NOTE

REDEFINING VIOLENCE IN THE FEDERAL SENTENCING GUIDELINES

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In 2015, the Supreme Court held that the residual clause in the Armed Career Criminal Act ("ACCA") was unconstitutionally vague. Johnson v. United States*, 135 S. Ct. 2551 (2015). Like the ACCA, the Federal Sentencing Guidelines provide severe sentence enhancements for defendants convicted of three or more "crimes of violence." The Guidelines' definition of "violent crime" previously contained a residual clause. In August 2016, the United States Sentencing Commission excised the residual clause from the Guidelines. Shortly after, the Supreme Court reviewed the constitutionality of the residual clause in the Guidelines in* Beckles v. United States *and held that the advisory Guidelines were not subject to void for vagueness challenges under the Fifth Amendment*

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Due Process Clause. 137 S. Ct. 886 (2017). Yet even after the Commission deleted the residual clause from the Guidelines, the Guidelines remain vague and difficult to apply, particularly in the remaining definitions of "crime of violence" in the career offender Guideline.

This Article proposes that the Sentencing Commission replace the remaining definitions of "crime of violence" in the Guidelines with definitions similar to the Minnesota Sentencing Guidelines' definition of "violent crime." Unlike the Federal Sentencing Guidelines, Minnesota lists each statute it considers a "violent crime." Following this model, the Sentencing Commission should create lists of all federal and state statutes that it believes delineate "violent crimes." The first list should encompass "default" violent crimes, or indivisible statutes with "narrow" swathes of conduct that fit the more generic definition of a particular crime. The second list should encompass divisible statutes and indivisible statutes with broader swathes of conduct than the relevant generic offense and should clearly separate divisible and overbroad indivisible statutes. These lists of federal and state statutes will help avoid constitutional vagueness problems in the definition of "violent crimes" and promote a more consistent application of the career offender Guideline.

I. Introduction

In *Johnson v. United States*,[1] the Supreme Court held that the "residual clause" in the Armed Career Criminal Act's ("ACCA's") definition of "violent felony"[2] was unconstitutionally vague.[3] Two years later, it seemed that the Court might do the same with the identically worded provision in the Federal Sentencing Guidelines in *Beckles v. United States*.[4] At issue in *Beckles* was the "residual clause" in the definition of the term "crime of violence" in the career offender Guideline,[5] which provides severe sentence enhancements for defendants convicted of three or more "crimes of violence."[6] The parallels between this clause and the one struck down in *Johnson* led the United States Sentencing Commission to delete the "residual clause" from the Guidelines even before the Court ruled in *Beckles*.[7] Yet on March 6, 2017, the Supreme Court held that the Federal Sentencing Guidelines "are not amenable to a vagueness challenge" under the Fifth Amendment Due Process Clause.[8] Writing for the majority in a 7-1 decision, Justice Thomas reasoned that the Guidelines could not be unconstitutionally vague because they "merely guide the district courts' discretion" but do not bind

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[1] 135 S. Ct. 2551 (2015).

[2] 18 U.S.C. § 924(e)(1) (2012).

[3] 135 S. Ct. at 2557. Prior to *Johnson*, the residual clause in the ACCA defined "violent felony" as a crime that "otherwise involves conduct that presents a serious potential risk of physical injury to another." 18 U.S.C. § 924(e)(2)(B)(ii).

[4] 137 S. Ct. 886, 894 (2017).

[5] *See* U.S. Sentencing Guidelines Manual § 4B1.2 (U.S. Sentencing Comm'n 2016).

[6] *Id.*

[7] U.S. Sentencing Comm'n, Amendment to Sentencing Guidelines, 1–2 (2016) (hereinafter "Amendment to Sentencing Guidelines").

[8] *See Beckles*, 137 S. Ct. at 894.

courts.[9] With this decision, the Court immunized the Federal Sentencing Guidelines from due process vagueness challenges.[10]

The Supreme Court's apparent unwillingness to hold portions of the Guidelines unconstitutionally vague presents a serious problem, as many provisions of the Guidelines remain vague. Even without the residual clause, the remaining definitions of "crime of violence"[11] are difficult to interpret and therefore are inconsistently applied.[12] Clearer definitions of "crime of violence" are crucial to provide notice to defendants and to promote consistent enforcement by judges. With the Supreme Court currently unlikely to strike down provisions of the Federal Guidelines as unconstitutionally vague, a large-scale amendment to the career offender Guidelines may be the only method of establishing clearer definitions. This paper makes a pro-

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[9] *Id.* The Supreme Court recently held in *Sessions v. Dimaya*, No. 15-1498, 2018 WL 1800371 (U.S. Apr. 17, 2018) that the nearly identically worded residual clause of the federal criminal code's definition of "crime of violence" as incorporated into the Immigration and Nationality Act ("INA") was unconstitutionally vague. *Id.* at *16. In holding this residual clause in violation of the Due Process Clause of the Fifth Amendment, the Court relied heavily on *Johnson*, stating that, "like ACCA's residual clause, [the INA's residual clause] produces more unpredictability and arbitrariness than the Due Process Clause tolerates." *Id.* (internal quotation omitted). In tandem with *Johnson*, *Dimaya* demonstrates the Court's continued willingness to strike down vague statutory provisions, though this willingness appears to apply mainly to statutes, not advisory guidelines.

[10] Justice Thomas noted that the Court's decision did not "render the advisory Guidelines immune from constitutional scrutiny." *Beckles*, 137 S. Ct. at 895. The Court pointed to its decision in *Peugh v. United States*, in which it held that a "'retrospective increase in the Guidelines range applicable to a defendant' violates the *Ex Post Facto* Clause." *Id.* (quoting Peugh v. United States, 569 U.S. 530, 544 (2013)). Justice Thomas stated, however, that "void-for-vagueness and ex post facto inquiries are analytically distinct." *Id.* (quotation marks omitted).

[11] The remaining definitions of "crime of violence" in the career offender Guideline are the following: (1) the "force" clause (a crime that "has as an element the use, attempted use, or threatened use of physical force against the person of another"); and (2) the "enumerated offense" clause (a crime that "is murder, voluntary manslaughter, kidnapping, aggravated assault, a forcible sex offense, robbery, arson, extortion, or the use or unlawful possession of a firearm described in 26 U.S.C. § 5845(a) or explosive material as defined in 18 U.S.C. § 841(c)." U.S. SENTENCING GUIDELINES MANUAL §§ 4B1.2(a)(1)–(2).

