

# Reestablishing a Knowledge Mens Rea Requirement for Armed Career Criminal Act “Violent Felonies” Post-*Voisine*

*Until 2016, federal courts unanimously concluded that predicate offenses for the Armed Career Criminal Act (“ACCA”) required a knowledge mens rea. Therefore, any state law crimes that could be committed with a reckless mens rea were not “violent felonies” and could not serve as ACCA predicates. In 2016, however, the U.S. Supreme Court’s opinion in Voisine v. United States disrupted that lower court consensus. The Court stated that a reckless mens rea was sufficient to violate 18 U.S.C. § 922(g)(9), which bars individuals convicted of misdemeanor domestic violence offenses from possessing firearms.*

*The ACCA’s language is similar to § 922(g)(9), so, after Voisine, some lower courts overruled their prior ACCA precedents and held that reckless offenses could serve as ACCA predicates. Other courts, however, found that the purpose and context of § 922(g)(9) is significantly different than the ACCA, and ACCA predicate offenses still require a knowledge mens rea.*

*This Note advocates for a congressional amendment to the ACCA that explicitly includes a knowledge mens rea requirement. A knowledge mens rea is most consistent with how the ACCA has been interpreted, adheres to original congressional intent, and ensures that repeated reckless offenders are not considered “career criminals” and are not subject to the ACCA’s harsh punishment.*

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## INTRODUCTION

The situation is not difficult to imagine. Police officers make a routine traffic stop on the Francis Scott Key Bridge, which spans the border between Virginia and Washington, D.C. During a legal vehicle search, police recover an unregistered firearm. Upon searching the individual’s criminal history, the police find that he has three prior felony arrests: two Ohio burglary convictions<sup>1</sup> and a Tennessee aggravated assault conviction.<sup>2</sup> Since the individual violated 18 U.S.C. § 922(g), which prohibits felons from possessing firearms, the city prosecutor refers the case to the federal government.<sup>3</sup> But which federal prosecutor’s office should the case be referred to—Washington, D.C. or Virginia? The decision is critical. If the prosecution occurs in Virginia, the defendant faces a *maximum* sentence of ten years in prison and could receive no

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1. OHIO REV. CODE ANN. § 2911.11 (LexisNexis 2019).

2. TENN. CODE ANN. § 39-13-102(a)(1)(B) (2019).

3. 18 U.S.C. § 922(g) makes it illegal for “any person—who has been convicted . . . of, a crime punishable by imprisonment for a term exceeding one year . . . to . . . possess . . . any firearm or ammunition . . .” 18 U.S.C. § 922(g) (2012).

jail time at all.<sup>4</sup> But if the prosecution occurs in the District of Columbia, the defendant faces a *minimum* sentence of fifteen years in prison.<sup>5</sup> What explains this dichotomy? How could the defendant's prospective jail time depend solely on which side of the border he is arrested?

The answer lies in a two-year-old circuit split over the scope of the U.S. Supreme Court's decision in *Voisine v. United States*<sup>6</sup> and the meaning of a "violent felony."<sup>7</sup> If the defendant's three prior convictions each count as "violent felonies," the individual can be charged under the Armed Career Criminal Act ("ACCA"), which has a fifteen-year mandatory minimum sentence.<sup>8</sup> If he has less than three "violent felony" convictions, however, then he can only be charged under the regular possession statute, which has a ten-year maximum penalty and no mandatory minimum.<sup>9</sup>

Over the last two years, the federal circuit courts have disagreed on which offenses count as "violent felonies." Offenses that can be committed with a "reckless" mens rea (that is, mental state) cannot serve as predicate violent felonies in the U.S. Court of Appeals for the

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4. 18 U.S.C. § 924(a)(2) (2012).

5. 18 U.S.C. § 924(e)(1). *See also* Mathis v. United States, 136 S. Ct. 2243, 2248 (2016) (explaining the dichotomy between situations where a defendant is sentenced as an armed career criminal and situations where they are not).

6. 136 S. Ct. 2272 (2016).

7. *Compare* United States v. Orona, 923 F.3d 1197, 1200 (9th Cir. 2019) (rejecting an argument that Arizona's assault specification, which encompasses reckless conduct, is not a crime of violence because "the reckless conduct must have caused actual physical injury to another person" (quoting United States v. Ceron-Sanchez, 222 F.3d 1169, 1172–73 (9th Cir. 2000))), United States v. Middleton, 883 F.3d 485, 497–500 (4th Cir. 2018) (Floyd, J., concurring for two judges) (concluding that in South Carolina, involuntary manslaughter is not a violent felony under the ACCA "because an individual can be convicted of this offense based on reckless conduct, whereas the ACCA force clause requires a higher degree of mens rea"), and United States v. Windley, 864 F.3d 36, 39 (1st Cir. 2017) ("Massachusetts reckless [assault and battery with a deadly weapon] is not a violent felony under the force clause [of the ACCA]."), *with* United States v. Burris, 920 F.3d 942, 951 (5th Cir. 2019) ("[T]he use of force under the ACCA includes reckless conduct."), United States v. Haight, 892 F.3d 1271, 1280–81 (D.C. Cir. 2018) (concluding "that the use of violent force includes the reckless use of such force"), United States v. Verwiebe, 874 F.3d 258, 262–64 (6th Cir. 2017) ("In sum, the argument that crimes satisfied by reckless conduct categorically do not include the 'use of physical force' simply does not hold water after *Voisine*."), United States v. Hammons, 862 F.3d 1052, 1055–56 (10th Cir. 2017) (reasoning that "it makes no difference whether the person applying the force had the specific intention of causing harm or instead merely acted recklessly" (citing *Voisine*, 136 S. Ct. at 2279)), and United States v. Fogg, 836 F.3d 951, 956 (8th Cir. 2016) (concluding that a prior conviction that required a mens rea of recklessness qualified as a violent felony under the ACCA's force clause). The issue is currently pending before an en banc Third Circuit. United States v. Santiago, *appeal docketed*, No. 16-4194 (3d Cir. Nov. 30, 2016). The Eleventh Circuit reaffirmed its pre-*Voisine* holding in early 2019, United States v. Moss, 920 F.3d 752, 758–59 (11th Cir. 2019), but the opinion was vacated and will be reheard by an en banc Eleventh Circuit. 928 F.3d 1340 (2019) (mem.).

8. 18 U.S.C. § 924(e)(1).

9. 18 U.S.C. § 924(a)(2).

Fourth Circuit, which includes Virginia.<sup>10</sup> Since a reckless mens rea is sufficient for an aggravated assault conviction in Tennessee,<sup>11</sup> the defendant has only two ACCA-qualifying convictions in the Fourth Circuit (the two burglary convictions)<sup>12</sup> and therefore can be charged only under the regular possession statute. On the other hand, federal courts in Washington, D.C., bound by U.S. Court of Appeals for the D.C. Circuit precedent, consider reckless offenses to be violent felonies.<sup>13</sup> Accordingly, in Washington, D.C., the exact same Tennessee aggravated assault conviction counts as the defendant's third qualifying violent felony, and he faces a fifteen-year mandatory minimum sentence as an "armed career criminal."

Before proceeding, a few key terms require definitional clarity: (1) violent felony, (2) recklessness, (3) categorical approach, and (4) modified categorical approach.

"Violent felony," as defined in 18 U.S.C. § 924(e)(2)(B)(i), is any crime punishable by a year or more in prison that "has as an element, the use, attempted use, or threatened use of physical force against the person of another."<sup>14</sup> Every year, thousands of criminal defendants face enhanced sentencing, additional penalties, and possible deportation under statutes with this or similar language.<sup>15</sup>

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10. *Middleton*, 883 F.3d at 497–500 (Floyd, J., concurring). It is technically unresolved whether Judge Floyd's *Middleton* concurrence, which he wrote for two members of the three-judge panel (a majority) is binding precedent in the Fourth Circuit. See Brief for the United States in Opposition at 14, *Haight v. United States*, 139 S. Ct. 796 (2019) (No. 18-370), 2018 WL 6584994, at \*14 ("It is not yet clear what precedential effect, if any, the Fourth Circuit will give that two-judge portion of a separate opinion."). In a subsequent case, however, the government conceded that Judge Floyd's opinion was controlling, and a different Fourth Circuit panel cited it approvingly. *United States v. Hodge*, 902 F.3d 420, 427 (4th Cir. 2018).

11. TENN. CODE ANN. § 39-13-102(a)(1)(B) (2018).

12. 18 U.S.C. § 924(e)(2)(B)(ii), *invalidated in part by Johnson v. United States*, 135 S. Ct. 2551 (2019). *Johnson* invalidated § 924(e)(2)(B)(ii)'s "residual clause," but did not affect the enumerated crimes. 135 S. Ct. at 2555.

13. *United States v. Haight*, 892 F.3d 1271, 1280–81 (D.C. Cir. 2018).

14. 18 U.S.C. § 924(e)(2)(B)(i).

15. While this Note focuses on the ACCA, the U.S. Code has an entire class of criminal statutes that use the terms "violent felony" or "crime of violence" to proscribe certain acts or provide certain punishments. In all of these statutes, the definition is nearly identical: either "use . . . of physical force against the person of another" or "use . . . of physical force against the person or property of another" (emphasis added). 18 U.S.C. § 16(a) (2012); 18 U.S.C. § 521(d)(3)(B)(ii) (2012); 18 U.S.C. § 924(c)(3)(A) (2012); 18 U.S.C. § 924(e)(2)(B)(i); 20 U.S.C. § 1161w(f)(3)(A)(ii) (2012); 28 U.S.C. § 540A(c) (2012); see also U.S. SENTENCING GUIDELINES MANUAL § 4B1.2 (U.S. SENTENCING COMM'N 2018). Cases mainly arise under (1) the ACCA, (2) 18 U.S.C. § 16 (which is the predicate for a host of proscriptions and deportation), and (3) the U.S. SENTENCING GUIDELINES MANUAL § 4B1.2 (U.S. SENTENCING COMM'N 2018). Federal courts read the statutory language the same way. *E.g.*, *Davis v. United States*, 900 F.3d 733, 736 (6th Cir. 2019) (stating that the ACCA and sentencing guidelines "have consistently been construed to have the same meaning"); *Haight*, 892 F.3d at 1281 (calling the ACCA and sentencing guidelines "equivalent"); *United States v. Hopkins*, 577 F.3d 507, 511 (3d Cir. 2009) ("[T]he definition of a violent felony under the ACCA is sufficiently

“Recklessness” is a level of culpability that a criminal defendant must have to be convicted of a particular crime.<sup>16</sup> A person acts recklessly if he “consciously disregards a substantial and unjustifiable risk that the material element exists or will result from [his] conduct.”<sup>17</sup>

The term recklessness is a pseudo-creation of the Model Penal Code (“MPC”).<sup>18</sup> The MPC supports a categorized approach to criminal liability: it (1) separates a crime’s elements into categories<sup>19</sup> and (2) enumerates four levels of mens rea, or “mental states,” that attach to each material element of a crime.<sup>20</sup> The four mental states, in order of increasing culpability, are negligence, recklessness, knowledge, and purpose.<sup>21</sup> These four mental states have garnered broad acceptance by U.S. courts and legislatures.<sup>22</sup>

The MPC divides the element analysis into three categories: conduct, circumstances, and result.<sup>23</sup> The “conduct” element encapsulates the action the defendant took that caused a negative result. The MPC left the mens rea for the “conduct” element of a criminal offense ambiguous: it does not assign reckless or negligent mens rea terms toward the defendant’s “conduct,” and it is unclear whether any definition was intended.<sup>24</sup> As a result, many scholars have defined the conduct element

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similar to the definition of a crime of violence under the Sentencing Guidelines that authority interpreting one is generally applied to the other . . .”).

16. MODEL PENAL CODE § 2.02(1) (AM. LAW INST. 1962).

17. *Id.* § 2.02(2)(c).

18. Prior to the MPC’s enactment, there were “eighty or so culpability terms existing in prior criminal codes.” Paul H. Robinson & Jane A. Grall, *Element Analysis in Defining Criminal Liability: The Model Penal Code and Beyond*, 35 STAN. L. REV. 681, 692 (1983). The MPC distilled it down to four liability terms. *Id.* at 692–93. Therefore, “recklessness” is best seen as an encapsulation of a litany of prior criminal terms.

19. The three categories are conduct, circumstances, and result. Some judges and judicial scholars, however, have combined the circumstances and result elements into the “consequences” of the conduct. *See, e.g.*, *United States v. Harper*, 875 F.3d 329, 332 (6th Cir. 2017) (describing the circumstances and result as the “consequences of one’s force”). Since most courts do not precisely define the mens rea terms, this Note will embrace the simplified conduct/consequences approach.

20. MODEL PENAL CODE § 2.02(2) (AM. LAW INST. 1962).

21. *Id.* The MPC generally sets recklessness as the minimum bar for criminal culpability, but recognizes many situations where a higher mens rea, such as knowledge, should be required. *Id.* § 2.02(3).

22. The Supreme Court recently adopted the MPC’s mens rea definitions. *Voisine v. United States*, 136 S. Ct. 2272, 2278 (2016); *see also* Rory Little, *Opinion Analysis: Federal “Use of Force” Encompasses Reckless Domestic Violence Misdemeanor Offenses*, SCOTUSBLOG (June 27, 2016, 9:08 PM), <http://www.scotusblog.com/2016/06/opinion-analysis-federal-use-of-force-encompasses-reckless-domestic-violence-misdemeanor-offenses/> [<https://perma.cc/HLC8-NAVM>] (“[A] significant majority of states have adopted large portions of the MPC . . .”).

23. Robinson & Grall, *supra* note 18, at 693.

24. *See* MODEL PENAL CODE § 2.02(2)(c)–(d) (AM. LAW INST. 1962) (defining “recklessness” and “negligence” only in regards to whether a “material element exists”).

narrowly, so it only encapsulates voluntary, volitional conduct.<sup>25</sup> All other material elements are considered “consequences” of the conduct.<sup>26</sup> The U.S. Supreme Court has supported this approach when determining whether certain conduct constitutes the “use” of physical force.<sup>27</sup> Therefore, under this approach, the mens rea for a “reckless” felony breaks down like this:

<b>Conduct Element</b>	Purpose or Knowledge
<b>Consequences Element(s)</b>	Recklessness

As a result, circuits (such as the Fourth Circuit) that have held recklessness insufficient for a “violent felony” implicitly require a defendant to have a knowledge mens rea towards the consequences—he must be “aware that it is practically certain” his voluntary conduct will cause the violent consequences of his intentional act.<sup>28</sup> Conversely, circuits (such as the D.C. Circuit) that embrace reckless crimes as ACCA predicates tacitly maintain that a defendant commits a violent felony if he “consciously disregards a substantial and unjustifiable risk” of the violent consequences of his voluntary conduct.<sup>29</sup> The difference is this: Does an actor need to be “practically certain” he is harming another

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25. *E.g.*, Robinson & Grall, *supra* note 18, at 712 (“Perhaps the best approach is to define ‘conduct’ narrowly so as to limit the significance of the culpability as to that element to involuntary acts and to consider all issues raised by the *nature* of one’s conduct as circumstance elements . . .”).

