William & Mary Bill of Rights Journal

Volume *25 (2016-2017)*
Issue 2 *Symposium: After Runnymede: Revising, Reissuing, and Reinterpreting Magna Carta in the Middle Ages*

Article 13

December 2016

The Flawed Reasoning Behind Johnson v. United States and a Solution: Why a Facts-Based Approach Should Have Been Used to Interpret the Residual Clause of the Armed Career Criminal Act

Jake Albert

THE FLAWED REASONING BEHIND *JOHNSON V. UNITED STATES* AND A SOLUTION: WHY A FACTS-BASED APPROACH SHOULD HAVE BEEN USED TO INTERPRET THE RESIDUAL CLAUSE OF THE ARMED CAREER CRIMINAL ACT

Jake Albert*

INTRODUCTION

The Armed Career Criminal Act (ACCA) is a United States federal law that provides sentencing enhancements to felons who commit crimes with firearms.[1] The ACCA is triggered if the felon has been convicted of certain other crimes three or more times.[2] Under the Act, anyone who has three prior convictions for a "violent felony" or a "serious drug offense" is subjected to a mandatory minimum sentence of fifteen years to life, instead of the ten-year maximum sentence prescribed by the Gun Control Act.[3] The applicable ACCA section defines "violent felony" and "serious drug offense" with different categories, with one part of the "violent felony" definition including any felony that "involves conduct that presents a serious potential risk of physical injury to another."[4] This is known as the residual clause.[5]

The Supreme Court case *Taylor v. United States*[6] was the first to interpret the residual clause and established the process of determining whether a crime constitutes a violent felony.[7] The Court held that, when determining if a crime constitutes a violent felony, "the only plausible interpretation of § 924(e)(2)(B)(ii) is that, like the rest of the enhancement statute, it generally requires the trial court to look only to the fact of conviction and the statutory definition of the prior offense."[8] In other words, *Taylor* established that a court must look to the elements of the crime of conviction, not the individual circumstances that led to an offender's conviction. This process is known as the categorical approach.[9]

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* J.D. Candidate, 2017, William & Mary Law School; B.A., Tufts University, 2014. I would like to thank my parents, Mary and Paul Albert, for their continuous sacrifices, support, and inspiration.

[1] 18 U.S.C. § 924 (2012).

[2] 18 U.S.C. § 924(e)(1) (2012).

[3] *Id.*

[4] 18 U.S.C. § 924(e)(2) (2012); 18 U.S.C. § 924(e)(2)(B)(ii) (2012), *invalidated by* Johnson v. United States, 135 S. Ct. 2551 (2015).

[5] *See Johnson*, 135 S. Ct. at 2556.

[6] 495 U.S. 575 (1990).

[7] *Id.*

[8] *Id.* at 602.

[9] *See id.* at 588–89 (employing the categorical approach to determine if attempted burglary is a violent felony); *see also* Sykes v. United States, 564 U.S. 1, 36–37 (2011) (Kagan, J.,

On June 26, 2015, in *Johnson v. United States*, the Supreme Court issued a ruling that declared the residual clause unconstitutional.[10] The Court held that the clause—requiring a court to look only at the elements of the crime of conviction—leaves grave uncertainty as to estimating the risk involved in any crime, and that it produces unpredictability and arbitrariness from judges.[11] For these reasons the Court held that the clause violates the Due Process Clause of the Fifth Amendment for vagueness.[12] In so holding, the Court contradicted four of its own decisions from the past decade that applied the residual clause.[13] Justice Alito filed a lengthy dissent, stating that "the Court is not stopped by the well-established rule that a statute is void for vagueness only if it is vague in all its applications" because, he asserted, the Court simply wanted to get rid of all residual clause cases for the future.[14]

The decision has left questions that affect many individuals sentenced under this statute, including whether the decision will be applied retroactively and allow for resentencing hearings for those individuals. Furthermore, there is now a circuit split over whether the holding of *Johnson* should be applied to other statutes, including an identical statute in the Federal Sentencing Guidelines.[15]

This Note will first analyze the applicable ACCA section, the prior case law overruled by *Johnson*, and the majority opinion and dissent of *Johnson*. It will argue that the Court's analysis in *Johnson* is flawed, that the problem is not with the wording of the residual clause, but instead with the categorical approach that was previously used to analyze residual clause cases. It will then argue that a different approach to the residual clause, looking to the facts of a defendant's prior convictions, is workable, and therefore the Court should not have declared the clause unconstitutional. Finally, this Note will then look to the implications of the decision and argue that similar sentencing enhancement statutes are now unconstitutional after *Johnson*.

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dissenting) ("Because we use the 'categorical approach,' we do not concern ourselves with Sykes's own conduct."); James v. United States, 550 U.S. 192, 202, 207–09 (2007), *overruled by* Johnson v. United States, 135 S. Ct. 2551 (2015).

[10] 135 S. Ct. 2551, 2563 (2015).

[11] *Id.* at 2557–58.

[12] *Id.* at 2558.

[13] *Id.* at 2562–63. The four cases are *Sykes v. United States*, 564 U.S. 1 (2011), *overruled by Johnson v. United States*, 135 S. Ct. 2251 (2015); *Chambers v. United States*, 555 U.S. 122 (2009); *Begay v. United States*, 553 U.S. 137 (2008); and *James v. United States*, 550 U.S. 192 (2007), *overruled by Johnson v. United States*, 135 S. Ct. 2251 (2015).

[14] *Johnson*, 135 S. Ct. at 2573–84 (Alito, J., dissenting).

[15] Some Circuits have, since *Johnson*, held that the identical statute, U.S.S.G. § 4B1.2(a), is not automatically unconstitutional, while some have refused to analyze the constitutional issue altogether. There is now a circuit split on the issue, with the Sixth, Seventh, and Tenth Circuits explicitly holding § 4B1.2 unconstitutionally vague; the Eighth and Eleventh Circuits explicitly holding § 4B1.2 constitutional; and the First, Third, Fourth, and Ninth Circuits expressing concerns about the constitutionality of § 4B1.2, but failing to address the issue. *See infra* Part III.A and accompanying notes.

I. BACKGROUND

A. The Armed Career Criminal Act

It is a federal offense for a felon to be in illegal possession of a firearm.[16] The ACCA states that any felon who is convicted of illegally possessing a firearm and who has three prior convictions for a "violent felony," "serious drug offense," or both, "committed on occasions different from one another," shall be "imprisoned not less than fifteen years, and, notwithstanding any other provision of law, the court shall not suspend the sentence of, or grant a probationary sentence to, such person."[17] The definition of "violent felony" is as follows:

> [T]he term "violent felony" means any crime punishable by imprisonment for a term exceeding one year, or any act of juvenile delinquency involving the use or carrying of a firearm, knife, or destructive device that would be punishable by imprisonment for such term if committed by an adult, that—
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> (i) has as an element the use, attempted use, or threatened use of physical force against the person of another; or
>
> (ii) is burglary, arson, or extortion, involves use of explosives, *or otherwise involves conduct that presents a serious potential risk of physical injury to another*.[18]

The last part of the definition, a crime that "otherwise involves conduct that presents a serious potential risk of physical injury to another," is known as the residual clause.[19]

The "Act was intended to supplement the States' law enforcement efforts against 'career' criminals. The House Report accompanying the Act explained that a 'large percentage' of crimes of theft and violence 'are committed by a very small percentage

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[16] 18 U.S.C. § 922(g)(1) (2012).

[17] 18 U.S.C. § 924(e)(1) (2012).

[18] 18 U.S.C. § 924(e)(2)(B) (2012) (emphasis added).