[12] The "controlled substance" provision of the career offender Guideline is also in need of revision. Indeed, in its 2016 Report to Congress, the Sentencing Commission acknowledged that defendants convicted of drug trafficking crimes make up a large portion of career offenders and encompass cases with the most government-recommended downward departures. The Commission recommended several amendments related to drug trafficking offenders subject to the career offender Guideline. *See* U.S. SENTENCING COMM'N, REPORT TO CONGRESS: CAREER OFFENDER SENTENCING ENHANCEMENTS, 43–45 (2016), https://www.ussc.gov/research/congressional-reports/2016-report-congress-career-offender-enhancements [https://perma.cc/J2FB-78U4] [hereinafter 2016 REPORT TO CONGRESS]. Because the Commission has already made several recommendations to amend the "controlled substance" portion of the career offender Guideline, this paper focuses on the "crime of violence" portion and the need to redefine what exactly constitutes "violence" warranting severe mandatory minimums. This discussion is especially important given the large number of violent offenders in both state and federal prisons. *See* Peter Wagner and Bernadette Rabuy, *Mass Incarceration: The Whole Pie 2017*, Prison Policy Initiative (Mar. 14, 2017), https://www.prisonpolicy.org/reports/pie2017.html [https://perma.cc/TD34-QUWA].

posal to amend the Federal Guidelines based on the Minnesota Guidelines.[13] Unlike the Federal Guidelines, the Minnesota Guidelines use a single method of defining "violent crimes" for the purpose of career offender sentence enhancements—the Minnesota Guidelines reference a list of enumerated statutes that the Minnesota Sentencing Guidelines Commission considers "violent."[14]

The U.S. Sentencing Commission should follow the Minnesota Sentencing Guidelines' definition of "violent crime" by replacing the current definition in the career offender Guideline with a list of the state and federal offenses that the Commission deems "violent." The U.S. Sentencing Commission should then separate these lists of statutes into two groups. The first list will contain "default" crimes of violence and will consist of "indivisible" statutes with a "narrow" swath of conduct that fit more generic definitions of particular crimes.[15] When a defendant's prior conviction falls within a statute on the "default" list, the conviction will automatically count as a prior "crime of violence." The second list will include both divisible[16] statutes and indivisible statutes with a "broader swath of conduct than the relevant generic offense."[17] When using the second list, judges will identify the statute at issue and then apply the modified categorical approach to determine whether the defendant's prior conviction involved the violent conduct defined in the statute.

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[13] *See* MINN. SENTENCING GUIDELINES AND COMMENTARY (MINN. SENTENCING GUIDELINES COMM'N 2017).

[14] *Id.* at 49; MINN. STAT. § 609.1095, subd. 1 (2017).

[15] "Narrow" meaning statutes that *only* cover violent conduct (i.e., the statute only covers the "generic" definition of a particular crime of violence).

[16] A divisible statute "sets out one or more elements of the offense in the alternative—for example, stating that burglary involves entry into a building *or* an automobile." Descamps v. United States, 133 S. Ct. 2276, 2281 (2013).

[17] *Id*. Indivisible statutes do not set elements in the alternative. Instead, such statutes speak in broad terms, thus including conduct that does not meet the "generic" definition of a particular crime. For example, the generic definition of robbery is an "aggravated larceny, containing at least the elements of misappropriation of property under circumstances involving immediate danger to the *person*." United States v. Becerril-Lopez, 541 F.3d 881, 891 (9th Cir. 2008) (emphasis in original) (quotation marks omitted). A robbery statute may stipulate that a person commits robbery "through the 'means of force or fear[,]' which includes both fear of unlawful injury to one's *person* and to *one's property* (e.g., 'Give me $10 or I'll key your car')." United States v. Wesley, 241 F. Supp. 3d 1140, 1146 n.7 (D. Nev. 2017) (quoting *Becerril-Lopez*, 541 F.3d at 891) (emphasis in original). This particular robbery statute would go beyond the "generic" definition of robbery. As a result, a person could be convicted under the robbery statute without actually committing the "generic" crime of burglary. In this sense, the statute is indivisible (no alternative elements) but overbroad.

II. Background

A. The United States Sentencing Commission

Before 1984, federal judges possessed nearly unmitigated discretion in issuing sentences. Most criminal statutes only provided maximum penalties and fines, allowing judges to dole out wide variations in sentences with limited appellate review.[18] In 1910, the insertion of parole into the federal system took some discretion away from judges but also promoted indeterminate sentencing.[19] Judges imposed sentences setting the maximum term of imprisonment, but parole boards could shorten defendants' sentences (usually once a defendant served at least one-third of the originally imposed sentence).[20] As a result, the length of time a defendant would ultimately spend in prison was uncertain. Starting in the 1950s, reformers criticized the system of indeterminate and discretionary sentencing, claiming that it caused large disparities in sentences for people convicted of the same offense.[21] The original motivation for discretion and parole had been to promote rehabilitation in the criminal justice system.[22] Yet by the 1970s, critics "denounced the rehabilitative model as ineffective, capricious, and discriminatory."[23] Indeed, liberal reformers who once supported indeterminate sentencing and parole as a means of facilitating rehabilitation criticized the system as unsuccessful, unpredictable, and fundamentally unequal.[24] Calls for reform eventually led to the Sentencing Reform Act ("SRA") of 1984[25] and, with it, the creation of the United States Sentencing Commission.[26]

The primary purposes of the SRA were to eliminate sentencing disparities and improve crime control.[27] To this end, Congress created the Sentencing Commission as an independent agency in the judicial branch.[28] Congress directed the Commission to "establish sentencing policies and practices" for federal courts that would, among other things, "avoid[ ] unwarranted sen-

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[18] Kate Stith & Steve Y. Koh, *The Politics of Sentencing Reform: The Legislative History of the Federal Sentencing Guidelines*, 28 Wake Forest L. Rev. 223, 225–26 (1993).

[19] *Id.* at 226–27.

[20] *Id.*

[21] *Id.* at 227.

[22] William W. Wilkins, Jr., Phyllis J. Newton & John R Steer, *Competing Sentencing Policies in a "War on Drugs" Era*, 28 Wake Forest L. Rev. 305, 308 (1993).

[23] *Id.*

[24] *See* Stith & Koh, *supra* note 18, at 227–28.

[25] Pub. L. No. 98-473, 98 Stat. 1976.

[26] Stephanie Marie Toribio, Note, *Effective Criminal Sentencing?: Analyzing the Effectiveness of the Federal Sentencing Guidelines on Career Offenders*, 22 Suffolk J. Trial & App. Advoc. 377, 377 (2017).

[27] U.S. Sentencing Comm'n, Simplification Draft Paper, The Sentencing Reform Act of 1984: Principal Features Affecting Guideline Construction (1996), http://www.ussc.gov/research/research-and-publications/simplification-draft-paper-2 [https://perma.cc/UT7V-G9KS] [hereinafter Simplification Draft Paper].

[28] 28 U.S.C. § 991 (2012) (outlining purposes of Sentencing Commission); *see also* Toribio, *supra* note 26, at 380–81.

tencing disparities."[29] The Commission was also created as "a means of assembling and distributing sentencing data, coordinating sentencing research and education, and generally advancing the state of knowledge about criminal behavior."[30] Thus, Congress instructed the Sentencing Commission to construct consistent standards for courts by conducting the sort of research and data collection that federal judges (and Congress, for that matter) did not have the time or capacity to accomplish. To meet these objectives, the Sentencing Commission created the Federal Sentencing Guidelines.[31]

B. The Career Offender Provision

The 1982 Violent Crime and Drug Enforcement Improvement Act instructed federal judges to sentence "'career criminals' to 'the maximum or approximately the maximum penalty for the current offense.'"[32] Congress delegated this statutory directive to the Sentencing Commission in the 1984 Comprehensive Crime Control Act.[33] Describing the rationale behind delegating the directive to the Commission rather than to judges, the Senate Report noted that the directive would be more effective in the hands of the Commission.[34] Specifically, the "guidelines development process," the Report remarked, would ensure "consistent and rational implementation" of Congress's goals.[35]

Following this directive from Congress, the Sentencing Commission identified and distinguished between different "categories" of offenders based on the seriousness of the offenses and the prior criminal history of the defendant. The Commission then formulated the most serious category into the "career offender" Guideline.[36] The career offender Guideline (Section 4B1.1) provides that a defendant is a "career offender" if: (1) the defendant is at least eighteen years old at the time the defendant commits the present offense; (2) the present offense is a felony that is a "crime of violence or a controlled substance offense"; and (3) the defendant has "at least two prior felony convictions of either a crime of violence or a controlled substance offense."[37] If a defendant meets the criteria, the Guidelines both provide for a substantially enhanced sentencing range and assign the defendant to the highest criminal history category on the Guidelines' sentencing table.[38]

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[29] 28 U.S.C. § 991.