26. *Id.* As an example of this “narrow” conduct approach, consider Michigan’s misdemeanor assault crime. A person is guilty of misdemeanor assault if they “assault[ ] an individual without a weapon and inflict[ ] serious or aggravated injury upon that individual without intending to commit murder . . .” MICH. COMP. LAWS § 750.81a(1) (2018). Under a “narrow” conduct approach, the different elements of this crime would break down as follows:

Conduct: swinging the fist in the direction of the other person (among other methods to assault a person).

Consequences: (1) the fist makes contact with the other person, (2) causes serious or aggravated injury, (3) no weapon, (4) did not intend to kill them.

To act “knowingly” with regards to the conduct element under this approach, therefore, the defendant would only need to know they are swinging their fist at another person. A “reckless” assault would still require the individual to knowingly swing their fist at the person—but would not require them to “knowingly” make contact with the other person.

27. *See Voisine*, 136 S. Ct. at 2278–79 (stating that an individual who employs a “powerful,” but “involuntary” motion has not actively “used” force, but a person who voluntarily applies force is reckless “with respect to the harmful consequences of his volitional conduct” has still “used” force).

28. MODEL PENAL CODE § 2.02(2)(b)(ii) (AM. LAW INST. 1962).

29. *Id.* § 2.02(2)(c).

person, or does he merely need to know there is a risk he will harm someone?

This difference, while seemingly academic, is extremely salient because of another Supreme Court creation: the “categorical approach,” which restricts a court’s discretion in determining which offenses qualify as ACCA predicates.<sup>30</sup>

Under the categorical approach, no convictions under a state statute can serve as ACCA predicates if the state statute is broader than the federal standard for a crime.<sup>31</sup> For example, a defendant violates some state aggravated assault statutes if he commits the crime “intentionally, knowingly or recklessly.”<sup>32</sup> These statutes list mens rea terms (intent, knowing, reckless) as three alternative ways the defendant can commit the same crime. Under the categorical approach, if ACCA predicate crimes require a knowledge mens rea, violation of one of these statutes could *never* serve as an ACCA predicate.<sup>33</sup> Even if the defendant *purposely* assaulted another person, his conviction would not count towards the ACCA because it is *possible* that a person could be convicted under the statute with less than the ACCA-required mens rea.<sup>34</sup>

This approach came to life in *Bennett v. United States*, a 2017 decision by the U.S. Court of Appeals for the First Circuit, where the defendant committed two aggravated assaults “either at gunpoint or at knifepoint.”<sup>35</sup> Because the “least serious conduct covered” by the Maine aggravated assault statute was recklessness, the court needed to determine whether recklessness was sufficient to serve as an ACCA predicate, even though the defendant almost certainly did not commit the

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30. *Mathis v. United States*, 136 S. Ct. 2243, 2248 (2016); *Descamps v. United States*, 570 U.S. 254, 257 (2013); *Taylor v. United States*, 495 U.S. 575, 602 (1990); *see also* *Welch v. United States*, 136 S. Ct. 1257, 1262 (2016) (“The categorical approach is the framework the Court has applied in deciding whether an offense qualifies as a violent felony under the Armed Career Criminal Act.”).

31. *Mathis*, 136 S. Ct. at 2248. This applies even if a single statute lists “elements in the alternative,” therefore defining multiple crimes or multiple ways of committing the same crime. *Id.* at 2249, 2251.

32. *E.g.*, ME. REV. STAT. ANN. tit. 17-a, § 208 (2019).

33. *Mathis*, 136 S. Ct. at 2249, 2251.

34. *See id.* at 2249 (stating that “no conviction” under a state statute that sweeps more broadly “could count as an ACCA predicate,” even if the defendant actually met the elements of the crime’s generic form).

35. 868 F.3d 1, 22 (1st Cir. 2017), *vacated as moot*, 870 F.3d 34 (1st Cir. 2017). The First Circuit adopted the reasoning from *Bennett* to justify the categorical approach almost immediately in *United States v. Windley*, 864 F.3d 36, 37 n.2 (1st Cir. 2017).

crime recklessly.<sup>36</sup> Because the First Circuit concluded that recklessness was not sufficient, the aggravated assaults did not count toward the defendant's three qualifying predicate offenses.<sup>37</sup>

The “modified categorical approach,” a close relative of the categorical approach, allows a sentencing court to take a limited look beyond the statutory elements when a defendant violated a “divisible statute.”<sup>38</sup> A statute is divisible if it “list[s] elements in the alternative” and therefore defines *different* crimes.<sup>39</sup> The court can look to the jury instructions, plea agreement, or “findings of fact” by the judge to determine what crime the defendant “necessarily” committed.<sup>40</sup>

The Supreme Court developed the categorical and modified categorical approaches to better effectuate Congress's intent when construing the ACCA—since ACCA eligibility is based on “convictions” rather than “crimes”<sup>41</sup>—and to avoid Sixth Amendment concerns.<sup>42</sup> Considered together, the categorical and modified categorical approaches potentially exclude entire categories of offenses from the ACCA, because if any defendant can be convicted of an offense with a reckless mens rea, then the offense can *never* serve as a predicate violent felony for the ACCA. Therefore, for many criminal defendants convicted of crimes that can be committed recklessly, their ACCA eligibility, with its corresponding harsh sentence enhancements, could entirely hinge on whether the ACCA's force clause includes reckless crimes.

This Note will proceed in three parts. Part I describes the background of the Armed Career Criminal Act and how courts interpreted its mens rea requirement. It examines the U.S. Supreme Court decisions that informed lower court interpretations of the ACCA's mens rea requirement, most recently the *Voisine* decision in 2016. Part II analyzes *Voisine*'s reasoning and compares it to the reasoning behind the lower courts' subsequent ACCA decisions, the legislative purpose of the

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36. *Bennett*, 868 F.3d at 22–23.

37. *Id.* at 23.

38. *Descamps v. United States*, 570 U.S. 254, 263 (2013); *see also Mathis*, 136 S. Ct. at 2253 (“[T]he modified approach serves—and serves solely—as a tool to identify the elements of the crime of conviction when a statute's disjunctive phrasing renders one (or more) of them opaque.”).

39. *Mathis*, 136 S. Ct. at 2249.

40. *Descamps*, 570 U.S. at 264 & n.2.

41. *Mathis*, 136 S. Ct. at 2252.

42. *Id.* at 2250 (“[A] construction of ACCA allowing a sentencing judge to go any further [than the crime the defendant necessarily committed] would raise serious Sixth Amendment concerns.”) (citing *Apprendi v. New Jersey*, 533 U.S. 466, 490 (2000)); *see also* Mary Frances Richardson, Comment, *Why the Categorical Approach Should Not Be Used When Determining Whether an Offense is a Crime of Violence Under the Residual Clause of 18 U.S.C. § 924(c)*, 67 AM. U. L. REV. 1989, 2004–09 (2018) (analyzing the benefits of the categorical approach and the Sixth Amendment limitations). The Supreme Court recently applied the categorical approach and struck down § 924(c)(3)(B)'s residual clause. *United States v. Davis*, 139 S. Ct. 2319, 2323–24 (2019).



ACCA, and prior ACCA decisions by the Supreme Court. It concludes that *Voisine's* holding and reasoning do not apply to ACCA violent felonies and that the ACCA is better read to require a knowledge mens rea. Part III proposes a legislative fix to the ACCA to clarify that ACCA predicate offenses require a knowledge mens rea.

## I. THE LEGAL LANDSCAPE BEFORE AND AFTER *VOISINE*

Congress promulgated the Armed Career Criminal Act as a method to lock up repeat, violent, “career” offenders.<sup>43</sup> Since its enactment, the U.S. Supreme Court has interpreted the scope of the ACCA numerous times.<sup>44</sup> The Court has never considered the mens rea required to violate the ACCA, but two of the Court’s decisions have impacted lower court interpretations of the ACCA mens rea requirement.<sup>45</sup> First, in 2004, the Court held in *Leocal v. Ashcroft* that a crime requiring a negligence mens rea categorically was not a felony “crime of violence” for purposes of 18 U.S.C. § 16, which featured a nearly identical definition to the ACCA.<sup>46</sup> Next, the Court held in *Voisine v. United States* that a conviction under a statute requiring only a reckless mens rea was sufficient for a “misdemeanor crime of domestic violence” under 18 U.S.C. § 922(g)(9).<sup>47</sup>

After *Leocal*, lower courts almost unanimously concluded that reckless offenses were outside the scope of the ACCA.<sup>48</sup> Following the *Voisine* decision, however, some circuits overruled their prior precedents and extended *Voisine's* reasoning to ACCA predicate offenses, holding that recklessness was sufficient for ACCA offenses.<sup>49</sup> This Part will examine the statutory and legislative history of the ACCA and

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43. H.R. REP. NO. 98-1073, at 1–2 (1984), *reprinted in* 1984 U.S.C.C.A.N. 3661, 3661–62.

44. Two common areas of interpretation have been the limits of the ill-fated residual clause, *see Johnson v. United States*, 135 S. Ct. 2551, 2563 (2015) (striking down the ACCA’s residual clause as an unconstitutional due process violation), and the amount of force a qualifying predicate requires, *see Stokeling v. United States*, 139 S. Ct. 544, 555 (2019) (holding that the ACCA’s force clause is satisfied by the amount of physical force required to “overcome a victim’s resistance”); *Johnson v. United States*, 559 U.S. 133, 140 (2010) (requiring “force capable of causing physical pain or injury to another person” under the ACCA’s force clause).

45. *See Voisine v. United States*, 136 S. Ct. 2272, 2280 (2016) (holding a reckless mens rea sufficient to violate 18 U.S.C. § 922(g)(9), with regard to a misdemeanor crime of domestic violence); *Leocal v. Ashcroft*, 543 U.S. 1, 10 (2004) (determining that a negligence mens rea was not sufficient for a felony “crime of violence” under 18 U.S.C. § 16).

46. *Leocal*, 543 U.S. at 9–10. 18 U.S.C. § 16’s “crime of violence” definition at the time was “the use . . . of physical force *against the person or property* of another.” *Id.* at 5 (emphasis added). The ACCA’s “violent felony” definition is identical, minus the phrase “or property.” 18 U.S.C. § 924(e)(2)(B)(i) (2012).

47. *Voisine*, 136 S. Ct. at 2279–80.

48. *See sources cited infra* note 76.

49. *See sources cited infra* note 90.

§ 922(g)(9), the rationales underlying the Supreme Court's decisions in *Leocal* and *Voisine*, and the way lower courts have interpreted each decision.

### A. *Legislative History of the ACCA*

Enacted in 1984, the original Armed Career Criminal Act provided stringent sentencing enhancements for illegal firearm possession if an offender had three prior convictions for burglary or robbery.<sup>50</sup> Congress's goal in passing the legislation was "incapacitating . . . repeat offenders."<sup>51</sup> The predicate crimes were robberies and burglaries because they were the "most damaging crimes to society" and the crimes "career criminals" were most likely to commit.<sup>52</sup>

The ACCA was amended two years later, animated by a congressional desire to more effectively reach the small group of career offenders that Congress originally intended to incapacitate.<sup>53</sup> Congress cited studies showing that an extremely small number of career offenders committed a high percentage of overall crime.<sup>54</sup> The final bill, a compromise between the House and Senate, expanded the predicate crimes from only robberies and burglaries to any felony drug offense or violent felony.<sup>55</sup>

Slight adjustments over the years led to the Act's current formulation, which increases the prison sentence for a person convicted of unlawful possession of a firearm<sup>56</sup> from a ten-year maximum<sup>57</sup> to a fifteen-

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50. Armed Career Criminal Act of 1984, Pub. L. No. 98-473, § 1802, 98 Stat. 1837, 2185 (1984), *repealed by* Pub. L. No. 99-308, § 104(b), 100 Stat. 449, 459 (1986). *See generally* James G. Levine, Note, *The Armed Career Criminal Act and the U.S. Sentencing Guidelines: Moving Towards Consistency*, 46 HARV. J. ON LEGIS. 537, 545–48 (2009) (providing an in-depth legislative history of the ACCA, including prior, unenacted versions of the bill).

51. H.R. REP. NO. 98-1073, at 2 (1984), *reprinted in* 1984 U.S.C.C.A.N. 3661, 3662; *see also* Taylor v. United States, 495 U.S. 575, 581 (1990) (stating that the Armed Career Criminal Act was intended to "supplement the States' law enforcement efforts against 'career' criminals").

52. H.R. REP. NO. 98-1073, at 3.

53. *See Armed Career Criminal Legislation: Hearing on H.R. 4639 and H.R. 4768 Before the Subcomm. on Crime of the H. Comm. on the Judiciary*, 99th Cong. 8 (1986) (statement of Rep. Wyden) ("[I]t seems to me just simple logic to include crimes of violence as potential predicate offenses. It does not make a lot of sense . . . that a referral under the Act is possible for a three-time bank robber but not a habitual offender with prior convictions for rape or murder. So I think . . . it's a logical extension.")

54. *Id.* at 3 ("In New York City, for example, studies showed that only 1,100 recidivists were probably responsible for most of the 100,000 robberies each year."); *see also* 132 CONG. REC. S4325-03 (daily ed. April 16, 1986) (statement of Sen. Specter on S. 2312, the Armed Career Criminal Act Amendments) (stating that the animating purpose behind the bill was to "broaden[] the prior convictions which lead to the classification of being a 'career criminal'").

55. Pub. L. No. 99-308, § 104, 100 Stat. 449, 456–59 (1986) (amended 1988).

56. 18 U.S.C. § 922(g) (2012).

