THE RETURN OF THE JURY: CONDUCT-BASED SENTENCING FOR RECIDIVISM

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Under current law, people charged under recidivist statutes are not entitled to have a jury assess their prior convictions. But the fact of a prior conviction should be proved to a jury beyond a reasonable doubt. This change would allow courts to use a conduct-based approach instead of a categorical approach while still complying with the Sixth Amendment.

When applying recidivist statutes such as the Armed Career Criminal Act (ACCA), the Supreme Court requires that courts use "a formal categorical approach, looking only to the statutory definitions of the prior offenses, and not to the particular facts underlying those convictions." The categorical approach bewilders judges, clogs court dockets, and frustrates the goals underlying recidivist statutes, such as consistency, deterrence, and incapacitation of the most dangerous criminals.

This Article builds on scholarship that evaluates alternatives to the categorical approach and explains why a conduct-based approach—focusing on the real-world facts of the prior offense—adjudicated by juries using a reasonable doubt standard is a better approach to recidivist, mandatory-minimum statutes such as the ACCA.

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INTRODUCTION

Studies show that recidivists are more likely to commit a criminal offense than the general population.[1] Federal, criminal, and immigration statutes—as well as the U.S. Sentencing Guidelines—impose enhanced penalties on people who previously committed certain offenses.[2] Most of these prior offenses are crimes under state law.[3] These recidivist statutes raise the difficult questions of which offenses, out of the myriad of state crimes, count as predicates—and who decides.[4] The fact of a prior conviction should be proved to a jury beyond a reasonable doubt.

The Sixth Amendment guarantees "[i]n all criminal prosecutions . . . the right to a speedy and public trial, by an impartial jury."[5] In *In re Winship*,[6] the Supreme Court held that the Due Process Clause of the Fourteenth Amendment protects an accused person "against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged."[7] In *Almendarez-Torres v. United States*,[8] the Court upheld a lower court's decision that a prior conviction is a "sentencing factor" rather than a "fact necessary to constitute the crime."[9] While the only issue before the *Almendarez-Torres* Court was the requirement that the prior offense be charged in an

1. *See Ovalles v. United States*, 905 F.3d 1231, 1254–55 (11th Cir. 2018) (Pryor, J., concurring) (surveying empirical research); *see also* U.S. SENT'G COMM'N, THE PAST PREDICTS THE FUTURE: CRIMINAL HISTORY AND RECIDIVISM OF FEDERAL OFFENDERS 6–7 (2017) ("[T]he *Guidelines Manual* establishes a method for evaluating an offender's criminal history by assigning points to criminal events that occurred during the offender's past. . . . [C]onsistent with its past work in this area, the Commission's present study found that recidivism rates are closely correlated with total criminal history points . . . as offenders with lower criminal history scores have lower recidivism rates than offenders with higher criminal history scores.").

2. Sarah French Russell, *Rethinking Recidivist Enhancements: The Role of Prior Drug Convictions in Federal Sentencing*, 43 U.C. DAVIS L. REV. 1135, 1137–38 (2010).

3. *Id.*

4. *See Ovalles*, 905 F.3d at 1254 (Pryor, J., concurring) ("The caselaw about how to punish recidivists has confounded the federal courts for decades . . . ."). Multiple state recidivist statutes exist, but this Article focuses exclusively on federal recidivist statutes, the U.S. Sentencing Guidelines, and applicable Supreme Court precedent.

5. U.S. CONST. amend. VI.

6. 397 U.S. 358 (1970).

7. *Id.* at 359, 364.

8. 523 U.S. 224 (1998).

9. *Id.* at 240, 246 (quoting *In re Winship*, 397 U.S. at 364).

indictment,[10] later Supreme Court opinions interpreted the case as suggesting that a judge may determine the fact of prior conviction by a preponderance of the evidence.[11] *Almendarez-Torres* should be reconsidered because some of the key precedents on which it relied have since been overruled.[12] One sitting Justice in the *Almendarez-Torres* majority has since rethought his position that judges may adjudicate prior convictions.[13] This Article contends that when courts implement recidivist statutes, the Sixth Amendment requires that the fact of a prior conviction be proven to a jury beyond a reasonable doubt.

If juries decide the applicability of recidivist statutes, they are best-equipped to use a fact-based/conduct-based approach. This Article advocates the use of such an approach. A conduct-based approach focuses on the "real-world facts" of a prior conviction—how the accused person "actually went about committing" the offense.[14] Under a conduct-based approach, the prosecutor would have to prove to a jury beyond a reasonable doubt, using a variety of potential methods, that the defendant's actual conduct satisfied the clause at issue.[15] For example, for the Armed Career Criminal Act's (ACCA) definition of a "violent felony," the jury would decide if the defendant "use[d], attempted [to] use, or threatened [to] use . . . physical force against the person of another" in committing the prior offense.[16] This approach could decrease the backlog of appellate cases and further the goals underlying recidivist statutes, such as consistency, deterrence, and incapacitation of the most dangerous offenders.

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10. *Id.* at 226.

11. *See, e.g.*, *Apprendi v. New Jersey*, 530 U.S. 466, 489–90 (2000).

12. *McMillan v. Pennsylvania*, 477 U.S. 79 (1986), *overruled by Alleyne v. United States*, 570 U.S. 99, 106–07 (2013); *see also United States v. Haymond*, 139 S. Ct. 2369, 2378 (2019) (recognizing *Alleyne* as overruling *McMillan*); *Walton v. Arizona*, 497 U.S. 639 (1990), *overruled by Ring v. Arizona*, 536 U.S. 584, 609 (2002); *Hildwin v. Florida*, 490 U.S. 638 (1989) (per curiam), *overruled by Hurst v. Florida*, 577 U.S. 92, 102 (2016); *Spaziano v. Florida*, 468 U.S. 447 (1984), *overruled by Hurst*, 577 U.S. at 102.

13. *See Mathis v. United States*, 136 S. Ct. 2243, 2259 (2016) (Thomas, J., concurring) ("I have urged that *Almendarez-Torres* be reconsidered."); *Descamps v. United States*, 570 U.S. 254, 281 (2013) (Thomas, J., concurring); *Shepard v. United States*, 544 U.S. 13, 27 (2005) (Thomas, J., concurring) ("[T]his Court has not reconsidered *Almendarez-Torres* . . . ."); *Apprendi*, 530 U.S. at 520–21 (Thomas, J., concurring) ("[O]ne of the chief errors of *Almendarez-Torres*—an error to which I succumbed—was to attempt to discern whether a particular fact is traditionally (or typically) a basis for a sentencing court to increase an offender's sentence.").

14. *Ovalles v. United States*, 905 F.3d 1231, 1233 (11th Cir. 2018).

15. *Id.* at 1250.

16. *See, e.g.*, Jennifer Lee Barrow, *Recidivism Reformation: Eliminating Drug Predicates*, 135 HARV. L. REV. F. (forthcoming 2022) (manuscript at 15) (quoting 18 U.S.C. § 924(e)(2)(B)(i)).

In *Taylor v. United States*,[17] however, the Supreme Court held that courts must use "a formal categorical approach, looking only to the statutory definitions of the prior offenses, and not to the particular facts underlying those convictions,"[18] in sentencing people under statutes such as the ACCA.[19] The Court also extended the categorical approach to some applications of the "aggravated felony" provision in the Immigration and Nationality Act.[20] The Court explained that the categorical approach avoided Sixth Amendment right-to-jury-trial issues that could arise from sentencing courts making findings of fact that properly belong to juries.[21] In subsequent cases, the Court continued to mandate the categorical approach, asserting in some cases that the government never asked the Court to consider a conduct-based approach;[22] that the text of the ACCA focuses on convictions, not conduct;[23] that the ACCA lacks any reference to the underlying crime's commission or circumstances;[24] and that applying the categorical approach avoids the impracticality of requiring sentencing courts to engage in after-the-fact reconstructions of circumstances underlying prior convictions.[25] Lower courts in every circuit have applied this categorical approach to the similarly worded

17. 495 U.S. 575 (1990).

18. *See id.* at 600, 602.

19. The ACCA mandates a minimum fifteen-year sentence for violating 18 U.S.C. § 922(g) after committing on different occasions three prior "violent felon[ies]," "serious drug offense[s]," or both. § 924(e)(1). Section 922(g) bans specific classes of people from transporting, possessing, receiving, or shipping firearms or ammunition and ordinarily carries a maximum ten-year penalty and no minimum penalty. § 924(a)(2). A "serious drug offense" is a federal or state-controlled substance offense with a maximum term of imprisonment of ten years or more. § 924(e)(2)(A)(i)–(ii). A federal controlled substance offense is defined as "an offense under the Controlled Substance Act (21 U.S.C. 801 et seq.), the Controlled Substances Import and Export Act (21 U.S.C. 951 et seq.), or chapter 705 of title 46." § 924(e)(2)(A)(i). A state-controlled substance offense is defined as "an offense under State law, involving manufacturing, distributing, or possessing with intent to manufacture or distribute, a controlled substance (as defined in section 102 of the Controlled Substances Act (21 U.S.C. 802))." § 924(e)(2)(A)(ii). "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 . . . has as an element the use, attempted use, or threatened use of physical force against the person of another; or . . . is burglary, arson, or extortion, [or] involves use of explosives.

§ 924(e)(2)(B)(i)–(ii).

20. 8 U.S.C. § 1101(a)(43); *see, e.g.*, *Sessions v. Dimaya*, 138 S. Ct. 1204, 1211 (2018).

21. *See Taylor*, 495 U.S. at 601.

22. *Dimaya*, 138 S. Ct. at 1217.

23. *Mathis v. United States*, 136 S. Ct. 2243, 2252 (2016).

24. *See id.*

25. *Id.* at 2252–53.

"Career Offender" provision in the U.S. Sentencing Guidelines.[26] This approach has been a disaster.

From 1990 to the present,[27] the Supreme Court's approach to recidivism laws has become more and more complex, moving from a categorical approach to a modified categorical approach[28] for certain types of statutes. Endless litigation has ensued as defendants appeal sentences, circuits split over predicate determinations, and jurists literally plead for divine deliverance[29] from attempting to apply this baffling precedent.[30]

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26. *See generally* U.S. OFF. OF THE GEN. COUNS., PRIMER: CATEGORICAL APPROACH (2021), https://www.ussc.gov/sites/default/files/pdf/training/primers/2021_Primer_Categorical_Approach.pdf [https://perma.cc/V59B-2BR7]. Section 4B1.2 of the Career Offender Guideline provides 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—
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> > (1) has an element the use, attempted use, or threatened use of physical force against the person of another, or
> >
> > (2) 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).
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> (b) The term "controlled substance offense" means an offense under federal or state law, punishable by imprisonment for a term exceeding one year, that prohibits the manufacture, import, export, distribution, or dispensing of a controlled substance (or a counterfeit substance) or the possession of a controlled substance (or a counterfeit substance) with intent to manufacture, import, export, distribute, or dispense.

U.S. SENT'G GUIDELINES MANUAL § 4B1.2 (U.S. SENT'G COMM'N 2021).

27. The Court decided *Taylor* in 1990, holding that courts must use "a formal categorical approach, looking only to the statutory definitions of the prior offenses, and not to the particular facts underlying those convictions." *Taylor v. United States*, 495 U.S. 575, 600, 602 (1990).

28. Using the "modified categorical approach," if a statute is divisible—that is, comprised of elements and not means to commit the offense—the court may examine charging documents; jury instructions or the judge's formal rulings of law and findings of fact (to which the defendant assented); plea agreements or statements; transcripts of the colloquy between the judge and defendant in which the defendant confirmed the factual basis for the plea; or any other comparably reliable documents from the prior offense to determine under what portion of the statute the person was convicted. *See Mathis*, 136 S. Ct. at 2249, 2260.

29. *United States v. McCollum*, 885 F.3d 300, 314 (4th Cir. 2018) (Wilkinson, J., dissenting) ("Heaven help us.").