[30] SIMPLIFICATION DRAFT PAPER, *supra* note 27.

[31] *See* U.S. SENTENCING GUIDELINES MANUAL (1987).

[32] 2016 REPORT TO CONGRESS, *supra* note 12, at 12 (quoting S. REP. No. 98-225, at 175 (1983)).

[33] 28 U.S.C. § 994.

[34] S. REP. No. 98-225, at 175.

[35] *Id.*

[36] *See* U.S. SENTENCING GUIDELINES MANUAL § 4B1.1 (U.S. SENTENCING COMM'N 2016).

[37] *Id.*

[38] *Id.* The Federal Sentencing Guidelines assign "points" to defendants based on a large variety of factors. These points correspond to a sentencing table, which assigns a certain number of months in prison for each point level. The table also contains "criminal history catego-

My proposal addresses sentencing enhancements for "crime[s] of violence" under the career offender Guideline. Until recently, the definitions section provided three categories of offenses, each constituting a "crime of violence": the "elements clause," the "enumerated offense clause," and the "residual clause."[39] The constitutionality of the "crime of violence" definition came into question when the Supreme Court reviewed an identically worded "residual clause" in the ACCA in *Johnson v. United States*.[40] The ACCA provides *statutory* sentence enhancements (including a fifteen-year mandatory minimum) for felons who commit crimes with firearms and have been convicted of three or more predicate "violent felonies."[41] Before *Johnson*, the ACCA included in its definition of "crimes of violence" a "residual clause" identical to the one in the career offender Guideline. In 2015, however, the Supreme Court held that the residual clause in the ACCA was unconstitutionally vague.[42] As a result, the constitutionality of the residual clause in the career offender Guideline became unclear. The main difference between the ACCA and the Federal Guidelines is that, while the ACCA mandates an enhanced sentence if a defendant possesses a sufficient number of predicate violent felonies, the Guidelines are, technically, advisory.[43]

Responding to the Court's holding in *Johnson,* the Sentencing Commission excised the residual clause from the Guidelines, leaving only the "elements" and "enumerated" clauses in the definition of "crime of violence."[44] While the Commission's actions shield future defendants from sentence enhancements under the residual clause, the Commission did not make the amendment retroactive.[45] Soon after, the Supreme Court addressed the constitutionality of the residual clause in the Guidelines, holding that the clause was not unconstitutionally vague.[46] Although the U.S. Sentencing Commis-

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ries" ranging from I to IV. The greater the defendant's criminal history, the higher corresponding number of months in prison. *See generally* U.S. SENTENCING GUIDELINES MANUAL, ch. 5, pt. A (U.S. SENTENCING COMM'N 2016).

[39] (1) The "elements clause" is a crime that "has as an element the use, attempted use, or threatened use of physical force against the person of another"; (2) The "enumerated offense clause" is a crime that is one of a provided list of crimes, including murder, voluntary manslaughter, kidnapping, and several others; and (3) The "residual clause" is a crime that "otherwise involves conduct that presents a serious potential risk of physical injury to another. AMENDMENT TO SENTENCING GUIDELINES, *supra* note 7, at 1–2.

[40] 135 S. Ct. 2551 (2015).

[41] 18 U.S.C. § 924(e)(1) (2012).

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

[43] For nearly twenty years after their promulgation, the Guidelines were mandatory for judges to follow in making sentencing decisions. In 2005, however, the Supreme Court in *United States v. Booker* held that mandatory sentencing guidelines violated the right to a jury trial. 543 U.S. 220, 232 (2005). The Sentencing Guidelines thus became advisory. *Id.* at 245.

[44] AMENDMENT TO SENTENCING GUIDELINES, *supra* note 7, at 1–2.

[45] The Sentencing Commission does have the authority from Congress to make amendments retroactive if it votes to do so. This authority comes from 28 U.S.C. § 994(u) (2012), which states: "[i]f the Commission reduces the term of imprisonment recommended in the guidelines applicable to a particular offense or category of offenses, it shall specify in what circumstances and by what amount the sentences of prisoners serving terms of imprisonment for the offense may be reduced."

[46] Beckles v. United States, 137 S. Ct. 886, 894 (2017).

sion had already deleted the residual clause from the Guidelines, the *Beckles* majority implied that the remaining Federal Sentencing Guidelines were not subject to constitutional vagueness challenges.[47] In her concurrence[48] in *Beckles*, Justice Sotomayor argued that the majority "reache[d] far beyond what [was] necessary to resolve this case" in ruling that the Guidelines were immune from vagueness challenges.[49]

III. The Need for Change in Defining "Crime of Violence"

A. The Federal Sentencing Guidelines are Effectively Binding

The majority in *Beckles* held that a federal system of discretionary sentencing is not amenable to vagueness challenges, reasoning that since discretion itself is not unconstitutionally vague, "the present system of guided discretion" cannot be vague.[50] Justice Thomas also stated that the Guidelines failed to implicate the "twin concerns" of vagueness doctrine: "providing notice and preventing arbitrary enforcement."[51] He noted that the statutory range provided notice, and that the Guidelines do not allow judges to arbitrarily "prohibit behavior or . . . prescribe the sentencing ranges available."[52] Thus, the usual due process concerns present in "statutes fixing sentences"[53] were absent from the Guidelines.

Yet there is good reason to believe that the Federal Sentencing Guidelines are, at best, extremely influential on sentencing and, at worst, effectively binding. As a result, the Guidelines should be held to the same standard of clarity as any other binding rule. The Supreme Court has recognized on multiple occasions that the Federal Guidelines constitute "not only the starting point for most federal sentencing proceedings but also the lodestar."[54] District courts begin the sentencing process by calculating the applicable Guidelines range;[55] the Guidelines thus produce an initial anchoring point for sentencing. Indeed, federal judges impose sentences within the Guidelines—or below, at the Government's request—in over 80% of cases.[56] Even where a judge departs from the Guidelines, "'if the judge uses the sentencing range as the beginning point to explain the decision to deviate

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[47] *Id.*

[48] Along with Justice Ginsburg, Justice Sotomayor concurred in the judgment. *See id.* at 898 (Sotomayor, J., concurring). She and Justice Ginsburg reasoned that the defendant's prior conviction constituted a "crime of violence" irrespective of the residual clause because the official commentary to the career offender Guideline "expressly designated" that particular offense of conviction as a "crime of violence." *Id.*

[49] *Id.* at 898 (Sotomayor, J., concurring).

[50] *Id.* at 889.

[51] *Id.*

[52] *Id.*

[53] *Id.* at 892 (quoting Johnson v. United States, 135 S. Ct. 2551, 2557 (2015)).

[54] Molina-Martinez v. United States, 136 S. Ct. 1338, 1346 (2016).