[19] *See* U.S. SENTENCING GUIDELINES MANUAL § 4B1.2 (U.S. SENTENCING COMM'N 2015) (defining a "crime of violence" as any crime that "is burglary of a dwelling, arson, or extortion, involves use of explosives, *or otherwise involves conduct that presents a serious potential risk of physical injury to another*") (emphasis added). While *Johnson* discusses the residual clause of the ACCA statute, the Sentencing Guidelines are also implicitly implicated. *See infra* Part III.A and accompanying notes. "[T]he Act's definition of 'violent felony,' 18 U.S.C. § 924(e)(2)(B), is identical in all relevant respects to the Guidelines' definition of 'crime of violence,' U.S.S.G. § 4B1.2(a)[,]" and the same approach is applied. United States v. Walker, 595 F.3d 441, 443 n.1 (2d Cir. 2010) (citing United States v. Palmer, 68 F.3d 52, 55 (2d Cir. 1995)).

of repeat offenders . . . .'"[20] Robbery and burglary, according to the study, are the crimes most committed by these career offenders.[21]

B. The Vagueness Doctrine

The purpose and procedure of finding a law void for vagueness has been well established by Supreme Court precedent.[22] Vagueness is a component of due process rights under the Fourteenth Amendment,[23] and is meant to ensure a citizen can choose legal from illegal conduct, for "[v]ague laws may trap the innocent by not providing fair warning."[24] "As generally stated, the void-for-vagueness doctrine requires that a penal statute define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement."[25] "These principles apply not only to statutes defining elements of crimes, but also to statutes fixing sentences."[26]

Thus, a statute can be unconstitutionally vague for either of two reasons: (1) if it fails to provide a person of reasonable intelligence what conduct is prohibited; or (2) if it authorizes or encourages arbitrary and discriminatory enforcement.[27] "[T]he more important aspect of vagueness doctrine 'is not actual notice, but the other principal element of the doctrine—the requirement that a legislature establish minimal guidelines to govern law enforcement.'"[28]

In practice, courts generally look to case law to see if other courts have created a standard for determining what a criminal must do in order to satisfy the statute's requirements,[29] whether the statute contains a scienter requirement,[30] the type of people affected by the law,[31] and to whether the amount of and subjectivity of the delegation given to "policemen, judges, and juries" is too arbitrary.[32] However, the Court has recognized that "because we are '[c]ondemned to the use of words, we can never expect mathematical certainty from our language.'"[33]

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[20] Taylor v. United States, 495 U.S. 575, 581 (1990) (quoting H.R. REP. No. 98-1073, at 1, 3 (1984)).

[21] *Id.*

[22] *See, e.g.*, Kolender v. Lawson, 461 U.S. 352, 357–58 (1983).

[23] Farrell v. Burke, 449 F.3d 470, 485 (2d Cir. 2006).

[24] Grayned v. City of Rockford, 408 U.S. 104, 108 (1972).

[25] *Kolender*, 461 U.S. at 357 (internal citations omitted).

[26] Johnson v. United States, 135 S. Ct. 2551, 2557 (2015) (citing United States v. Batchelder, 442 U.S. 114, 123 (1979)).

[27] Hill v. Colorado, 530 U.S. 703, 732 (2000) (internal citations omitted).

[28] *Kolender*, 461 U.S. at 358 (quoting Smith v. Goguen, 415 U.S. 566, 574 (1974)).

[29] *Id.*

[30] *Hill*, 530 U.S. at 732.

[31] Papachristou v. City of Jacksonville, 405 U.S. 156, 162–63 (1972).

[32] Grayned v. City of Rockford, 408 U.S. 104, 108–09 (1972).

[33] *Hill*, 530 U.S. at 733 (quoting *Grayned*, 408 U.S. at 110).

C. Prior Residual Clause Cases

1. *Taylor v. United States*

There are a few important cases to know and understand that preceded and likely influenced the Court in *Johnson*. The first, *Taylor v. United States*, established the categorical approach in determining whether a crime is a crime of violence.[34] The Court held that, when determining if a crime constitutes a "violent felony," "the only plausible interpretation of § 924(e)(2)(B)(ii) is that, like the rest of the enhancement statute, it generally requires the trial court to look only to the fact of conviction and the statutory definition of the prior offense."[35] Thus, a court must look only to the elements of the crime of conviction and not the individual circumstances of the defendant's past crimes.

The Court had several reasons for advancing this approach. First, the Court stated that this approach was Congress's intent, which the Court stated was shown from phrasing the statute as "a person who . . . has three prior convictions" instead of "a person who has committed" three prior offenses.[36] Second, the Court thought there were practical difficulties and potential unfairness from using a fact-of-conviction approach.[37] The Court worried that charging documents would not always be available and that "in cases where the defendant pleaded guilty, there is often no record of the underlying facts."[38]

Thus the categorical approach was established for evaluating residual clause cases, and would remain in use until *Johnson*.

2. *James v. United States*

The beginning of the recent string of cases that *Johnson* would eventually overrule is *James v. United States*.[39] In *James*, the Court stated that "Congress' inclusion of a broad residual provision in clause (ii) indicates that it did not intend the preceding enumerated offenses to be an exhaustive list of the types of crimes that might present a serious risk of injury to others . . . ."[40]

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[34] 495 U.S. 575 (1990).

[35] *Id.* at 602 (employing the categorical approach to determine if attempted burglary is a violent felony); *see also* Sykes v. United States, 564 U.S. 1, 36–37 (2011) (Kagan, J., dissenting) ("Because we use the 'categorical approach,' we do not concern ourselves with Sykes's own conduct."); James v. United States, 550 U.S. 192, 202, 207–09 (2007), *overruled by* Johnson v. United States, 135 S. Ct. 2551 (2015).

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

[37] *Id.* at 601.

[38] *Id.*

[39] 550 U.S. 192 (2007).

[40] *Id.* at 200.

The defendant in *James* argued that attempted burglary—not completed burglary—should not constitute a violent felony, but the Court applied the categorical approach and determined that because of the term "potential risk" in the residual clause, "Congress intended to encompass possibilities even more contingent or remote than a simple 'risk,' much less a certainty."[41]

Justice Scalia, with whom Justices Ginsberg and Stevens joined, filed a dissent advocating for a new framework in residual clause cases, arguing that the risk of crimes should be evaluated against the least-risky enumerated crime, which he stated is burglary.[42] Scalia believed this would provide clearer guidelines to lower courts interpreting the statute.[43] However, the Court stated that the clause "is not so indefinite as to prevent an ordinary person from understanding" its scope.[44]

3. *Begay v. United States*

The next case, *Begay v. United States*,[45] discussed in detail the residual clause's scope.[46] The Court stated: "In our view, the provision's listed examples . . . illustrate the kinds of crimes that fall within the statute's scope. Their presence indicates that the statute covers only *similar* crimes, rather than *every* crime that 'presents a serious potential risk of physical injury to another.'"[47] The Court thus applied the categorical approach and determined that the residual clause applied to crimes similar to those explicitly listed earlier in the statute instead of all potentially violent crimes.[48]

When applied to the case at hand, the Court held that driving under the influence did not constitute a violent felony because it did not involve "purposeful, 'violent,' and 'aggressive' conduct," differentiating it from the crimes enumerated in the statute.[49]

4. *Sykes v. United States*

Finally, the Court last addressed the residual clause in 2011 in *Sykes v. United States*.[50] The Court discussed the previous residual clause cases and, applying the

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[41] *Id.* at 207–08. This reasoning is important for my discussion on the Court's holding in the *Johnson* case, *infra* Part II.A.

[42] *James*, 550 U.S. at 214–31 (Scalia, J., dissenting).

[43] *Id.* at 216.

[44] *Id.* at 210 n.6 (majority opinion).

[45] 553 U.S. 137 (2008).

[46] *Id.* at 141–44.

[47] *Id.* at 142 (quoting 18 U.S.C. § 924(e)(2)(B)(ii) (2006)).

[48] *Id.*

[49] *Id.* at 144–45 (quoting United States v. Begay, 470 F.3d 964, 980 (10th Cir. 2006) (McConnell, J., dissenting in part), *rev'd*, 553 U.S. 137 (2008)).

[50] 564 U.S. 1 (2011).

categorical approach as it had in the past, determined that vehicular flight from police is a violent felony.[51]

Addressing the vagueness of the residual clause, the Court stated that the clause "states an intelligible principle and provides guidance that allows a person to 'conform his or her conduct to the law.' Although this approach may at times be more difficult for courts to implement, it is within congressional power to enact."[52] The Court went on to cite eight different federal laws that also rely on similar wording, such as assessing "risk," "substantial risk," or "foreseeable risk of bodily injury to another person."[53]

Justice Scalia filed a strongly worded dissent, stating that, regarding the Court's fourth case in recent history to interpret the residual clause, "[i]nsanity, it has been said, is doing the same thing over and over again, but expecting different results. Four times is enough. We should admit that ACCA's residual provision is a drafting failure and declare it void for vagueness."[54] Scalia would go on to state that the Court's inability to craft a clear test leads to arbitrary enforcement and uncertainty.[55] No other Justices joined in his dissent in this case from 2011.[56]

D. Johnson v. United States: *The Holding*

In *Johnson*, the appellant pled guilty to being a felon in possession of a firearm, and the government successfully argued for an enhanced sentence under the ACCA.[57] The government relied on a prior conviction for unlawful possession of a short-barreled shotgun as a prior violent felony.[58] Such a conviction is not one of the enumerated violent felonies in § 924, so it would normally be analyzed under the residual clause and the categorical approach framework.[59] Instead of this framework, the Court decided that the residual clause violates the Due Process Clause of the

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[51] *Id.* at 16.