30. "[W]e have struggled to understand the contours of the Supreme Court's framework. Indeed, over the past decade, perhaps no other area of the law [besides the categorical approach] has demanded more of our resources." *United States v. Aguila-Montes de Oca*, 655 F.3d 915, 917 (9th Cir. 2011). Fourth Circuit Judge G. Steven Agee lamented, "The dockets of our court and all federal courts are now clogged with [ACCA] cases." *United States v. Vann*, 660 F.3d 771, 787 (4th Cir. 2011) (Agee, J., concurring). Justice Samuel Alito opined that "only Congress can rescue the federal courts from the mire into which [the] ACCA's draftsmanship and *Taylor*'s 'categorical approach' have

One of the purposes of mandatory minimum sentences and Sentencing Guidelines is uniformity,[31] but the categorical approach ensures different sentences depending on the state in which the crime occurred.[32]

For example, imagine that two people are convicted of burglarizing homes in identical manners in two different states. One state's burglary statute matches the elements of "generic burglary," according to the Supreme Court, and the other state's does not.[33] The person's conviction in the former state counts as an ACCA predicate, while the person's conviction in the latter state does not.[34]

The stated purpose of the ACCA was to incapacitate the most dangerous offenders,[35] but the categorical approach results in much violent conduct eluding an enhanced sentence. In *Borden v. United States*,[36] the Supreme Court recently held that an offense that requires only a mens rea of recklessness cannot qualify as a "violent felony" predicate under the ACCA.[37] This decision ensures that the ACCA will capture much less violent conduct.

Of course, offenses such as reckless assault and reckless homicide will no longer qualify as ACCA predicates.[38] Additionally, many states codify felony assault in one indivisible provision that can be satisfied by recklessness or a more culpable mental state.[39] Under the categorical

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pushed us," and Alito lamented that "the 'categorical approach' to predicate offenses has created numerous splits among the lower federal courts, the resolution of which could occupy [the Supreme] Court for years." *Chambers v. United States*, 555 U.S. 122, 132–33 (2009) (Alito, J., concurring) (footnote omitted). The Seventh Circuit Court of Appeals explained, "In recent years, federal courts have seen a floodtide of litigation over what qualifies as an ACCA predicate." *Dotson v. United States*, 949 F.3d 317, 318 (7th Cir. 2020).

31. Quincy H. Ferrill, Comment, *Enhancement Without a Cause:* United States v. Sefrass *and Its Erasure of the Scienter Requirement*, 53 TEX. TECH L. REV. 311, 314–15 (2021).

32. "[T]he categorical approach employed today is difficult to apply and can yield dramatically different sentences depending on where a burglary occurred . . . ." *Quarles v. United States*, 139 S. Ct. 1872, 1881 (2019) (Thomas, J., concurring).

33. *Id.* at 1877.

34. *See id.* at 1880; *Mathis v. United States*, 136 S. Ct. 2243, 2257 (2016).

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

36. 141 S. Ct. 1817 (2021).

37. *Id.* at 1821–22.

38. *See id.* at 1855 (Kavanaugh, J., dissenting).

39. *Id.* at 1856 n.22 (Kavanaugh, J., dissenting) (first citing ME. REV. STAT. ANN. tit. 17-A, § 208 (Cum. Supp. 2021) (aggravated assault); then citing R.I. GEN. LAWS § 11-5-2 (Supp. 2020) (felony assault); then citing UTAH CODE ANN. § 76-5-103 (Supp. 2019) (aggravated assault); then citing *United States v. Rose*, 896 F.3d 104, 114 (1st Cir. 2018) ("[A]lthough Rhode Island case law is inconclusive, 'it appears possible' that ordinary recklessness suffices for felony assault under R. I. Gen. Law § 11-5-2."); and then citing *State v. Seach*, 483 P.3d 1265, 1271 (Utah Ct. App. 2021) ("Utah Code Ann. § 76-5-103 requires the state to prove that a defendant acted 'intentionally, knowingly, or recklessly.'")).

approach, if it is possible to violate a statute with a mens rea of only recklessness, after *Borden*, that statute no longer qualifies as an ACCA predicate.

Further, many violent offenses that fail to specify a minimum requisite mens rea also no longer will qualify. Under the Model Penal Code, if no requisite minimum mens rea is specified for an offense, a minimum of recklessness is assumed.[40] Several states have based their criminal codes on the Model Penal Code;[41] thus, recklessness is the default minimum mens rea for criminal offenses in many of these states.[42] And in many states, some forms of second-degree murder and manslaughter fail to require a more culpable mental state than recklessness.[43]

Counting fewer violent offenses as ACCA predicates may be considered desirable to some, but if incapacitation is valued, eliminating violent predicates may not be the best place to begin ACCA reforms. People who have committed violent ACCA predicates recidivate more frequently than people who have committed only ACCA drug predicates.[44] In a study of ACCA offenders released in 2009, 2010, and 2011, over an eight-year follow-up period, people with three or more violent predicates were rearrested at a rate of 61.7%,[45] which is higher than the 49.3% recidivism rate for all federal offenders released in 2005.[46] People with one or two violent predicates (and one or more drug predicates) recidivated

40. MODEL PENAL CODE § 2.02 cmt. 5 (AM. L. INST. 1985).

41. Paul H. Robinson & Markus D. Dubber, *The American Model Penal Code: A Brief Overview*, 10 NEW CRIM. L. REV. 319, 326 (2007).

42. *See Borden*, 141 S. Ct. at 1845 (Kavanaugh, J., dissenting). Oregon, a state that has adopted the Model Penal Code almost in its entirety, specifies an even less culpable mental state as a default mens rea, criminal negligence: "Except as provided in ORS 161.105, if a statute defining an offense does not prescribe a culpable mental state, culpability is nonetheless required and is established only if a person acts intentionally, knowingly, recklessly or with criminal negligence." OR. REV. STAT. § 161.115(2) (2021).

43. *Borden*, 141 S. Ct. at 1856 (Kavanaugh, J., dissenting); *see, e.g.*, N.Y. PENAL LAW § 125.15 (McKinney 2022) ("A person is guilty of manslaughter in the second degree when . . . [h]e recklessly causes the death of another person . . . .").

44. Barrow, *supra* note 16 (manuscript at 48); U.S. SENT'G COMM'N, FEDERAL ARMED CAREER CRIMINALS: PREVALENCE, PATTERNS, AND PATHWAYS 42, 53–54, 57 (2021) https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2021/20210303_ACCA-Report.pdf [https://perma.cc/494G-LUCR]. The author is acknowledged for contributions to the development of this publication. *Id.* at 75.

45. Barrow, *supra* note 16 (manuscript at 48); U.S. SENT'G COMM'N, *supra* note 44, at 42, 54.

46. U.S. SENT'G COMM'N, RECIDIVISM AMONG FEDERAL OFFENDERS: A COMPREHENSIVE OVERVIEW 3, 5 (2016), https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2016/recidivism_overview.pdf [https://perma.cc/5W2U-C73H].

at a rate of 48.9%.[47] People with only drug predicates recidivated at a rate of 36.4%.[48]

Here is an example of a conduct-based approach in practice: A person may be charged under the ACCA for committing an unlawful weapons possession offense after committing three "violent felonies." In a bifurcated proceeding, first the jury would decide if the person committed the unlawful weapons possession offense. If the person were found guilty of the weapons offense, the prosecutor would then introduce evidence that the person committed three prior "violent felonies"—that is, committed the felonies in a violent manner, in accordance with the ACCA's definition of "violent felony" and the Supreme Court's definition of the force needed to meet the ACCA's definition.

The prosecutor could introduce documents from the prior convictions, such as the charging documents; jury instructions or the judge's formal rulings of law and findings of fact (to which the defendant assented); plea agreements or statements; transcripts of the colloquy between the judge and defendant in which the defendant confirmed the factual basis for the plea; stipulations; factual proffers; verdict forms; or any other documents that the presiding judge determined to be reliable and admissible. The prosecutor also could use traditional evidence such as physical evidence and witness testimony.

For example, one of the alleged prior "violent felonies" could be "attempted carjacking." Under the categorical approach, if there exists "a realistic possibility" the "attempted carjacking" statute could be violated without violence, the prior offense may not count as a "violent felony." Under this Article's conduct-based approach, however, the government could introduce the government's proffer from the plea hearing that describes the following:

> They see a family getting out of a Chevy Venture in Clayton County, Georgia, and as the family is getting out of their car, these two defendants along with their co-conspirators go up to the family and demand the keys to the car and demand the car. Now, they have a baseball bat and guns with them. There's a juvenile, a 13-year-old female, who is part of that family group of victims. They hit that juvenile in the mouth with a baseball bat. The damage to her I am sure will be addressed at sentencing. It was not—she did not go to the hospital. Let me say that.
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> They are demanding the keys. Somebody comes out of the apartment complex where this is happening and that person has

47. Barrow, *supra* note 16 (manuscript at 48); U.S. SENT'G COMM'N, *supra* note 44, at 42, 54.

48. Barrow, *supra* note 16 (manuscript at 48); U.S. SENT'G COMM'N, *supra* note 44, at 42, 57.

> a gun. He then confronts the assailants . . . . They flee, not taking the Chevy Venture, which is why it is an attempted carjacking.
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> The government would show that the Chevy Venture traveled in interstate commerce, that it was not made in the State of Georgia. The government would prove it was these defendants not only through their confessions as to this event, also through the victims' testimony. They do I.D. the defendants in this particular case.
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> On the way out of the apartment complex [the coconspirator] has an AK-47 style assault rifle and he then discharges that gun several times towards the victim family, the guy who came to rescue them, who was armed, and the car . . . .[49]

The prosecutor also could introduce the transcript of the plea colloquy in which the accused person stated that she had no "material disagreement with what the government sa[id] it could prove," pled guilty, acknowledged that her pleas were voluntary, and explained that she was so pleading because she was "in fact guilty as charged in the criminal information."[50]

The defense could utilize any of this evidence. The defense, however, could not attempt to retry the prior offenses. The ACCA applies to a person who "has three previous convictions,"[51] so an accused person is free to argue that they were not previously convicted. They may not relitigate the findings of the jury that convicted them of the prior offenses, however. Most likely, any dispute would revolve around whether the prior conviction could serve as an ACCA predicate.

The jury would be instructed in ACCA's definition of "violent felony": conduct that "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, [or] involves use of explosives."[52] Additionally, the judge would provide the jury with the Supreme Court's definition of "force" as "violent force—that is, force capable of causing

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49. These examples of a factual proffer and plea colloquy come from *Ovalles v. United States*, 905 F.3d 1231, 1235 (11th Cir. 2018). *Ovalles*, however, did not concern a statute dealing with prior offenses.

50. *Id.* at 1235 (alteration in original).

51. In the case of a person who violates section 922(g) of this title and has three previous convictions by any court referred to in section 922(g)(1) of this title for a violent felony or a serious drug offense, or both, committed on occasions different from one another, such person shall be fined under this title and imprisoned not less than fifteen years . . . .

18 U.S.C. § 924(e)(1).

52. *Id.* § 924(e)(2)(B).

physical pain or injury to another person."[53] The jury would deliberate and decide if the accused had committed three felonies in violent ways in accordance with the text of the ACCA. After the jury decided the applicability, the judge would sentence the convicted person, applying ACCA's mandatory minimum sentence as under the status quo.

Much confusion exists in the scholarship on this topic. Other pieces outline potential solutions. Some advocate a "conduct" or "fact-based" approach but still rely on judges, using limited evidence, to adjudicate recidivist statutes.[54] Others see no path forward for change unless Congress rewrites statutes like the ACCA.[55] This Article builds on this scholarship.

Part I argues that the Sixth Amendment requires that the fact of prior conviction be proven to a jury beyond a reasonable doubt and that the Supreme Court case purportedly suggesting otherwise, *Almendarez-Torres v. United States*, should be reconsidered because the Court has overruled some of the key precedents on which it relied. Part II outlines the categorical approach and the conduct-based approach that this Article advocates. Part III traces the shift from jury sentencing to judicial sentencing in our country. It then goes on to explain why jury adjudication is the key to using a conduct-based approach for recidivist statutes, in part because jury adjudication complies with the Sixth Amendment and also in light of the fact that the arguments for judicial sentencing apply with less force to mandatory-minimum statutes and conduct-based assessments. Part IV addresses potential problems with jury adjudication and explains why jury adjudication could benefit defendants.

The frustration of the sitting Justices of the Supreme Court has reached a near boiling point. In 2016 Justice Alito opined that "[a] real-world approach would avoid the mess that today's decision will produce."[56] In 2019 Justice Thomas urged his colleagues to consider "whether [the categorical] approach is actually required in the first place

53. *Johnson v. United States*, 559 U.S. 133, 140 (2010) (emphasis omitted).

54. *See, e.g.*, Sheldon A. Evans, *Categorical Nonuniformity*, 120 COLUM. L. REV. 1771 (2020) [hereinafter Evans, *Categorical Nonuniformity*] (comparing different approaches, including a conduct-based approach); Sheldon A. Evans, *Punishing Criminals for Their Conduct: A Return to Reason for the Armed Career Criminal Act*, 70 OKLA. L. REV. 623 (2018) [hereinafter Evans, *Punishing Criminals for Their Conduct*] (advocating for a judicially adjudicated conduct-based approach, using the *Shepard* documents, for determining ACCA applicability).