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

[56] *Beckles*, 137 S. Ct. at 900 (Sotomayor, J., concurring).

from it, *then the Guidelines are in a real sense the basis for the sentence.*'"[57] The appeals process also illustrates the binding nature of the Guidelines.[58] A judge who miscalculates the Guidelines range "commits reversible procedural error,"[59] while a judge who levies a sentence within the Guidelines range is afforded a presumption that the sentence was reasonable.[60] For the defendant in *Beckles*, the Guidelines exerted a tremendous impact on his final sentence.[61] The district court would have sentenced the defendant to "between 33 and 98 fewer months in prison" without the sentencing enhancements from the career offender Guideline.[62] As Justice Sotomayor reasoned, "it was the Guidelines, not just the statute, that 'fix[ed]' Beckles' 'sentenc[e]' in every meaningful way."[63] Rules with such weight must avoid unconstitutional vagueness by providing adequate notice to defendants and avoiding arbitrary enforcement.[64]

B. Even if the Guidelines are "Merely Advisory," They Implicate Vagueness Concerns

Before *Beckles*, two circuit courts declared that advisory Guidelines could not implicate vagueness concerns under the Due Process Clause.[65] The courts made the following three arguments. First, advisory Guidelines cannot be any more arbitrary than "unfettered discretion."[66] Second, defendants cannot expect notice from the Guidelines because the Guidelines do not require judges to impose any particular sentence.[67] Third, a system uniquely defined by discretion cannot implicate vagueness concerns because vagueness challenges would "upend [the] sentencing regime."[68] Yet each argument fails to acknowledge that confusing (albeit advisory) Guidelines may

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[57] *Molina-Martinez*, 136 S. Ct. at 1345 (emphasis in original) (quoting Peugh v. United States, 569 U.S. 530, 542 (2013)).

[58] *See Peugh*, 569 U.S. at 548–49.

[59] *Beckles*, 137 S. Ct. at 900 (citing *Gall*, 552 U.S. at 51).

[60] Rita v. United States, 551 U.S. 338, 347 (2007).

[61] *Beckles*, 137 S. Ct. at 902 (Sotomayor, J., concurring).

[62] *Id.* at 901–02.

[63] *Id.* at 902 (quoting Johnson v. United States, 135 S. Ct. 2551, 2556–57 (2015).

[64] *Id.* at 898 (citing Kolender v. Lawson, 461 U.S. 352, 357 (1983)).

[65] *See* United States v. Matchett, 802 F.3d 1185, 1193 (11th Cir. 2015); *see also* United States v. Tichenor, 683 F.3d 358, 365 (7th Cir. 2012), *overruled by* United States v. Hurlburt, 835 F.3d 715 (7th Cir. 2016). Indeed, before the Supreme Court decided *Beckles*, many circuits held that the advisory sentencing Guidelines could be challenged on vagueness grounds. These included the Third, Sixth, Seventh, Tenth, and D.C. Circuits. Kelsey McCowan Heilman, *Why Vague Sentencing Guidelines Violate the Due Process Clause*, 95 OR. L. REV. 53, 84–86 (2016).

[66] *Beckles*, 137 S. Ct. at 889.

[67] *Tichenor*, 683 F.3d at 365. Specifically, the court in *Tichenor* stated that the "Supreme Court has made clear that '[a]ny expectation subject to due process protection . . . that a criminal defendant would receive a sentence within the presumptively applicable guideline range did not survive' the *Booker* decision." *Id.* at 364 (quoting Irizarry v. United States, 553 U.S. 708, 713 (2008)).

[68] *Matchett*, 802 F.3d at 1196.

be more harmful to due process than the absence of Guidelines altogether. In her *Beckles* concurrence, Justice Sotomayor described the distinction between "unfettered" discretion and discretion governed by vague and ambiguous guidelines.[69] She noted that when a judge sentences a defendant under a "purely discretionary regime," the judge does not use arbitrary factors but instead conducts a "fact- and context- sensitive determination."[70] In contrast, a judge sentencing a defendant using vague advisory guidelines relies on confusing and "shapeless" rules that are "impossible [for the defendant] to understand."[71] Reliance on "an impenetrable rule" as the anchor for sentencing violates the implicit premise of due process: "that the law must be one that carries an understandable meaning with legal standards that courts must enforce."[72] Vague and "shapeless" rules lead to arbitrary enforcement by judges and lack of notice to defendants.

C. The Definition of "Crime of Violence" Remains Vague and Inconsistently Applied

Even without the residual clause, the definition of "crime of violence" remains vague and must be amended. Justice Thomas appeared to admit this in *Beckles* when he wrote that "[h]olding that the Guidelines are subject to vagueness challenges . . . would cast serious doubt on their validity. *Many of these other factors appear at least as unclear* as § 4B1.2(a)'s residual clause."[73] Indeed, neither the "elements clause" nor the "enumerated clause" provides clarity for judges determining whether a defendant has been convicted of the requisite predicate crimes to qualify for career offender enhancements.

First, some circuits split over whether particular crimes qualify as a crime of violence within the meaning of the elements clause. For example, the Seventh Circuit held that a defendant's prior conviction of domestic battery under Illinois law qualified as a crime of violence under the "elements" clause of the career offender Guideline.[74] The defendant argued that, because the relevant statute did not include physical force as an "express element of the crime," it failed to qualify as a crime of violence.[75] The court rejected

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[69] *Beckles*, 137 S. Ct. at 904 (Sotomayor, J., concurring).

[70] *Id.*

[71] *Id.* A judge could arguably still conduct a "fact- and context- sensitive determination" using vague and advisory guidelines. The point, however, is that this determination would be directed by confusing standards, making the determination more difficult for judges and less predictable. But even if one believes that a judge could successfully conduct a "fact- and context- sensitive determination" under the directive of vague standards, my proposal provides a clearer directive, thus making sentencing comparatively easier for judges and more predictable for defendants.

[72] *Id.* (quoting Giaccio v. Pennsylvania, 382 U.S. 399, 403 (1966)).

[73] *Beckles*, 137 S. Ct. at 896 (emphasis added).

[74] United States v. Waters, 823 F.3d 1062, 1064 (7th Cir.), *cert. denied*, 137 S. Ct. 569 (2016).

[75] *Current Circuit Splits*, 13 Seton Hall Cir. Rev. 59, 73 (2016).

this argument, stating that a domestic battery statute *necessarily* (and therefore, *implicitly*) required proving physical force "because proving intentional causation of bodily harm 'unambiguously requires proving physical force.'"[76] The Eighth Circuit adopted the same view, holding that a defendant's prior conviction of second-degree battery included violent force as an element "since it is impossible to cause bodily injury without using force capable of producing that result."[77] Yet the First Circuit rejected the view that the element of "causing physical injury" implies the additional element of physical force.[78] Thus, these circuits disagree over whether similar statutes constitute "crimes of violence" under the elements clause.

Another example of the circuit splits (and general confusion) surrounding the elements clause involves the question of whether reckless use of force against another constitutes a "crime of violence" under the elements clause. In *Leocal v. Ashcroft*,[79] the Supreme Court declined to address "whether a state or federal offense that requires proof of the *reckless* use of force against a person or property of another qualifies as a crime of violence . . . ."[80] The Supreme Court still has not addressed this question.[81] As a result, courts have split over the issue. For example, the Fifth Circuit in *United States v. Howell* held that "the mental state of recklessness may qualify" as a "crime of violence" under the elements clause of the Sentencing Guidelines.[82] Similarly, the Eighth Circuit held that "[r]eckless conduct . . . constitutes a 'use' of force under the ACCA . . . ."[83] The District Court for the District of Columbia explicitly disagreed with the Fifth and Eighth Circuits, holding that "a state statute that requires the mere reckless application of force . . . does not meet the requirements of the elements clause of the ACCA."[84] Additionally, district courts within the First Circuit have split over

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[76] *Waters*, 823 F.3d at 1064 (quoting United States v. Upton, 512 F.3d 394, 405 (7th Cir. 2008)).

