United States, 136 S. Ct. 2243, 2253 (2016)).

[299] *Descamps*, 570 U.S. at 269 (noting that a "finding would (at the least) raise serious Sixth Amendment concerns if it went beyond merely identifying a prior conviction"); *id.* at 269–70 ("The Sixth Amendment contemplates that a jury — not a sentencing court — will find such facts, unanimously and beyond a reasonable doubt. And the only facts the court can be sure the jury so found are those constituting elements of the offense — as distinct from amplifying but legally extraneous circumstances.").

[300] *See supra* pp. 222–23.

took a clumsy approach in passing the ACCA, the Sentencing Commission is well suited to determine how past convictions and criminal history should adjust sentences. Its Sentencing Guidelines adjust the effect of a prior conviction based on its seriousness (as measured by sentence length), make exceptions for stale convictions, and allow judges discretion to modify the recommended sentence if the history overstates or understates the seriousness of the prior offense or the likelihood of recidivism.[301]

The fundamental flaw in the categorical approach and mandatory minimums comes from the one-size-fits-all design. There is a better way to target punishments to fit the offense, but it requires Congress to have more faith in others — particularly the Sentencing Commission and federal judges — to do their jobs. The federal punishment architecture established in the 1980s fails to recognize the limits of Congress in setting punishments. Until that fundamental flaw is remedied, we will continue to see disproportionate punishments throughout the federal system in ACCA cases and elsewhere, and the Supreme Court will continue to be put on the spot in resolving how best to interpret a law whose drafters failed to wrestle with the most basic questions about its application.

The Court's current approach to the ACCA, the categorical approach, makes the best of a bad situation in a manner that is consistent with the Constitution's requirements. Interpreting the ACCA as narrowly as possible and robustly enforcing the rule of lenity should be the Court's other touchstones in this area in light of the harsh consequences the ACCA imposes and the vast discretion it gives prosecutors. But ultimately there is only so much the Court can do. It is up to Congress to fix its mistakes and, until it does, we can expect to see more ACCA cases on the Court's docket.

---

[301] U.S. SENTENCING GUIDELINES MANUAL §§ 4A1.1, 4A1.2(e), 4A1.3 (U.S. SENTENCING COMM'N 2018).