57. 18 U.S.C. § 924(a)(2) (2012).

year minimum if they have three prior convictions for “violent felonies” or “serious drug offenses.”<sup>58</sup> This Note focuses on violent felonies. A “violent felony” must be punishable by more than one year in prison and must meet one of two additional requirements. It either must involve “the use, attempted use, or threatened use of physical force against the person of another,”<sup>59</sup> or be burglary, arson, extortion, or involve explosives.<sup>60</sup>

### *B. Legislative History of 18 U.S.C. § 922(g)(9)*

Section 922(g)(9), the statute at issue in *Voisine v. United States*, was promulgated in 1996,<sup>61</sup> twelve years after the Armed Career Criminal Act was first enacted. It bars “any person who has been convicted . . . of a misdemeanor crime of domestic violence” from “possess[ing] . . . any firearm.”<sup>62</sup> A “misdemeanor crime of domestic violence” is an offense that “has, as an element, the use or attempted use of physical force.”<sup>63</sup>

Section 922(g)(9) is a statute that is both very narrow and very broad: it was promulgated to solve a very narrow problem—specifically, the danger of allowing domestic abusers to possess firearms<sup>64</sup>—but it has broad coverage over crimes within its scope.<sup>65</sup> Existing firearm laws, including the ACCA, had failed to combat the danger of gun possession by convicted abusers because “many perpetrators of domestic violence are convicted only of misdemeanors.”<sup>66</sup> Therefore, Congress enacted § 922(g)(9) to close that “dangerous loophole.”<sup>67</sup> It was written broadly: the bill’s sponsor, Senator Frank Lautenberg of New Jersey, stated that the language was “probably broader” than the “crime of violence” language in the ACCA and other gun possession laws,<sup>68</sup> and

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58. 18 U.S.C. § 924(e)(1).

59. 18 U.S.C. § 924(e)(2)(B)(i). This is commonly referred to as the “force clause” of the Act. *E.g.*, *United States v. Gardner*, 823 F.3d 793, 801–02 (4th Cir. 2016).

60. 18 U.S.C. § 924(e)(2)(B)(ii). The Supreme Court recently held the “residual clause” of subsection (ii), “involves conduct that presents a serious potential risk of physical injury to another,” unconstitutionally vague. *Johnson v. United States*, 135 S. Ct. 2551, 2563 (2015). This has increased the salience of the recklessness issue under the force clause, because it was previously uncontested.

61. Omnibus Consolidated Appropriations Act, 1997, Pub. L. No. 104-208, § 658(b)(2), 110 Stat. 3009, 3372 (1996) (codified as amended at 18 U.S.C. § 922(g)(9) (2012)).

62. 18 U.S.C. § 922(g)(9).

63. 18 U.S.C. § 921(a)(33)(A)(ii) (2012).

64. *United States v. Hayes*, 555 U.S. 415, 426–27 (2009).

65. *United States v. Castleman*, 572 U.S. 157, 160 (2014).

66. *Id.*

67. *Id.* (internal quotation marks omitted).

68. 142 CONG. REC. S11872-01 (daily ed. Sept. 30, 1996) (statement of Sen. Lautenberg).

thus would better serve the statute's purpose to provide special protection to a narrow class of domestic violence victims.<sup>69</sup> To implement § 922(g)(9)'s desired breadth, Congress specifically rejected the ACCA's definition of "violent felony."<sup>70</sup>

### C. Circuit Courts Align After *Leocal*

While the Supreme Court has still never opined on the mens rea requirement for the Armed Career Criminal Act, it first began to shape interpretations in *Leocal v. Ashcroft*, a case about the deportation statute 18 U.S.C. § 16, which contains similar language. In *Leocal v. Ashcroft*, the Court held that "the use . . . of physical force against the person or property of another," for purposes of deportation under 18 U.S.C. § 16, was not satisfied by a conviction for "DUI causing serious bodily injury," a strict liability crime.<sup>71</sup> The unanimous Court stated that while a person may negligently employ physical force in a general sense, "it is much less natural to say that a person actively employs physical force against another person by accident."<sup>72</sup> Although the Court ultimately concluded that negligent and strict liability crimes cannot serve as predicates for the statute,<sup>73</sup> the Court expressly reserved judgment on reckless conduct.<sup>74</sup> Section 16 is interpreted the same way as the ACCA.<sup>75</sup>

Following *Leocal*, the circuit courts immediately extended the Court's reasoning to reckless crimes—the same factors that made negligence insufficient in *Leocal* also prevented reckless crimes from qualifying as the "use of physical force against the person or property of another."<sup>76</sup> The Third Circuit's analysis in *Tran v. Gonzales* was typical of

69. *Id.*

70. *United States v. Booker*, 644 F.3d 12, 19 (1st Cir. 2011) ("In the course of drafting § 921(a)(33)(A), Congress expressly rejected § 16's definition of 'crime of violence' . . .").

71. 543 U.S. 1, 4–5, 8–9 (2004).

72. *Id.* at 9 (emphasis added).

73. *Id.* ("[T]he 'use . . . of physical force against the person or property of another' [] most naturally suggests a higher degree of intent than negligent or merely accidental conduct.").

74. *Id.* at 13 ("This case does not present us with the question whether . . . the *reckless* use of force against a person or property of another qualifies as a crime of violence . . .").

75. See sources cited *supra* note 15.

76. *United States v. Fish*, 758 F.3d 1, 16–17 (1st Cir. 2014) (interpreting 18 U.S.C. § 16, the same statute at issue in *Leocal*); *United States v. Palomino Garcia*, 606 F.3d 1317, 1319, 1335 (11th Cir. 2010) (interpreting the federal sentencing guidelines); *United States v. Zuniga-Soto*, 527 F.3d 1110, 1124 (10th Cir. 2008) (interpreting the federal sentencing guidelines); *United States v. Portela*, 469 F.3d 496, 499 (6th Cir. 2006) (interpreting 18 U.S.C. § 16); *Tran v. Gonzales*, 414 F.3d 464, 470–71 (3d Cir. 2005) (holding that reckless burning was not a "crime of violence" under 18 U.S.C. § 16 because it involved "mere recklessness as to causing harm"); *Bejarano-Urrutia v. Gonzales*, 413 F.3d 444, 446–47 (4th Cir. 2005) (interpreting 18 U.S.C. § 16). The statutes at issue in each case were felony statutes that involve nearly identical language to the ACCA: "[T]he use of

this approach.<sup>77</sup> In *Tran*, the defendant's conviction for conspiracy to commit reckless burning required the state to prove two elements: (1) the defendant knowingly started a fire (conduct requirement) (2) while exhibiting recklessness towards the damage the fire would cause (consequences requirement).<sup>78</sup> The court explained that recklessness was not sufficient to sustain a conviction, because the "[u]se of physical force is an intentional act, and therefore the first prong of § 16 requires specific intent to use force."<sup>79</sup> Because reckless burning did not require the defendant's knowledge that burning would result in property damage, the Third Circuit held that the statute did not involve the "use . . . of physical force against the person or property of another."<sup>80</sup>

All federal courts that considered the issue reached the same result as the Third Circuit.<sup>81</sup> Indeed, the federal appellate courts had arrived at such unanimity that in 2010, the Eleventh Circuit noted that the government could "cite[ ] no authority . . . that a conviction based on recklessness satisfies the 'use of physical force' requirement."<sup>82</sup>

#### *D. Voisine Creates Confusion Among the Lower Courts*

After twelve years of lower court consensus that *Leocal* required a knowledge mens rea for an Armed Career Criminal Act-qualifying violent felony conviction, the Supreme Court disrupted the unity in a

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physical force against the person of another." Courts interpret the language of all these statutes in unison. See sources cited *supra* note 15.

77. 414 F.3d 464 (3d Cir. 2005).

78. *Id.* at 469.

79. *Id.* (quoting *United States v. Parson*, 955 F.2d 858, 866 (3d Cir. 1992)).

80. *Id.* at 471.

81. See sources cited *supra* note 76.

82. *United States v. Palomino Garcia*, 606 F.3d 1317, 1336 n.16 (11th Cir. 2010). The lower court consensus was further bolstered by the Supreme Court's decision in *Begay v. United States*, which held that a strict liability DUI conviction was not a "violent felony" under the ACCA's residual clause. 553 U.S. 137, 148 (2008), *abrogated by* *Johnson v. United States*, 135 S. Ct. 2551 (2015). While the statute at issue was a strict liability statute, the Court used the occurrence to discuss how the "basic purposes" of the ACCA only support convicting felons who engage in "intentional or purposeful conduct," and are therefore "the kind of person who might deliberately point the gun and pull the trigger." *Id.* at 146. The Court cited 18 U.S.C. § 1365(a), "reckless tampering with consumer products," as the sort of conviction that would inappropriately become an ACCA predicate if reckless conduct was swept in. *Id.* Lower courts immediately extended *Begay* to reckless crimes under the ACCA's residual clause. See, e.g., *United States v. Smith*, 544 F.3d 781, 786 (7th Cir. 2008). While the ACCA's residual clause was entirely struck down in *Johnson v. United States*, 135 S. Ct. 2551 (2015), advocates have argued *Begay's* reasoning equally applies to the ACCA's force clause, even after *Voisine*. E.g., Brief for Amici Curiae on Behalf of Federal Public and Community Defender Offices of the Third Circuit in Support of Appellee Ixandro Santiago at 23, *United States v. Santiago*, No. 16-4194 (3d Cir. Aug. 1, 2018), 2018 WL 3725556, at \*23 (arguing that *Begay's* reasoning "elucidate[s] the statutory purpose to require a higher mens rea under . . . [the] ACCA . . . than *Voisine* required in 18 U.S.C. § 921(a)(33)(A)(ii)").

2016 case that did not involve the ACCA, § 16, or any other violent felony statute.

*Voisine v. United States* was supposed to resolve a circuit split about whether reckless domestic assaults qualify an individual for prosecution under 18 U.S.C. § 922(g)(9).<sup>83</sup> A “misdemeanor crime of domestic violence,” as used in § 922(g)(9), requires “the use . . . of physical force.”<sup>84</sup> Section 922(g)(9) is not typically interpreted the same way as the ACCA,<sup>85</sup> but the statutory language is similar: § 922(g)(9) requires the “use . . . of physical force,”<sup>86</sup> while the ACCA requires the “use . . . of physical force against the person of another.”<sup>87</sup>

The Court determined that misdemeanor reckless assaults were qualifying convictions for § 922(g)(9)<sup>88</sup> but expressly reserved judgment on whether recklessness is sufficient for “violent felonies” under the ACCA, § 16, and a related class of statutes.<sup>89</sup> Despite the Supreme Court’s acknowledgment that recklessness may not be sufficient to sustain an ACCA conviction, however, lower courts immediately split on *Voisine*’s application to the ACCA and other violent felonies.<sup>90</sup>

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83. *Voisine v. United States*, 136 S. Ct. 2272, 2277–78 (2016). The statute at issue, 18 U.S.C. § 922(g)(9), bars any person convicted of a “misdemeanor crime of domestic violence” from owning a gun. 18 U.S.C. § 922(g)(9) (2012).

84. 18 U.S.C. § 921(a)(33)(A) (2012).

85. See Rachel B. Polan, Note, *The Context of Violence: The Lautenberg Amendment & Interpretive Issues in the Gun Control Act*, 83 BROOK. L. REV. 1441, 1452 (2018) (“[T]he ACCA is borne out of a different purpose and effectuates a very different outcome than [18 U.S.C. § 922(g)(9)].”). Compare *Johnson v. United States*, 559 U.S. 133, 140 (2010) (ACCA violations require “violent force”), with *United States v. Castleman*, 572 U.S. 157, 162–63 (2014) (18 U.S.C. § 922(g)(9) conviction only requires “offensive touching”).

86. 18 U.S.C. § 921(a)(33)(A).

87. 18 U.S.C. § 924(e)(2)(B)(i) (2012).

88. See *Voisine*, 136 S. Ct. at 2278–81 (“Congress’s definition of a ‘misdemeanor crime of violence’ contains no exclusion for convictions based on reckless behavior.”).

89. *Id.* at 2280 n.4.

90. Compare *United States v. Orona*, 923 F.3d 1197, 1202–03 (9th Cir. 2019) (refusing to apply *Voisine* to ACCA issues), *United States v. Middleton*, 883 F.3d 485, 497–500 (4th Cir. 2018) (Floyd, J., concurring for two judges) (“Indeed, this Court’s force clause cases lead me to conclude that ACCA predicates must have, as an element, a higher degree of mens rea than recklessness.”), and *Bennett v. United States*, 868 F.3d 1, 22–23 (1st Cir. 2017) (holding recklessness insufficient for conviction under the ACCA), *vacated as moot*, 870 F.3d 34 (1st Cir. 2017), with *United States v. Burris*, 920 F.3d 942, 951 (5th Cir. 2019) (“[T]he use of force under the ACCA includes reckless conduct.”); *Davis v. United States*, 900 F.3d 733, 736 (6th Cir. 2019) (holding recklessness sufficient for conviction under the ACCA); *United States v. Haight*, 892 F.3d 1271, 1280–81 (D.C. Cir. 2018) (“In light of *Voisine*, we conclude that the use of violent force includes the reckless use of such force.”), *United States v. Hammons*, 862 F.3d 1052, 1055–56 (10th Cir. 2017) (stating that Oklahoma’s “reckless discharge of a firearm” statute is an ACCA predicate, despite the reckless mens rea required for conviction), *United States v. Howell*, 838 F.3d 489, 500–01 (5th Cir. 2016) (“We therefore conclude that the mental state of recklessness may qualify as an offense . . . within the meaning of § 4B1.2(a)(1) of the Guidelines.”), and *United States v. Fogg*, 836 F.3d 951, 956 (8th Cir. 2016) (recklessness sufficient).

The First, Fourth, and Ninth Circuits concluded that pre-*Voisine* precedents continue to control.<sup>91</sup> After conducting in-depth analyses of *Voisine*, the three circuits held that the additional statutory language “against the person of another” evinces a statutory purpose that the force *and* consequences must be intentional.<sup>92</sup>

In contrast, five circuits (the Fifth, Sixth, Eighth, Tenth, and D.C. circuits) held that *Voisine* controls the outcome in cases arising under the ACCA.<sup>93</sup> These circuits found that “against the person of another” requires no additional mens rea: as in *Voisine*, the actor can be reckless towards the consequences of the force.<sup>94</sup> An additional circuit, the Eighth Circuit, originally found that recklessness was sufficient for an ACCA violation,<sup>95</sup> but recent decisions have cast doubt on that position.<sup>96</sup>

This split has led to the current discrepancy: a person with three prior felony convictions including a Tennessee aggravated assault conviction<sup>97</sup> would face a fifteen-year mandatory minimum if arrested on a gun charge in Washington, D.C., but not if arrested in Maryland or Virginia. *Voisine* has sown doubt about which offenses brand someone as an “armed career criminal.” The outsized effect on the lives of thousands of criminal defendants necessitates action.

