

# VIOLENCE AGAINST PROPERTY: THE BREAKING POINT OF FEDERAL CRIME OF VIOLENCE CLASSIFICATIONS

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*The federal criminal code provides enhanced penalties for offenses that qualify as crimes of violence. This Note concerns a basic question: What qualifies as a crime of violence? The code offers two seemingly clear definitions, classifying as violent any crime that either (1) includes the use of physical force against the person or property of another as an element of the crime or (2) by its nature involves a substantial risk of the use of physical force against the person or property of another. However coherent those definitions may appear at first blush, the unfortunate truth is that federal courts have struggled for years to make them work. In fact, the Supreme Court has entirely given up on parsing the second definition, declaring that provision unconstitutionally vague in a pair of decisions from 2018 and 2019. This Note examines whether the first definition should meet the same fate.*

*In analyzing the first definition's validity, this Note focuses on one specific aspect: the definition's reference to property. This Note argues that including property in a force-based definition of violent crime contravenes traditional conceptions of violence, burdens courts with inapt inquiries, leads to incongruous applications of punishment, and violates due process guarantees against vague laws. Existing doctrine suggests that physical force refers to an action that causes harm. But because property damage can result from decidedly nonforceful acts, harm to persons and harm to property are conflicting benchmarks for violence. Physical force thus carries a vague double meaning in the crime-of-violence statute, one that perversely condemns violence against property more comprehensibly than violence against people. The solution, this Note contends, is to recenter violence classification on human targets.*

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## INTRODUCTION

When is a crime a *violent crime*? The question might seem relevant only in the context of impersonal statistics or abstract criminology. But for some defendants, decades of mandatory prison time hang in the balance. In United States federal criminal law, 18 U.S.C. § 924(c) prescribes a five-year minimum sentence for an individual who commits a “crime of violence” while armed.<sup>1</sup> Depending on the type of firearm carried or the existence of prior convictions, the minimum sentence can grow to life in

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1. 18 U.S.C. § 924(c) (2018).

prison.<sup>2</sup> The defendant receives the § 924(c) sentence on top of any punishment already imposed for the predicate crime itself,<sup>3</sup> and the statute explicitly disallows probation and concurrent prison terms.<sup>4</sup> Other parts of the federal criminal law apply similarly severe penalties for violence. The “crime of violence” provision in 18 U.S.C. § 16, for example, in conjunction with the Immigration and Nationality Act, adds deportation to the list of possible penalties for violence.<sup>5</sup> When a crime is a violent crime, it earns harsh consequences.

Such harsh consequences give great significance to the legal definition of violence. This Note argues that the United States’ definition doesn’t work. In the federal criminal code, an offense qualifies as a crime of violence if it “has as an element the use, attempted use, or threatened use of physical force against the person or property of another.”<sup>6</sup> Perfectly sensible at first glance, this statutory language gets pushed through a patchwork of court-made doctrine that magnifies the language’s imprecision and turns the sensible into the senseless. This Note is the first to examine the senselessness that newly evolved doctrine can create when it confronts one word from § 924(c)’s violence definition: property.<sup>7</sup>

Notwithstanding imprecision across the whole of § 924(c)’s violence definition—“the use, attempted use, or threatened use of physical force against the person or property of another”<sup>8</sup>—the reference to property is notably anomalous.<sup>9</sup> What is the use of force against property, and what relation does it have to violence? How does force against property compare to force against persons? Does the provision demand violence classification in the name of broken windows and graffitied walls, or does it leave such minor contact with property outside the scope of violence? Federal courts grapple with these questions and arrive at different answers.

The courts’ answers matter. In FY2020, federal courts handed down 2,525 convictions under 18 U.S.C. § 924(c), with the resultant prison terms

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2. See *id.* § 924(c)(1)(C)(ii) (mandating a life sentence when “the firearm involved is a machinegun or a destructive device, or is equipped with a firearm silencer or firearm muffler” and the defendant has a prior conviction under 18 U.S.C. § 924(c)).

3. *Id.* § 924(c)(1)(A).

4. *Id.* § 924(c)(1)(D).

5. *Sessions v. Dimaya*, 138 S. Ct. 1204, 1211 (2018).

6. 18 U.S.C. § 924(c)(3)(A).

7. See *United States v. Davis*, 139 S. Ct. 2319, 2324 (2019). The original definition for “crime of violence” included two parts. See *infra* section I.B.2. *Davis* invalidated the second part as unconstitutionally vague. See *infra* section I.C.2. In doing so, *Davis* expounded a textual understanding of § 924(c)’s crime of violence definition that, when applied to what remains of § 924(c)’s definition, causes a breakdown of the statute and doctrine. See *infra* section I.C.2 and Part II.

8. 18 U.S.C. § 924(c)(3)(A).