[77] United States v. Rice, 813 F.3d 704, 706 (8th Cir.), *cert. denied*, 137 S. Ct. 59 (2016) (quoting United States v. Castleman, 134 S. Ct. 1405, 1407 (2014) (Scalia, J., concurring in part and concurring in the judgment)).

[78] Whyte v. Lynch, 807 F.3d 463, 470–71 (1st Cir. 2015), *reh'g denied*, 815 F.3d 92 (1st Cir. 2016). The First Circuit reasoned that third degree assault under the relevant Connecticut statute "does not require proof of all of the required elements of a crime of violence." *Id.* at 465. Both parties had agreed that "physical force" meant "violent force." *Id.* at 468. The Court noted, however, that the text of the Connecticut statute lacked "any indication that the offense also requires the use, threatened use, or attempted use of 'violent force.'" *Id.* The First Circuit thus concluded that the Connecticut third degree assault statute did not "contain as a necessary element the use, attempted use, or threatened use of violent force." *Id*. at 468–69.

[79] 543 U.S. 1 (2004).

[80] *Id.* at 13 (emphasis in original).

[81] *See* United States v. Webb, 217 F. Supp. 3d 381, 392 (D. Mass. 2016) (citing United States v. Booker, 644 F.3d 12, 19–20 (1st Cir. 2011)).

[82] 838 F.3d 489, 501 (5th Cir. 2016), *cert. denied*, 137 S. Ct. 1108 (2017).

[83] United States v. Fogg, 836 F.3d 951, 956 (8th Cir. 2016), *cert. denied*, 137 S. Ct. 2117 (2017).

[84] United States v. Taylor, No. CR 03-10 (CKK), 2017 WL 3431946, at *14 (D.D.C. Aug. 9, 2017).

the issue,[85] and the First Circuit has yet to resolve the split.[86] These cases illustrate how different circuits may arrive at divergent conclusions over whether similar statutes qualify as crimes of violence under the "elements clause," potentially leading to both over- and under-inclusion of certain conduct. The Sentencing Commission could remedy these splits by listing specific statutes and specifying what behavior covered by these statutes constitutes a "crime of violence."

Along with splits related to the "elements clause," use of the "enumerated clause" can also lead to inconsistent and arbitrary results. The enumerated clause lists the following as crimes of violence: "murder, voluntary manslaughter, kidnapping, aggravated assault, a forcible sex offense, robbery, arson, extortion, or the use or unlawful possession of a firearm . . . or explosive material . . . ."[87] In deciding whether a defendant's prior conviction constitutes a predicate "crime of violence," the judge must determine whether the prior statute of conviction has the basic elements of the modern day, "generic" understanding of the enumerated offense.[88] Indeed, certain statutes describing the enumerated crimes may include elements that do not fit the "generic" offense. These "divisible" statutes list elements in the alternative (thus defining several crimes within one statute).[89] For example, a statute may describe burglary as "'the lawful [or] unlawful entry' of a premises with intent to steal."[90] Because the "generic" definition of burglary does not include lawful entry, the defendant has only committed the predicate enumerated crime if her crime of conviction included unlawful entry. Similarly, certain "indivisible statutes"—statutes not containing alternative elements—may still criminalize a "broad swath of conduct."[91] For example, a statute stating that a "'person who enters' certain locations 'with intent to commit grand or petit larceny or any felony is guilty of burglary'" is overbroad because it "does not require the entry to have been unlawful in the way most burglary laws do."[92] Both divisible and overbroad indivisible stat-

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[85] *Compare* United States v. Dancy, 248 F. Supp. 3d 292, 298 (D. Mass. 2017) (holding that "an offense which can be committed with a mens rea of recklessness is not a 'violent felony'" under the elements clause); United States v. Lattanzio, 232 F. Supp. 3d 220, 227 (D. Mass. 2017) (same) *with* United States v. Webb, 217 F. Supp. 3d 381, 397 (D. Mass. 2016) (holding that reckless conduct is sufficient to constitute a violent felony).

[86] *See* United States v. Faust, 853 F.3d 39, 60 (1st Cir.), *reh'g denied*, 869 F.3d 11 (1st Cir. 2017) (declining to address whether reckless conduct qualifies as "use" under the elements clause).

[87] U.S. SENTENCING GUIDELINES MANUAL § 4B1.2 (U.S. SENTENCING COMM'N 2016).

[88] Taylor v. United States, 495 U.S. 575, 602 (1990). In *Taylor*, the Court defined "generic" burglary as "roughly corresponding to the definitions of burglary in a majority of the States' criminal codes." *Id.* Thus, in defining "generic" burglary, the Court looked to modern statutes and the Model Penal Code. *Id.* at 598 n.8; *see also* Jessica A. Roth, *The Divisibility of Crime*, 64 DUKE L.J. ONLINE 95, 100 (2015).

[89] Mathis v. United States, 136 S. Ct. 2243, 2249 (2016).

[90] *Id.*

[91] Descamps v. United States, 133 S. Ct. 2276, 2281–82 (2013).

[92] *Id.*

utes present difficulties in determining which prior offense the defendant actually committed.

To address these difficulties, the Supreme Court provided a tool for judges parsing divisible statutes. Yet it did not provide one for overbroad indivisible statutes. When examining a prior conviction under a divisible statute, the Court instructs judges to use the "modified categorical approach."[93] Under this approach, the judge may look to a "limited class of documents"—such as the charging document, jury instructions, or plea agreement—to determine the elements underlying the defendant's prior conviction.[94] While providing the modified categorical approach as a way to apply the career offender Guideline to divisible statutes, the Supreme Court held in *Descamps v. United States* that judges cannot use the approach for indivisible but overbroad statutes.[95] Albeit in the context of the ACCA, the Court stated that a conviction under the overbroad statute could "never" count as the enumerated predicate crime.[96] In this sense, the enumerated clause leads to completely arbitrary results for defendants. Defendants convicted of the same prior conduct but under differently worded statutes may receive vastly different sentences—one convicted under the overly broad statute may receive no enhancement while one convicted of the *same conduct* under a narrow or divisible statute will receive the career offender enhancement.[97]

D. Severe Sentence Discrepancies Result From Incorrect Career Offender Designation

Vague and incomprehensible Guidelines have real impacts on defendants, thus necessitating clearer standards for judges to follow. As mentioned, Beckles's sentence would have been 33 to 98 months shorter had the Court held the residual clause unconstitutionally vague and ordered a resentenc-

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[93] *Mathis*, 136 S. Ct. at 2249.

[94] *Id.*

[95] *See Descamps*, 133 S. Ct. at 2281–82. The Court explained that the modified categorical approach was meant to examine the elements of the statute of conviction, not the "factual basis of the prior plea." *Id.* at 2284 (quoting Shepard v. United States, 544 U.S. 13, 25 (2005)).

[96] *Id.* at 2293.