55. *See, e.g.*, G. Kirk Smith, Note, *Categorically Wrong: Judicial Interpretation of the Armed Career Criminal Act Has Left the Act Confusing and Difficult to Apply, but Congress Can Fix It*, 57 U. LOUISVILLE L. REV. 157 (2018); Matthew Kopp, Note, *Erased: State Burglary Convictions as Violent Felonies Under the Armed Career Criminal Act*, 93 N.D. L. REV. 425 (2018).

56. *Mathis v. United States*, 136 S. Ct. 2243, 2269 (2016) (Alito, J., dissenting).

for ACCA's enumerated-offenses clause."[57] Now may be an opportune moment for a new conduct-based approach that gives juries a role in adjudication.

I. CONSTITUTIONAL REQUIREMENTS

A. Almendarez-Torres v. United States *Was Wrongly Decided*

This Article contends that when it comes to recidivist statutes, the Sixth Amendment requires that the government prove the fact of prior conviction to a jury beyond a reasonable doubt. This issue has never been squarely before the Supreme Court, but dicta does suggest the permissibility of judicial determination of such convictions. *Almendarez-Torres v. United States* is the case that the Supreme Court, in later opinions, has stated *suggests* that judges may adjudicate the fact of a prior conviction. That proposition is debatable, however. Further, *Almendarez-Torres* was wrongly decided and relied on precedent that has now been overruled.

In *Almendarez-Torres*, the petitioner pled guilty to an indictment charging him with being "'found in the United States . . . after being deported' without the 'permission and consent of the Attorney General' in 'violation of . . . Section 1326.'"[58] At the petitioner's plea colloquy, he also admitted that his deportation took place "'pursuant to' three earlier 'convictions' for aggravated felonies."[59] Subsection (a) of Section 1326 defines the crime and authorizes a maximum sentence of two years' imprisonment.[60]

Subsection (b)(2) of the same section authorizes a maximum sentence of twenty years' imprisonment if the initial "deportation was subsequent to a conviction for commission of an aggravated felony."[61] The court sentenced the petitioner to eighty-five months' imprisonment.[62] The issue was whether subsection (b)(2) "defines a separate crime" and thus requires the government to identify that additional element—a prior aggravated felony—in an indictment or "simply authorizes an enhanced penalty," which would not require the indictment to identify the aggravated felony.[63] The Supreme Court held that subsection (b)(2) "simply authorizes an

57. *Quarles v. United States*, 139 S. Ct. 1872, 1881 (2019) (Thomas, J., concurring).

58. *Almendarez-Torres v. United States*, 523 U.S. 224, 227 (1998) (quoting Joint Appendix at 3, *id.* (No. 96-6839), 1997 WL 3693418, at *3AA).

59. *Id.* (quoting Joint Appendix, *supra* note 58, at 10–14).

60. 8 U.S.C. § 1326(a) (1994).

61. *Id.* § 1326(b)(2).

62. *Almendarez-Torres*, 523 U.S. at 227.

63. *Id.* at 226.

enhanced penalty" and thus "neither the statute nor the Constitution requires the Government to charge the factor that it mentions, an earlier conviction, in the indictment.[64] The Court rejected petitioner's argument "that the Constitution requires Congress to treat recidivism as an element of the offense."[65]

The Constitution requires that any element of a crime be (1) "charged in the indictment [at the federal level; (2)] submitted to a jury, and [(3)] proven by the Government beyond a reasonable doubt."[66] In *McMillan v. Pennsylvania*,[67] the Supreme Court introduced the concept that some facts affecting a sentence are not "elements" but rather are "sentencing factors" not subject to the same constitutional strictures as "elements."[68] In *In re Winship*, the Court held that the Due Process Clause of the Fourteenth Amendment protects an accused person "against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged."[69] The case, however, did not address the questions of whether or when the government must treat a certain fact as an element of a crime as opposed to a sentencing factor.

Five years later, in *Mullaney v. Wilbur*,[70] the Court extended *In re Winship*'s strictures to not only the determination of guilt, but also to sentence length.[71] The *Mullaney* Court explained that

> "if *Winship* were limited to those facts that constitute a crime as defined by state law, a State could undermine many of the interests that decision sought to protect" just by redefining "the elements that constitute[ed] different crimes, characterizing them as factors that bear solely on the extent of punishment."[72]

The *Almendarez-Torres* Court conceded that *Mullaney* "provide[d the] petitioner with stronger support" than *In re Winship* and that

> [r]ead literally, [*Mullaney*'s] language . . . suggests that Congress cannot permit judges to increase a sentence in light of recidivism, or any other factor, not set forth in an indictment and

64. *Id.* at 226–27.

65. *Id.* at 239.

66. *Jones v. United States*, 526 U.S. 227, 232 (1999).

67. 447 U.S. 79 (1986).

68. *Id.* at 85–86; *Apprendi v. New Jersey*, 530 U.S. 466, 485 (2000) ("It was in *McMillan v. Pennsylvania* that this Court, for the first time, coined the term 'sentencing factor' to refer to a fact that was not found by a jury but that could affect the sentence imposed by the judge.") (citation omitted).

69. *In re Winship*, 397 U.S. 358, 364 (1970).

70. 421 U.S. 684 (1975).

71. *See Almendarez-Torres v. United States*, 523 U.S. 224, 251 (1998) (Scalia, J., dissenting) (citing *Mullaney*, 421 U.S. at 698–99).

72. *Id.* at 240 (quoting *Mullaney*, 421 U.S. at 698) (alteration in original).

> proved to a jury beyond a reasonable doubt . . . [and] that the Constitution requires that most, if not all, sentencing factors be treated as elements.[73]

The *Almendarez-Torres* Court explained that the petitioner needed to rely primarily on *McMillan v. Pennsylvania*.[74] In *McMillan*, a Pennsylvania statute required a judge to impose a minimum sentence of five years' imprisonment for "visibly possessing a firearm."[75] The *McMillan* Court held that the Constitution did not require the State to treat "visibly possessing a firearm" as an element of the crime.[76] While the dissenters accused the majority of selectively culling factors from the discussion, the *Almendarez-Torres* Court identified five

> features of the case upon which the [*McMillan*] Court's conclusion arguably turned . . . : (1) that the statute plainly "does not transgress the limits expressly set out in *Patterson*[]"; (2) that the defendant (unlike *Mullaney*'s defendant) did not face "'a differential in sentencing ranging from a nominal fine to a mandatory life sentence[]'"; (3) that the statute did not "alte[r] the maximum penalty for the crime" but "operates solely to limit the sentencing court's discretion in selecting a penalty within the range already available to it[]"; (4) that the statute did not "create[e] a separate offense calling for a separate penalty[]"; and (5) that the statute gave "no impression of having been tailored to permit the visible possession finding to be a tail which wags the dog of the substantive offense," but, to the contrary, "simply took one factor that has always been considered by sentencing courts to bear on punishment . . . and dictated the precise weight to be given that factor[.]"[77]

The *Almendarez-Torres* Court asserted that for most of the factors, the case "resembles *McMillan*," but the third factor differed because the statute at issue did "alte[r] the maximum penalty for the crime."[78] The Court also noted, presumably related to the second factor, that the statute "create[d] a wider range of appropriate punishments than did the statute in

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73. *Id.* at 240–41.

74. *Id.* at 242.

75. *Id.* (quoting 42 PA. CONS. STAT. § 9712 (1982)).

76. *Id.*

77. *Id.* at 242–43 (citations omitted) (quoting *McMillan v. Pennsylvania*, 477 U.S. 79, 87–90 (1986)).

78. *Id.* at 243 (alteration in original) (quoting *McMillan*, 477 U.S. at 87).

McMillan."[79] The Court then went on to explain why those differences were constitutionally insignificant.[80]

The Court began the explanation by asserting, "First, the sentencing factor at issue here—recidivism—is a traditional, if not the most traditional, basis for a sentencing court's increasing an offender's sentence."[81] At the outset, one might wonder what this assertion has to do with the second and third *McMillan* factors. In fact, the dissent found it "impossible to understand how *McMillan* could mean one thing in a later case where recidivism is at issue, and something else in a later case where some other sentencing factor is at issue."[82] Ironically, the dissenters in *Jones*, consisting of four of the five Justices from the *Almendarez-Torres* majority, agreed with the *Almendarez-Torres* dissenters on this point.[83]

Second, the Court's assertion proves too much. While recidivism may be a traditional basis for increasing a sentence, as the *Almendarez-Torres* dissent points out, many other factors are as well.[84] A judge is likely to increase a sentence—and may be advised to by the Federal Sentencing Guidelines—if a crime is "committed with a firearm [as in *McMillan*], or in the course of another felony"[85] or results in "serious bodily injury," as in *Jones*.[86] This likelihood does not make "armed robbery and felony murder . . . sentencing enhancements rather than separate crimes."[87] Nor did this likelihood cause the *Jones* Court to allow "resulting in 'serious bodily injury'" to be a sentencing factor.[88] Instead, the Court refused to exempt that provision from the requirements of notice, jury submission, and proof beyond a reasonable doubt.[89]

Finally, whether recidivism is a "traditional" sentencing factor is the wrong question.[90] To understand the meaning of the Sixth Amendment and its implications for recidivism, what matters more is whether recidivism "traditional[ly]" has been charged in indictments and decided by juries. The *McMillan* Court hinted at the relevance of this latter inquiry by noting

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79. *Id.*
80. *Id.* at 243–46.
81. *Id.* at 243.
82. *Id.* at 258 (Scalia, J., dissenting).
83. *Jones v. United States*, 526 U.S. 227, 270 (1999) (Kennedy, J., dissenting).
84. *See Almendarez-Torres*, 523 U.S. at 260–61 (Scalia, J., dissenting).
85. *Id.* at 261 (Scalia, J., dissenting).
86. *Jones*, 526 U.S. at 257 (Kennedy, J., dissenting).
87. *Almendarez-Torres*, 523 U.S. at 261 (Scalia, J., dissenting).
88. *Jones*, 526 U.S. at 235–36.
89. *Id.* at 251–52.
90. Justice Thomas, who joined the *Almendarez-Torres* majority, now believes this is so. *Apprendi v. New Jersey*, 530 U.S. 466, 520 (2000) (Thomas, J., concurring) ("[O]ne of the chief errors of *Almendarez-Torres*—an error to which I succumbed—was to attempt to discern whether a particular fact is traditionally (or typically) a basis for a sentencing court to increase an offender's sentence.").

that "petitioners do not contend that the particular factor made relevant [by the statute] . . . has historically been treated 'in the Anglo-American legal tradition' as requiring proof beyond a reasonable doubt."[91] Many state supreme courts have held that under their state constitutions or as a matter of common law, courts must treat prior offenses as elements of the underlying offense.[92]

The dissenters pointed out that at common law, the fact of a prior conviction had to be charged in the same indictment as the underlying crime and submitted to the jury for determination.[93] As late as 1965, juries in all but eight states adjudicated prior offenses.[94]

Moreover, to support its assertion that recidivism is a "traditional" sentencing factor, the Court cited U.S. Sentencing Guidelines sections 4A1.1 and 4A1.2[95] as "requiring sentencing court[s] to consider [a]

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91. *McMillan v. Pennsylvania*, 477 U.S. 79, 90 (1986) (quoting *Patterson v. New York*, 432 U.S. 197, 226 (1977) (Powell, J., dissenting)).

92. For rulings under state constitutions, see, for example, *State v. McClay*, 78 A.2d 347, 353 (Me. 1951); *Tuttle v. Commonwealth*, 68 Mass. (2 Gray) 505, 506 (1854); *State v. Furth*, 104 P.2d 925, 933 (Wash. 1940); *State ex rel. Lockmiller v. Mayo*, 101 So. 228, 230 (Fla. 1924); *Roberson v. State*, 362 P.2d 1115, 1119 (Okla. Crim. App. 1961). For rulings as a matter of common law, see, for example, *People ex rel. Cosgriff v. Craig*, 88 N.E. 38, 39–40 (N.Y. 1909); *People v. McDonald*, 206 N.W. 516, 519 (Mich. 1925); *State v. Smith*, 106 N.W. 187, 188 (Iowa 1906) ("By the uniform current authority, the fact of the prior convictions is to be taken as part of the offense instantly charged, at least to the extent of aggravating it and authorizing an increased punishment."); *State v. Pennye*, 427 P.2d 525, 526–27 (Ariz. 1967); *State v. Waterhouse*, 307 P.2d 327, 329–30 (Or. 1957); *Robbins v. State*, 242 S.W.2d 640, 643–44 (Ark. 1951); *State v. Eichler*, 83 N.W.2d 576, 578–79 (Iowa 1957).