## II. WHY *VOISINE*’S REASONING IS A POOR FIT FOR THE ACCA

The Supreme Court’s decision in *Voisine v. United States* created a sea change in lower court interpretations of the statutory phrase “the

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91. *Orona*, 923 F.3d at 1202–03; *Middleton*, 883 F.3d at 497–500 (Floyd, J., concurring for two judges); *Bennett*, 868 F.3d at 22–23; *see also* Walker v. United States, 769 F. App’x 195, 201–02 (6th Cir. 2019) (Stranch, J., concurring) (“[I]f we were not bound by *Verwiebe*, I would hold that an offense that requires only the reckless use of force . . . is not a violent felony under the ACCA.”); *United States v. Harper*, 875 F.3d 329, 331–32 (6th Cir. 2017) (holding that absent circuit precedent, the three-judge panel would have held recklessness insufficient).

92. *Orona*, 923 F.3d at 1203; *Middleton*, 883 F.3d at 497 (“I would conclude that the defendant . . . did not ‘use’ violent force against the victim because he caused death recklessly rather than intentionally.”); *Harper*, 875 F.3d at 331–32.

93. *Burris*, 920 F.3d at 951; *Davis*, 900 F.3d at 736; *Haight*, 892 F.3d at 1280–81; *Hammons*, 862 F.3d at 1055–56; *Howell*, 838 F.3d at 500–01.

94. *See Hammons*, 862 F.3d at 1056 (“[I]t makes no difference whether the person applying the force had the specific intention of causing harm or instead merely acted recklessly.”).

95. *Fogg*, 836 F.3d at 956.

96. *Smith v. United States*, 747 F. App’x 443, 444 (8th Cir. 2019) (per curiam) (stating that North Dakota’s felony aggravated assault is not an ACCA predicate offense); *see also* *Mountain v. United States*, 774 F. App’x 317, 318 (8th Cir. May 17, 2019) (per curiam) (stating the same). Both of these Eighth Circuit decisions rely on a published 2018 Eighth Circuit decision that stated North Dakota’s felony aggravated assault was not a predicate offense under the federal sentencing guidelines because a person could be convicted under the statute for reckless driving. *United States v. Schneider*, 905 F.3d 1088, 1092 (8th Cir. 2018).

97. TENN. CODE ANN. § 39-13-102(a)(1)(B) (2019).

use of physical force against the person of another.”<sup>98</sup> Five circuits that previously determined a reckless mens rea was insufficient to “use” physical force “against” another person reversed course, holding that a reckless mens rea was sufficient.<sup>99</sup> But this sea change was unwarranted: the *Voisine* decision was based on principles that do not apply to violent felonies. The more faithful reading of *Voisine*, in light of the Supreme Court’s treatment of the ACCA generally and the principles underlying the penal code, would require a knowledge mens rea for all material elements.

### A. *Voisine’s Narrow Holding*

In the *Voisine* decision, the Supreme Court only intended to clarify what *United States v. Castleman* left open two years prior: whether a reckless assault involved the “use of physical force.”<sup>100</sup> On *Voisine’s* initial appeal to the First Circuit, he argued that his prior domestic violence conviction could not serve as a § 922(g)(9) predicate because the conviction only required a reckless mens rea, and § 922(g)(9) required a knowledge mens rea.<sup>101</sup> The First Circuit rejected *Voisine’s* argument, stating that a reckless mens rea was all that was required to violate § 922(g)(9).<sup>102</sup> Notably, the First Circuit had previously construed the ACCA to require a knowledge mens rea, and therefore it found that § 922(g)(9) required a *lesser mens rea than the ACCA*.<sup>103</sup> The First Circuit panel justified this differential treatment on the grounds that domestic violence encompasses acts that may not be considered violent in the nondomestic context.<sup>104</sup> It also noted that Congress intended

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98. *E.g.*, *United States v. Bettcher*, 911 F.3d 1040, 1045 (10th Cir. 2018) (“*Voisine’s* application and understanding of *Leocal* overrides our contrary precedents classifying reckless harm with negligent or accidental harm.”).

99. *See* sources cited *supra* note 93.

100. *United States v. Castleman*, 572 U.S. 157, 169 n.8 (2014) (“[T]he merely reckless causation of bodily injury under § 39–13–101(1) may not be a ‘use’ of force.”); Petition for Writ of Certiorari at 8, *Voisine v. United States*, 136 S. Ct. 2272 (2016) (No. 14-10154).

101. *United States v. Voisine*, 778 F.3d 176, 180–81 (1st Cir. 2015). 18 U.S.C. § 922(g)(9) is commonly referred to as the “Lautenberg Amendment,” named after the Senator who introduced it in 1996. Melanie C. Schneider, *The Imprecise Draftmanship of the Lautenberg Amendment and the Resulting Problems for the Judiciary*, 17 COLUM. J. GENDER & L. 505, 505 (2008).

102. *Voisine*, 778 F.3d at 180–81 (differentiating the ACCA language from the 18 U.S.C. § 922(g)(9) language, especially the phrase “against the person . . . of another”).

103. *Compare* *United States v. Fish*, 758 F.3d 1, 9–10 (1st Cir. 2014) (requiring knowledge mens rea under 18 U.S.C. § 16, which has nearly identical language to the ACCA definition), *with* *United States v. Booker*, 644 F.3d 12, 19–20 (1st Cir. 2011) (holding reckless mens rea sufficient for conviction under 18 U.S.C. § 922(g)(9)).

104. *Voisine*, 778 F.3d at 181 (quoting *Castleman*, 572 U.S. at 164–65 & 164 n.4) (“‘Domestic violence’ is a ‘term of art’ that ‘encompasses a range of force broader than that which constitutes ‘violence’ simpliciter,’ including ‘acts that might not constitute ‘violence’ in a nondomestic context.’”).



§ 922(g)(9) to be broader than the ACCA, and Congress had “expressly rejected” the ACCA’s definition.<sup>105</sup>

The Supreme Court agreed. The Court considered the statutory background and recognized that Congress enacted § 922(g)(9) after passing the rest of the federal bans on felon firearm possession, including the ACCA, and passed it to “‘close a dangerous loophole’ in the gun control laws.”<sup>106</sup> The “loophole” was that numerous gun control provisions “already barred convicted felons from possessing firearms”—but did not cover domestic abusers convicted of misdemeanors.<sup>107</sup> Congress recognized that “[f]irearms and domestic strife are a potentially deadly combination”<sup>108</sup>—so broader provisions that swept in misdemeanor conduct were necessary to protect vulnerable spouses from that “deadly” combination.

The *Voisine* holding was also notable for how it turned on a single word: “use.”<sup>109</sup> The majority used a detailed example of an individual in a domestic altercation—if the person intentionally threw a plate, he “used physical force in common parlance,” whether he intended to hit his spouse or not.<sup>110</sup> Therefore, the “use of physical force,” simpliciter, is indifferent to a defendant’s mens rea towards the consequences of his conduct.<sup>111</sup>

After *Voisine*, the circuit courts have debated whether the ACCA’s additional language “against the person of another” is restrictive or descriptive. If the language is *restrictive*, then a higher mens rea towards the conduct’s consequences (i.e., knowledge mens rea) is likely required.<sup>112</sup> On the other hand, if the phrase is merely *descriptive*, specifying who the force must be “used” against, a reckless mens rea is likely sufficient.

Two parts of the *Voisine* decision shed light on this restrictive versus descriptive conflict. First, the Court recognized that § 922(g)(9) requires force “against a domestic relation.”<sup>113</sup> Therefore, despite the fact that § 922(g)(9) does not contain the phrase “against the person of

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105. *Id.*

106. *Voisine v. United States*, 136 S. Ct. 2272, 2276 (2016) (quoting *Castleman*, 572 U.S. at 160).

107. *Id.*

108. *United States v. Hayes*, 555 U.S. 415, 427 (2009).

109. *Voisine*, 136 S. Ct. at 2278 (“[U]se’ . . . the only statutory language either party thinks relevant.”).

110. *Id.* at 2279 (internal quotation marks omitted).

111. *Id.*

112. *See United States v. Harper*, 875 F.3d 329, 331 (6th Cir. 2017) (stating that under the federal sentencing guidelines, the phrase “against the person of another” is restrictive, and should require a mens rea of knowledge towards the conduct’s consequences).

113. *Voisine*, 136 S. Ct. at 2276.

another,” the force must still be used against another person.<sup>114</sup> Second, the Court specifically stated that its construction of § 922(g)(9) did not resolve whether 18 U.S.C. § 16 (the statute at issue in *Leocal*, with nearly identical language to the ACCA) was satisfied with a reckless mens rea towards the consequences.<sup>115</sup> In a footnote, the Court recognized that “[c]ourts have sometimes given those two statutory definitions divergent readings in light of differences in their contexts and purposes, and we do not foreclose that possibility with respect to their required mental states.”<sup>116</sup> These two declarations by the Court confirmed that the mens rea standard for “violent felonies” remains unresolved at the Supreme Court level. However, while *Voisine* resolved the circuit split over the mens rea requirement for § 922(g)(9) convictions, it created a new circuit split about the meaning of “against the person of another” in its wake.<sup>117</sup>

### *B. Post-Voisine: Analysis of the Divergent Approaches*

The post-*Voisine* conflict at the court of appeals level is primarily about the scope of *Voisine*’s holding: Does “the use of physical force against the person of another” in the Armed Career Criminal Act have the same mens rea requirement as “the use of physical force” in § 922(g)(9)?<sup>118</sup> As discussed, prior to *Voisine*, every lower court held that violent felonies required a knowledge mens rea for conviction.<sup>119</sup> Thus, the critical question is whether *Voisine* overruled the prior ACCA court of appeals decisions.<sup>120</sup> The courts that found *Voisine* does not control have focused largely on the restrictive nature of the additional statutory

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114. *See id.*; *see also* United States v. Haight, 892 F.3d 1271, 1281 (D.C. Cir. 2018) (“[T]he provision at issue in *Voisine* still required the defendant to use force against another person.”); United States v. Verwiebe, 874 F.3d 258, 263 (6th Cir. 2017) (“There . . . are no victim-less prosecutions under the *Voisine* statute.”).

115. *Voisine*, 136 S. Ct. at 2280 n.4.

116. *Id.*

117. *See* United States v. Tavares, 843 F.3d 1, 19 (1st Cir. 2016) (“Does *Voisine* upend the circuits’ wide consensus that recklessly causing injury is different than using force against a person?”).

118. *See Haight*, 892 F.3d at 1281 (“*Voisine*’s reasoning applies to ACCA’s violent felony provision.”); United States v. Pam, 867 F.3d 1191, 1208 (10th Cir. 2017) (noting that the Tenth Circuit had already applied *Voisine*’s 18 U.S.C. § 922(g)(9) interpretation to the ACCA); Bennett v. United States, 868 F.3d 1, 23 (1st Cir. 2017) (stating that the court was left with “grievous ambiguity” over whether *Voisine* controls in the ACCA context), *vacated as moot*, 870 F.3d 34 (1st Cir. 2017).

119. *See* sources cited *supra* note 76 and accompanying text.

120. *See, e.g.*, United States v. Orona, 923 F.3d 1197, 1200 (9th Cir. 2019) (citing Miller v. Gammie, 335 F.3d 889, 900 (9th Cir. 2003) (en banc)) (“[W]e must follow [prior circuit precedent] unless *Voisine* ‘undercut the theory or reasoning underlying the prior circuit precedent in such a way that the cases are clearly irreconcilable.’”); United States v. Verwiebe, 874 F.3d 258, 262 (6th Cir. 2017) (“[O]nly the en banc process . . . [or] a material intervening Supreme Court decision . . . permits us to override binding circuit precedent.”).

language and the severity of ACCA penalties relative to § 922(g)(9).<sup>121</sup> Courts that found the additional language insignificant, however, have deemed *Voisine* binding.<sup>122</sup>

### 1. *Voisine* Does Not Control ACCA Decisions

The circuits that found *Voisine* nonbinding on Armed Career Criminal Act decisions correctly state that “against the person of another” is restrictive.<sup>123</sup> The ACCA proscribes the “use . . . of physical force against the person of another,”<sup>124</sup> while § 922(g)(9) prohibits the “use . . . of physical force.”<sup>125</sup> The issue is whether “against the person of another” is restrictive. If read restrictively, the addition of the phrase “against the person of another” requires the mens rea to carry throughout the entire phrase—the person must knowingly “use” their force *against another person*.

In *United States v. Harper*, a Sixth Circuit panel relied on the additional phrase “against the person of another” to conclude that *Voisine* should not apply to violent felonies.<sup>126</sup> Judge Kethledge, writing

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121. *United States v. Middleton*, 883 F.3d 485, 497–500 (4th Cir. 2018) (Floyd, J., concurring) (“Indeed, this Court’s force clause cases lead me to conclude that ACCA predicates must have, as an element, a higher degree of mens rea than recklessness.”); *United States v. Harper*, 875 F.3d 329, 330–32 (6th Cir. 2017) (“The italicized language is a restrictive phrase that describes the particular type of ‘use of physical force’ necessary to satisfy U.S. SENTENCING GUIDELINES MANUAL § 4B1.2 (U.S. SENTENCING COMM’N 2018).); *Bennett*, 868 F.3d at 20–22 (“*Voisine* does not make similarly clear that a reckless assault involves the deliberate decision to employ force ‘against the person of another.’”).

122. *Haight*, 892 F.3d at 1281 (“In light of *Voisine*, we conclude that the use of violent force includes the reckless use of such force.”); *Verwiebe*, 874 F.3d at 262 (“*Voisine*’s analysis applies with equal force to the Guidelines.”); *Pam*, 867 F.3d at 1207–09; *United States v. Mendez-Henriquez*, 847 F.3d 214, 220–22 (5th Cir. 2017) (“In other words, ‘the word ‘use’ does not demand that the person applying force have the purpose or practical certainty that it will cause harm, as compared with the understanding that it is substantially likely to do so.’”); *United States v. Fogg*, 836 F.3d 951, 956 (8th Cir. 2016) (“Reckless conduct thus constitutes a ‘use’ of force under the ACCA.”).