[52] *Id.* at 15–16 (internal citations omitted).

[53] *Id.* (citing the following statutes: 18 U.S.C. § 1031(b)(2) (2006) ("conscious or reckless risk of serious personal injury"); 18 U.S.C. § 2118(e)(3) (2006) ("risk of death, significant physical pain"); 18 U.S.C. § 2246(4) (2006) ("substantial risk of death, unconsciousness, extreme physical pain"); 18 U.S.C. § 2258B(b)(2)(B) (2006 ed., Supp. III) ("substantial risk of causing physical injury"); 18 U.S.C. § 3286(b) (2006) ("forseeable risk of . . . death or serious bodily injury to another person" (footnote omitted)); 18 U.S.C. § 4243(d) (2006) ("substantial risk of bodily injury to another person"); 18 U.S.C. §§ 4246(a), (d), (d)(2), (e), (e)(1), (e)(2), (f), (g) (2006) (same); 18 U.S.C. § 4247(c)(4)(C) (2006) (same)).

[54] *Id.* at 28 (Scalia, J., dissenting).

[55] *Id.* at 34 ("The Court's ever-evolving interpretation of the residual clause will keep defendants and judges guessing for years to come.").

[56] *Id.* at 28–35.

[57] 135 S. Ct. 2551, 2556 (2015).

[58] *Id.*

[59] *Id.* at 2557.

Fourteenth Amendment for vagueness, declared the clause unconstitutional, remanded the appellant's case, and explicitly overturned *James* and *Sykes*.[60]

The Court began by discussing how laws are determined unconstitutionally vague, and the specific problem with the wording of the residual clause.[61] The Court took issue specifically with the phrase "potential risk," stating that "assessing 'potential risk' seemingly requires the judge to imagine how the idealized ordinary case of the crime subsequently plays out."[62] The Court discussed how in *James* the majority had one idea of the risk imposed by an "ordinary" attempted burglary and the dissent had another, and that "[t]he residual clause offers no reliable way to choose between these competing accounts of what 'ordinary' attempted burglary involves."[63]

The Court stated that "the residual clause leaves uncertainty about how much risk it takes for a crime to qualify as a violent felony," and, regarding coming to a determination that attempted burglary in *James* did qualify, stated that "that rule . . . offers no help at all with respect to the vast majority of offenses . . . ."[64] The Court stated that the residual clause precedent "failed to establish any generally applicable test that prevents the risk comparison required by the residual clause from devolving into guesswork and intuition," saying the precedent "did not (and could not) eliminate the need to imagine the kind of conduct typically involved in a crime."[65]

Thus, the Court held that both tests for vagueness mentioned above[66] were met: the residual clause was not clear enough that an ordinary citizen would understand the conduct that it prohibited, and the clause encouraged arbitrary enforcement by judges.[67]

Finally, the Court addressed the dozens of federal and state criminal laws that use terms like "substantial risk" and "grave risk," and stated that the holding does not threaten the constitutionality of such laws because the statutes "require gauging the riskiness of conduct in which an individual defendant engages *on a particular occasion*[,]" as opposed to the residual clause analysis of looking at an "idealized ordinary case of the crime."[68]

In response to the argument that the Court should interpret the residual clause in the aforementioned "acceptable" way of looking at the particular conduct in which the defendant engaged, the Court was dismissive, stating that (1) "the Government has not asked us to abandon the categorical approach in residual-clause cases[,]"[69]

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[60] *Id.* at 2557, 2563.
[61] *Id.* at 2556–57.
[62] *Id.* at 2557–58.
[63] *Id.* at 2558.
[64] *Id.*
[65] *Id.* at 2559.
[66] *See supra* Part I.B.
[67] *Johnson*, 135 S. Ct. at 2562.
[68] *Id.* at 2561.
[69] *Id.* at 2562.

and (2) "*Taylor* had good reasons to adopt the categorical approach," including that "no record of the underlying facts may be available."[70]

E. Johnson v. United States*: Justice Alito's Dissent*

Justice Alito filed a lengthy dissent in which he makes several arguments as to why the residual clause is not unconstitutionally vague.[71] Alito began by discussing *stare decisis*, noting that "the Court holds that the residual clause is unconstitutionally vague even though we have twice rejected that very argument within the last eight years."[72] Alito noted that in both *James* and *Sykes*, vagueness was mentioned by Justice Scalia in dissent, but that the Court explicitly held otherwise, stating that the scope of the clause was "understandable" to an ordinary person.[73] The fact that Scalia was the only Justice four years ago before *Johnson*'s decision to believe the clause to be vague, with no further cases in between, led Alito to argue that "[n]othing has changed since our decisions in *James* and *Sykes*—nothing, that is, except the Court's weariness with ACCA cases."[74]

Next, Justice Alito argued that the threshold for the Fifth Amendment prohibition on vague laws is incredibly high, especially with sentencing provisions, for "Due Process does not require, as Johnson oddly suggests, that a 'prospective criminal' be able to calculate the precise penalty that a conviction would bring."[75]

Finally, Justice Alito's main argument was that courts should stop using the categorical approach with residual clause cases and instead apply the provision to real-world conduct.[76] "The Court all but concedes that the residual clause would be constitutional if it applied to 'real-world conduct.'"[77] Regarding the use of the categorical approach, Alito stated that the "ACCA, however, makes no reference to 'an idealized ordinary case of the crime.' That requirement was the handiwork of this Court in [*Taylor*]."[78]

Justice Alito argued that the reasons set forth in *Taylor* for adopting the categorical approach, especially the practical difficulties of unduly burdening the courts and potential unfairness, do not dictate that the categorical approach must be used.[79] "Indeed, the Court's main argument for overturning the statute is that this approach is unmanageable in residual clause cases."[80] Instead, Alito argued that looking to the real-world

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[70] *Id.*
[71] *Id.* at 2573–84 (Alito, J., dissenting).
[72] *Id.* at 2573.
[73] *Id.* at 2575.
[74] *Id.*
[75] *Id.* at 2577.
[76] *Id.* at 2577–80.
[77] *Id.* at 2578.
[78] *Id.* at 2577.
[79] *Id.* at 2579.
[80] *Id.*

conduct of the offender is manageable, preferable, and eliminates any concern over vagueness.[81] While it may be difficult to determine whether, in an idealized general case, handling a sawed-off shotgun is a violent felony, Alito argued that if we are given the specific facts, such as that a defendant was concealing the shotgun underneath a jacket and looking for the man who had killed his brother, the crime is clearly a violent felony.[82]

II. THE RESIDUAL CLAUSE IS CONSTITUTIONAL

A. The Court Should Look to the Facts of Conviction Instead of Using the Categorical Approach

The Court was wrong with its holding in *Johnson*. The Court's analysis is flawed: the problem is not with the wording of the residual clause, but instead with the categorical approach.

The Court's own words in the majority opinion repeat time and again that assessing the "potential risk" requires a judge to imagine the idealized ordinary case of the crime.[83] This process, called the categorical approach, is the problem. Just because applying the categorical approach to this issue causes vagueness problems does not mean the statute should go away,[84] but that the process that interprets it this way should go away.

The Court should have interpreted the residual clause as a separate entity from the rest of the statute for the exact reason that they ruled it unconstitutional: there are no specifically enumerated crimes.[85] That fact does not, as the Court suggests,[86]

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[81] *Id.* at 2579–80.

[82] *Id.* at 2579.

[83] *Id.* at 2557–58 (majority opinion).