[97] *See Shepard*, 544 U.S. at 35–36 (O'Connor, J., dissenting) (arguing that the "majority's rule, which forces the federal sentencing court to feign agnosticism about clearly knowable facts, cannot be squared with the ACCA's twin goals of incapacitating repeat violent offenders, and of doing so *consistently* notwithstanding the peculiarities of state law"); *see also Descamps*, 133 S. Ct. at 2302 (Alito, J., dissenting) (arguing that Congress enacted ACCA to ensure dangerous recidivists are subject to enhanced penalties and that those penalties are "applied uniformly, regardless of state-law variations"). In his dissent in *Descamps*, Justice Alito pointed out that "[d]efendants convicted of the elements of generic burglary in California will not be subject to ACCA, but defendants who engage in exactly the same behavior in, say, Virginia, will fall within ACCA's reach." *Id.* (citing VA. CODE ANN. § 18.2-90 (2009)). The Federal Sentencing Guidelines have the same effects. *See* Roth, *supra* note 88, at 96–98.

ing.[98] Moreover, many district courts, believing the residual clause in the Guidelines was unconstitutional after *Johnson*, resentenced defendants designated career offenders under the residual clause.[99] Eight circuits have already resentenced defendants without the residual clause in the Guidelines.[100] These resentencings illustrate the severe discrepancies in sentencing with and without the career offender Guideline.[101] In their recent paper concerning *Beckles* and the Sentencing Commission, Leah M. Litman and Luke C. Beasley surveyed these resentencings.[102] They found that, in a group of eight defendants spanning the eight circuits that had already resentenced, the defendants collectively had their prison sentences reduced by 288 months (an average of 36 months).[103] Of the more striking reductions, the Tenth Circuit reduced one defendant's sentence from 120 months to 63 months,[104] and the Ninth Circuit reduced another's sentence from 87 months to 35 months.[105] These reductions illustrate the sheer magnitude of the disparity between career offender and non-career offender sentences.

Further illustrating this disparity are defendants in three circuits, none of which, prior to *Beckles*, had yet resentenced defendants given enhancements under the residual clause before the Commission amended the Guidelines.[106] In the Fourth Circuit, one defendant's Guidelines range would be reduced from 322 to 387 months to 181 to 211 months without the career offender enhancement; in the Seventh Circuit, another's range would be reduced from 262 to 327 months to 92 to 115 months; and in the D.C. Circuit, another's range would be reduced from 360 months to life to 92 to 115 months.[107] The difference between a career offender designation and a nor-

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[98] Beckles v. United States, 137 S. Ct. 886, 901 (2017). The district court judge in *Beckles* stated that she "would not have imprisoned Beckles to 360 months" had the career offender Guideline not applied. *Id.*

[99] Leah M. Litman & Luke C. Beasley, *How the Sentencing Commission Does and Does Not Matter in* Beckles v. United States, 165 U. Pa. L. Rev. Online 33, 38 (2016).

[100] *Id.*

[101] *Id.*

[102] *Id.*

[103] *Id.* at 38–39.

[104] *Id.* at 39 (citing Amended Judgment at 2, United States v. Smith, No. 1:14-1136 (D.N.M. Nov. 9, 2015)).

[105] *Id.* (citing Amended Judgment at 2, United States v. Benavides, No. 4:13-0718 (N.D. Cal. Dec. 17, 2015)).

[106] Prior to *Beckles*, it seemed as though these three circuits might also resentence defendants given enhancements under the residual clause of the Guidelines. The D.C. Circuit had already held that the residual clause in the sentencing Guidelines was unconstitutionally vague and remanded a case to district court for resentencing in light of *Johnson*. *See* United States v. Sheffield, 832 F.3d 296, 315 (D.C. Cir. 2016). The Seventh Circuit had also held the residual clause in the Guidelines unconstitutional before *Beckles* in *United States v. Hurlburt*, 835 F.3d 715 (7th Cir. 2016), *abrogated by* Beckles v. United States, 137 S. Ct. 886 (2017). The Fourth Circuit had yet to make a ruling on the residual clause of the Guidelines. After *Beckles*, it seems unlikely that the Fourth Circuit will direct district courts to resentence. It is not presently clear how the D.C. and Seventh Circuits will treat cases that took place before the Sentencing Commission excised the residual clause from the Guidelines.

[107] Litman & Beasley, *How the Sentencing Commission Does and Does Not Matter in* Beckles v. United States, *supra* note 99, at 40–41.

mal sentence under the Guidelines is staggering. As a result, amending the career offender Guideline to produce the clearest possible instructions to judges is critical.

IV. Proposal

A. Defining "Violent Crime" in the Minnesota Guidelines

The Minnesota Sentencing Guidelines' definition of "violent crime" should serve as a model for amending the Federal Guidelines. The Minnesota Sentencing Guidelines are "presumptive," meaning that judges may depart from the Guideline ranges "only when substantial and compelling circumstances can be identified and articulated."[108] If a judge chooses to depart from the Minnesota Guidelines, she must submit a "departure report" to the Minnesota Sentencing Guidelines Commission within fifteen days of the sentencing.[109] Thus, the presumptive nature of the Guidelines creates anchoring points for sentencing. The Minnesota Guidelines also contain a "dangerous and repeat felony offenders" Guideline ("dangerous offender Guideline")—the equivalent of the career offender Guideline in the Federal Guidelines. Instructions under the Mandatory Sentences section state that the presumptive prison sentence is the relevant statutory mandatory minimum or "the duration provided in the appropriate cell on the applicable Grid, whichever is longer."[110] The dangerous offender Guideline references the statutory mandatory sentence for career offenders set out in Minn. Stat. section 609.1095, subdivision 3.[111] As such, judges look to Minn. Stat. section 609.1095 for relevant definitions and mandatory minimums.

For a "dangerous offender" convicted of (at least) three violent crimes, Minn. Stat. section 609.1095, subdivision 3, imposes a mandatory sentence of "at least the length of the presumptive sentence under the Sentencing Guidelines."[112] The statute defines the term "violent crime" as "a violation of or an attempt or conspiracy to violate any of the following laws of this state or any similar laws of the United States or any other state," followed by a list of over forty criminal statutes and qualifications for a few of those statutes.[113] Thus, when sentencing a defendant, the judge refers to the list of statutes to determine whether the defendant was convicted of any two predicate crimes on the list of statutes.

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[108] Minn. Sentencing Guidelines and Commentary at 2. (Minn. Sentencing Guidelines Comm'n 2017).

[109] *Id.* at 3.

[110] *Id.* at 51–52.

[111] *Id.* at 53.

[112] Minn. Stat. Ann. § 609.1095 (West 2017).

[113] *Id.* § 609.1095. To give a few examples, the statute lists everything from murder in the first through third degrees, *id.* § 609.185; *id.* § 609.19; *id.* § 609.195, to criminal sexual assault in the first through third degrees, *id.* § 609.342; *id.* § 609.343; *id.* § 609.344, to simple robbery, *id.* § 609.24.

B. Modeling the Federal Guidelines' Definition of "Crime of Violence" off the Definition in the Minnesota Guidelines Will Result in Clearer Standards

I propose deleting the current definitions of "crime of violence" in the career offender Guideline and replacing them with Minnesota's model of enumerating specific statutes.[114] The Sentencing Commission should choose statutes it determines constitute crimes of violence. In addition to listing *federal* statutes, the Sentencing Commission should also list all *state* statutes that constitute crimes of violence. This proposal thus adds to the Minnesota Guidelines model, because Minnesota only lists Minnesota state statutes and instructs judges to look at "any similar laws of the United States or any other state."[115] To avoid inconsistent application—and to simplify the process for judges—the Sentencing Commission should list all statutes that qualify as predicate "crimes of violence." The Commission should then categorize the list and provide further instructions to judges.