123. *Voisine*’s holding is not controlling precedent in the First, Fourth, and Ninth Circuits. See sources cited *supra* note 91 and accompanying text. The Sixth Circuit panel in *Harper* was bound by circuit precedent, but unanimously held that they would have come to the opposite conclusion. 875 F.3d at 330 (“[W]e write further to explain why, in our view, the decision in *Verwiebe* was mistaken.”); see also *Walker v. United States*, 769 F. App’x 195, 201 (6th Cir. 2019) (Stranch, J., concurring) (“*Verwiebe* misreads both *Voisine* and the ACCA’s plain text.”).

124. 18 U.S.C. § 924(e)(2)(B)(i) (2012).

125. 18 U.S.C. § 921(a)(33)(A) (2012).

126. *Harper*, 875 F.3d at 331–32. The court was construing the term “crime of violence” in § 4B1.2 of the Federal Sentencing Guidelines; the language is identical to ACCA’s language. U.S. SENTENCING GUIDELINES MANUAL § 4B1.2 (U.S. SENTENCING COMM’N 2004). The Sixth Circuit interprets the sentencing guidelines’ and ACCA’s language identically. See *United States v. Burris*, 912 F.3d 386, 392 (6th Cir. 2019) (“Because the text of the ACCA and Guidelines elements clauses are identical, we typically interpret both elements clauses ‘the same way.’” (quoting *United States v. Harris*, 853 F.3d 318, 320 (6th Cir. 2017))).

for the panel, found the ACCA's additional language "not meaningless, but restrictive."<sup>127</sup> He stated that the phrase "describes the particular type of 'use of physical force' necessary to satisfy [the statute]."<sup>128</sup> A higher mens rea is required, therefore, "not only as to the employment of force, but also as to its *consequences*."<sup>129</sup> As long as "against the person of another" performs a narrowing function, *Voisine* cannot be controlling—*Voisine* only interpreted the word "use," and said nothing about the meaning of "against the person of another."<sup>130</sup>

This interpretation of the ACCA, ascribing a narrowing function to "against the person of another," best accords with basic principles of statutory interpretation, most notably the canon against surplusage. The Supreme Court "has often said that 'every clause and word of a statute' should, 'if possible, be given effect,' " a principle that is referred to as the canon against surplusage.<sup>131</sup> While the canon against surplusage is not a steadfast rule,<sup>132</sup> it "is strongest when an interpretation would render superfluous another part of the same statutory scheme."<sup>133</sup> Since § 922(g)(9) and the ACCA are part of the same broad statutory scheme to fight gun violence by banning dangerous individuals from possessing guns,<sup>134</sup> the canon against surplusage would seem to apply with the most force.<sup>135</sup>

Accordingly, the phrase "use of physical force" should be read in a way that does not render the language "against the person of another"

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127. *Harper*, 875 F.3d at 332.

128. *Id.* at 331.

129. *Id.* (emphasis in original).

130. *See id.* at 333 ("*Voisine* tells us what 'use' means, not what 'against the person of another' means."); *see also* *United States v. Orona*, 923 F.3d 1197, 1203 (9th Cir. 2019) (stating that *Voisine* did not undercut "the theory or reasoning" of prior circuit precedent); *Bennett v. United States*, 868 F.3d 1, 19 (1st Cir. 2017) ("*Voisine* does not appear to foreclose the possibility that the follow-on 'against' phrase in ACCA performs the narrowing function that *Fish* and a slew of other circuits had ascribed to the similarly worded 'against' phrase in § 16."), *vacated as moot*, 870 F.3d 34 (1st Cir. 2017).

131. *Chickasaw Nation v. United States*, 534 U.S. 84, 93 (2001) (quoting *United States v. Menasche*, 348 U.S. 528, 538–39 (1955)).

132. *King v. Burwell*, 135 S. Ct. 2480, 2492 (2015).

133. *Marx v. General Revenue Corp.*, 568 U.S. 371, 386 (2013); *see also* *Bailey v. United States*, 516 U.S. 137, 146 (1995) ("'[U]sing a firearm' should not have a different meaning in § 924(c)(1) than it does in § 924(d).") (internal quotations omitted); *United Sav. Ass'n of Tex. v. Timbers of Inwood Forest Assocs.*, 484 U.S. 365, 371 (1988) ("A provision that may seem ambiguous in isolation is often clarified by the remainder of the statutory scheme.").

134. *See Voisine v. United States*, 136 S. Ct. 2272, 2276 (2016) (stating that Congress enacted § 922(g)(9) to "close a dangerous loophole" in existing gun control provisions).

135. *Marx*, 568 U.S. at 386.

superfluous in the ACCA.<sup>136</sup> Since *Voisine* required recklessness towards the consequences of an individual's conduct,<sup>137</sup> the ACCA must be read to apply a knowledge mens rea both to the conduct (the force itself) and to the consequences (against another person).<sup>138</sup> The phrase "against the person of another" would be superfluous if the ACCA were read to require only a reckless mens rea.

Adherence to legislative intent also does not compel the same result in the ACCA as in § 922(g)(9). The *Voisine* majority was expressly concerned with the risk of emasculating Congress's statutory purpose.<sup>139</sup> A knowledge mens rea requirement would have rendered § 922(g)(9) "broadly inoperative" in thirty-five states that criminalized reckless misdemeanor domestic assaults, because the statute only covered one type of offense: misdemeanor domestic assaults.<sup>140</sup>

While § 922(g)(9) only addresses a narrow category of crimes, the ACCA covers a broad swath of offenses. It not only specifies certain predicate crimes (e.g., "burglary, arson, or extortion"),<sup>141</sup> but also includes *any crime* that "has as an element the use . . . of physical force against the person of another."<sup>142</sup> So, although there are a significant number of offenses impacted by the knowledge versus reckless ambiguity,<sup>143</sup> many crimes that the ACCA addresses (for example, murder, armed robbery, and rape) are not affected—they already require a knowledge mens rea.<sup>144</sup> Ascribing a knowledge mens rea to the ACCA, therefore, does not risk the same inoperability concerns that animated the *Voisine* decision.

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136. *United States v. Middleton*, 883 F.3d 485, 499 n.3 (4th Cir. 2018) (Floyd, J., concurring) ("The word 'use' should be read without rendering the phrase 'against the person of another' superfluous."); *see also* *Bennett v. United States*, 868 F.3d 1, 19 (1st Cir. 2017) ("[T]he canon against surplusage does at least suggest that the follow-on 'against' phrase in ACCA must be conveying something that the phrase 'use . . . of physical force' does not."), *vacated as moot*, 870 F.3d 34 (1st Cir. 2017).

137. *Voisine*, 136 S. Ct. at 2282.

138. *See* *United States v. Harper*, 875 F.3d 329, 331 (6th Cir. 2017) ("[The Federal Sentencing Guidelines] require[ ] a mens rea—not only as to the employment of force, but also as to its consequences—that the provision in *Voisine* did not.").

139. *Voisine*, 136 S. Ct. at 2280–81; *see also* *United States v. Savath*, 300 F. Supp. 3d 1215, 1224 (E.D. Or. 2018) (stating that the *Voisine* majority was "heavily influenced by policy concerns specific to the statute at issue").

140. *Voisine*, 136 S. Ct. at 2280.

141. 18 U.S.C. § 924(e)(2)(B)(ii) (2012).

142. 18 U.S.C. § 924(e)(2)(B)(i).

143. *See* sources cited *infra* note 169 and accompanying text.

144. *See* *Bennett v. United States*, 868 F.3d 1, 23 (1st Cir. 2017) ("[T]he exclusion of reckless aggravated assault from the definition of a 'violent felony' would not risk rendering ACCA broadly 'inoperative' in the way that the exclusion of reckless assault would risk rendering broadly inoperative § 922(g)(9)."), *vacated as moot*, 870 F.3d 34 (1st Cir. 2017).

## 2. Arguments that *Voisine* Controls ACCA Decisions Are Unconvincing

Courts that have interpreted *Voisine* to mean that a reckless mens rea is sufficient for Armed Career Criminal Act convictions focus on § 922(g)(9)'s similar statutory language and ignore the Supreme Court's acknowledgment of the differences in "contexts and purposes."<sup>145</sup> The five circuits that have reached this result<sup>146</sup> emphasized the similar wording between the two statutes<sup>147</sup> and the fact that both provisions require a victim.<sup>148</sup> However, "they have done so without seriously considering or even discussing the divergent contexts and purposes of the ACCA and [§ 922(g)(9)]."<sup>149</sup>

These circuits' conclusions are defensible if the phrase "against the person of another" in the ACCA is *descriptive*, not *restrictive*. But as illustrated above, the canon against surplusage appears to favor a restrictive reading of the statute.<sup>150</sup> Yet none of the five circuits that found *Voisine* controlling attempted to reconcile this apparent conflict with the canon against surplusage. Only two of the five circuits addressed the differences in statutory language in any meaningful way.<sup>151</sup> Most recently, in *United States v. Haight*, a 2018 D.C. Circuit decision, then-Judge Brett Kavanaugh found the ACCA's different statutory language irrelevant because *Voisine*'s provision still required force to be used

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145. *Voisine*, 136 S. Ct. at 2280 n.4.

146. *Davis v. United States*, 900 F.3d 733, 736 (6th Cir. 2019); *United States v. Haight*, 892 F.3d 1271, 1281 (D.C. Cir. 2018) ("In light of *Voisine*, we conclude that the use of violent force includes the reckless use of such force."); *United States v. Pam*, 867 F.3d 1191, 1207–09 (10th Cir. 2017) (reckless mens rea is sufficient to violate the ACCA); *United States v. Mendez-Henriquez*, 847 F.3d 214, 220–22 (5th Cir. 2017) (stating that *Voisine* only requires a reckless use of force and bound the court); *United States v. Fogg*, 836 F.3d 951, 956 (8th Cir. 2016) ("Reckless conduct thus constitutes a 'use' of force under the ACCA."). As discussed *supra* notes 95–96 and accompanying text, the Eighth Circuit's position is no longer clear. This Note assumes that *Fogg* continues to apply until the Eighth Circuit explicitly overrules it.

147. See *Haight*, 892 F.3d at 1280 (calling the statutory language in 18 U.S.C. § 922(g)(9) and the ACCA "nearly identical"); *Fogg*, 836 F.3d at 956 (stating that 18 U.S.C. § 922(g)(9)'s force clause is "similarly worded" to the ACCA's).

148. See *United States v. Hayes*, 555 U.S. 415, 426 (2009) (holding that § 921(a)(33)(A) convictions require a victim: "the defendant's current or former spouse"); see also *Haight*, 892 F.3d at 1281 ("[T]he provision at issue in *Voisine* still required the defendant to use force against another person."); *United States v. Verwiebe*, 874 F.3d 258, 263 (6th Cir. 2017) ("There . . . are no victimless prosecutions under the *Voisine* statute.").

149. *United States v. Middleton*, 883 F.3d 485, 499–500 (4th Cir. 2018) (Floyd, J., concurring).

150. See *Marx v. General Revenue Corp.*, 568 U.S. 371, 386 (2013) (nothing that the canon against surplusage "is strongest when an interpretation would render superfluous another part of the same statutory scheme.").

151. *Haight*, 892 F.3d at 1280 (calling the statutory language in 18 U.S.C. § 922(g)(9) and the ACCA "nearly identical"); *Verwiebe*, 874 F.3d at 263.

against a “victim.”<sup>152</sup> One year earlier, Judge Sutton, writing for a Sixth Circuit panel in *United States v. Verwiebe*, stated that “[t]he addition of the word ‘against’ cannot change *Voisine*’s holding that the ‘use of physical force’ covers this act in the first instance.”<sup>153</sup> He attempted to reconcile the additional statutory language in the ACCA by stating “the category of victims is larger” under the ACCA statute than under § 922(g)(9)—the ACCA covers physical force against any person, rather than physical force specifically against a domestic partner.<sup>154</sup> This does little, however, to explain why Congress would not specify who the force must be used “against” at all in § 922(g)(9), if it indeed intended the two statutory phrases to have the same meaning.

### 3. Relationship Between the ACCA and § 922(g)(9) in Other Contexts

Prior Supreme Court comparisons of the Armed Career Criminal Act and § 922(g)(9) confirm that § 922(g)(9) is intended to reach a broader class of offenders than the ACCA.<sup>155</sup> In *United States v. Castleman*, the Court found that § 922(g)(9) convictions required less “physical force” than ACCA convictions.<sup>156</sup> The *Castleman* defendant relied on the Court’s precedent from *Johnson v. United States*,<sup>157</sup> where the Court held that ACCA predicate offenses required “violent force.”<sup>158</sup> The defendant argued the two statutes should be read the same way, and therefore his Tennessee conviction for “knowingly caus[ing] bodily injury to the mother of his child” could not be a § 922(g)(9) predicate, because he could be convicted of “causing bodily injury” with *minimal* force.<sup>159</sup> Rejecting that argument, the *Castleman* Court determined that § 922(g)(9) should be read more broadly than the ACCA, and is satisfied by less “physical force.”<sup>160</sup> The Court provided three rationales for read-

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152. *Haight*, 892 F.3d at 1281; *see also Verwiebe*, 874 F.3d at 263 (holding that the two provisions should be similarly construed because 18 U.S.C. § 922(g)(9) “requires a victim”).

153. *Verwiebe*, 874 F.3d at 263.

154. *Id.* The *Verwiebe* court also relied on *Voisine*’s contextual analysis, stating that it was “unlikely” the U.S. Sentencing Commission intended to circumvent the laws of “[t]hirty-four states plus the District of Columbia” that had included recklessness in their assault statutes. *Id.* However, as discussed *infra* note 169 and accompanying text, many fewer assault laws are impacted by a knowledge mens rea standard for “violent felonies.”

155. *United States v. Castleman*, 572 U.S. 157, 164–65, 164 n.4 (2014) (Characterizing domestic violence as a term of art that “encompasses a range of force broader than that which constitutes ‘violence’ *simpliciter*,” including “acts that might not constitute ‘violence’ in a nondomestic context.”).

156. *Id.* at 163.

157. 559 U.S. 133, 140 (2010).

158. *Id.*

159. *Castleman*, 572 U.S. at 162–63.