93. *Almendarez-Torres v. United States*, 523 U.S. 224, 260 (1998) (Scalia, J., dissenting) (first citing *Spencer v. Texas*, 385 U.S. 554, 566 (1967); then citing *Massey v. United States*, 281 F. 293, 297 (8th Cir. 1922); then citing *Singer v. United States*, 278 F. 415, 420 (3d Cir. 1922); and then citing *People v. Sickles*, 51 N.E. 288, 289 (N.Y. 1898)); *see also People v. Reese*, 179 N.E. 305, 308 (N.Y. 1932) (citations omitted) ("The answer made to the 'accusation' by the verdict of the jury may mean that the defendant will be a free man after a brief term of confinement, or may mean, on the other hand, that he will be a prisoner for life. If the previous convictions had been charged in an indictment, there is no doubt that they must have been proved beyond a reasonable doubt, for they would then have been elements affecting the grade of the offense. We find no token of a purpose to abate the measure of the proof upon an inquiry as to the same elements after guilt has been adjudged. The genius of our criminal law is violated when punishment is enhanced in the face of a reasonable doubt as to the facts leading to enhancement. If that genius is to be expelled, there should be a clear announcement of the purpose to drive it forth from the dwelling it has inhabited so long."); Nancy J. King, *Sentencing and Prior Convictions: The Past, the Future, and the End of the Prior-Conviction Exception to* Apprendi, 97 MARQ. L. REV. 523, 552 (2014) ("As for charging practice, in the late 1700s, there appear to be no decisions departing from the common law rule that required the initial charge to allege any prior offense that increased punishment.").

94. *See* Harold Dubroff, Note, *Recidivist Procedures*, 40 N.Y.U. L. REV. 332, 333, 347 (1965).

95. U.S. SENT'G GUIDELINES MANUAL §§ 4A1.1–2 (U.S. SENT'G COMM'N 1997).

defendant's prior record in every case."[96] The U.S. Sentencing Guidelines, however, no longer "require" sentencing courts to do anything.[97] In *United States v. Booker*,[98] the Supreme Court held that for the Guidelines to be anything but "advisory" was constitutionally impermissible.[99]

The Court went on to explain that "[c]onsistent with this tradition" of treating recidivism as a sentencing factor, the Court previously held "that a State need *not* allege a defendant's prior conviction in the indictment or information that alleges the elements of an underlying crime, even though the conviction was 'necessary to bring the case within the statute.'"[100] The Court cited *Graham v. West Virginia*,[101] decided in 1912, in which the Court reasoned that recidivism "does not relate to the commission of the offense, but goes to the punishment only."[102] The Court also cited *Oyler v. Boles*,[103] decided in 1962, for the proposition that "due process does not require advance notice that trial for [the] substantive offense will be followed by accusation that the defendant is a habitual offender"[104] and quoted *Parke v. Raley*,[105] decided in 1992: "[A] charge under a recidivism statute does not state a separate offense, but goes to punishment only."[106]

The Court, however, had to admit that "these precedents do not foreclose petitioner's claim (because, for example, the state statute at issue in *Graham* and *Oyler* provided for a jury determination of disputed prior convictions)."[107] In both *Graham* and *Oyler*, the issue was whether a state's failure to allege a prior conviction in the initial indictment with the underlying offense—and its decision instead to charge and try the conviction separately—violated the Fourteenth Amendment's Due Process Clause.[108] *Graham* also considered whether this procedure violated the Double Jeopardy Clause.[109]

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96. *Almendarez-Torres*, 523 U.S. at 243.

97. It may have been an overstatement to say the U.S. Sentencing Guidelines required sentencing courts to do anything in the first place. Even before *Booker*, the Guidelines were never truly mandatory, only presumptive. Paul J. Hofer, *Immediate and Long-Term Effects of* United States v. Booker*: More Discretion, More Disparity, or Better Reasoned Sentences?*, 38 ARIZ. ST. L.J. 425, 437 (2006).

98. 543 U.S. 220 (2005).

99. *Id.* at 233.

100. *Almendarez-Torres*, 523 U.S. at 243 (quoting *Graham v. West Virginia*, 224 U.S. 616, 624 (1912)).

101. 224 U.S. 616.

102. *Almendarez-Torres*, 523 U.S. at 244 (emphasis omitted) (quoting *Graham*, 224 U.S. at 629).

103. 368 U.S. 448 (1962).

104. *Almendarez-Torres*, 523 U.S. at 244 (citing *Oyler*, 368 U.S. at 452).

105. 506 U.S. 20 (1992).

106. *Id.* (alteration in original) (quoting *Raley*, 506 U.S. at 27).

107. *Id.*

108. *Graham v. West Virginia*, 224 U.S. 616, 619 (1912); *Oyler*, 368 U.S. at 449.

109. *Graham*, 224 U.S. at 619.

Conversely, the *Almendarez-Torres* Court construed the Fifth Amendment's Indictment Clause, which is inapplicable to the states.[110] *Graham* and *Oyler* were decided before the Court incorporated the Sixth Amendment's requirements of a right to reasonable notice[111] and to a jury trial[112] against the states. A justification exists for drawing a distinction between double jeopardy protection and the right to jury trial, on the one hand, and proof beyond a reasonable doubt (with regard to recidivism) on the other. Under the common law and early American practice, prior offenses could be charged and tried separately from the underlying offense,[113] but a judge could not adjudicate such offenses under a preponderance-of-the-evidence standard.[114]

Back when the Court decided *Graham* and *Oyler*, there was a policy reason for treating the right to have a prior conviction alleged in the original indictment differently from the right to a jury trial employing a reasonable doubt standard. Surely, in 1912, when *Graham* was decided, but also in 1962, when *Oyler* was decided, identification was much more difficult than it is today. A delay in determining whether an accused person committed previous crimes was more understandable in a world before electronic records and the FBI's Integrated Automatic Fingerprint Identification System.[115]

Despite the differences between the cases, the Court sought refuge in the "longstanding tradition," articulated in *Graham* and *Raley*, "of treating recidivism as 'go[ing] to the punishment only.'"[116] The problem is that *Mullaney v. Wilbur* erased any distinction between facts "relat[ing] to the commission of the offense" and "go[ing] to the punishment only," at least for the purposes of the requirements of jury adjudication and proof beyond a reasonable doubt.[117] The *Mullaney* Court held that the requirements of jury adjudication and proof beyond a reasonable doubt applied to facts that were "not general elements of the crime . . . [but bore] only on the appropriate punishment category."[118]

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110. *See Almendarez-Torres*, 523 U.S. at 226–27 ("[N]either the statute nor the Constitution requires the Government to charge . . . an earlier conviction[] in the indictment."); *see also* U.S. CONST. amend. V.

111. *See Washington v. Texas*, 388 U.S. 14, 18 (1967).

112. *See Duncan v. Louisiana*, 391 U.S. 145, 149 (1968).

113. *Almendarez-Torres*, 523 U.S. at 259–60 (Scalia, J., dissenting) (first citing *Spencer v. Texas*, 385 U.S. 554, 566–67 (1967); then citing *Graham*, 224 U.S. at 623, 625–26, 631; and then citing *McDonald v. Massachusetts*, 180 U.S. 311, 312–13 (1901)).

114. *Id.* at 251, 258–60 (Scalia, J., dissenting).

115. *See* King, *supra* note 93, at 561.

116. *Almendarez-Torres*, 523 U.S. at 244 (alteration in original) (quoting *Graham*, 224 U.S. at 629).

117. *See Graham*, 224 U.S. at 629; *Mullaney v. Wilbur*, 421 U.S. 684, 699, 703–04 (1975).

118. *Mullaney*, 421 U.S. at 697–99.

B. Any Basis upon Which Almendarez-Torres *Rested Has Been Eroded*

The *Almendarez-Torres* Court relied most heavily on *McMillan v. Pennsylvania*, which the Court overruled in *Alleyne v. United States*.[119] The *Almendarez-Torres* Court stated that because of the *McMillan* holding, the petitioner had to "concede that 'firearm possession' (in respect to a mandatory minimum sentence) does not violate" "'the constitutional limits' of a legislature's power to define the elements of an offense"; the Court also stated that the petitioner "must argue that, nonetheless, 'recidivism' (in respect to an authorized maximum) does violate those limits."[120] The Court's overruling of *McMillan* turned the tables. Now the Court is in the position of having to justify why recidivism is different.

The Court stated that the rule for which petitioner essentially advocated was "that any significant increase in a statutory maximum sentence would trigger a constitutional 'elements' requirement."[121] The Court remarked "that such a rule would seem anomalous in light of existing case law that permits a judge, rather than a jury, to determine the existence of factors that can make a defendant eligible for the death penalty, a punishment far more severe than that faced by petitioner here."[122] The Court, however, overruled such precedent in *Ring v. Arizona*.[123]

C. No Recidivism Exception Should Exist

Almendarez-Torres is considered the source of the recidivism exception to the rule that juries must decide facts that alter the minimum or maximum sentences authorized for crimes. The exception itself, however, is dicta: *Almendarez-Torres* did not concern a recidivist statute.[124] Ironically, all of the Justices in the *Almendarez-Torres* majority have since rejected such an exception.

At the outset, *Almendarez-Torres* concerned only the right to have a prior offense contained in the indictment. The petitioner pled guilty[125] and

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119. 570 U.S. 99 (2013); *see United States v. Haymond*, 139 S. Ct. 2369, 2378 (2019) (recognizing *Alleyne* as overruling *McMillan*).

120. *Almendarez-Torres*, 523 U.S. at 242 (quoting *McMillan v. Pennsylvania*, 477 U.S. 79, 86 (1986)).

121. *Id.* at 247.

122. *Id.* (first citing *Walton v. Arizona*, 497 U.S. 639, 647 (1990), *overruled in part by Ring v. Arizona*, 536 U.S. 584 (2002); then citing *Hildwin v. Florida*, 490 U.S. 638, 640–41 (1989) (per curiam); and then citing *Spaziano v. Florida*, 468 U.S. 447, 465 (1984)).

123. 536 U.S. 584.

124. *See Almendarez-Torres*, 523 U.S. at 239–47.

125. *Id.* at 227.

thus likely had no reason to contest the lack of jury adjudication or the standard of proof. The Court in *Jones v. United States* found this distinction significant in asserting that *Almendarez-Torres* was not controlling because *Jones* also concerned the Sixth Amendment right to jury trial.[126] Additionally, the *Almendarez-Torres* Court clarified that it "express[ed] no view on whether some heightened standard of proof might apply to sentencing determinations that bear significantly on the severity of sentence."[127]

To be sure, there exists language in the *Almendarez-Torres* majority opinion suggesting that the decision turned on the fact that what was excluded from the indictment was a prior offense. The Court began its statutory analysis by stating, "With recidivism as the subject matter in mind, we turn to the statute's language."[128] The Court began its constitutional analysis by noting, "First, the sentencing factor at issue here—recidivism—is a traditional, if not the most traditional, basis for a sentencing court's increasing an offender's sentence."[129] The Court distinguished the case from prior precedent "in light of the particular sentencing factor at issue in this case—recidivism."[130]

In a later case, *Jones v. United States*, the Court held that a carjacking statute established "separate offenses by the specification of distinct elements, each of which must be charged by indictment, proven beyond a reasonable doubt, and submitted to a jury for its verdict."[131] The Court articulated its rule, in a footnote—oddly—that "under the Due Process Clause of the Fifth Amendment and the notice and jury trial guarantees of the Sixth Amendment, any fact (other than prior conviction) that increases the maximum penalty for a crime must be charged in an indictment, submitted to a jury, and proven beyond a reasonable doubt."[132] Establishing a caveat to this rule, the Court explained that its precedents "suggest[ed] rather than establish[ed] this principle."[133]

The *Jones* Court distinguished *Almendarez-Torres* in part because *Almendarez-Torres* concerned only the right to have a fact included in an

126. *Jones v. United States*, 526 U.S. 247, 248–49 (1999). However, the dissenters disagreed, arguing there was no reason that the requirements for inclusion in an indictment and for jury adjudication would be different. *Id.* at 254, 268–69 (Kennedy, J., dissenting).

127. *Almendarez-Torres*, 523 U.S. at 248.

128. *Id.* at 230.

129. *Id.* at 243.