[84] *Id.* at 2576 (Alito, J., dissenting) ("The strong presumptive validity that attaches to an Act of Congress has led this Court to hold many times that statutes are not automatically invalidated as vague simply because difficulty is found in determining whether certain marginal offenses fall within their language.") (quoting United States v. Nat'l Dairy Prods. Corp., 372 U.S. 29, 32 (1963)); *id.* at 2576–77 ("A statute is thus void for vagueness only if it wholly 'fails to provide a person of ordinary intelligence fair notice of what is prohibited, or is so standardless that it authorizes or encourages seriously discriminatory enforcement.'") (quoting United States v. Williams, 553 U.S. 285, 304 (2008)). The Court in *Sykes* explicitly stated that the residual clause "states an intelligible principle and provides guidance that allows a person to 'conform his or her conduct to the law.'" Sykes v. United States, 564 U.S. 1, 15 (2011) (citing Chicago v. Morales, 527 U.S. 41, 58 (1999) (plurality opinion)).

[85] *See Johnson*, 135 S. Ct. at 2556–57, 2563 (majority opinion) (explaining that the residual clause is separate from the enumerated crimes in the ACCA and that the decision in *Johnson* does not affect the application of the statute in regards to the four enumerated offenses in the ACCA).

[86] *Id.* at 2561 ("Almost none of the cited laws links a phrase such as 'substantial risk' to a confusing list of examples" like the residual clause).

create more confusion, but instead should be considered suggestive that the clause is meant to encompass more than just the enumerated crimes. The clause would not exist if it were simply repeating the previous crimes, but only if it was meant to encompass what the other listed crimes did not.

Just because a statute involves assessing the level of risk involved does not mean it is unconstitutionally vague.[87] The majority even recognizes this point, stating that "[a]s a general matter, we do not doubt the constitutionality of laws that call for the application of a qualitative standard such as 'substantial risk' to real-world conduct . . . ."[88] The majority states that such a standard applied to real world facts allows for more predictability than to the imaginary ideal of the categorical approach.[89]

One could easily imagine a system in which the circumstances of a defendant's past criminal actions are examined to determine if he or she had committed a violent felony. Much like the circumstances of a criminal action are researched and mitigating factors are considered at a normal criminal sentencing,[90] the circumstances of the crime are essential in determining whether it was violent. Unfairness does not result from this procedure as the majority suggests,[91] but instead unfairness results when someone who commits what most would consider a nonviolent felony, such as owning a sawed-off shotgun in a locked safe in a bedroom as protection against intruders, must be considered the same as a person who is found with a concealed sawed-off shotgun in public looking for someone.[92]

The residual clause, using the categorical approach, is thus inherently unfair. But the solution is not to then get rid of a clause that has been the law for over thirty years and has been used in sentencing with no qualms from the Supreme Court (with the exception of Justice Scalia's dissent in *Sykes*)[93] up until this decision. The solution

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[87] *See* 18 U.S.C. § 2246(4) (2012) ("[T]he term 'serious bodily injury' means bodily injury that involves a *substantial risk* of death, unconsciousness, extreme physical pain, protracted and obvious disfigurement, or protracted loss or impairment of the function of a bodily member, organ, or mental faculty . . . .") (emphasis added); 18 U.S.C. § 3286(b) (2012) ("Notwithstanding any other law, an indictment may be found or an information instituted at any time without limitation for any offense listed in section 2332b(g)(5)(B), if the commission of such offense resulted in, or created a *foreseeable risk* of, death or serious bodily injury to another person.") (emphasis added); 18 U.S.C. § 4243(g) (2012) ("*substantial risk* of bodily injury to another person") (emphasis added).

[88] *Johnson*, 135 S. Ct. at 2561.

[89] *Id.*

[90] *See* Wiggins v. Smith, 539 U.S. 510, 524–25 (2003) (holding that failure of an attorney to expand an investigation of possible mitigating factors at sentencing resulted in ineffective assistance of counsel under the Sixth Amendment); Eddings v. Oklahoma, 455 U.S. 104, 113 (1982) (discussing the importance of considering all mitigating factors at sentencing, and holding that to do otherwise violates the Eighth and Fourteenth Amendments).

[91] *See Johnson*, 135 S. Ct. at 2562.

[92] Justice Alito argues that this second example is very clearly a violent felony. *Id.* at 2579 (Alito, J., dissenting); *see also* United States v. Vincent, 575 F.3d 820 (8th Cir. 2009) (holding possession of a sawed-off shotgun to be a violent felony for ACCA sentencing purposes).

[93] *See supra* notes 54–56 and accompanying text.

is to use an approach that looks at what actually happened in each case, not an assessment describing typical conduct.

The majority recognizes this argument, and briefly (and sweepingly) dismisses it on a few different grounds.[94] First, the majority "decline[d]" to "jettison for the residual clause (though not for the enumerated crimes) the categorical approach adopted in *Taylor* and reaffirmed in each of our four residual-clause cases."[95] However, the Court is hypocritical in that statement. In holding the residual clause unconstitutional, the Court is completely jettisoning the holdings of *Taylor* and each of the four recent residual clause cases. In each of those cases, the Court developed a clear standard and issued a ruling on whether the defendant's conduct was a violent felony.[96]

On the one hand, the Court is saying that because it has never looked at the actual conduct of the defendant, and is not being asked to do so by the Government, it will not change the process.[97] On the other hand, the Court is saying that although it has created a standard for the residual clause before, and was not asked by either party to look at the clause under the vagueness doctrine, it would ignore precedent and analyze it for vagueness anyway.[98] The Court is saying it will not consider changing the residual clause procedure because it was not asked to do so, but then nixing the entire procedure even though it was not asked to do so.[99] Instead of choosing to respect precedent generally, the Court is deciding that the reasoning of the *Taylor* Court from 1986 is more important and stronger than the reasoning of multiple cases within the past decade.

Next, the majority cites the Government not asking the Court to abandon the categorical approach as a reason for not considering it.[100] However, the appellant in this case never asked the Court to consider whether the residual clause was unconstitutionally vague.[101] The Court took it upon itself to bring up one argument that was not before it because the Court thought it was compelling,[102] only to then decline to consider another argument citing that it was not brought before them as the reason for not considering it.[103]

It is one thing for the Court to analyze both arguments and come to an opinion. Had the Court done this and considered the merits of straying from the categorical approach, there would be less to debate. It is another thing to consider vagueness

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[94] *Johnson*, 135 S. Ct. at 2561–62 (majority opinion).

[95] *Id.* at 2562 (internal citations omitted).

[96] *See supra* Part I.C.

[97] *See Johnson*, 135 S. Ct. at 2561–62.

[98] *Id.* at 2562.

[99] *Id.* at 2561–62.

[100] *Id.* at 2562.

[101] *Id.* at 2580 (Alito, J., dissenting) ("Johnson did not ask us to hold that the residual clause is unconstitutionally vague, but the Court interjected that issue into the case, requested supplemental briefing on the question, and heard reargument.").

[102] *Id.* at 2556 (majority opinion).

[103] *Id.* at 2562.

when it was not asked to consider it, while not considering abandoning the categorical approach because it was not asked to consider it.

B. The Court's Concerns Are No Longer Applicable

The majority states that the *Taylor* court "had good reasons to adopt the categorical approach," especially the "impracticability of requiring a sentencing court to reconstruct, long after the original conviction, the conduct underlying that conviction."[104] However, the Court has said that using hypothetical situations will not support a facial attack on a statute.[105]

Determining whether a crime was categorically a crime of violence back in 1990 was significantly more difficult than examining records of conviction is today.[106] With many records now computerized[107] with detailed Presentence Reports, and with courts now requiring a defendant to agree to the exact facts of the conviction prior to accepting a guilty plea,[108] many of the concerns over reconstructing the facts underlying a conviction simply are no longer as relevant.

The Court also looked to the other reason from *Taylor*, that the statute refers to "convictions for" three prior felonies instead of wording it as "a person who has committed" three prior violent felonies.[109] However, in the original version of the statute, the term "burglary" was defined, insinuating that Congress intended the courts to look at the specific facts of the defendant's crimes to see if they matched the definition.[110] Only later was the definition taken out for a more categorical procedure.[111]

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[104] *Id.*

[105] Hill v. Colorado, 530 U.S. 703, 733 (2000) ("More importantly, speculation about possible vagueness in hypothetical situations not before the Court will not support a facial attack on a statute when it is surely valid 'in the vast majority of its intended applications.'") (quoting United States v. Raines, 362 U.S. 17, 23 (1960)).