160. *Id.* at 163.

ing the statutes differently: (1) the remedial congressional intent behind § 922(g)(9); (2) the commonly understood meaning of the word “domestic violence”; and (3) the terms applied to individuals who violate the statute—§ 922(g) bars many low-level offenders from owning guns, while the ACCA labels offenders as “armed career criminal[s]” and imposes a stiff penalty.<sup>161</sup>

The Supreme Court has also recognized that Congress envisioned § 922(g)(9) as an expansion of the existing class of gun control laws in a second way: § 922(g)(9) convictions only require *misdemeanor* conduct, while ACCA convictions require *felonious* conduct.<sup>162</sup>

It is puzzling, therefore, that lower courts only read § 922(g)(9) and the ACCA *in pari materia* when determining the requisite mens rea. *Castleman* held that the ACCA requires more force,<sup>163</sup> and similarly, *Voisine* recognized that the ACCA requires a more serious crime<sup>164</sup>—therefore, the ACCA should also require a more culpable mens rea. This is especially true considering the additional statutory language. If mens rea was the *one area* where Congress intended the ACCA and § 922(g)(9) to be read in tandem, why would it not adopt the same statutory language that defines the ACCA, § 924(c), and § 16?

The ACCA does not specifically require more force than § 922(g)(9) for a qualifying conviction; both statutes require the “use . . . of physical force.”<sup>165</sup> The ACCA merely adds a relational element: the force must be used “against the person of another.” Yet *Castleman* found that an ACCA conviction requires more force than a § 922(g)(9) conviction.<sup>166</sup> With the additional statutory phrase “against the person of another,” ACCA convictions should require a higher mens rea than § 922(g)(9) convictions.

### C. The Importance of the Enumerated vs. Unenumerated Distinction

The Supreme Court has “repeatedly declined to construe [a] statute in a way that would render it inapplicable in many States.”<sup>167</sup> While

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161. *Id.* at 164–67.

162. *Voisine v. United States*, 136 S. Ct. 2272, 2276 (2016) (“Congress added § 922(g)(9) to prohibit any person convicted of a ‘misdemeanor crime of domestic violence’ from possessing any gun or ammunition with a connection to interstate commerce.”).

163. 572 U.S. at 163.

164. 136 S.Ct. at 2276.

165. 18 U.S.C. § 921(a)(33)(A) (2012); 18 U.S.C. § 924(e)(2)(B) (2012).

166. Compare *Johnson v. United States*, 559 U.S. 133, 140 (ACCA violations require “violent force”), with *Castleman*, 572 U.S. at 162–63 (18 U.S.C. § 922(g)(9) convictions only require “offensive touching”).

167. *Stokeling v. United States*, 139 S. Ct. 544, 552 (2019).



lower courts have relied on this canon of statutory interpretation to argue that a knowledge mens rea would render the Armed Career Criminal Act inoperative in many jurisdictions,<sup>168</sup> this analysis is misguided. In short, the enumerated crimes (burglary, arson, and extortion) are the only crimes that Congress clearly intended to serve as ACCA predicates. The other (unenumerated) offenses do not clearly count as ACCA predicate offenses, because there is no basis to conclude that Congress intended the ACCA to reach aggravated assault, reckless endangerment, or other “reckless” offenses.

Most lower court concern regarding ACCA “inoperability” surrounds aggravated assault convictions—twenty-six states currently have at least one form of felony aggravated assault that can be committed with a reckless mens rea toward the consequences, twelve of which are “indivisible.”<sup>169</sup> And since felony aggravated assault certainly *seems* like a “violent felony” to most lay observers, “it may seem anomalous that an offense bearing the name ‘aggravated assault’ could escape ACCA’s reach.”<sup>170</sup> However, this concern is not controlling.

The originally enacted ACCA did not include aggravated assault—it enumerated two crimes, robbery and burglary, as predicate offenses.<sup>171</sup> Today, after thirty-five years of revision, the ACCA enumerates a number of crimes that are “violent felonies”—“burglary, arson, or

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168. *United States v. Verwiebe*, 874 F.3d 258, 263 (6th Cir. 2017) (“In view of the categorical approach applied in this setting, Verwiebe’s argument would require us to find that no conviction obtained under any of these statutes qualifies as a ‘crime of violence.’”).

169. ALA. CODE § 13A-6-21(a)(3) (2019) (divisible, reckless); ALASKA STAT. § 11.41.220(a)(1) (2019) (divisible, reckless); ARIZ. REV. STAT. ANN. § 13-1204 (2018) (indivisible, reckless); COLO. REV. STAT. § 18-3-203(1)(d) (2019) (divisible, reckless); CONN. GEN. STAT. § 53a-60(a)(3) (2018) (indivisible, reckless); DEL. CODE ANN. tit. 11, § 612(a) (2019) (indivisible, reckless); HAW. REV. STAT. § 707-711 (2018) (indivisible, reckless); IOWA CODE § 708.2(4) (2019) (divisible, reckless—“general intent”); KAN. STAT. ANN. § 21-5413(b)(2)(A) (2018) (divisible, reckless); KY. REV. STAT. ANN. § 508.025(1)(a) (West 2019) (indivisible, reckless); ME. STAT. tit. 17-a, § 208 (2019) (indivisible, reckless); MASS. GEN. LAWS ch. 265, § 13A(a) (2019) (divisible, reckless, as interpreted by *United States v. Faust*, 853 F.3d 39, 55–57 (1st Cir. 2017)); MO. REV. STAT. § 565.052 (2016) (divisible, reckless); NEB. REV. STAT. § 28-309(1)(b) (2016) (divisible, reckless); N.H. REV. STAT. ANN. § 631:2(1)(a) (2019) (indivisible, reckless); N.J. STAT. ANN. § 2C:12-1(b)(3) (West 2019) (divisible, reckless); N.Y. PENAL LAW § 120.05 (McKinney 2019) (indivisible, reckless); N.C. GEN. STAT. § 14-32(b) (2019) (indivisible, negligence, as interpreted by *United States v. Geddie*, 125 F. Supp. 3d 592, 600–01 (E.D. N.C. 2015)); N.D. CENT. CODE § 12.1-17-02 (2019) (divisible, reckless, as interpreted by *United States v. Schneider*, 905 F.3d 1088, 1091–92 (8th Cir. 2018)); OKLA. STAT. tit. 21, §§ 641–642, 646(A)(1) (2019) (indivisible, reckless—“willful”); OR. REV. STAT. § 163.165 (2017) (amended 2019) (divisible, reckless); R.I. GEN. LAWS ANN. § 11-5-2.2(a) (2019) (indivisible, negligence); TENN. CODE ANN. § 39-13-102(a)(1)(B) (2019) (divisible, reckless); TEX. PENAL CODE ANN. §§ 22.01(a)—22.02(a) (West 2019) (indivisible, reckless); UTAH CODE ANN. § 76-5-102(1) (LexisNexis 2019) (indivisible, reckless, as interpreted by *United States v. Bettcher*, 911 F.3d 1040, 1043 (10th Cir. 2018)); WASH. REV. CODE § 9A.36.031(1)(d), (f) (2019) (divisible, negligence).

170. *Bennett v. United States*, 868 F.3d 1, 22 (1st Cir. 2017), *vacated as moot*, 870 F.3d 34 (1st Cir. 2017).

171. *See Stokeling*, 139 S. Ct. at 550 (recounting the history of the ACCA).

extortion,” and any crime that “involves use of explosives.”<sup>172</sup> Therefore, there is very little doubt that Congress intended felony burglary, arson, and extortion convictions to serve as ACCA predicates. The remaining ACCA violent felonies, however, are unenumerated—the crimes only serve as ACCA predicates *because* they meet the ACCA’s other textual requirements.

Since aggravated assault is not an enumerated crime in the ACCA, the entire analysis is flipped.<sup>173</sup> For enumerated crimes, the crime’s definition is based on the common-law crime—that is, how a majority of states defined the crime at the time Congress enacted the law.<sup>174</sup> For unenumerated crimes such as aggravated assault, however, the state laws are compared to the ACCA’s definition of “violent felony”—i.e., “the use of physical force against the person of another.”<sup>175</sup>

By way of example, consider the recent Supreme Court case of *Stokeling v. United States*.<sup>176</sup> The *Stokeling* Court reviewed a state-law robbery conviction. Although robbery is not currently enumerated in the ACCA, it was enumerated when Congress originally passed the statute.<sup>177</sup> Therefore, the *Stokeling* majority read robbery like it was an enumerated crime, and found that the ACCA force clause, as applied to felony robbery, only requires enough force to “overcome the victim’s resistance.”<sup>178</sup> The Court read the force clause this way, in part, because it did not want to interpret the ACCA in a way that would prevent the statute from reaching one of the originally enumerated ACCA crimes in at least thirty-one jurisdictions.<sup>179</sup>

In a similar vein, the *Voisine* Court did not want to leave § 922(g)(9), which enumerates domestic assault as the only predicate crime, “broadly inoperative in the 35 jurisdictions with assault laws extending to recklessness.”<sup>180</sup> Interpreting the statutes differently in

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172. 18 U.S.C. § 924(e)(2)(B)(ii) (2012).

173. *See, e.g.*, *United States v. McMurray*, 653 F.3d 367, 373 n.4 (6th Cir. 2011) (“Because aggravated assault is not an enumerated crime under the ACCA, the analysis of the generic definition of aggravated assault in other contexts in which it is an enumerated crime is not directly relevant.”).

174. *See Stokeling*, 139 S. Ct. at 550–51 (defining the common-law crime of robbery in the context of state laws in effect at the time).

175. *See McMurray*, 653 F.3d at 373 (“Because aggravated assault is not an enumerated crime, we analyze whether recklessly causing serious bodily injury to another meets . . . the ‘use of physical force’ clause.”).

176. 139 S. Ct. 544 (2019).

177. *Id.* at 551.

178. *Id.* at 550.

179. *Id.* at 552 (noting that both sides agreed at least 31 states’ robbery statutes would be outside the ACCA’s scope if the Court required more force than necessary to “overcome a victim’s resistance”).

180. *Voisine v. United States*, 136 S. Ct. 2272, 2280 (2016).

*Stokeling* and *Voisine* would have jeopardized the purpose of the ACCA, since both cases involved enumerated predicate crimes that Congress clearly intended to reach under the statute.<sup>181</sup>

This analysis for enumerated crimes, where Congress's intent to reach certain crimes controls, does not apply for unenumerated crimes. Most states require a knowledge mens rea for the enumerated ACCA offenses (burglary, arson, and extortion).<sup>182</sup> Requiring a knowledge mens rea for all material elements would have no effect on those statutes,<sup>183</sup> and little effect on unenumerated serious crimes that involve the "use . . . of physical force against the person of another."<sup>184</sup> Even for aggravated assault, the impact would be minimal because the modified categorical approach would only categorically exclude a minority of states' felony aggravated assault laws from the ACCA's scope.<sup>185</sup>

Therefore, to claim that the ACCA includes reckless crimes *because* some states include recklessness in their aggravated assault definitions proves too much. For unenumerated crimes, state laws are considered *against* the statutory definition, not the other way around.<sup>186</sup> The fact that some states include recklessness in their statutory definitions of aggravated assault has no bearing on whether Congress intended the "use of physical force against the person of another" to stretch that far.

Furthermore, the argument for including reckless crimes is at least arguably undermined by attempt liability in the ACCA's force clause. Read in its entirety, § 924(e)(2)(B) defines "violent felony" as the

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181. *Stokeling*, 139 S. Ct. at 552; *Voisine*, 136 S. Ct. at 2280–81.

182. *E.g.*, CONN. GEN. STAT. § 53a-112 (2019) (felony arson requires "intent to destroy or damage a building"); IND. CODE § 35-43-2-1 (2019) (burglary requires "intent to commit a felony or theft"); KAN. STAT. ANN. § 21-5807 (2018) (burglary requires "intent to commit a felony, theft or sexually motivated crime"); TENN. CODE ANN. § 39-14-303 (2019) (arson requires a person to "knowingly damage[]" property or land); TEX. PENAL CODE ANN. § 30.02 (West 2019) (burglary requires "intent to commit a felony, theft, or an assault").

183. It would have no practical effect at all, because any action regarding the "force clause" would not affect the "enumerated clause." The enumerated crimes would continue to be interpreted against the common-law crimes of burglary, arson, and extortion.

184. *E.g.*, NEB. REV. STAT. § 28-304 (2016) (second-degree murder requires the defendant to act "intentionally"); N.M. STAT. ANN. § 30-16-2 (2019) (robbery requires "criminal intent," as interpreted by *State v. Puga*, 510 P.2d 1075, 1076–77 (N.M. Ct. App. 1973)). Some states predicate second-degree murder on a gross recklessness mens rea: "[C]ircumstances manifesting extreme indifference to human life." *E.g.*, ARIZ. REV. STAT. ANN. § 13-1104(A)(3) (2019). These convictions would not be impacted by a finding that recklessness is not sufficient, as gross recklessness is commonly seen as more similar to knowledge mens rea than recklessness mens rea. See Guyora Binder et al., *Capital Punishment of Unintentional Felony Murder*, 92 NOTRE DAME L. REV. 1141, 1147 (2017) (discussing how critics of felony murder rules accept liability for death caused with an "intent or gross recklessness" mens rea, but do not accept a recklessness or negligence mens rea).

185. See sources cited *supra* note 169 and accompanying text.

186. *United States v. McMurray*, 653 F.3d 367, 373 (6th Cir. 2011).

“use, attempted use, or threatened use of physical force against the person of another.”<sup>187</sup> It is impossible to *attempt* to commit a *reckless* crime.<sup>188</sup> The attempted and threatened predicate crimes, therefore, must have a knowledge mens rea for all material elements. Additionally, it would seem anomalous to lower the mens rea requirement for crimes that involve the “use” of force, but not the “threatened” or “attempted” use of force. Despite this issue, the *Voisine* Court did not address the inconsistency when interpreting § 922(g)(9), which features the same “attempt” language as the ACCA.<sup>189</sup>

In sum, *Voisine* did not answer whether offenses with a reckless mens rea can serve as ACCA predicate offenses, and its reasoning is a poor fit as applied to the ACCA. The statutory context, congressional intent, and prior court decisions show that a knowledge mens rea is required for an ACCA predicate offense.