To achieve this amendment, the Commission should take the following steps. First, the Commission should generate a list of conduct that, using research and data, it considers "violent." Like the current enumerated clause, the list should describe "generic" conduct. The Commission should allow a notice-and-comment period for the public to propose conduct it deems "violent."[116] In formulating this initial list, the Commission should clarify the stakes of identifying certain conduct as violent: the conduct must be violent enough to warrant *severe* enhancement of prison time after a defendant has committed such conduct a third time. The Commission is in the best position to generate this initial list of conduct given its access to data and ability to solicit comments from different groups. For example, in its 2016 amendments, the Commission removed "burglary" from the enumerated clause based on several studies demonstrating that the majority of burglaries "do not involve physical violence," an analysis of offenders sentenced in 2014, and an analysis of recidivism rates.[117] In the same amendments, the Commission also added "use or unlawful possession of a fire-

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[114] The Commission may independently decide to propose an amendment to Congress and does not need specific authorization. According to Rule 4.1 of the Sentencing Commission's Practice and Procedure: "The Commission may promulgate and submit to Congress amendments to the guidelines after the beginning of a regular session of Congress and not later than May 1 of that year. Amendments shall be accompanied by an explanation or statement of reasons for the amendments. Unless otherwise specified, or unless Congress legislates to the contrary, amendments submitted for review shall take effect on the first day of November of the year in which submitted. 28 U.S.C. § 994(p)." RULES OF PRACTICE AND PROCEDURE pt. 4, R.4.1, (U.S. SENTENCING COMM'N 2016).

[115] MINN. STAT. ANN. § 609.1095.

[116] The Commission routinely publishes proposed amendments for public notice and comment. 28 U.S.C. §§ 994(a), (o), (p), (x) (2017); RULES OF PRACTICE AND PROCEDURE pt. 4, R.4.3 ("Notice and Comment on Proposed Amendments"); *id.* R.4.4 ("Federal Register Notice of Proposed Amendments").

[117] AMENDMENT TO SENTENCING GUIDELINES, *supra* note 7, at 3.

arm" to the enumerated clause after arriving at the conclusion that "such weapons are inherently dangerous and, when possessed unlawfully, serve only violent purposes."[118] These amendments illustrate the Commission's capacity to reach the best definitions of violent conduct and use data and modern studies to overcome initial intuitions about what conduct truly constitutes violence.

Once the Commission has outlined the type of conduct it considers violent, the Commission should sift through all state and federal criminal statutes and create a master list of criminal statutes containing elements that constitute crimes of violence. The Commission should then break the master list into two lists: a "default" crimes of violence list and a "broad conduct" list. The first list will be labeled "default" crimes of violence. If a defendant has a prior conviction under a statute on the "default" list, that conviction will automatically count as a predicate under the career offender Guideline. The "default" list will include indivisible statutes with narrow "swaths of conduct" that fit the generic definitions of violent conduct the Commission initially identified. In other words, statutes on the "default" list *only* cover violent conduct.

The Commission should then create a second "broad conduct" list containing statutes that cover both violent and non-violent conduct. This list will include divisible statutes (statutes that "set[ ] out one or more elements of the offense in the alternative"[119]) and indivisible statutes (statutes with one "set of elements sweeping more broadly than the corresponding generic offense").[120] To make this system easier for judges, the Commission should label each statute in this second "broad conduct" list either "divisible" or "overly broad" (thus dividing the second "broad conduct" list into two categories). The Commission should also clearly specify the exact conduct within these statutes that constitutes a crime of violence. For example, the Commission should specify whether reckless versions of the statutes constitute crimes of violence. If a defendant has a prior conviction under a statute on the second "broad conduct" list, the judge must then apply the modified categorical approach to determine whether the defendant was convicted of the violent conduct in the statute. Judges examining divisible statutes under the "broad conduct" list should follow steps for the modified categorical approach as set out in *Taylor v. United States*[121] and *Shepard v. United States.*[122] For example, an assault statute may list state of mind elements in the alternative, declaring that a person commits assault if they intentionally,

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[118] *Id.* at 4.
[119] Descamps v. United States, 133 S. Ct. 2276, 2279 (2013).
[120] *Id.* at 2283.
[121] 495 U.S. 575 (1990).
[122] 544 U.S. 13 (2005).

knowingly, *or* recklessly cause bodily injury to another.[123] If the Commission decides that certain reckless conduct does not constitute a crime of violence,[124] judges looking at statutes listing state of mind elements in the alternative will use certain pre-conviction documents—as set out in *Shepard*—to determine which state of mind element the defendant was convicted of and will sentence appropriately.

When a judge examines an indivisible but overly broad statute under the "broad conduct" list, the judge will apply the modified categorical approach in the same way courts did before *Descamps*.[125] Take, for example, a burglary statute stating: "[e]very person who enters [various structures] . . . with intent to commit grand or petit larceny or any felony is guilty of burglary."[126] The Commission may deem this statute overbroad because it does not require the entry to be unlawful (the usual requirement for "generic" burglary). In *United States v. Aguila-Montes de Oca*,[127] the Ninth Circuit examined this overly broad burglary statute and conducted an "inquiry under the modified categorical approach [as to] whether the record demonstrates that [the defendant's] conviction necessarily *rested on facts* that sat-

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[123] *See, e.g.*, ME. STAT. tit. 17-A, § 208 (2017); NEB. REV. STAT. § 28-310 (2017); 18 PA. CON. STAT. § 2702 (2017); TEX. PENAL CODE ANN. § 22.01 (West 2017); WYO. STAT. ANN. § 6-2-502 (West 2017).

[124] Some courts have held that "reckless" versions of certain statutes do not qualify as predicate violent felonies in the context of the ACCA. *See, e.g.*, United States v. Dancy, 248 F. Supp. 3d 292, 298 (D. Mass. 2017) (holding that reckless versions of assault and battery on a police officer and assault and battery with a dangerous weapon statutes do not qualify as predicate violent felonies under ACCA).

[125] This portion of the proposal may be viewed as going against the Supreme Court's holding in *Descamps*, which stated that courts may not use the modified categorical approach for indivisible, overly broad statutes. It is first important to note that the Court's decision in *Descamps* rested on a statutory interpretation of the ACCA (and arguably, as Justice Alito points out in his dissent, not necessarily a very good interpretation). The ACCA may mandate an "elements-based" approach, but there is no reason the Sentencing Guidelines must follow suit. My proposal can thus be distinguished from *Descamps* because my approach deals with the Sentencing Guidelines and is not dictated by a statutory interpretation of the ACCA. The Supreme Court will hopefully reexamine the issue once the Commission amends the Guidelines so thoroughly. Yet even if the holding of *Descamps* poses a problem, I propose three possible solutions. First, if the Court upholds *Descamps*, it might come up with a different tool for judges to use when examining indivisible, overly broad statutes if the Commission chooses to put such an emphasis on them. Second, because this is a matter of statutory interpretation, Congress could presumably step in and allow judges to use this approach. Third, (and as a last resort), if the Court continues to strike down the use of any sort of modified categorical approach for indivisible, overly broad statutes, the Commission will just have to delete these statutes from the list, meaning that conviction under those statutes will not count as predicate crimes. Even if this happens, the Commission's list of indivisible, overbroad statutes will still be helpful, as it will indicate to judges which statutes do not warrant sentence enhancement in a *Descamps* world. While this outcome would not be optimal for the purposes of consistency, *see* Descamps v. United States, 133 S. Ct. 2276, 2302 (2015) (Alito, J., dissenting), it would at least assist trial judges in determining which statutes can and cannot count as predicate "crimes of violence" in the Guidelines.

[126] CAL. PENAL CODE § 459 (West 2017).