9. See Alice Ristorph, *Criminal Law in the Shadow of Violence*, 62 Ala. L. Rev. 571, 604 (2011) (“In contrast to the traditional understanding of violent crime, this definition expands the concept of violence . . . [because] it counts force against *property* as violence . . .”).

averaging over eleven years.<sup>10</sup> Countless other § 924(c) charges were bargained away or voluntarily forgone by prosecutors.<sup>11</sup> Prosecutors' discretion to bring § 924(c) charges against a wide range of varying harmful conduct raises concerns of unfair application of the laws. In the summer of 2020, for example, prosecutors in the Eastern District of New York brought § 924(c) charges against two protestors who lobbed Molotov cocktails into a deserted police car.<sup>12</sup> If convicted, the protestors would have faced a mandatory minimum sentence of thirty years for the § 924(c) charges alone.<sup>13</sup>

This Note shows that the property provision muddles the doctrine surrounding the statutory crime of violence definition to the extent that it raises unconstitutional vagueness concerns. Doctrinal constraints force courts to evaluate crimes on a categorical (as opposed to case-by-case) basis that applies the crime of violence label only when all manifestations of a particular crime necessarily involve the use of force against persons or property.<sup>14</sup> That is, one case of a crime is not violent unless *all* cases of that crime are. The current approach diverts courts to sideshows, where they must consider idiosyncratic versions of crimes that have little to do with the defendant's actual conduct. These sideshows can raise crucial questions about whether property crimes are violent. A 2019 Tenth Circuit case involving witness retaliation provides an example.<sup>15</sup> The defendant had physically beaten a witness, but the court could not classify the beating as a crime of violence without first deciding that spray painting a car—conduct that could satisfy the same witness retaliation offense—also constituted violence as defined in § 924(c) (that is, whether spray painting involves the use of force against the property of another).<sup>16</sup>

The current crime of violence definition leads justice astray by necessitating a dubious, overly technical inquiry. It bears little connection to any sensible understanding of criminal violence and relies on the false equivalence of force used against persons and force used against property.<sup>17</sup> The inclusion of property in a force-based definition of violent crime contra-

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10. U.S. Sent'g Comm'n, Quick Facts: 18 U.S.C. § 924(c) Firearms Offenses 1 (2021), [https://www.ussc.gov/sites/default/files/pdf/research-and-publications/quick-facts/Section\\_924c\\_FY20.pdf](https://www.ussc.gov/sites/default/files/pdf/research-and-publications/quick-facts/Section_924c_FY20.pdf) [<https://perma.cc/KQB2-F2PD>] (last visited Oct. 4, 2021).

11. See *infra* section II.A.

12. See *infra* section II.A.

13. See 18 U.S.C. § 924(c)(1)(B)(ii) ("If the firearm possessed by a person convicted of a violation of this subsection . . . is a machinegun or a destructive device, . . . the person shall be sentenced to a term of imprisonment of not less than 30 years."); see also Indictment at 3, *United States v. Mattis*, No. CR 20 203 (E.D.N.Y. filed June 11, 2020) (charging the protestors under 18 U.S.C. § 924(c)(1)(B)(ii)).

14. See *infra* section I.C.1.

15. See *United States v. Bowen*, 936 F.3d 1091, 1095 (10th Cir. 2019).

16. See *id.* at 1104.

17. See *infra* section II.D.2.

venes traditional conceptions of violence, burdens courts with inapt inquiries, leads to incongruous applications of punishment, and violates due process guarantees against vague laws.

Finally, this Note argues that, in the absence of legislative intervention, the federal crime of violence definition can still survive scrutiny if federal courts follow a novel statutory interpretation that imputes a nexus requirement between property and person. The use of physical force against property constitutes violence if it implies, provokes, or impends the use of force against a person. Without a nexus requirement, the federal code's violence classification scheme is untenable. Interpreted literally, it is unreasonable; interpreted liberally, it is unworkable; interpreted in light of existing doctrine, it is unconstitutional.

Part I summarizes the relevant theoretical, legislative, and doctrinal understandings of violence. Part II explains how the notion of violence against property complicates the already convoluted crime of violence jurisprudence. Part III offers a solution for reconciling crime of violence doctrine with a more reasonable conception of violence.

### I. WHAT IS VIOLENT CRIME?

This Part explores the principles underlying crime of violence classification, from theory to statute to doctrine. It introduces the prevailing theoretical conceptions of violence in section I.A and explains how legislatures have attempted to fit such abstract conceptions into concrete crime of violence statutes in section I.B. It then describes in section I.C the approach taken by courts to interpret federal definitions of crimes of violence. Of particular focus is the inclusion of property in a violence definition. Traditional common law and other fields of study generally center the understanding of violence on human victims or targets. The federal code moves the legal definition of violence away from such traditional understandings.

#### A. *Theoretical Underpinnings of Violence*

"Violence" eludes a definitive meaning. Human violence pervades the history of the species and has accordingly attracted theoretical inquiry from a wide range of disciplines, including philosophy, sociology, psychology, and criminology, each of which offers its own explanation for the meaning of violence.<sup>18</sup> Ordinary individuals, who directly or indirectly feel violence's presence in the human experience, harbor their own definitions.<sup>19</sup> Shared between the various understandings of violence, though,

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18. Violence: A Public Health Menace and a Public Health Approach 4 (Sandra L. Bloom ed., Routledge 2d ed. 2018) (2001).