### III. MOVING FORWARD: A SIMPLE SOLUTION TO A CONVOLUTED PROBLEM

In the absence of a Supreme Court resolution, Congress should explicitly amend the Armed Career Criminal Act to require knowledge for predicate offenses. This approach is most faithful to the ACCA’s history and purpose, and it ensures that individuals are only labeled “armed career criminals” after repeated incidences of intentionally violent conduct.

#### *A. A Congressional Fix to a Court-Created Problem*

Thus far, this Note has argued that both the Armed Career Criminal Act’s legislative history<sup>190</sup> and the Supreme Court’s interpretation of the statute<sup>191</sup> support the fact that Congress only intended the statute to reach knowing, violent, “armed career” criminals. Further, this Note has established that a faithful reading of the ACCA and § 922(g)(9) supports a restrictive function for the statutory phrase

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187. 18 U.S.C. § 924(e)(2)(B) (2012).

188. *United States v. Moreno*, 821 F.3d 223, 230 (2d Cir. 2016) (“Because it is legally impossible to intend to commit a crime that is defined . . . by an unintended result, one cannot attempt to commit reckless second degree assault under Connecticut law.”); *Dale v. Holder*, 610 F.3d 294, 302 (5th Cir. 2010) (“[A] defendant cannot be tried and convicted of attempted reckless assault.”); *see also State v. Lyerla*, 424 N.W.2d 908, 913 (S.D. 1988) (“[C]ourts have . . . found attempted reckless homicide a logical impossibility.”).

189. *Voisine v. United States*, 136 S. Ct. 2272 (2016).

190. *See supra* Section I.A.

191. *E.g.*, *Johnson v. United States*, 559 U.S. 133, 140 (2010); *Begay v. United States*, 553 U.S. 137, 146–47 (2008).

“against the person of another,”<sup>192</sup> and that the inoperability concerns underlying *Stokeling* and *Voisine* do not apply to unenumerated crimes in the ACCA’s force clause.<sup>193</sup> In light of these considerations, a knowledge mens rea should be required for a prior conviction to serve as a predicate “violent felony” under the ACCA’s force clause. Thirty years of unanimity among lower courts support the claim that the “use of physical force against the person of another” requires a knowledge mens rea for all material elements—unanimity unsettled only by the Supreme Court’s decision in *Voisine*.<sup>194</sup>

Courts, however, are not well-suited to fix this problem of their own creation. As previously discussed, the circuit courts are in conflict,<sup>195</sup> and the Supreme Court has not expressed any interest in clarifying the issue.<sup>196</sup> Moreover, many ACCA mens rea cases are cloaked in difficult procedural postures that make them unlikely candidates for resolution by the Supreme Court.<sup>197</sup>

Additionally, any court that must ascertain congressional intent is left deciphering the intent of the Congress that passed the amended

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192. *See supra* Part II.

193. *See supra* Section II.C.

194. *E.g.*, *United States v. Fish*, 758 F.3d 1, 16–17 (1st Cir. 2014); *United States v. Palomino Garcia*, 606 F.3d 1317, 1335–36 (11th Cir. 2010); *United States v. Zuniga-Soto*, 527 F.3d 1110, 1124 (10th Cir. 2008); *United States v. Portela*, 469 F.3d 496, 499 (6th Cir. 2006); *Tran v. Gonzales*, 414 F.3d 464, 470 (3d Cir. 2005); *Bejarano-Urrutia v. Gonzales*, 413 F.3d 444, 445 (4th Cir. 2005).

195. *See sources cited supra* note 7.

196. The Supreme Court had a chance to resolve the issue recently, but chose not to take the case. *Haight v. United States*, 139 S. Ct. 796 (2019) (denying certiorari). While there were certain complications in the *Haight* case, notably that the lower court decision was authored by then-Judge Kavanaugh when he was on the D.C. Circuit, Brief for the United States in Opposition at 14–15, *Haight v. United States*, 139 S. Ct. 796 (2019) (mem.) (No. 18-370), 2018 WL 6584994, the case presented a relatively clean vehicle for resolution of the decision. The case was a direct appeal of an ACCA conviction, *United States v. Haight*, 892 F.3d 1271, 1274 (D.C. Cir. 2018), and the conviction at issue (Washington, D.C. assault with a dangerous weapon) was the only conviction challenged on appeal. *Id.* at 1280–81.

197. ACCA decisions are often clouded by a variety of procedural and legal issues that prevent a clean presentation of the mens rea issue, often because petitioners have lengthy criminal records. For example, consider *Santos v. United States*, recently vacated and remanded by the Supreme Court. No. 18-7096, 2019 WL 2166413 (U.S. May 20, 2019). In *Santos*, the ACCA mens rea issue was one of four questions petitioned for certiorari. Petition for Writ of Certiorari at i, *Santos v. United States*, No. 18-7096 (U.S. Dec. 17, 2018). The petitioner’s case was a federal collateral release case, *id.* at 5–6, and involved a separate question of whether assault on a police officer involves enough force to be an ACCA-qualifying conviction. *Id.* at 24–28. This commonly occurs in ACCA cases raising the mens rea issue. *See, e.g.*, *United States v. Rose*, 896 F.3d 104, 114 (1st Cir. 2018) (deciphering if a Rhode Island felony conviction for “assault with a deadly weapon” can be sustained with a reckless mens rea); *Haight*, 892 F.3d at 1280 (resolving whether indirect force is sufficient for an “assault with a dangerous weapon” conviction in Washington, D.C.); *United States v. Pam*, 867 F.3d 1191, 1203 (10th Cir. 2017) (determining that appellant’s collateral attack waiver did not bar his claim, and that the statute is divisible).

ACCA in 1986.<sup>198</sup> Aside from the inherent challenges in interpreting a thirty-five-year-old statute, the ACCA is not a model of statutory clarity.<sup>199</sup> Therefore, courts have struggled to interpret the ACCA in a consistent fashion.<sup>200</sup>

Since it appears unlikely that the judiciary can successfully resolve the issue, it is now up to Congress to provide the required clarification. Congress could solve the complex mens rea problem with one simple word: “knowing.” Incorporating the word “knowing” into the statutory definition of violent felony would ensure that only those who repeatedly commit violent crimes with intent will face punishment under the ACCA. As the statute currently reads, a “violent felony means any crime punishable by imprisonment for a term exceeding one year . . . that has as an element the use, attempted use, or threatened use of physical force against the person of another.”<sup>201</sup> As amended, the statute would read: “[V]iolent felony means any crime punishable by imprisonment for a term exceeding one year . . . that has as an element the *knowing* use, attempted use, or threatened use of physical force against the person of another.” Under traditional principles of statutory interpretation, the inclusion of the single mens rea term “knowing” is distributed to all material elements of the crime.<sup>202</sup> It would distribute to the conduct (“use . . . of physical force”) and the consequence (“against the person of another”) elements of the crime.<sup>203</sup>

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198. See, e.g., *Thompson v. Thompson*, 484 U.S. 174, 179 (1988) (stating that “Congress’ intent in enacting the statute” is controlling in statutory interpretation).

199. See, e.g., *Stokeling v. United States*, 139 S. Ct. 544, 561–62 (2019) (Sotomayor, J., dissenting) (delineating the unclear statutory history of the ACCA and the changes in enumerated offenses); *Johnson v. United States*, 135 S. Ct. 2551, 2560 (2015) (noting the “pervasive disagreement [among courts] about the nature of the inquiry one is supposed to conduct and the kinds of factors one is supposed to consider” with the ACCA’s residual clause).

200. See *Stokeling*, 139 S. Ct. at 560 (Sotomayor, J., dissenting) (stating that the robbery/physical force distinction caused the majority to create “a brave new world of textual interpretation”).

201. 18 U.S.C. § 924(e)(2)(B)–(B)(i) (2012).

202. MODEL PENAL CODE § 2.02(4) (AM. LAW INST. 1962) (“When the law defining an offense prescribes the kind of culpability that is sufficient for the commission of an offense . . . such provision shall apply to all the material elements of the offense, unless a contrary purpose plainly appears.”); see also *People v. Ryan*, 626 N.E.2d 51, 54 (N.Y. 1993) (“[I]f a single mens rea is set forth . . . it presumptively applies to all elements of the offense unless a contrary legislative intent is plain.”).

203. It would also encompass crimes committed with “purpose,” since “knowing” is a lesser mens rea than “purpose.” MODEL PENAL CODE § 2.02(5) (AM. LAW INST. 1962) (“When acting knowingly suffices to establish an element, such element also is established if a person acts purposely.”).

### B. Practical Benefits of a Knowledge Standard

Adopting a knowledge mens rea standard for Armed Career Criminal Act predicates would have many benefits. First, from a practical perspective, the term “knowing” is most consistent with the surrounding mens rea terms in § 924. The substantive crime provisions in § 924 repeatedly condemn “knowing” violations of statutory provisions.<sup>204</sup> Notably, none of § 924’s substantive provisions provide for culpability with a reckless mens rea.<sup>205</sup>

Second, it would ensure that § 922(g)(9), the misdemeanor statute from *Voisine*, truly is an expansion of the ACCA and other gun possession laws. Section 922(g)(9) was intended to be broader than the ACCA,<sup>206</sup> and the Supreme Court has recognized its breadth: a § 922(g)(9) conviction requires less force<sup>207</sup> and a less severe predicate crime than an ACCA conviction.<sup>208</sup> It would be logical to recognize the same statutory differences for mens rea—especially given the additional language delineating the two statutes.<sup>209</sup>

More broadly, in an era where government and society are recognizing the perils of mass incarceration, an express knowledge requirement would ensure that the ACCA imposes fifteen-year mandatory minimum sentences only on the most dangerous offenders. Judicial scholars have long advocated for criminal sentencing reform, calling it

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204. 18 U.S.C. § 924(a)(1)(A)–(C), (a)(2), (d)(1), (f). Some provisions alternatively provide the mens rea terms “willful” and “intent.” 18 U.S.C. § 924(a)(1)(D), (b), (g). In this context, it seems that the term “intent” is “purpose.” See generally *People v. Beeman*, 674 P.2d 1318, 1323 (Cal. 1984) (describing “intent” and “knowledge” as alternative elements in a criminal statute).

205. 18 U.S.C. § 924.

206. 142 CONG. REC. S11872-01 (daily ed. Sept. 30, 1996) (statement of Sen. Lautenberg).

207. Compare *Johnson v. United States*, 559 U.S. 133, 140 (2010) (requiring violent force to violate the ACCA), with *United States v. Castleman*, 572 U.S. 157, 163, 168 (2014) (requiring only the “slightest offensive touching” to violate 18 U.S.C. § 922(g)(9)).

208. See *Castleman*, 572 U.S. at 166 (recognizing that 18 U.S.C. § 922(g)(9) differs from the ACCA because it is satisfied by a misdemeanor, as opposed to a felony, conviction).

209. Some lower courts have taken the opposite approach and argued for the same mens rea standard for 18 U.S.C. § 922(g)(9) and “violent felonies.” See, e.g., *United States v. Verwiebe*, 874 F.3d 258, 263–64 (6th Cir. 2017) (“Our ‘crime of violence’ jurisprudence . . . already has plenty of highly reticulated, difficult to explain distinctions. We see no good reason to add one more.”). However, this approach is inconsistent with the Supreme Court’s consistent recognition of differences between violent felonies and misdemeanor crimes of domestic violence. See, e.g., *Voisine v. United States*, 136 S. Ct. 2272, 2280 n.4 (2016) (recognizing the differences between “crimes of violence” and 18 U.S.C. § 922(g)(9), and leaving open the possibility for violent felonies to be interpreted in a different way); *Castleman*, 572 U.S. at 168 (holding that a “misdemeanor crime of domestic violence” requires less force than a “violent felony”). A concurring opinion in *Castleman* advocated for 18 U.S.C. § 922(g)(9) to require the same force as the ACCA, but did not come close to garnering a majority of the court. 572 U.S. at 175 (Scalia, J., concurring in part and concurring in the judgment).

a “failed public policy, if not a looming crisis.”<sup>210</sup> Congress recently began addressing the problem by enacting the First Step Act in late 2018.<sup>211</sup> The Act, which was passed by broad majorities in both houses of Congress,<sup>212</sup> focuses on reducing criminal sentences and developing early release programs for nonviolent offenders.<sup>213</sup> With a similar push occurring at the state level,<sup>214</sup> there is a strong movement to enact more equitable sentencing laws that reduce mass incarceration in the United States.

A knowledge mens rea requirement for ACCA predicates will ensure that federal prisons are filled only with individuals who evince repeated criminal intent. It is inconceivable for a fifteen-year mandatory minimum sentence to apply to individuals who are convicted of reckless endangerment,<sup>215</sup> reckless discharge of a firearm,<sup>216</sup> or other crimes that “reveal a degree of callousness toward risk”<sup>217</sup> at the same time that Congress is acting to reduce sentences for many of those same types of offenders.

### C. Doctrinal Benefits of a Knowledge Standard

Stepping back, a knowledge mens rea requirement for Armed Career Criminal Act predicate offenses best aligns with utilitarian and retributive theories of punishment. The Model Penal Code defaults to a recklessness mens rea for most criminal liability.<sup>218</sup> Therefore, it would

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210. Jonathan Simon & Adrian A. Kragen, *Ending Mass Incarceration Is a Moral Imperative*, 26 FED. SENT’G REP. 271, 271 (2014); see also Lynn Adelman & Jon Deitrich, *Booker, Judges, and Mass Incarceration*, 29 FED. SENT’G REP. 224 (2017); Dorothy E. Roberts, *The Social and Moral Cost of Mass Incarceration in African American Communities*, 56 STAN. L. REV. 1271 (2004).

211. First Step Act of 2018, Pub. L. No. 115-391, 132 Stat. 5194 (codified as amended in scattered sections of 18 U.S.C. (2012)).

212. Erin McCarthy Holliday, *President Trump signs criminal justice reform First Step Act into law*, JURIST (Dec. 21, 2018, 3:30 PM), <https://www.jurist.org/news/2018/12/president-trump-signs-criminal-justice-reform-first-step-act-into-law/> [<https://perma.cc/H288-QK36>].

213. Nicholas Fandos, *Senate Passes Bipartisan Criminal Justice Bill*, N.Y. TIMES (Dec. 18, 2018), <https://www.nytimes.com/2018/12/18/us/politics/senate-criminal-justice-bill.html> [<https://perma.cc/UC6S-LFF3>].