130. *Id.* at 245.

131. *Jones*, 526 U.S. at 252.

132. *Id.* at 243 n.6. The majority believed it had articulated this rule "plainly enough" in the text of the opinion but included the footnote because the "dissent repeatedly chide[d the majority] for failing to state precisely enough the principle animating [its] view that the [statute] . . . may violate the Constitution." *Id.*

133. *Id.*

indictment, not the jury trial right or the burden of proof. The *Jones* Court, however, focused mostly on the constitutional significance the *Almendarez-Torres* Court placed on the fact that the sentencing factor was recidivism. The *Jones* Court even went a step further than *Almendarez-Torres* and provided additional reasoning for this significance, explaining,

> One basis for that possible constitutional distinctiveness [of recidivism] is not hard to see: unlike virtually any other consideration used to enlarge the possible penalty for an offense, and certainly unlike the factor before us in this case, a prior conviction must itself have been established through procedures satisfying the fair notice, reasonable doubt, and jury trial guarantees.[134]

The *Jones* dissenters, however—consisting of four of the five Justices from the *Almendarez-Torres* majority[135]—explained that recidivism was not constitutionally significant in *Almendarez-Torres*. The dissenters explained that the history of using recidivism as a basis to increase an offender's sentence was simply an example used to refute the petitioner's claim that all facts that increase a sentence must be considered elements of the offense.[136] The dissenters agreed with the *Almendarez-Torres* dissent that "there is no rational basis for making recidivism an exception."[137]

Oddly, four of the five Justices who joined the *Jones* majority appear to have rejected the recidivism exception in the past or did so after the case. Justices Souter and Ginsburg joined Justice Scalia's dissent in *Monge v. California*[138] (decided before *Jones*) asserting that *Almendarez-Torres* holding that "'recidivism' findings do not have to be treated as elements of the offense, even if they increase the maximum punishment to which the defendant is exposed," was "a grave constitutional error affecting the most fundamental of rights."[139] After *Jones*, Justice Thomas, concurring

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134. *Id.* at 249.

135. The *Almendarez-Torres* majority was comprised of Chief Justice Rehnquist and Justices Breyer, O'Connor, Kennedy, and Thomas. *Almendarez-Torres v. United States*, 523 U.S. 224, 226 (1998). The *Jones* dissenters were Chief Justice Rehnquist and Justices Kennedy, O'Connor, and Breyer. *Jones*, 526 U.S. at 229.

136. *Jones*, 526 U.S. at 269 (Kennedy, J., dissenting) ("In our constitutional analysis we invoked the long history of using recidivism as a basis for increasing an offender's sentence to illustrate the novel and anomalous character of the petitioner's proposed constitutional rule—*i.e.*, that under *McMillan v. Pennsylvania* any factor that increases the maximum penalty for a crime must be deemed an element of the offense.").

137. *Id.* (Kennedy, J., dissenting) (emphasis omitted) (quoting *Almendarez-Torres*, 523 U.S. at 258 (Scalia, J., dissenting)).

138. 524 U.S. 721 (1998).

139. *Id.* at 741 (Scalia, J., dissenting) (emphasis omitted).

in *Apprendi v. New Jersey*[140] and joined by Justice Scalia, professed that "the fact of prior conviction is an element under a recidivism statute."[141] With the same breakdown of Justices in the majority and dissent as in *Jones*, the *Apprendi* Court reiterated the *Jones* rule that "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt."[142] As in *Jones*, however, the statute at issue did not concern prior offenses,[143] so the recidivism exception remained dicta. The Court in *Alleyne v. United States* declined to revisit the recidivism exception because the parties did not contest it.[144]

II. A CONDUCT-BASED APPROACH

A. The Categorical Approach

Studies show that recidivists are more likely to commit a criminal offense than the general population.[145] Federal criminal and immigration statutes and the U.S. Sentencing Guidelines impose enhanced penalties for previous violations of state and federal law.[146] How does a court determine what prior conduct justifies these penalties? The Supreme Court has held that in ACCA and the Immigration and Nationality Act (INA) cases, courts must apply "a formal categorical approach, looking only to the statutory definitions of the prior offenses, and not to the particular facts underlying those convictions."[147] Similarly, lower courts have applied this categorical approach to the Career Offender provision of the U.S. Sentencing Guidelines.[148]

The categorical approach is applied in two different circumstances: elements clauses and enumerated offense clauses. An example of an elements clause is the ACCA provision that a "violent felony" "has as an element the use, attempted use, or threatened use of physical force against the person of another."[149] Under the categorical approach, to determine if an offender has committed a "violent felony" or a "crime of violence," a

140. 530 U.S. 466 (2000).

141. *Id.* at 521 (Thomas, J., concurring).

142. *Id.* at 490.

143. *See id.* at 468.

144. *Alleyne v. United States*, 570 U.S. 99, 111 n.1 (2013).

145. *See Ovalles v. United States*, 905 F.3d 1231, 1255 (11th Cir. 2018); *see also* U.S. SENT'G COMM'N, *supra* note 1, and accompanying parenthetical.

146. *See generally* U.S. SENT'G COMM'N, FEDERAL SENTENCING: THE BASICS (2018).

147. *Taylor v. United States*, 495 U.S. 575, 600 (1990).

148. Joshua Rothenberg, *Criminal Certification: Restoring Comity in the Categorical Approach*, 51 U. MICH. J.L. REFORM 241, 265–66 (2017).

149. 18 U.S.C. § 924(e)(2)(B)(i).

judge presumes any conviction "rested upon . . . the least of th[e] acts"[150] or the "minimum conduct"[151] criminalized by the statute. The judge then "decide[s] if the least of the acts criminalized includes the use, attempted use, or threatened use of physical force against another person."[152] If so, the conviction is a predicate offense.[153] In other words, if, under the text or caselaw, a "realistic probability"[154] exists that the statute could be violated without using, attempting to use, or threatening to use physical force, the conviction under that statute fails to serve as a predicate offense. This is true even if the defendant actually violated the statute by using force.[155]

In addition to the elements clause described in the previous paragraph, the ACCA also enumerates three "violent felon[ies]": "any crime punishable by imprisonment for a term exceeding one year [that] . . . is burglary, arson, or extortion."[156] Congress, however, declined to define any of these offenses. To determine if an offender has committed one of these enumerated offenses, a court first settles on a "generic" definition of the offense based on the majority of state definitions of the offense at the time of the ACCA's enactment.[157] Then, as with an elements clause, the judge determines the "minimum conduct" criminalized by the statute under which the defendant was convicted.[158] If the "minimum conduct" satisfies the elements of the "generic" definition, the conviction serves as a predicate offense.[159]

If a "realistic probability" exists that the statute could be violated in a way that fails to satisfy the "generic" definition, it fails to count as a predicate offense.[160] The statute fails to count even if the defendant's actual conduct satisfied the "generic" definition.[161] How the state labeled the offense is also irrelevant.[162]

For example, in *Taylor v. United States*, the Supreme Court held that "the generic, contemporary meaning of burglary contains at least the following elements: an unlawful or unprivileged entry into, or remaining

150. *Esquivel-Quintana v. Sessions*, 137 S. Ct. 1562, 1568 (2017) (alterations in original) (quoting *Johnson v. United States*, 559 U.S. 133, 137 (2010)).

151. *Moncrieffe v. Holder*, 569 U.S. 184, 191 (2013).

152. *United States v. Davis*, 875 F.3d 592, 597 (11th Cir. 2017).

153. *Taylor v. United States*, 495 U.S. 575, 590 (1990).

154. *Gonzales v. Duenas-Alvarez*, 549 U.S. 183, 193 (2007).

155. *See id.*

156. 18 U.S.C. § 924(e)(2)(B)(ii).

157. *See Taylor*, 495 U.S. at 598 ("We believe that Congress meant by 'burglary' the generic sense in which the term is now used in the criminal codes of most States.").

158. *Moncrieffe v. Holder*, 569 U.S. 184, 191 (2013).

159. *Id.*

160. *Duenas-Alvarez*, 549 U.S. at 193.

161. *Mathis v. United States*, 136 S. Ct. 2243, 2251 (2016).

162. *Id.*

in, a building or other structure, with intent to commit a crime."[163] Later, in *Mathis v. United States*,[164] the Supreme Court decided whether a defendant's conviction under Iowa's burglary statute served as an ACCA predicate.[165] While the generic definition of burglary requires unlawful entry into a "building or other structure," the Iowa statute prohibits unlawful entry into "any building, structure, *[or] land, water, or air vehicle*."[166] Though the sentencing judge, after inspection of the defendant's prior conviction records, had no reason to believe the defendant may have unlawfully entered a "land, water, or air vehicle," (as opposed to "a building or other structure"), the Supreme Court held that the defendant's conviction under the Iowa burglary statute failed to count as an ACCA predicate because the elements of Iowa burglary are broader than generic burglary.[167]

B. A Conduct-Based Approach in Practice

The categorical approach bewilders judges, clogs court dockets, and frustrates the goals underlying recidivist statutes, such as consistency, deterrence, and incapacitation of the most dangerous criminals. For these reasons, this Article advocates a shift to a conduct-based approach. For an elements clause, the prosecutor, using a variety of potential methods, would have to prove to a jury beyond a reasonable doubt that the defendant's actual conduct satisfied the clause. For example, for the ACCA's definition of "violent felony," the jury would decide if the defendant "use[d], attempted [to] use, or threatened [to] use . . . physical force against the person of another" in committing the offense.[168] For the ACCA enumerated-offense clause, the court would instruct the jury as to the elements of the generic offense. The prosecutor would have to prove to a jury beyond a reasonable doubt that during the offense, the defendant satisfied the elements of the generic offense.

III. THE JURY AS THE KEY TO ADJUDICATING RECIDIVIST STATUTES

While some advocate for jury sentencing in general, recidivist statutes may seem the least obvious place for implementation. Professor Douglas A. Berman and then Professor Stephanos Bibas (who now sits as a judge on the Third Circuit) argue that juries are most suited to adjudicate

163. *Taylor v. United States*, 495 U.S. 575, 598 (1990).

164. 136 S. Ct. 2243 (2016).

165. *See id.* at 2247–50.

166. *Id.* at 2250 (alterations in original) (first quoting *Taylor*, 495 U.S. at 598; and then quoting IOWA CODE § 702.12 (2013)).

167. *Id.* at 2250, 2257.

168. 18 U.S.C. § 924(e)(2)(B)(i).

offense characteristics and judges are best at determining *offender* characteristics.[169] Berman and Bibas contend that "[p]rior convictions are the consummate *offender* characteristic."[170] However, this Article argues that recidivist provisions and mandatory minimum statutes in particular, including the ACCA, are the best vehicles through which to begin bringing back juries' role in sentencing. Juries will ensure that a conduct-based approach for adjudicating past conduct is compatible with the Sixth Amendment. Using juries for mandatory minimum statutes in particular poses fewer problems than using juries to make discretionary sentencing decisions. Furthermore, the benefits juries bring to adjudication, such as their commonsense wisdom and community values, are particularly useful for recidivist statutes.

A. The Journey from Jury to Judicial Sentencing

In pre-colonial England, juries typically were not directly involved in sentencing, but for recidivist penalties "the fact of prior convictions had to be charged in the same indictment charging the underlying crime, and submitted to the jury for determination along with that crime."[171] Crimes prescribed particular sentences,[172] so in effect, by deciding what offense the accused committed, the jury was deciding the sentence. During colonial times, juries imposed sentences—including sentences for violations of habitual offender laws—due to colonists' distrust of judges.[173]

Jury sentencing remained the norm in the United States until the years following World War II.[174] A variety of factors effected the shift from jury to judicial sentencing. One factor was a belief that judicial sentencing was fairer to the accused because considering offender characteristics, such as prior offenses, prejudiced the jury. In *Spencer v. Texas*,[175] the Supreme Court opined that it "might well agree" that "leaving th[e] question [of recidivism] to the court" would be "faire[r]" than informing the jury of the

169. Douglas A. Berman & Stephanos Bibas, *Making Sentencing Sensible*, 4 OHIO ST. J. CRIM. L. 37, 56–57 (2006).

170. *Id.* at 57 (emphasis omitted).

171. *Almendarez-Torres v. United States*, 523 U.S. 224, 261 (1998) (Scalia, J., dissenting) (emphasis omitted) (collecting authorities).

172. Steven A. Hatfield, *Criminal Punishment in America: From the Colonial to the Modern Era*, 1 U.S. A.F. ACAD. J. LEGAL. STUD. 139, 140–45 (1990).