[106] *See* James Jacobs & Tamara Crepet, *The Expanding Scope, Use, and Availability of Criminal Records*, 11 N.Y.U. J. LEGIS. & PUB. POL'Y 177, 178, 190–91 (2008) ("The [FBI] has recently proposed adding the arrests of adults and juveniles for minor offenses to the types of criminal records it accepts from the states for inclusion in the National Crime Information Center (NCIC). Information stored in the NCIC is available to law enforcement . . . throughout the country. . . . By 2007, the NCIC contained eighteen databases, several of which did not depend upon a previous conviction or even on an arrest.").

[107] Gabriel J. Chin, *The New Civil Death: Rethinking Punishment in the Era of Mass Conviction*, 160 U. PA. L. REV. 1789, 1806 (2012) ("Criminal records are increasingly available to all branches of the government and all segments of the public through computer databases, thus making collateral consequences more susceptible to ready enforcement.").

[108] Alexander v. State, 488 So. 2d 41, 42 (Ala. Crim. App. 1986) ("In a guilty plea proceeding, the trial judge should undertake a factual inquiry to determine if the plea is voluntarily made with an understanding of the nature of the charge and of the consequences of the plea. The trial judge should also be satisfied that there is a factual basis for the plea.").

[109] *Johnson*, 135 S. Ct. at 2562.

[110] *See id.* at 2579 (Alito, J., dissenting) (citing Taylor v. United States, 495 U.S. 575, 589–90 (1990)).

[111] *Id.*

Regardless, taking a real-world, actual circumstances of crimes approach is not unreasonable and the concerns with such an approach have certainly lessened over the last twenty-five years.

C. Such a Facts-Based Approach Is Already Currently Used

There is a statute in the Sentencing Guidelines that is in all respects identical to the residual clause.[112] In the Commentary to the statute, the Sentencing Commission states that "in determining whether an offense is a crime of violence or controlled substance for the purposes of § 4B1.1 (Career Offender), the offense of conviction (i.e., *the conduct of which the defendant was convicted*) is the focus of inquiry."[113] This Commentary seems to imply that the Sentencing Commission believes, for this provision, that one can look to the conduct of the defendant.

While it can be argued that this statement only reiterates that one should look to the conduct of the crime and not the real-world facts, certain courts have used a "modified categorical approach" in which they do look to the actual facts underlying an offender's conviction.[114]

For instance, when determining if a conviction constitutes a "crime of violence," the Second Circuit employs a two-step "modified categorical approach."[115] The first step is to look at the statute as a whole to determine if the statute exclusively criminalizes conduct that falls within U.S.S.G. § 4B1.2(a)(2)'s definition of a violent crime.[116] "If so, the inquiry ends."[117] If the statute also criminalizes conduct that does not qualify as a crime of violence, then the government carries the burden of proving that the conviction rested on facts identifying the conviction as one for a violent crime.[118] "The modified categorical approach is merely a tool for district courts to use to 'determine which alternative element in a divisible statute formed the basis of the defendant's conviction.'"[119]

Additionally, a district court may look to certain documents to determine which subsection of a statute a defendant was convicted under, including "charging documents, plea agreements, transcripts of plea colloquies, findings of fact and conclusions

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[112] *See infra* Part III.A.

[113] U.S. SENTENCING GUIDELINES MANUAL, *supra* note 19, at § 4B1.2 (emphasis added).

[114] *See infra* notes 115–19 and accompanying text.

[115] United States v. Reyes, 691 F.3d 453, 458 (2d Cir. 2012) (quoting United States v. Walker, 595 F.3d 441, 443 (2d Cir. 2010)).

[116] *Id.*

[117] *Id.*

[118] *Id.* (quoting *Walker*, 595 F.3d at 444).

[119] United States v. Barker, 723 F.3d 315, 320 (2d Cir. 2013) (quoting Descamps v. United States, 133 S. Ct. 2276, 2293 (2013)).

of law from a bench trial, and jury instructions and verdict forms."[120] However, a district court may not rely on a presentence report's description of a prior crime to determine if it was a violent crime.[121]

There is no reason why such an approach would not also work for the residual clause of the ACCA. The system and rules are already in place as to researching the conduct that constituted a conviction for the residual clause of § 4B1.2, which has the exact same wording.[122] It seems apparent that if the goal of a career offender sentencing statute such as the ACCA is to punish more severely those criminals that pose the greatest threat,[123] the best way to know who poses such a threat is to look at the actions of the defendants, not a generic definition of a crime. The Court should have at least brought up and considered such an approach, especially because it is already implemented in federal courts.[124]

It is understandable that the facts of conviction for certain crimes committed in the past may not be obtainable. However, that is not a strong enough reason to avoid a possible alternative to the categorical approach. If the facts are not available and the crime is not one of those enumerated in the statute, then the government simply would not meet its burden and the crime could not be used to increase a defendant's sentence.[125] This approach would allow for the statutory sentence increase for crimes where the facts of conviction demonstrate violence, while simply avoiding that increase where the facts of conviction are missing or unclear.

Overall, the Court is saying that the residual clause is only vague because of the categorical approach, yet then saying it will not change from the categorical approach because of impracticability, and yet then saying that other statutes that use such an impractical process are lawful.[126] Any first-year law student can see the problems with the structure of such an argument.

A facts-based approach may have had potential issues in the past, but given the plethora of advances in technology, accompanied by the fact that the facts of a given crime are already used in other court proceedings, advancing such an approach for the residual clause would work, and would alleviate the vagueness of the statute.

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[120] Johnson v. United States, 559 U.S. 133, 144 (2010).

[121] *Reyes*, 691 F.3d at 459 ("[A] sentencing court may not rely on a PSR's description of a defendant's pre-arrest conduct that resulted in a prior conviction to determine that the prior offense constitutes a 'crime of violence' under U.S.S.G. § 4B1.2(a)(1), even where the defendant does not object to the PSR's description.").

[122] *See supra* notes 115–19 and accompanying text.

[123] *See supra* note 20 and accompanying text (explaining that the majority of violent crimes are committed by repeat offenders, and the ACCA statute was created in order to have a stronger sentence for these offenders).

[124] *See supra* notes 115–19 and accompanying text.

[125] *See Reyes*, 691 F.3d at 458 (citing United States v. Walker, 595 F.3d 441, 443 (2d Cir. 2010)) (stating how the Government carries the burden of proving that the prior convictions were for violent felonies).

[126] *See supra* Part II.A.

D. Applying the Vagueness Doctrine to a Facts-Based Approach

Given that the residual clause, due to the categorical approach, was ruled void for vagueness, it is necessary to apply the vagueness doctrine to the solution advanced by this Note: the facts-based approach. Specifically, this section will examine whether the statute "define[s] the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement."[127]

The Court states that, "unlike the part of the definition of a violent felony that asks whether the crime 'has *as an element* the use . . . of physical force,' the residual clause asks whether the crime '*involves conduct*' that presents too much risk of physical injury."[128] It is unclear, according to the Court, exactly what an ordinary person could look to in order to determine whether a certain activity would "involve conduct" that presents too much risk of physical injury to another.[129] However, when taking away the categorical approach and employing a facts-based approach, there is no longer an "ordinary case" of the crime to look to. Instead, a court can look to the individual circumstances of the crime to determine if the crime was violent. Taking out the hypothetical and replacing it with the reality eliminates the Court's concerns of the "ordinary case."

Attempting to measure the risk of physical injury to another for a crime one is about to commit is possible: if one were to break into a home, there is almost certainly a serious potential risk of injury to another.[130] However, the *Johnson* Court states that there are multiple ways to attempt to measure the risk—statistics, case law, experts, etc.[131]—and without knowing what to look for, where to look for it, and what a judge will ultimately look to, the clause does not rise to the level of a clear law that an ordinary person would understand.[132] But giving a judge the actual facts behind an individual's conviction does not invite the same level of arbitrariness as attempting to decipher an "ordinary case" of a crime. In fact, it is well within a judge's already given discretion: judges already consider the severity of a crime using the individual circumstances of the crime when deciding a sentence, just as they consider mitigating factors.[133]

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[127] Kolender v. Lawson, 461 U.S. 352, 357 (1983) (internal citations omitted).

[128] Johnson v. United States, 135 S. Ct. 2551, 2557 (2015).

[129] *Id.*

[130] United States v. Walker, 631 F. App'x 753, 755 (11th Cir. 2015) (holding that second-degree burglary of a dwelling under Florida state law is a crime of violence).