214. See, e.g., S.B. 642, Fla. 121st Reg. Sess. (Fla. 2019) (recently introduced bill for the “Florida First Step Act”).

215. E.g., DEL. CODE ANN. tit. 11, § 604 (2019); N.H. REV. STAT. ANN. § 631:3(I)–(II) (2019).

216. E.g., OKLA. STAT. tit. 21, § 652(B) (2019) (“Every person who uses any vehicle to facilitate the intentional discharge of any kind of firearm . . . in conscious disregard for the safety of any other person . . . shall upon conviction be guilty of a felony.”) (emphasis added).

217. *Begay v. United States*, 553 U.S. 137, 146 (2008).

218. MODEL PENAL CODE § 2.02(3) (AM. LAW INST. 1985) (establishing recklessness as the statutory default for culpability if the statute does not otherwise provide a mens rea). This approach best aligns with most juror-eligible adults’ views. See Matthew R. Ginther et al., *Decoding Guilty Minds: How Jurors Attribute Knowledge and Guilt*, 71 VAND. L. REV. 241, 270 (2018) (summarizing the results from a juror experiment by stating that “most jury-eligible adults regard recklessness as a necessary basis for criminal liability”).



not be consistent for the ACCA, a statute predicated on incapacitating hardened criminals, to apply the default mens rea. A higher standard should be required to match the severity of the punishment.

If the ACCA had been motivated by utilitarian *conduct*-based concerns, a minimum mens rea of recklessness could potentially make sense.<sup>219</sup> A utilitarian would argue that society should ban firearm ownership by people who consistently demonstrate a proclivity to engage in extremely risky activity that causes injury.<sup>220</sup> This conduct-based approach asserts that by taking risks that consistently harm people, these actors have shown that they cannot stop acting in a dangerous fashion.<sup>221</sup> So, if the actor is allowed to continue carrying a gun, there is a heightened risk that he will use the gun dangerously in the future, and therefore should not be allowed to carry it. The increased risk of harm this actor inflicts on people around him necessitates his extended incapacitation.

This line of argument, however, is flatly inconsistent with the Supreme Court's current precedent that negligent crimes cannot be predicate "violent felonies."<sup>222</sup> The Model Penal Code, widely adopted by the states, considers recklessness based on the actor's subjective awareness of risk.<sup>223</sup> The difference between knowledge, recklessness (which the Model Penal Code considers sufficient for punishment), and negligence (not sufficient) is *awareness* of risk.<sup>224</sup> While "knowing" crimes require a near certainty that harm will result, reckless crimes only require awareness of *some risk* of harm, and negligent crimes involve no awareness of the risk.<sup>225</sup> If ACCA punishment truly was predicated on the dangerous conduct, regardless of the actor's awareness of harm, then the ACCA would extend to negligent crimes as well (e.g., negligent homicide). In other words, if certain people repeatedly engage

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219. The ACCA is inconsistent with a retributive theory of punishment as its "primary aim is not to promote retribution but rather to prevent future harm through incapacitation." Levine, *supra* note 50, at 563 n.211.

220. See, e.g., Youngjae Lee, *The Constitutional Right Against Excessive Punishment*, 91 VA. L. REV. 677, 738 (2005) ("The purpose of punishment, under [the utilitarian] view, is not to give each criminal what he or she deserves, but to deter future crimes.").

221. See Robinson & Grall, *supra* note 18, at 695 (theorizing that the difference between "knowledge" and "recklessness" mens rea is that knowledge punishes "intentional" conduct, whereas recklessness punishes a person for "taking risks").

222. *Leocal v. Ashcroft*, 543 U.S. 1, 13 (2004).

223. MODEL PENAL CODE § 2.02(3) cmt. 3 (AM. LAW INST. 1962); Kenneth W. Simons, *Rethinking Mental States*, 72 B.U. L. REV. 463, 482 (1992) ("Under the Model Penal Code, both a reckless actor and a negligent actor engage in highly deficient conduct, but the reckless actor also must subjectively believe that he is creating a substantial risk.").

224. Robinson & Grall, *supra* note 18, at 695.

225. *Id.*; see also *Voisine v. United States*, 136 S. Ct. 2272, 2288–89 (2016) (Thomas, J., dissenting) (discussing that the "crucial distinction" between reckless and knowing conduct is the actor's awareness of risk).

in dangerous behavior, the risk of them owning a firearm is the same whether they are aware of the risk or not. However, since *Leocal v. Ashcroft* establishes that negligent crimes are insufficient to constitute “violent felonies” under the ACCA, reckless crimes must also be insufficient.<sup>226</sup>

*D. Application of a Knowledge Mens Rea in the Modern Criminal Justice Landscape*

Adopting a knowledge mens rea standard for all material elements of an offense may raise some concerns. However, many of these concerns are less about the statute itself and more about the application of the Armed Career Criminal Act under specific circumstances. A primary concern is that many of the offenders who are convicted under certain statutes that include recklessness—e.g., aggravated assault statutes—actually commit the crime purposely or knowingly.<sup>227</sup> Many of these offenders, however, are convicted under statutes that sweep in reckless offenses so that prosecutors can secure plea bargains more easily.

The categorical approach is one reason that convictions against most criminal defendants do not accurately reflect their culpability. The categorical approach requires that courts look only at the offense’s elements, not at the underlying facts.<sup>228</sup> Courts must “consider the least serious conduct covered by an offense.”<sup>229</sup> If the least serious conduct criminalized by the statute is not within the ACCA’s definition of a “violent felony,” no criminal convictions under that statute can serve as ACCA predicates. For example, in *Bennett v. United States* (the First Circuit case that held recklessness is insufficient for an ACCA conviction), the defendant “apparently” committed aggravated assault “either at gunpoint or at knifepoint.”<sup>230</sup> However, since the court was required to consider the least serious conduct that *could* be committed under the statute, it concluded that Maine’s aggravated assault statute could not serve as an ACCA predicate offense.<sup>231</sup>

Additionally, the issue has been compounded by the statutory structure set up around plea bargaining. The rate of plea bargaining

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226. *Leocal*, 543 U.S. at 13.

227. See, e.g., *Bennett v. United States*, 868 F.3d 1, 22 (1st Cir. 2017) (“[I]t may seem anomalous that an offense bearing the name ‘aggravated assault’ could escape ACCA’s reach.”), *vacated as moot*, 870 F.3d 34 (1st Cir. 2017). The reasoning in *Bennett* was later adopted by the First Circuit in *United States v. Windley*, 864 F.3d 36, 37 n.2 (1st Cir. 2017).

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

229. *Bennett*, 868 F.3d at 22.

230. *Id.*

231. *Id.* at 4, 6.

has skyrocketed over the last fifty years.<sup>232</sup> The increased reliance on plea bargaining has led to numerous accommodations that support the plea-bargaining process, including the development of mandatory minimum sentences.<sup>233</sup> Another major accommodation is an increased series of “cliffs” in sentencing laws—grades for the same types of crimes that leave prosecutors considerable discretion on what crimes to charge—and leave the defendants many options to “plead down” to.<sup>234</sup> The result of these “cliffs” is that many defendants plead to a lower category of felony than the prosecutor could have charged.<sup>235</sup> Both parties benefit—the defendant receives a reduced sentence and the prosecution saves judicial resources from the time and expense of trial.<sup>236</sup> However, one result of this is that some of these “reduced” felony sentences include a lower mens rea standard, which may remove the offense from the ACCA’s scope. So, the plea-bargaining process and the categorical approach may exclude a crime from the ACCA even though a defendant “purposely” committed the crime (clearly making it a “violent felony”).<sup>237</sup>

Whatever merit these claims have, reducing the ACCA mens rea to accommodate these realities is not the proper answer. Defying congressional intent to accommodate other judicial standards does not solve the problem—it compounds it. If ACCA issues really rest on the absurd results created by the categorical approach, then the court should abandon the categorical approach when analyzing the ACCA and return to a case-by-case inquiry to determine whether a crime involved the “use . . . of physical force against the person of another.”<sup>238</sup>

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232. See, e.g., Ronald Wright & Marc Miller, *Honesty and Opacity in Charge Bargains*, 55 STAN. L. REV. 1409, 1415 (2003) (“In the federal system, 96.6% of all convictions resulted from guilty pleas in 2001.”); see also *Lafler v. Cooper*, 566 U.S. 156, 170 (2012) (“[C]riminal justice today is for the most part a system of pleas, not a system of trials.”); *Missouri v. Frye*, 566 U.S. 134, 143 (2012) (“[P]lea bargains have become so central to the administration of the criminal justice system . . .”).

233. George Fisher, *Plea Bargaining’s Triumph*, 109 YALE L.J. 857, 860 (2000) (“Probation’s rise and the indeterminate sentence’s fall are but two of plea bargaining’s victories.”).

234. See Stephanos Bibas, *Plea Bargaining Outside the Shadow of Trial*, 117 HARV. L. REV. 2463, 2488–91 (2004) (discussing how the “cliffs” in criminal sentencing laws provide incentives for both parties to bargain).

235. See *id.* at 2475 (“[S]ome prosecutors learn charge- and sentence-bargaining tricks, such as exploiting the minutiae of the Federal Sentencing Guidelines, that they use to grant larger concessions.”).

236. *Id.* at 2470–71.

237. See *Bennett v. United States*, 868 F.3d 1, 22–23 (1st Cir. 2017) (commenting on the anomaly of a crime committed purposely falling outside the ACCA), *vacated as moot*, 870 F.3d 34 (1st Cir. 2017).

238. Although, admittedly, the categorical approach is based on a judicial analysis of congressional intent and the Sixth Amendment right to a jury. See *Descamps v. United States*, 570 U.S. 254, 268 (2013) (stating that Congress intended the ACCA to be considered categorically, so that a “prior crime would qualify as a predicate offense in all cases or in none”). The Sixth Amendment

Changes to the categorical approach for determining whether prior convictions qualify as “violent felonies” could ensure that truly dangerous individuals who carry firearms after they have repeatedly engaged in knowing violent conduct are subject to the ACCA’s fifteen-year mandatory minimum sentence, while individuals who instead have a proclivity to engage in risky conduct do not face such a draconian sanction.<sup>239</sup> It would leave the ACCA as a statutory tool for prosecutors to incarcerate offenders who repeatedly engage in violent conduct, but not run the risk of being overinclusive.

### CONCLUSION

The current circuit split regarding the applicability of *Voisine v. United States* to “violent felonies” under the Armed Career Criminal Act has left gun-carrying defendants with lengthy rap sheets facing jail time that could be determined solely by the region of the country in which they are arrested.<sup>240</sup> The statutory language and legislative history of the ACCA demonstrates that Congress did not intend to reach merely reckless offenders.<sup>241</sup> This Note therefore suggests that Congress add a “knowledge” mens rea to § 924(e)(2)(B)(i) of the ACCA. The addition of a knowledge standard would conform with the surrounding statutory provisions, ensure the ACCA is not enforced against undeserving offenders, and provide the judiciary with much needed clarity

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right to a jury requires any fact that would increase a defendant’s maximum sentence to be found by a jury beyond a reasonable doubt. *Apprendi v. New Jersey*, 530 U.S. 466, 490 (2000). Without the categorical approach, a “sentencing court could make its own finding of fact about the means by which the defendant committed the offense and run afoul of the Sixth Amendment guarantee.” *United States v. Hennessee*, 932 F.3d 437, 443 (6th Cir. 2019). Judges disagree, however, whether the categorical approach truly is constitutionally required. See sources cited *infra* note 239.

239. See *Mathis v. United States*, 136 S. Ct. 2243, 2268–69 (2016) (Alito, J., dissenting) (arguing for the elimination of the categorical approach); *United States v. Burris*, 912 F.3d 386, 407 (6th Cir. 2019) (Thapar, J., concurring) (“The time has come to dispose of the long-baffling categorical approach.”); *United States v. Reyes-Contreras*, 910 F.3d 169, 186 (5th Cir. 2018) (“By requiring sentencing courts and this court to ignore the specifics of prior convictions well beyond what the categorical approach and Supreme Court precedent instruct, our jurisprudence has proven unworkable and unwise.”).

240. Compare *United States v. Middleton*, 883 F.3d 485, 497–500 (4th Cir. 2018) (Floyd, J., concurring) (knowledge mens rea required to violate ACCA), and *Bennett*, 868 F.3d at 20–22 (same), with *United States v. Haight*, 892 F.3d 1271, 1281 (D.C. Cir. 2018) (recklessness mens rea sufficient to violate ACCA), and *United States v. Pam*, 867 F.3d 1191, 1207–09 (10th Cir. 2017) (same).

241. See *United States v. Harper*, 875 F.3d 329, 332 (6th Cir. 2017) (stating that the language “against the person of another” in the Federal Sentencing Guidelines is restrictive, not explanatory); *United States v. Booker*, 644 F.3d 12, 21 (1st Cir. 2011) (“ACCA seeks to protect society at large from a diffuse risk of injury or fatality at the hands of armed, recidivist felons.”).

in the wake of *Voisine*.<sup>242</sup> Congress did not create the problem,<sup>243</sup> but it can be the one to fix it. A statutory clarification of a knowledge mens rea would also provide the Supreme Court with an opportunity to revisit the categorical approach<sup>244</sup> to effectuate the ACCA's purpose. Most of all, though, it would ensure that criminal defendants without histories of intentional violent conduct do not face severe mandatory minimum sentences.

“Sometimes the simplest explanation is the best explanation,”<sup>245</sup> and when interpreting the Armed *Career* Criminal Act, it simply seems “doubtful that one can make a career out of recklessness.”<sup>246</sup>

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242. *C.f.* Polan, *supra* note 85, at 1465 (advocating for a congressional fix to 18 U.S.C. § 922(g)(9) to clarify that the statute should be read to encompass a broader mens rea than the ACCA).

243. The lower courts all agreed reckless offenses could not serve as ACCA predicates prior to *Voisine*. *E.g.*, *United States v. Palomino Garcia*, 606 F.3d 1317, 1336 (11th Cir. 2010); *United States v. Zuniga-Soto*, 527 F.3d 1110, 1124 (10th Cir. 2008); *United States v. Portela*, 469 F.3d 496, 499 (6th Cir. 2006).

244. *E.g.*, *Mathis*, 136 S. Ct. 2243; *Descamps v. United States*, 570 U.S. 254 (2013); *Taylor v. United States*, 495 U.S. 575 (1990).

245. *United States v. Verwiebe*, 874 F.3d 258, 263 (6th Cir. 2017).

246. *United States v. Parson*, 955 F.2d 858, 874 (3d Cir. 1992).

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