173. Nancy Gertner, *A Short History of American Sentencing: Too Little Law, Too Much Law, or Just Right*, 100 J. CRIM. L. & CRIMINOLOGY 691, 692 (2010); *see* Albert W. Alschuler & Andrew G. Deiss, *A Brief History of the Criminal Jury in the United States*, 61 U. CHI. L. REV. 867, 871–77 (1994) (reviewing jury resistance to the enforcement of certain laws and judicial decisions).

174. Morris B. Hoffman, *The Case for Jury Sentencing*, 52 DUKE L.J. 951, 965–66 (2003).

175. 385 U.S. 554 (1967).

defendant's criminal history.[176] In concurrence, Justice Stewart wrote that "[i]f the Constitution gave [him] a roving commission to impose upon the criminal courts of [the states his] own notions of enlightened policy, [he] would not join the [majority] opinion" upholding jury determinations of recidivism because other "recidivist procedures . . . are far superior."[177] Academics argued similarly.[178]

Another factor that propelled the move to judicial sentencing was the development of a rehabilitative approach to sentencing.[179] The idea was that an expert judge was needed to determine how much incarceration a defendant needed to become rehabilitated.[180] Currently, some states, particularly in the South, still use jury sentencing.[181]

B. Why Jury Adjudication Is the Answer

The Sixth Amendment right to jury trial has been significantly diminished since the ratification of the Constitution.[182] This elimination of community judgment is unfair to accused persons and deprives society of its right to participate in criminal justice. Sentencing is one area where power has shifted to the judiciary. At the Founding, juries routinely sentenced. Today, however, judges usually sentence. Juries should adjudicate recidivist statutes such as the Armed Career Criminal Act.

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176. *Id.* at 566–67.

177. *Id.* at 569 (Stewart, J., concurring).

178. *See, e.g.*, David S. Sidikman, Note, *The Pleading and Proof of Prior Convictions in Habitual Criminal Prosecutions*, 33 N.Y.U. L. REV. 210, 215–16 (1958) (arguing that judicial assessment "should be preferred over the common-law" method and that "a jury trial should not be considered essential where the issue is conviction of prior offenses").

179. Generally, criminal punishment seeks to serve four purposes: retribution, deterrence, rehabilitation, and incapacitation. *See* Michele Cotton, *Back with a Vengeance: The Resilience of Retribution as an Articulated Purpose of Criminal Punishment*, 37 AM. CRIM. L. REV. 1313, 1313 (2000). "Retribution supposes that crime inherently merits punishment" and focuses on giving the offender what he deserves. *Id.* at 1315 (emphasis omitted). Deterrence seeks to prevent future illegal conduct, both from the offender through specific deterrence and from the rest of the population through general deterrence. *Id.* at 1316. Rehabilitation attempts to assist the offender, perhaps through psychological counseling or job training, in improving himself to prevent future misconduct. *Id.* at 1316–17. Incapacitation protects society from the offender through imprisonment. *Id.* at 1316.

180. *See* Charles W. Webster, *Jury Sentencing—Grab-Bag Justice*, 14 SW. L.J. 221, 229–30 (1960).

181. The states are Arkansas, Kentucky, Missouri, Texas, and Virginia. *See* Adriaan Lanni, *Jury Sentencing in Noncapital Cases: An Idea Whose Time Has Come (Again)?*, 108 YALE L.J. 1775, 1790 & n.65 (1999).

182. *See* SUJA A. THOMAS, THE MISSING AMERICAN JURY: RESTORING THE FUNDAMENTAL CONSTITUTIONAL ROLE OF THE CRIMINAL, CIVIL, AND GRAND JURIES 3–5, 25 (2016).

1. JURY ADJUDICATION MAKES A CONDUCT-BASED APPROACH COMPLY WITH THE SIXTH AMENDMENT

Jury adjudication is the way to move constitutionally from a categorical to a conduct-based approach for recidivist statutes. The Supreme Court has held that the Sixth Amendment requires that "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury" and found beyond a reasonable doubt.[183] The Court later held that any fact that increases the statutory minimum must also be found by a jury with the same standard.[184]

Justices Thomas and Scalia, in dissenting opinions, even expressed the view that a judge determining the fact of a prior conviction violates the Sixth Amendment.[185] This is not a novel idea. "[T]he right to have a jury decide prior-offense status . . . was the law in virtually every federal and state jurisdiction, from the Founding past World War II."[186] Early state-court decisions held that "a verdict of the jury finding the prior conviction [was] essential to the power of the court to impose the increased punishment" if a statute overriding the common law did not abrogate such power.[187]

2. THE REASONS FOR JUDICIAL SENTENCING APPLY WITH LESS FORCE TO MANDATORY MINIMUM SENTENCING SCHEMES AND CONDUCT-BASED DETERMINATIONS

In their article, *Making Sentencing Sensible*, Berman and Bibas argue that juries are best-suited to find *offense* facts, while judges may find *offender* characteristics.[188] They identify prior convictions as the "consummate *offender characteristic*."[189] When we examine their reasoning, however, we find their distinctions in many ways inapplicable to mandatory minimum sentencing schemes and to conduct-based determinations.

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183. *Apprendi v. New Jersey*, 530 U.S. 466, 490 (2000).

184. *Alleyne v. United States*, 570 U.S. 99, 115–16 (2013).

185. *Sessions v. Dimaya*, 138 S. Ct. 1204, 1254 (2018) (Thomas, J., dissenting) ("In my view, if the Government wants to enhance a defendant's sentence based on his prior convictions, it must put those convictions in the indictment and prove them to a jury beyond a reasonable doubt."); *Almendarez-Torres v. United States*, 523 U.S. 224, 267 (1998) (Scalia, J., dissenting) ("[I]t is . . . 'unfair,' of course, to deprive [a] defendant of a jury determination . . . on the critical question of [a] prior conviction.").

186. King, *supra* note 93, at 553.

187. *State v. Findling*, 144 N.W. 142, 143 (Minn. 1913) (collecting cases).

188. Berman & Bibas, *supra* note 169, at 56.

189. *Id.* at 57.

Berman and Bibas reason that sentencing "calls upon an expert, repeat-player judge to exercise reasoned judgment."[190] They assert that the "theme that justifies judicial sentencing as a phase distinct from jury trial is that it embodies reasoned practical judgment, reviewable on appeal."[191] They explain that in sentencing, the decision-maker "can choose from various possible dispositions"[192] as opposed to the "simple, binary" choices at trial, and so sentencing "requires the use of reasoned judgment to impose a just and effective punishment."[193] Whether a recidivist statute, such as the ACCA mandatory minimum, applies is a "simple, binary" choice, however. In enacting a mandatory minimum sentence, Congress reduces the amount of discretion needed for sentencing, so a repeat player's reasoned judgment is not as important.

Berman and Bibas make sense out of the Supreme Court's seemingly conflicted jurisprudence as to what the Sixth Amendment requires by explaining that *Booker* is properly understood as making a distinction between facts and judgment. Berman and Bibas explain that the *Booker* Court held that "the Sixth Amendment permits only the jury to find those facts that will have fixed and predictable sentencing consequences."[194] The Court excepts the fact of a prior conviction from this constitutional requirement. At least one current Justice—Justice Thomas—disagrees with this exception, however.[195] A statute with a mandatory minimum sentence certainly falls into the category of "fixed and predictable sentencing consequences." So the categorical approach, which looks solely at the statute under which the defendant was convicted, is necessary to comply with a judicial determination of a mandatory minimum statute's applicability.

If a conduct-based approach is used, juries should determine whether the recidivist statute applies. If more than the fact of a prior conviction must be evaluated, then to comply with the Sixth Amendment under current Supreme Court precedent, a jury must decide.

This is also compatible with Berman and Bibas's sentencing principles. They assert that "[j]uries should make findings about the offense conduct that constitutes the criminal behavior forbidden by legislatures."[196] They describe trials as "backward-looking, offense-oriented events," which typically "center on particular issues of historical fact" that "include whether the defendant was the person who committed an act, what the defendant's mental state was, or whether the defendant

190. *Id.* at 37.
191. *Id.* at 39.
192. *Id.* at 55.
193. *Id.* at 54–55.
194. *Id.* at 58.
195. *Sessions v. Dimaya*, 138 S. Ct. 1204, 1254 (2018) (Thomas, J., dissenting).
196. Berman & Bibas, *supra* note 169, at 38.

used a weapon or inflicted a particular injury."[197] They explain that "[s]ometimes trial disputes also involve value judgments specified by legislatures to differentiate degrees of criminality," such as "whether a particular homicide is murder or provoked voluntary manslaughter"—value judgments that "often call[] for a normative judgment as well as a factual assessment."[198] Berman and Bibas assert that "[j]urors, who represent community values and exercise practical wisdom, are suited to [the] task" of "careful[ly] examin[ing] . . . evidence about what happened and [making] broad-brush normative judgments about wrongdoing."[199]

Determining whether an offense was a "violent felony" or "serious drug offense"—and is thus a predicate under a recidivist statute—using a conduct-based approach involves making a finding "about the offense conduct that constitutes the criminal behavior forbidden by legislatures."[200] Doing so "center[s] on particular issues of historical fact,"[201] such as "whether the defendant used a weapon or inflicted a particular injury" (for the "violent felony" determination).[202]

Deciding "whether a particular homicide is murder or provoked voluntary manslaughter" is a question of mens rea. The Supreme Court has held that to count as an ACCA predicate, the statute must require "purposeful" or "knowing" conduct.[203] A jury will be well-suited to making these mens rea determinations. Perhaps "community values" and "practical wisdom" should be at play when deciding important questions such as whether simply "overcoming victim resistance" in a robbery amounts to enough force to be considered a "violent felony."[204]

One important role of jury participation is to "bring[] the community's conscience and common sense to bear."[205] In a concurrence, Judge William Pryor asked, "How did we ever reach the point where this Court, sitting en banc, must debate whether a carjacking in which an assailant struck a 13-year-old girl in the mouth with a baseball bat and a cohort fired an AK-47 at her family is a crime of violence? It's nuts."[206]

Justice Alito in a dissent remarked, "While the concept of a conviction for burglary might seem simple, things have not worked out

197. *Id.* at 54.
198. *Id.*
199. *Id.* at 55.
200. *Id.* at 38.
201. *Id.* at 54.
202. *Id.*
203. *Borden v. United States*, 141 S. Ct. 1817, 1821–22 (2021).
204. This was the question in *Stokeling v. United States*, 139 S. Ct. 544, 555 (2019).
205. Berman & Bibas, *supra* note 169, at 40.
206. *Ovalles v. United States*, 905 F.3d 1231, 1253 (11th Cir. 2018) (Pryor, J., concurring).

that way under our case law."[207] Judge Ed Carnes wrote for the Eleventh Circuit in an ACCA "violent felony" case,

> So here we go down the rabbit hole again to a realm where we must close our eyes as judges to what we know as men and women. It is a pretend place in which a crime that the defendant committed violently is transformed into a non-violent one because other defendants at other times may have been convicted, or future defendants could be convicted, of violating the same statute without violence. Curiouser and curiouser it has all become, as the holding we must enter in this case shows. Still we are required to follow the rabbit.[208]

It is likely that jurors, who "exercise practical wisdom,"[209] will not struggle with these issues as our courts have and will reach less "seemingly odd results with which [none] of us are particularly happy."[210]

The main problems scholars identify with jury sentencing are that purportedly judges are less susceptible to prejudice and are more lenient; judges sentence more uniformly; and jury sentencing encourages compromise verdicts.[211] However, not one of these problems applies to a binary, non-discretionary choice such as determining whether a mandatory minimum applies. Moreover, the rehabilitative model for punishment has been mostly abandoned.[212] In 1983 the Senate report accompanying the Sentencing Reform Act asserted that "almost everyone involved in the criminal justice system now doubts that rehabilitation can be induced reliably in a prison setting, and it is now quite certain that no one can really detect whether or when a prisoner is rehabilitated."[213] Further, any need for a judge to determine the amount of incarceration a person needs to be rehabilitated is removed by mandatory minimum statutes.

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207. *Descamps v. United States*, 570 U.S. 254, 282 (2013) (Alito, J., dissenting).

208. *United States v. Davis*, 875 F.3d 592, 595 (11th Cir. 2017).

209. Berman & Bibas, *supra* note 169, at 55.

210. *United States v. McCollum*, 885 F.3d 300, 309 (4th Cir. 2018) (Traxler, J., concurring).

211. *See* Jennifer K. Robbennolot, *Evaluating Juries by Comparison to Judges: A Benchmark for Judging*, 32 FLA. ST. U. L. REV. 469, 477 n.28 (2005); Hoffman, *supra* note 174, at 989–90.