[127] 655 F.3d 915 (9th Cir. 2011), *abrogated by* Young v. Holder, 697 F.3d 976 (9th Cir. 2012), *and abrogated by Descamps*, 570 U.S. 254.

isfy the elements of" the generic offense of burglary.[128] Judges examining overly broad indivisible statutes should follow the same method. To promote consistency, the Commission should survey state and federal statutes and compile a list of elements for each "generic" violent crime included in the master list of statutes.

C. Counterarguments

My proposal avoids vagueness concerns by creating a definitive list of predicate statutes for judges and defendants. The "default" list provides clarity and allows judges to simply match statutes. While requiring more work on the part of judges, the "broader conduct" list focuses this work on an individualized analysis of a defendant's particular conduct in prior convictions. In this sense, the inquiry judges must conduct is directed by the Commission and backed up by data that judges simply do not have the time or institutional capacity to produce. I now address several potential counterarguments to this proposal.

To begin, the proposal may still lead to problems when judges apply the modified categorical approach to the second "broader conduct" list. Specifically, the *Shepard* documents that a judge may examine when using the modified categorical approach may not fully specify the elements to which a defendant pled guilty. Indeed, the First Circuit recently vacated an ACCA mandatory minimum sentence based on this very problem. In *United States v. Kennedy*,[129] the First Circuit examined whether a defendant's prior conviction of assault and battery with a dangerous weapon ("ABDW") counted as a predicate violent felony under the ACCA.[130] The relevant Massachusetts intentional ABDW constituted a crime of violence under the Sentencing Guidelines, but reckless ABDW did not.[131] In *Kennedy*, however, the court noted that "the record to which [the court was] allowed to look does not plainly show that [the defendant] pled guilty to [the intentional] form of the offense."[132] Indeed, the "plea colloquy could support a conviction under either a reckless or intentional theory of assault," and none of the charging documents specified the "form of offense actually charged."[133] As a result, the modified categorical approach may be useless in such situations.

Moreover, a defendant pleading guilty to her first or second offense may not realize that the difference between pleading to one element over another could lead to hefty sentence enhancements in the future. Thus, a defendant may accept a plea bargain that she would otherwise reject if she

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[128] *Id.* at 945 (emphasis added).
[129] 881 F.3d 14 (1st Cir. 2018).
[130] *Id.* at 14, 19.
[131] *Id.*
[132] *Id.* at 24.
[133] Supplemental Brief of Defendant-Appellant, United States v. Kennedy, 881 F.3d 14 (1st Cir. 2018) (No. 15-2298), 2017 WL 2418182, at *1, 7.

were aware of the potential consequences down the road. These are genuine concerns with the modified categorical approach. Still, these problems already exist under the current system. To this end, the proposal does not worsen problems with the modified categorical approach. Instead, the proposal creates a more comprehensible approach for judges to start with, thereby providing more guidance overall.

Additionally, the proposal creates an enormous amount of work for the Sentencing Commission, which must conduct research, select certain "violent" conduct, and sift through every state and federal criminal statute. Yet this work was precisely what Congress created the Commission to accomplish. Better the Commission embark on this task than to leave it to judges, who lack the time, data, and ability to coordinate with other judges to promote consistency. Preventing unfair discrepancies in sentencing spurred Congress to create the Commission. Current arbitrary discrepancies in sentencing outcomes warrant a reworking of the Guidelines, regardless of the amount of work required.

One could also argue that a preferable reform would be to delete the enumerated crimes that cause confusion among courts. The Commission arguably did this with respect to burglary in its 2016 Amendments. In addition to relying on studies showing that burglary usually does not result in violence, "the Commission also considered that courts have struggled with identifying a uniform contemporary, generic definition of 'burglary of dwelling.'"[134] While deleting confusing portions of the Guidelines certainly helps promote clarity, the Commission cannot do this with all confusing provisions and was likely only able to do so with burglary because of its overarching research showing that burglary tended not to be violent.[135] Surely, the Commission cannot simply remove a crime like aggravated assault solely because it causes confusion among the circuits.

Finally, one could argue that a large-scale reworking of the Guidelines would lead to a massive flood of litigation from defendants seeking resentencing. The Commission may choose not to make the amendments retroactive (as it did when it deleted the residual clause), thus avoiding the resentencing issue. Yet even if the Commission chose to make the amendments retroactive—which it should to promote fairness—the subsequent resentencing likely would not cripple courts for several reasons. First, after the Commission declared that lower sentencing standards for crack cocaine cases were retroactive, the expected "predictions that this process would bog down the courts . . . [did] not come to pass."[136] Additionally, at a hearing

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[134] AMENDMENT TO SENTENCING GUIDELINES, *supra* note 7, at 3.

[135] *See id.* at 3–4.

[136] U.S. SENTENCING COMM'N, PUBLIC HEARING BEFORE THE U.S. SENTENCING COMM'N 65 (June 1, 2011), http://www.ussc.gov/sites/default/files/pdf/amendment-process/public-hearings-and-meetings/20110601/Hearing_Transcript.pdf [https://perma.cc/7K9X-UEGE] (statement of Michael S. Nachmanoff, Federal Public Defender for the Eastern District of Virginia). Attorney Nachmanoff credited this success to collaboration between defense attorneys, prose-

concerning the residual clause amendment to the career offender Guideline, "the Commission was informed that the number of career offender designations that depended on the residual clause—*or even violent crimes*, as opposed to controlled substance offenses—was 'far fewer . . . than the thousands of defendants who got resentenced during' the drug Guideline amendments."[137] Thus, even a retroactive application of a total reworking of the "crime of violence" portion of the career offender Guideline would not produce the amount of litigation that came from altering drug sentences—which, in any event, remained manageable.

V. Conclusion

My proposed amendments to the career offender Guideline will not be easy, nor do they necessarily go far enough in altering a provision that leads to shockingly severe sentences for certain defendants. Arguably, scrapping the entire concept of the "career offender" designation and simply adjusting sentences for certain crimes would be more transparent and humane. Yet Congress specifically instructed the Sentencing Commission in promulgating the Guidelines to create a provision that doled out maximum penalties to "career offenders."[138] Thus, while the Commission cannot scrap the entire provision, harsh yet inconsistent penalties dealt to career offenders suggest the need for clarity. My proposed amendment hopefully leads to a more consistent and fair application of the career offender Guideline. By listing specific statutes that define "crimes of violence," the Sentencing Commission can use its institutional expertise to identify conduct that actually deserves a higher sentence. Moreover, by deviating slightly from the Minnesota Guidelines and creating two lists, the proposal more clearly delineates different types of conduct and more accurately fits sentences to crimes. In this sense, the proposal is an attempt at achieving a more directed type of discretion for courts—it attempts to strike a balance between unwielding rules and vague standards. One of the purposes of creating the Sentencing Commission was to eradicate disparities and promote uniformity in federal sentencing through research and data collection. Greater specificity in the Guidelines and direction to judges will help achieve this goal.

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cutors, probation officers, clerks' offices, and courts. The collaborative process involved "looking at who was eligible, trying to prioritize those cases to determine who would get out fastest, and then trying to decide whether or not we could come to an agreement that those people should get relief. And in the overwhelming majority of cases, that is exactly what we agreed to." *Id.*

[137] Litman & Beasley, *supra* note 99, at 45 (emphasis added) (quoting U.S. Sentencing Comm'n, Public Hearing on Proposed Amendments to the Federal Sentencing Guidelines Before the U.S. Sentencing Comm'n 153–55 (Nov. 5, 2015), http://www.ussc.gov/sites/default/files/transcript_4.pdf [https://perma.cc/7VFR-JUNX]).

[138] 2016 Report to Congress, *supra* note 12, at 12.