[131] *Johnson*, 135 S. Ct. at 2557 ("How does one go about deciding what kind of conduct the 'ordinary case' of a crime involves? 'A statistical analysis of the state reporter? A survey? Expert evidence? Google? Gut instinct?'") (quoting United States v. Mayer, 560 F.3d 948, 952 (9th Cir. 2009) (Kozinski, C.J., dissenting)).

[132] *Id.*

[133] *See supra* note 90 and accompanying text.

The possibility of one offender's actions falling under the clause while another's actions, equally or more violent but not specifically enumerated, does not, invites the unfairness and arbitrariness that the vagueness doctrine is meant to prevent. If an offender commits a violent act, he or she should be subject to the increased sentence under the ACCA whether or not the violent act was one enumerated in the statute. By eliminating the catch-all clause, the Court opens a loophole whereby felons can attempt to manufacture a nonviolent history by bargaining for a plea for a crime not specifically listed in the clause. This is inherently unfair, and is likely why the clause was included in the first place.

It is better to look to the facts of the conviction and judge whether or not a crime is violent than to eliminate the clause altogether.[134] Otherwise we are left with the possibility of increasing one offender's sentence and not another's simply because one of the violent felonies was listed and the other was not.

III. IMPLICATIONS ON SIMILAR FEDERAL AND STATE LAWS

No matter one's views on whether the holding of *Johnson* is correct, the fact remains that the residual clause is now gone, being ruled unconstitutionally vague. The further fact remains that the residual clause is very similar to dozens of federal and state laws,[135] and thus there is now a question of whether such laws can survive under the test and outcome of *Johnson*. This Note argues that such federal and state laws—a couple of which will be mentioned and analyzed—are now unconstitutional.

A. U.S.S.G. § 4B1.2

The United States Sentencing Commission establishes the sentencing policies and practices of the federal courts.[136] The Commission crafts the Sentencing Guidelines, which are a part of the federal rules.[137] Federal courts are required to calculate the Guidelines' sentencing range for each defendant being sentenced and use the range as a starting point in the sentencing process.[138]

One such Guideline section is a sentencing enhancement very similar to that of the ACCA.[139] Instead of a sentencing enhancement mandating fifteen years minimum for three or more prior convictions for a violent felony, § 4B1.1 of the Guidelines requires a sentencing enhancement that increases the offender's sentencing level by

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[134] *See Johnson*, 135 S. Ct. at 2575–80 (Alito, J., dissenting) ("[A] statute is void for vagueness only if it is vague in all its applications.").

[135] *Id.* at 2561 (majority opinion); *Id.* at 2577 (Alito, J., dissenting).

[136] *About*, U.S. SENTENCING COMM'N, http://www.ussc.gov/about [http://perma.cc/M4BZ-4T65].

[137] *Id.*

[138] Gall v. United States, 552 U.S. 38, 49–50 (2007).

[139] *See* U.S. SENTENCING GUIDELINES MANUAL, *supra* note 19, at § 4B1.1.

labeling him or her a "career offender" for three or more prior convictions for a "crime of violence."[140] A crime of violence is defined in § 4B1.2 as follows:

> (a) The term "crime of violence" means any offense under federal or state law, punishable by imprisonment for a term exceeding one year, that—
>
> (1) has as an element the use, attempted use, or threatened use of physical force against the person of another, or
>
> (2) is burglary of a dwelling, arson, or extortion, involves use of explosives, or *otherwise involves conduct that presents a serious potential risk of physical injury to another*.[141]

The last part of the definition, "or otherwise involves conduct that presents a serious potential risk of physical injury to another," is known as the residual clause of the section, and is identical to the wording of the residual clause of the ACCA statute.[142]

Several times courts have recognized the similarities among the statutes,[143] while one court has actually held the same offense to violate one provision but not the other.[144]

With not only a similar statute but also the exact wording of the residual clause, the Sentencing Guidelines' residual clause is unconstitutional. Yet the Court in *Johnson* did not mention the statute in its holding, and the new Commentary to the Sentencing Guidelines that took effect in November 2015 still includes the clause.[145] If the ACCA clause is unconstitutionally vague because it denies an offender fair notice by increasing a sentence to a mandatory minimum of years, then the exact same words must also be deemed unconstitutionally vague in the context of increasing an offender's sentence level.

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[140] *Id.*

[141] *Id.* § 4B1.2 (emphasis added).

[142] *See* 18 U.S.C. § 924(e)(2)(B)(ii) (2012).

[143] *See* James v. United States, 550 U.S. 192, 206 (2007), *overruled by* Johnson v. United States, 135 S. Ct. 2551 (2015) ("The United States Sentencing Commission has come to a similar conclusion with regard to the Sentencing Guidelines' career offender enhancement, whose definition of a predicate 'crime of violence' closely tracks ACCA's definition of 'violent felony.'"). "[T]he [ACCA]'s definition of 'violent felony,' 18 U.S.C. § 924(e)(2)(B), is identical in all relevant respects to the Guidelines' definition of 'crime of violence,' U.S.S.G. § 4B1.2(a)," and the same approach is applied. United States v. Walker, 595 F.3d 441, 443 n.1 (2d Cir. 2010) (citing United States v. Palmer, 68 F.3d 52, 55 (2d Cir. 1995)).

[144] United States v. Hood, 628 F.3d 669, 673 (4th Cir. 2010) (holding that possession of a sawed-off shotgun is a "crime of violence" under the Guidelines but is not a "violent felony" under the ACCA due to Commentary to the Guidelines expressly discussing possession of a sawed-off shotgun as violent).

[145] U.S. SENTENCING GUIDELINES MANUAL, *supra* note 19, at § 4B1.2 cmt. 1.

Some circuits have, since *Johnson*, held that U.S.S.G. § 4B1.2(a) is not automatically unconstitutional,[146] while some have refused to analyze the constitutional issue altogether.[147] There is now a circuit split on the issue, with the Sixth, Seventh, and Tenth Circuits explicitly holding § 4B1.2 unconstitutionally vague;[148] the Eighth and Eleventh Circuits explicitly holding § 4B1.2 constitutional;[149] and the First, Third, Fourth, and Ninth Circuits expressing concerns about the constitutionality of § 4B1.2 but failing to address the issue.[150] The primary concern is that while the ACCA is a federal statute, the Guidelines are merely advisory to federal courts and are not federal law.[151]

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[146] *See infra* notes 148–50 and accompanying text.

[147] *See infra* note 150 and accompanying text.

[148] United States v. Madrid, 805 F.3d 1204, 1210 (10th Cir. 2015) ("The concerns about judicial inconsistency that motivated the Court in *Johnson* lead us to conclude that the residual clause of the Guidelines is also unconstitutionally vague."); Ramirez v. United States, 799 F.3d 845, 856 (7th Cir. 2015) ("[W]e proceed on the assumption that the Supreme Court's reasoning applies to section 4B1.2 as well."); United States v. Darden, 605 F. App'x 545, 546 (6th Cir. 2015) ("We have previously interpreted both residual clauses identically, and Darden deserves the same relief as Johnson: the vacating of his sentence.") (internal citations omitted).

[149] United States v. Walker, 631 F. App'x 753, 755–56 (11th Cir. 2015) ("We recently held in *United States v. Matchett* that the residual clause of § 4B1.2(a)(2) of the guidelines is not unconstitutionally vague because advisory sentencing guidelines cannot be unconstitutionally vague. We reasoned that *Johnson* was limited by its own terms to criminal statutes, like the ACCA, that define elements of a crime or fix punishments—neither of which the advisory guidelines do. The vagueness doctrine, we explained, rests on a lack of notice, but the Sentencing Guidelines, because they are merely advisory, cannot give rise to an expectation protected by due process. Therefore, *Matchett* precludes the success of Walker's argument based on *Johnson* that the residual clause in § 4B1.2(a)(2) of the guidelines is unconstitutionally vague.") (internal citations omitted); United States v. Taylor, 803 F.3d 931, 933 (8th Cir. 2015) ("The reasoning in *Wivell* that the guidelines cannot be unconstitutionally vague because they do not proscribe conduct is doubtful after *Johnson*.").