212. Cotton, *supra* note 179, at 1346, 1353 n.185.

213. S. REP. NO. 98-225, at 38 (1983).

IV. THE PROBLEMS AND BENEFITS OF JURY ADJUDICATION FOR RECIDIVIST STATUTES

A. Problems with Jury Adjudication for Recidivist Statutes

To be sure, jury adjudication is not beyond criticism. For example, juries may engage in propensity reasoning, and jury adjudication may be resource intensive. In order for a jury to determine applicability of a recidivist statute, it would have to be made aware of the prior offenses of the accused person. If guilt and sentencing were determined during the same proceeding, the person's prior convictions could prejudice the jury.[214] This awareness does not pose a constitutional problem because the Supreme Court has held that the "use of prior convictions in [a] . . . criminal trial . . . [is not] so egregiously unfair upon the issue of guilt or innocence as to offend" due process.[215] This problem would not be very common because ninety-seven percent of federal prosecutions are resolved through guilty pleas.[216]

States actually have been managing the issue of prejudice from prior convictions for about 200 years in cases in which a prior conviction elevates the level of offense; felony firearm cases; and habitual offender cases.[217] States in some cases allow accused persons to stipulate to the prior offenses (and then prohibit any mention of them); bifurcate the guilt and sentencing proceedings; or allow waiver of the jury for the prior-conviction element alone.[218] Bifurcation, of course, has the disadvantage of expending more resources.[219]

On its face, jury adjudication seems to expend more resources than judge sentencing. Professor Rachel Barkow asserts that under a conduct-based approach, "find[ing] out what really happened" could be "quite labor intensive."[220] While the accused person may not relitigate the findings of the jury that found them guilty of the prior offense, the sentencing phase could turn into a full-blown trial, with witnesses and physical evidence. This is unlikely in most cases, however, for the reasons

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214. King, *supra* note 93, at 559 ("[R]esearch has shown that jurors will 'infer guilt directly from the existence of prior convictions.'") (quoting JULIAN V. ROBERTS, PUNISHING PERSISTENT OFFENDERS: EXPLORING COMMUNITY AND OFFENDER PERSPECTIVES 210 (2008)).

215. *Spencer v. Texas*, 385 U.S. 554, 559 (1967).

216. *Ovalles v. United States*, 905 F.3d 1231, 1260 (11th Cir. 2018) (Pryor, J., concurring).

217. King, *supra* note 93, at 560.

218. *Id.* at 560, 566–78.

219. *See id.* at 560.

220. Rachel E. Barkow, *Categorical Mistakes: The Flawed Framework of the Armed Career Criminal Act and Mandatory Minimum Sentencing*, 133 HARV. L. REV. 200, 238 (2019).

mentioned above: that most federal defendants plead guilty[221] and may stipulate to prior offenses.[222]

Most state and federal prosecutions end in guilty pleas.[223] Five judges on the Eleventh Circuit assert that for a jury-adjudicated conduct-based approach, "the relevant details of prior convictions ordinarily will be preserved in factual proffers and other plea records."[224] For example, in the case in which they concurred, the proffer for the potential predicate offense of attempted carjacking detailed that the accused person and her co-conspirators "approached a family getting out of their minivan, demanded the keys, hit the family's 13-year-old child in the face with a baseball bat, and then, in making their escape, fired an AK-47 assault rifle at the family and a Good Samaritan who had come to their aid."[225] That proffer seemingly would provide enough information for the jury to determine that the attempted carjacking was a violent offense.

The Supreme Court, however, has reasoned that statements of fact in plea colloquies may be "downright wrong" because the accused "often has little incentive to contest facts that are not elements of the charged offense—and may have good reason not to."[226] Justice Kavanaugh opined that "[t]he categorical approach avoids the unfairness of allowing inaccuracies to 'come back to haunt the defendant many years down the road.'"[227] These seem like valid concerns. Perhaps a solution could be to admit only plea documents created after the Supreme Court held that a conduct-based approach should be used or after Congress provided so by statute. Then defendants and their counsel would be on notice to contest any facts in the plea documents relating to potential predicate offenses about which they disagree.

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221. *See* U.S. SENT'G COMM'N, FISCAL YEAR 2018: OVERVIEW OF FEDERAL CRIMINAL CASES 8 (2019), https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2019/FY18_Overview_Federal_Criminal_Cases.pdf [https://perma.cc/V67C-UM2Q] (stating that 97.4% of federal offenders pleaded guilty in 2018).

222. *See* King, *supra* note 93, at 560.

223. BRIAN A. REAVES, BUREAU OF JUST. STAT., NCJ 243777, STATE COURT PROCESSING STATISTICS: FELONY DEFENDANTS IN LARGE URBAN COUNTIES, 2009 - STATISTICAL TABLES 24 tbl.21 (2013) (showing that in 2009, the overwhelming majority of felony convictions in the seventy-five largest counties were the result of pleas).

224. *Ovalles v. United States*, 905 F.3d 1231, 1261 (11th Cir. 2018) (Pryor, J., concurring).

225. *Id.* at 1253.

226. *Descamps v. United States*, 570 U.S. 254, 270 (2013).

227. *United States v. Davis*, 139 S. Ct. 2319, 2344 (2019) (Kavanaugh, J., dissenting) (quoting *Mathis v. United States*, 136 S. Ct. 2243, 2253 (2016)).

Additionally, continually advancing modern technology, such as electronic records, makes proving prior convictions easier.[228] Also, offenders tend to recidivate rapidly, so records likely will not be too old.[229]

Most importantly, any extra expense of having juries adjudicate recidivist statutes with a conduct-based approach must be compared to the vast resources currently being expended in adjudicating recidivist statutes with the categorical approach. Ninth Circuit Judge Jay Bybee wrote that "over the past decade, perhaps no other area of the law [besides the categorical approach] has demanded more of our resources."[230] Fourth Circuit Judge G. Steven Agee lamented, "The dockets of our court and all federal courts are now clogged with [ACCA] cases."[231] Justice Samuel Alito opined that "only Congress can rescue the federal courts from the mire into which [the] ACCA's draftsmanship and *Taylor*'s 'categorical approach' have pushed us," and Alito lamented that "the 'categorical approach' to predicate offenses has created numerous splits among the lower federal courts, the resolution of which could occupy [the Supreme] Court for years."[232] The Seventh Circuit Court of Appeals explained, "In recent years, federal courts have seen a floodtide of litigation over what qualifies as an ACCA predicate."[233]

Most ACCA predicates are state offenses.[234] Granted, once the Supreme Court holds that a particular state offense is a predicate, generally the matter is decided. However, a change in state court precedent could reopen litigation about whether a statute serves as a predicate.

For example, under the categorical approach, if a "realistic possibility" exists that a person could violate the statute in a non-violent way, violating the statute may not be considered a "violent felony." If, after the Supreme Court held there was no "realistic probability" the statute could *not* be violated in a non-violent way, a state prosecuted a person for violating the statute in a non-violent way, the issue of whether the statute serves as a predicate could be revisited. Additionally, all fifty states have their own criminal codes. The number of state statutes that

228. *Ovalles*, 905 F.3d at 1261 (Pryor, J., concurring).

229. *See* U.S. SENT'G COMM'N, RECIDIVISM AMONG FEDERAL OFFENDERS RECEIVING RETROACTIVE SENTENCE REDUCTIONS: THE 2011 FAIR SENTENCING ACT GUIDELINE AMENDMENT 3, 7 (2018), https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2018/20180328_Recidivism_FSA-Retroactivity.pdf [https://perma.cc/KQ2W-6PB5] (finding the median time it took released persons to recidivate was approximately 14 months).

230. *United States v. Aguila-Montes de Oca*, 655 F.3d 915, 917 (9th Cir. 2011).

231. *United States v. Vann*, 660 F.3d 771, 787 (4th Cir. 2011) (en banc) (Agee, J., concurring).

232. *Chambers v. United States*, 555 U.S. 122, 132–33 (2009) (Alito, J., concurring) (footnote omitted).

233. *Dotson v. United States*, 949 F.3d 317, 318 (7th Cir. 2020).

234. *See* T.J. Matthes, Comment, *The Armed Career Criminal Act: A Severe Implication Without Explanation*, 59 ST. LOUIS U. L.J. 591, 593 (2015).

could potentially satisfy a recidivist statute is vast, and under the categorical approach, any change of statute wording could restart litigation all over.

B. Jury Adjudication May Benefit Defendants

Most defense attorneys oppose conduct-based approaches to recidivism statutes because the categorical approach usually works in favor of defendants.[235] Incorporating the jury into sentencing under recidivism statutes, however, has the potential to benefit defendants both individually and collectively through accompanying policy changes.

Requiring prosecutors to prove prior convictions to a jury beyond a reasonable doubt may be more difficult than proving such convictions to a judge by a preponderance of the evidence. This may have a disciplining effect and encourage prosecutors to pursue fewer cases under recidivist statutes. The element of uncertainty in securing the jury conviction that may enter into a prosecutor's calculus may also encourage fewer ACCA prosecutions.

This is all true because proving a prior conviction to a jury need not be a mere formality, as demonstrated by some early state prosecutions. In a Texas case, *Dozier v. State*,[236] the jury weighed "certified copies of the judgment and sentence[,] records of the Texas Department of Correction, including fingerprints, . . . [and] expert testimony identifying [the fingerprints] as identical with those of the [defendant]" in determining the applicability of a recidivist statute.[237] In another Texas recidivist statute case, *Crocker v. State*,[238] when the defendant declined to stipulate to a prior robbery conviction, the jury evaluated "records from the penitentiary," "testimony of one of the officers involved in the prior case and [a] comparison of finger prints of the [defendant] with the finger prints taken in connection with the prior offense."[239] The Supreme Court of Indiana, in applying a statute under which "the previous convictions, sentences, and imprisonments [had to] be described specifically, and the jury [had to] find that the defendant was convicted, sentenced, and imprisoned in the instances described, and not otherwise," held that the prosecution could not rely on "a certified transcript of a judgment . . . [that did] not describe the crime for which [the defendant] was convicted, but merely recite[d]" the length of incarceration to which the defendant was sentenced.[240]

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235. *See* Evans, *Punishing Criminals for Their Conduct*, *supra* note 54, at 625.
236. 318 S.W.2d 80 (Tex. Crim. App. 1958).
237. *Id.* at 82.
238. 385 S.W.2d 392 (Tex. Crim. App. 1965).
239. *Id.* at 393.
240. *Kelley v. State*, 185 N.E. 453, 455 (Ind. 1933).

Research suggests that prior juvenile offenses and decades-old adult criminal offenses many not be very good predictors of recidivism.[241] One of the criticisms of the ACCA is that it dictates no time limit on prior offenses as other recidivism provisions, such as the Career Offender Guidelines, do, and in fact juvenile offenses may serve as predicates.[242] It may be more difficult for prosecutors to prove very old prior offenses to a jury. As a result, such offenses might not serve as predicates. Thus, using juries might take some of the rough edges off statutes like the ACCA.

Using juries to decide ACCA convictions actually could lead to the ACCA's abolition. A curious paradox of American popular opinion is that while many Americans believe criminals receive too-lenient treatment, studies show that when Americans are presented with specific offender and crime circumstances and asked to determine the appropriate sentence, those same Americans sentence pretty leniently themselves.[243] Surely, most Americans are not familiar with the particulars of the ACCA. Including such citizens in ACCA sentencing would inform them about the ACCA's provisions, and they may come across instances in which the ACCA imposes sentences that are too harsh.

Under the status quo, however, informing the jury of the potential sentence the defendant could be facing is impermissible in federal court and most state courts.[244] Jurors might find out for themselves after the trial what sentence the ACCA provides. But jurors would become even more likely to be educated by the process if they were informed regarding the sentence, as some scholars contend they should be.[245] Then jurors may encourage their congressional representatives to make changes. This is all the more likely because jury participation has been shown to increase participation in politics and voting.[246] As Tocqueville once commented, "[T]he jury, which is the most energetic means of making the people rule,

241. *See* King, *supra* note 93, at 544–45 (explaining that "most people desist from crime after late adolescence" and that research "question[s] the predictive value of juvenile offenses," as well as asserting that "[d]epending upon the age of an offender, the recency of a prior conviction may dramatically impact its predictive capacity").