[150] United States v. Castro-Vazquez, 802 F.3d 28, 38 (1st Cir. 2015) ("Intervening authority has called the residual clause into question. . . . We do not decide whether the residual clause of the guidelines fails under *Johnson*."); United States v. Doe, 806 F.3d 732, 752 n.11 (3d Cir. 2015) ("Because the need to decide whether that case invalidated the career-offender provision depends on the interpretation of a very recent Supreme Court opinion and on how the District Court will exercise its discretion over any amendment that is sought, we believe it sensible to remand this case without addressing *Johnson*."); United States v. Willis, 795 F.3d 986, 996 (9th Cir. 2015) ("[W]e have not yet considered whether the due process concerns that led *Johnson* to invalidate the ACCA residual clause as void for vagueness are equally applicable to the Sentencing Guidelines. We need not resolve this issue to dispose of this appeal."), *cert. denied*, 136 S. Ct. 2543 (2016); United States v. Parral-Dominguez, 794 F.3d 440, 444 n.4 (4th Cir. 2015) ("We also note that the Supreme Court's decision in *United States v. Johnson* concerned the similar risk-of-injury language in 18 U.S.C. § 924(e)(2)(B) and does not affect our decision in this case.") (internal citations omitted).

[151] *See supra* note 149.

However, even though the Guidelines are advisory, both sections concern the same consequences for an offender (an increased sentence), and both clauses have the same wording.[152] Regarding the issue of the ACCA being a statute and the Guidelines being advisory, "district court[s] should begin all sentencing proceedings by correctly calculating the applicable Guidelines range[,]"[153] thus making them mandatory in this respect, and the Sentencing Guidelines can be challenged "notwithstanding the fact that sentencing courts possess discretion to deviate from the recommended sentencing range."[154]

Disregarding the wording of the statute, it is still necessary to examine it under the vagueness framework, specifically whether the statute "define[s] the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement."[155]

The same reasoning the Court applies in *Johnson* to the residual clause of the ACCA can be applied to the wording of the residual clause in the Guidelines: "unlike the part of the definition of a violent felony that asks whether the crime 'has *as an element* the use . . . of physical force,' the residual clause asks whether the crime '*involves conduct*' that presents too much risk of physical injury."[156] It is unclear exactly what an ordinary person could look to in order to determine whether a certain activity would "involve conduct" that presents too much risk of physical injury to another.[157] Because the residual clause of the Guidelines is also examined under the categorical approach like the ACCA,[158] it would require the potential offender to have to think about the "ordinary" case of the crime and the potential risk of injury to another in such an ordinary case.[159]

Measuring the risk of physical injury to another for a crime one is about to commit might be possible; if one were to break into a home, there is almost certainly a serious potential risk of injury to another.[160] However, it is unclear exactly how one imagines an "ordinary" break-in and the risk it would entail.[161] As the *Johnson*

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[152] *See supra* notes 141–42 and accompanying text.

[153] Gall v. United States, 552 U.S. 38, 49 (2007).

[154] Peugh v. United States, 133 S. Ct. 2072, 2082 (2013).

[155] Kolender v. Lawson, 461 U.S. 352, 357 (1983).

[156] Johnson v. United States, 135 S. Ct. 2551, 2557 (2015).

[157] *Id.*

[158] *See* United States v. Walker, 595 F.3d 441, 443 n.1 (2d Cir. 2010) (citing United States v. Palmer, 68 F.3d 52, 55 (2d Cir. 1995).

[159] *Johnson*, 135 S. Ct. at 2557.

[160] United States v. Walker, 631 F. App'x 753, 756 (11th Cir. 2015) (holding that second-degree burglary of a dwelling under Florida state law is a crime of violence).

[161] David C. Holman, *Violent Crimes and Known Associates: The Residual Clause of the Armed Career Criminal Act*, 43 CONN. L. REV. 209, 220–21 (2010) ("[A] sentencing court has few tools to determine reliably the 'ordinary' commission of a crime. Without better guidance, courts have tried several approaches, including the use of statistics, applying their

Court states, there are multiple ways to attempt to measure the risk,[162] but without knowing what a court might consider the law is unclear.[163]

For these same reasons, such a statute, when viewed in the light of the vagueness doctrine and the requirement of the categorical approach, also invites arbitrariness and discrimination from judges. When it is unclear for an ordinary person to measure the risk associated with an "ordinary" case of a crime, it is likely that judges would have the same problem. Without more clarity on how to establish an "ordinary" case of a crime or what amounts to a serious potential risk of injury, it is likely that different judges will have different opinions on the same crimes, and at the very least are *allowed* to have different opinions, which is the essence of what vagueness law under the Due Process Clause is attempting to prevent.[164]

While there have been attempts by courts to create a standard for U.S.S.G. § 4B1.2,[165] similar attempts were made to create a standard for 18 U.S.C. § 924(e)(2)(B),[166] and if such attempts were not enough to salvage § 924(e)(2)(B) in *Johnson*, then they are also not enough to salvage § 4B1.2.[167]

B. 18 U.S.C. § 3286(b)

There are many other federal statutes that can rightfully be compared to the "potential risk" standard of the residual clause.[168] This Note will analyze one, 18 U.S.C. § 3286(b), which illustrates a similar standard to the others.[169] Section 3286(b)

'intuitive belief' to hypothesize how the crime is usually committed, and imagining how the crime could be committed in the exceptional case.").

[162] *Johnson*, 135 S. Ct. at 2557; *see also supra* notes 131–32 and accompanying text.

[163] *See Johnson*, 135 S. Ct. at 2557.

[164] *See supra* Part I.B.

[165] *See generally Walker*, 631 F. App'x at 756; United States v. Castro-Vazquez, 802 F.3d 28, 37 (1st Cir. 2015) (holding that burglary and robbery under Puerto Rico law are not crimes of violence); United States v. Simmons, 782 F.3d 510, 518 (9th Cir. 2015) (holding that the crime of escape is not a crime of violence because it is not similar in kind to the enumerated offenses or similar in the degree of risk posed).

[166] *See generally* Sykes v. United States, 564 U.S. 1 (2011), *overruled by* Johnson v. United States, 135 S. Ct. 2251 (2015) (holding that vehicular flight from a law enforcement officer under Indiana law is a violent felony); Chambers v. United States, 555 U.S. 122–23 (2009) (holding that failure to report to a penal institution under Illinois law is not a violent felony); Begay v. United States, 553 U.S. 137, 140 (2008) (holding that New Mexico's offense of driving under the influence is not a violent felony); James v. United States, 550 U.S. 192, 209 (2007), *overruled by* Johnson v. United States, 135 S. Ct. 2251 (2015) (holding that Florida's offense of attempted burglary is a violent felony).

[167] United States v. Madrid, 805 F.3d 1204, 1210 (10th Cir. 2015) ("The concerns about judicial inconsistency that motivated the Court in *Johnson* lead us to conclude that the residual clause of the Guidelines is also unconstitutionally vague.").

[168] *See supra* notes 53, 68.

[169] *See supra* note 53.

regards the extension of the statute of limitations for certain terrorism crimes, and states, in relevant part, "[n]otwithstanding any other law, an indictment may be found or an information instituted at any time without limitation for any offense listed in section 2332b(g)(5)(B), if the commission of such offense resulted in, or created *a foreseeable risk of, death or serious bodily injury* to another person."[170] Thus, the standard in § 3286(b) is "foreseeable risk" of death or serious bodily injury,[171] compared to a "potential risk" of physical injury standard in the residual clause.[172]

To the common eye, these two standards seem similar. A risk that is foreseeable is inherently similar to a risk that is potential. One would think that, even if there were some difference between the two, that if one were labeled so vague as to be unconstitutional, it would be difficult to explain how the other could escape the same fate. The Court tries to do so, but its reasoning is not compelling.

Disregarding the similarity in wording of the statute, it is still necessary to examine it under the vagueness framework, specifically whether the statute "define[s] the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement."[173]

The majority distinguishes statutes such as this one from the residual clause on two grounds: first, that "[a]lmost none of the cited laws links a phrase such as 'substantial risk' to a confusing list of examples";[174] second, that "almost all of the cited laws require gauging the riskiness of conduct in which an individual defendant engages *on a particular occasion*," as opposed to the *Taylor* Court creation of the categorical approach for residual clause cases.[175]

Regarding the first reason, § 3286(b) is linked to a confusing list of not four crimes like the ACCA's residual clause, but instead forty-five different crimes, covering a plethora of acts.[176] Many statutes have a list of examples and then a "residual clause" that is meant to encompass like crimes so that there are no loopholes in the statute, so that no one can claim that a crime may be violent but it is not explicitly listed.[177]

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[170] 18 U.S.C. § 3286(b) (2012) (emphasis added).

[171] *Id.*

[172] 18 U.S.C. § 924(e)(2)(B)(ii) (2012), *invalidated by* Johnson v. United States, 135 S. Ct. 2551 (2015).

[173] Kolender v. Lawson, 461 U.S. 352, 357 (1983).

[174] Johnson v. United States, 135 S. Ct. 2551, 2561 (2015).

[175] *Id.*

[176] 18 U.S.C. § 2332(g)(b)(B)(i) (2012) ("section 32 (relating to destruction of aircraft or aircraft facilities), 37 (relating to violence at international airports), 81 (relating to arson within special maritime and territorial jurisdiction), 175 or 175b (relating to biological weapons), 175c (relating to variola virus), 229 (relating to chemical weapons), subsection (a), (b), (c), or (d) of section 351 (relating to congressional, cabinet, and Supreme Court assassination and kidnapping), 831 (relating to nuclear materials), 832 (relating to participation in nuclear and weapons of mass destruction threats to the United States), 842(m) or (n) (relating to plastic explosives) . . . .").

[177] *See, e.g.*, § 924(e)(2)(B)(ii); 18 U.S.C. § 3286(b) (2012).

An ordinary person cannot tell the difference between a "foreseeable risk" of death or serious bodily injury and a "potential risk of physical injury to another." As the *Johnson* Court states, there are a multiplicity of ways to attempt to measure the risk[178] and not knowing how a court will assess that risk, or even what a court would look to, makes it impossible for an ordinary person to understand the law.[179] Both statutes are linked to a set of examples, the standard is the same for both, and both can be approached the same way, and thus with the Court's ruling, § 3286(b) must be unconstitutional.

Regarding the second reason given by the Court, this Note has already discussed why the courts should not be forced to use a categorical approach and should instead gauge the riskiness of conduct "*on a particular occasion*."[180] The Court is again saying that the residual clause is only a vague statute because of the categorical approach, yet then saying it will not change from the categorical approach because of impracticability, yet then saying that statutes that use such an impractical process are constitutional.[181] This argument is circular, and § 3286(b) is just as unconstitutional as the ACCA section.[182]

If the ACCA residual clause invites arbitrariness and discrimination from judges with a "serious potential risk" standard,[183] it is difficult to say that a "foreseeable risk" standard would not invite the same arbitrariness from a judge. What may seem foreseeable to one judge may not to another, and if there is no clear standard for judging a foreseeable risk, then there is none for judging a potential risk.

Furthermore, the fact that § 3286(b) is not a sentencing provision like the residual clause means that it should be scrutinized even more than the residual clause.[184] A vagueness challenge is particularly weak with a sentencing statute because it focuses on what happens after the conduct in question, not the criminality of the conduct.[185]

In other words, the concern should be about whether or not a person knows if certain conduct is criminal, not whether a person knows exactly how long of a sentence said conduct would incur. In reality, no one knows with certainty what any sentence will be until a sentencing hearing is conducted due to different sentencing calculations, consideration of mitigating factors, and the discretion given to the judge.[186] The Due Process Clause does not require that a would-be offender know

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[178] *See supra* notes 131–32, 161.

[179] *See Johnson*, 135 S. Ct. at 2557.

[180] *See supra* Part II.

[181] *See supra* Part II.A.

[182] *See generally Johnson*, 135 S. Ct. at 2551.

[183] *Id.* at 2551.

[184] *See id.* at 2577 (Alito, J., dissenting) (citing Chapman v. United States, 500 U.S. 453, 468 (1991)) (stating that "since whatever debate there is would center around the appropriate sentence and not the criminality of the conduct," a vagueness challenge is weak).

[185] *Id.*

[186] *See supra* note 90.

what his or her sentence will be if he or she commits a crime, but only what does and what does not constitute a crime.

CONCLUSION

This Note examined the recent Supreme Court case of *Johnson v. United States* and argued that the Court's reasoning was flawed, while also illustrating the many questions the decision raises regarding statutes similar to that of the residual clause of the Armed Career Criminal Act.

The main argument of this Note is that the problem with the residual clause is not with the wording of the clause, but instead with the categorical approach used to interpret the clause. The Court repeats time and again that assessing the "potential risk" requires a judge to imagine the idealized ordinary case of the crime.[187] This process, called the categorical approach, is the problem; just because applying the categorical approach to this issue causes vagueness problems does not mean the statute should go away, but instead that the categorical approach should.[188]

The solution this Note proposes is a facts-based approach where a court can look to the facts of a defendant's past conviction in assessing whether or not it constituted a violent felony. Much like the circumstances of a criminal action are researched and mitigating factors are considered at a normal criminal sentencing,[189] the circumstances of the crime are essential in determining whether it was violent.

The many concerns the Court expounded in *Taylor* that led to the establishment of the categorical approach for residual clause cases[190] are greatly alleviated in the age of technological records.[191] Additionally, if facts are indeed unavailable for the prior conviction, then the government simply fails to meet its burden[192] and the conviction cannot be used. This approach is preferable because it still allows for the statutes to address criminals with prior violent felonies not enumerated in the ACCA, instead of limiting the statute to only the few violent felonies listed.

Finally, this Note looked to the aftermath of *Johnson*, arguing that there are now many federal statutes with standards similar to that of the residual clause that are now unconstitutionally vague. Specifically, U.S.S.G. § 4B1.2(a), a Sentencing Guideline provision with the exact wording of the ACCA residual clause,[193] must be deemed unconstitutionally vague for the same reasons[194] the ACCA clause was deemed vague. Additionally, 18 U.S.C. § 3286(b), a federal statute governing an extension of

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[187] *Johnson*, 135 S. Ct. at 2557–58 (majority opinion).
[188] *See supra* Part II.
[189] *See supra* note 90 and accompanying text.
[190] *See supra* Part I.C.1 and accompanying notes.
[191] *See supra* Part II.B.
[192] *See supra* note 118 and accompanying text.
[193] *See supra* note 142 and accompanying text.
[194] *See generally* Part III.A.

the statute of limitations for certain crimes of terrorism,[195] has a similar standard of "foreseeable risk of death or serious bodily injury,"[196] and, given that it should be scrutinized even more than a sentencing statute like the ACCA,[197] should also be deemed unconstitutionally vague. These are just two of the dozens of statutes that use similar standards[198] to those of the residual clause and are now placed in doubt due to the holding of *Johnson*.

There is much left to be discussed that this Note, regrettably, does not touch upon. What exactly changed between 2011 and 2015 that caused such a dramatic shift in the Court's treatment of the residual clause? Should prisoners currently serving largely increased sentences under the residual clause be able to receive resentencing hearings? What role did or should the doctrine of *stare decisis* have played in the Court's decision-making?

There are many questions left for courts in the immediate future as well. What will happen to prisoners who attempt to revive an appeal based on this decision? How are lower courts going to interpret the applicability of *Johnson* to other statutes, such as U.S.S.G. § 4B1.2(a)? Will the Court hear another case in the near future to decide the circuit split on this issue?

In closing, the Supreme Court ruling that a federal law is unconstitutionally vague is nothing new. However, declaring a statute unconstitutionally vague a mere four years after stating that that same statute "states an intelligible principle and provides guidance that allows a person to 'conform his or her conduct to the law,'"[199] is new, and deserves attention.

This Note, ultimately, argued that the Court's opinion in *Johnson* was fundamentally flawed by focusing on the categorical approach to the residual clause instead of simply changing to a facts-based approach. It illustrated the deep questions left to be answered with regards to the constitutionality of many other federal statutes using a "substantial" or "foreseeable risk" standard. It is unclear what will happen in the future, but the sentences of many prisoners sentenced under the Armed Career Criminal Act's residual clause, and with outstanding appeals pending, are likely going to be dramatically changed.

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[195] *See supra* notes 170–71 and accompanying text.

[196] *Id.*

[197] *See supra* note 184 and accompanying text.

[198] *See supra* note 53.

[199] Johnson v. United States, 135 S. Ct. 2551, 2575 (2015) (Alito, J., dissenting) (quoting Sykes v. United States, 564 U.S. 1, 15 (2011)).