242. *See United States v. Keesee*, 358 F.3d 1217, 1221 (9th Cir. 2004) ("The only time limitation supported by the language of the Armed Career Criminal Act is that the predicate convictions be 'previous.'"); *United States v. Moody*, 770 F.3d 577, 580 (7th Cir. 2014) ("The district court . . . had no authority to ignore the [ACCA predicate] conviction because of its age or its underlying circumstances. Such considerations are irrelevant in determining predicate offenses under the Act."); U.S. SENT'G GUIDELINES MANUAL § 4B1.4 cmt. 1 (U.S. SENT'G COMM'N 2021) (noting the time periods in § 4A1.2 are inapplicable to the determination of whether a defendant is subject to an enhanced sentence under section 924(e) (the ACCA)).

243. *See* Lanni, *supra* note 181, at 1780–81.

244. Daniel Epps & William Ortman, *The Informed Jury*, 75 VAND. L. REV. 823, 829–33 (2022).

245. *See, e.g.*, *id.* at 824–25.

246. Jenia Iontcheva, *Jury Sentencing as Democratic Practice*, 89 VA. L. REV. 311, 342–43 (2003).

is also the most efficacious means of teaching it how to rule well."[247] Jury adjudication could be a more direct and effective way for citizens to influence sentencing rather than relying upon determinate sentencing schemes and mandatory minimum sentences imposed by their elected representatives.[248]

Another way jury adjudication for recidivist statutes could benefit an accused person is through jury nullification. Take, as a hypothetical example, a defendant who, as a juvenile, was convicted of three prior drug offenses. Imagine that this defendant, though a felon, possessed firearm ammunition for an innocuous purpose, such as defense of family or hunting. Jurors who do not agree with imposing an enhanced sentence may choose not to convict even in the face of evidence beyond a reasonable doubt. As discussed, if this prohibition on informing a jury about potential sentencing consequences were changed, as some scholars contend it should be,[249] jury nullification could become much more likely.

Evidence exists that juries nullify in the face of harsh recidivist and mandatory minimum statutes. During the first half of the twentieth century, when in the vast majority of states juries determined the applicability of recidivist statutes, these juries sometimes would choose to nullify harsh ones.[250] In the latter half of the twentieth century, juries frequently refused to convict under harsh mandatory minimum firearm statutes. After Michigan's enactment of a two-year mandatory minimum sentence for possession of a firearm while engaging in a felony, only three of the forty-three cases tried to a jury for assault with a gun resulted in convictions on the gun count.[251] Seemingly inconsistently, in more than 11% of the cases, the jury convicted the accused of felonious assault but acquitted on the gun count, likely to avoid the mandatory minimum.[252] After the enactment of the 1973 New York Rockefeller laws creating mandatory sentences for drug offenses, the conviction rate for such offenses declined from 86% in 1972 to 79% in 1976.[253]

Interestingly, judges—or at least local judges—do not appear to be immune from nullifying harsh mandatory minimums. After the passage of

247. Akhil Reed Amar, *The Bill of Rights as a Constitution*, 100 YALE L.J. 1131, 1187 (1991) (quoting 1 ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA 287 (Phillips Bradley ed., Borzoi ed. 1945)).

248. *See generally* Lanni, *supra* note 181, at 1777.

249. Epps & Ortman, *supra* note 244, at 824–25.

250. King, *supra* note 93, at 554 ("Observers reported more than one case in which the jury, despite fingerprints and other 'unmistakable evidence' that a defendant was indeed a multiple offender, 'decided upon its oath that the prisoner was a first offender.'") (quoting 6 THE BAUMES LAW 142–43 (Julia E. Johnsen ed., 1929)).

251. Lanni, *supra* note 181, at 1784.

252. *Id.*

253. *Id.* at 1784 & n.40. *But see* JOINT COMM. ON N.Y. DRUG L. EVALUATION, THE NATION'S TOUGHEST DRUG LAW: EVALUATING THE NEW YORK EXPERIENCE 95 (1978).

Massachusetts's Bartley-Fox Amendment providing a one-year minimum sentence for possession of an unlicensed firearm, acquittals under the offense increased at both the bench and jury stages from 53.5% in 1974 to 80% in 1976.[254] It may not be out of the realm of possibility that requiring the categorical approach, which generally limits the reach of mandatory minimum statutes like the ACCA, may for some Justices be a form of judicial nullification of a statute with which they do not agree.[255]

Jury nullification is certainly a controversial issue. Refusing to apply the law because of its perceived injustice is considered by some an abdication of a juror's sworn duty. But what if a juror determines a statute is unconstitutional? Given the number of (for the most part unsuccessful[256]) legal challenges,[257] reasonable minds seemingly could differ on the constitutionality of the ACCA.[258]

No court has held that mandatory minimum sentences violate the Eighth Amendment. Some academics, however, question the ACCA's constitutionality under the same reasoning that the Supreme Court held mandatory death-sentence schemes unconstitutional. The Court reasoned that mandatory capital punishment is unconstitutional because it "treats all persons convicted of a designated offense not as uniquely individual human beings, but as members of a faceless, undifferentiated mass"; the Court also reasoned that "the fundamental respect for humanity underlying the Eighth Amendment requires consideration of the character and record of the individual offender and the circumstances of the particular offense as a constitutionally indispensable part of the process of inflicting the

254. Lanni, *supra* note 181, at 1784–85; KENNETH CARLSON, U.S. DEP'T OF JUST., MANDATORY SENTENCING: THE EXPERIENCE OF TWO STATES 8–10 (1982).

255. The recent case of *Borden v. United States*, holding that offenses that may be committed with a mens rea of recklessness may not serve as ACCA predicates, may be an example of the Justices nullifying the ACCA. *See Borden v. United States*, 141 S. Ct. 1817, 1821–22 (2021); *id.* at 1855 (Kavanaugh, J., dissenting) ("[I]n discussing context and purpose, the plurality alludes several times to the 15-year mandatory minimum sentence in ACCA. (The mandatory minimum seems to loom very large as an influence on the plurality's overall analysis here.)").

256. The Supreme Court found the ACCA's residual clause, 18 U.S.C. § 924(e)(2)(B)(ii) ("conduct that presents a serious potential risk of physical injury to another"), void for vagueness. *See Johnson v. United States*, 576 U.S. 591, 593, 606 (2015).

257. *See, e.g.*, *United States v. Fenner*, 600 F.3d 1014, 1024–25 (8th Cir. 2010) (holding a mandatory life sentence for conspiracy to distribute fentanyl and cocaine base complied with the Eighth Amendment); *United States v. Reynolds*, 215 F.3d 1210, 1214 (11th Cir. 2000) ("[E]very circuit to have considered this issue has concluded that the 15-year minimum mandatory sentence under ACCA is neither disproportionate . . . nor cruel and unusual punishment."); *United States v. Ramirez*, No. 93-30295, 1994 WL 482059, at *2 (9th Cir. 1994) (unpublished table decision) (holding a mandatory ten-year sentence for possession with intent to distribute cocaine complied with the Eighth Amendment).

258. *See generally* RACHEL ELISE BARKOW, PRISONERS OF POLITICS 188, 194 (2019) (contending that the Supreme Court has "effectively ceded [its] authority" in the "substantive review of punishment" under the Eighth Amendment but noting that "some movement is being made and more could be done . . . in the Eighth Amendment context").

penalty of death."[259] Professor Rachel Barkow remarked that "it is hard to see why this logic applies with any less force when the sentence is placing an individual in a cage for years" and that "[i]f the Court were to take more seriously the requirements of the Eighth Amendment . . . it might conclude that the imposition of mandatory minimum sentences in many cases is 'cruel and unusual.'"[260]

While not suggesting that he is "wholly persuaded," Professor Akhil Reed Amar explains the arguments in favor of "jury review."[261] In 1800, "one of the greatest Supreme Court advocates of all time" and the future longest-serving attorney general of the United States, William Wirt, attempted to argue to a jury that the Sedition Act was unconstitutional in federal circuit court.[262] The judge who stopped him, Samuel Chase, was later impeached for his handling of the case and for prohibiting "defense counsel in another criminal case to argue law to the jury."[263]

Professor Amar points out that judges are not the only actors to take oaths to uphold the Constitution; presidents do, and in a certain sense the jurors do also.[264] President Jefferson pardoned those sentenced under the Sedition Act because he believed the Act to be unconstitutional, even though federal circuit courts held it was constitutional as applied to the very offenders he pardoned.[265] In 1791 James Wilson asserted, "[W]hoever would be obliged to obey a constitutional law, is justified in refusing to obey an unconstitutional act of the legislature . . . . [W]hen a question, even of this nature, occurs, every one who is called to act, has a right to judge."[266]

Samuel Chase argued against William Wirt's attempt to argue unconstitutionality by complaining of a "jury's lack of 'competence' to decide the Sedition Act's (un)constitutionality."[267] Professor Amar points out, however, that the U.S. Constitution was the "people's law," ratified by conventions of ordinary citizens and questions why ordinary citizens would be incompetent to interpret it.[268] The possibility of "jury review" is another facet of jury-adjudicated, conduct-based recidivist determinations that could benefit defendants.

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259. *Woodson v. North Carolina*, 428 U.S. 280, 304 (1976) (plurality opinion) (citation omitted).

260. Barkow, *supra* note 220, at 226.

261. Amar, *supra* note 247, at 1195.

262. *Id.* at 1191 (quoting Rex Lee, Commemoration of the 200th Anniversary of the Supreme Court's First Sitting (Jan. 16, 1990), *in* 110 S. Ct. 108, ciix (1990)).

263. *Id.*

264. *Id.* at 1192.

265. *Id.*

266. *Id.* (alterations in original) (quoting 1 THE WORKS OF JAMES WILSON 186 (Robert Green McCloskey ed., 1967)).

267. *Id.* at 1195.

268. *Id.* (emphasis omitted).

Another way a conduct-based approach could benefit accused persons concerns *Alford* or no-contest pleas, in which a person never admits guilt but concedes only that the government could meet its burden of proving the offense elements beyond a reasonable doubt.[269] Under the status quo, such pleas can count as predicates under recidivist statutes.[270] Under a conduct-based approach, however, no contest pleas may not and should not.[271] A conduct-based approach requires the government to prove the requisite offense conduct to the jury, not just the fact of conviction. A government proffer is a reliable source regarding offense conduct only if the accused person admits to the conduct in a plea colloquy. In a no-contest plea, the accused person never admits to any conduct. Thus, the plea documents likely would fail to prove the predicate conduct.

CONCLUSION

The Sixth Amendment right to jury trial, identified by the Constitution in three separate amendments, has been significantly diminished since the ratification of the Constitution.[272] This elimination of community judgment is unfair to accused persons and deprives society of its right to participate in criminal justice. Sentencing is one area where power has shifted to the judiciary. At the Founding, juries routinely sentenced. Today, judges usually sentence.

Juries should adjudicate recidivist statutes such as the Armed Career Criminal Act. The reasons for judicial sentencing apply with less force to mandatory minimum statutes. Jury adjudication of recidivist statutes is not just good policy; the Sixth Amendment right to jury trial requires it.

While judges may not constitutionally find facts that increase a minimum or maximum sentence, the Supreme Court created an exception for the fact of a prior conviction. The precedent on which the Court relied—*Almendarez-Torres v. United States*—does not establish such an exception. Even if it did, *Almendarez-Torres* was wrongly decided and was based on precedent that has now been overruled.

One reason the Supreme Court has required that the categorical approach be used to adjudicate recidivist statutes is that judicial fact-finding runs afoul of the Sixth Amendment. If juries decide guilt under

269. *See North Carolina v. Alford*, 400 U.S. 25, 37 (1970).

270. *See, e.g.*, *United States v. Mitchell*, 743 F.3d 1054, 1067 (6th Cir. 2014) ("Convictions based on *Alford*-type pleas can be predicate convictions under the ACCA if the qualifying crime is inherent in the fact of the prior conviction . . . .") (quoting *United States v. McMurray*, 653 F.3d 367, 381 (6th Cir. 2011)); *Harrington v. United States*, 689 F.3d 124, 127 (2d Cir. 2012) (accepting an *Alford* plea as a predicate for an ACCA sentence); *United States v. Salean*, 583 F.3d 1059, 1061 & n.3 (8th Cir. 2009) ("Alford pleas are indistinguishable from other guilty pleas for purposes of [applying the ACCA].").

271. *See* Evans, *Categorical Nonuniformity*, *supra* note 54, at 1823.

272. *See* THOMAS, *supra* note 182, at 2–3, 12.

recidivist statutes, the Sixth Amendment problems disappear. Such an approach could decrease the backlog of appellate cases and further the goals underlying recidivist statutes, such as consistency, deterrence, and incapacitation of the most dangerous offenders.