19. See World Health Org., World Report on Violence and Health 3 (Etienne G. Krug, Linda L. Dahlberg, James A. Mercy, Anthony B. Zwi & Rafael Lozano eds., 2002), <https://apps.who.int/iris/rest/bitstreams/50364/retrieve> [https://perma.cc/CD4V-F7E5].

are a core set of elements, which are perhaps best encapsulated by a common dictionary definition: “the use of physical force so as to injure, abuse, damage, or destroy.”<sup>20</sup>

But the dictionary definition leaves much to be desired. Its elements are no less equivocal than the headword itself. Thus, a precise understanding of the definition requires analysis of second-order questions: What is physical force? What constitutes injury or damage? From these questions arise third-order inquiries: Physical force applied to *what*? Injury or damage to *what*? A short breakdown of a simple dictionary definition thus ends at a central issue of this Note: What does violence target?

The relevant literature generally centers its conception of violence on human targets. For example, in a 2002 report, the World Health Organization (WHO) published a highly influential definition of violence that focused on decidedly human-oriented effects: “[t]he intentional use of physical force or power, threatened or actual, against oneself, another person, or against a group or community, that either results in or has a high likelihood of resulting in injury, death, psychological harm, maldevelopment or deprivation.”<sup>21</sup> Legal commentators, similarly, often limit their theoretical analyses of violence to human targets.<sup>22</sup> The legal context, however, demands an extra layer of analysis because any theoretical treatment of violence must confront the preexisting legal classifications of crime as recognized by a given jurisdiction.

Statutory classifications of violent crime are a relatively modern phenomenon,<sup>23</sup> but the English common law concept of “crimes against the person” represents a traditional approach to assigning severe sentences for a category of especially heinous offenses.<sup>24</sup> Broadly speaking, crimes against the person are crimes that harm the human body.<sup>25</sup> The concept approximates the WHO’s harmful-force definition and encompasses

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20. Violence, Merriam-Webster, <https://www.merriam-webster.com/dictionary/violence> [<https://perma.cc/Y7E8-XZ54>] (last visited Oct. 5, 2021).

21. World Health Org., *supra* note 19, at 5; see also Bandy X. Lee, *Violence: An Interdisciplinary Approach to Causes, Consequences, and Cures* 4 (2019) (“This new concept of violence has revolutionized our thinking about violence and has shaped approaches to the topic ever since.”).

22. See, e.g., Franklin E. Zimring & Gordon Hawkins, *Is American Violence a Crime Problem?*, 46 *Duke L.J.* 43, 43 (1996) (“Criminal violence is the intentional and unjustified infliction or threatened infliction of physical injury to a human being.”).

23. Facing intense public concern over rising crime rates, jurisdictions in the United States began to distinguish a special class of “violent” crimes in the mid-1970s. See Russell Patterson, *Punishing Violent Crime*, 95 *N.Y.U. L. Rev.* 1521, 1533 (2020). State legislatures applied augmented sentences to offenses they deemed violent, following a prevailing theory that the nation’s crime problem could be brought under control if the most violent offenders were swept from the streets. See *id.* Congress followed suit with the Crime Control Act of 1984, the source of the “crime of violence” definition examined in this Note. See Comprehensive Crime Control Act of 1984, Pub. L. No. 98-473, 98 Stat. 1976 (codified at 18 U.S.C. § 16 (2018)).

24. See Ristroph, *supra* note 9, at 577.

25. *Id.* at 577–78.

crimes like murder that would most obviously meet any definition of violence.<sup>26</sup> More than that, the common law notion of crimes against the person includes burglary and arson, crimes not directly implicating the human body. Arson and burglary come under the ambit through an expansive understanding of “person.”<sup>27</sup> Even though arson and burglary technically target property, they transcend ordinary property crimes because they target uniquely personal property—the home—that in some sense is an extension of a person themselves.<sup>28</sup> Whether explicitly or through a creative construction of “person,” the origins of violence classification in the criminal law show paramount interest in persons as the ultimate targets.

### B. *Statutory Classification of Violent Crimes*

Harm to humans thus emerges as a key component of violence. Yet, violence in the criminal law context has grown far beyond concerns of bodily harm.<sup>29</sup> Modern criminal law sometimes conflates violence with a general conception of crime, resulting in classifications that may only tenuously connect to traditional theoretical bases of violence.<sup>30</sup> Violence has become “an abstraction, and eventually that abstraction may become a repository for all we find repulsive, transgressive, or simply sufficiently annoying.”<sup>31</sup> This section analyzes how the modern criminal law approaches the classification of violent crimes.

1. *Methods of Statutory Violence Classification.* — Violent crime classification schemes can take three forms: enumerated offenses, qualitative criteria, or a mix of both.<sup>32</sup> Enumerative definitions simply list the specific offenses that a given jurisdiction considers violent. The leanest definitions

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26. See *id.*

27. *Id.* at 580.

28. *Id.*; see also Michael O’Hear, *Third-Class Citizenship: The Escalating Legal Consequences of Committing a “Violent” Crime*, 109 *J. Crim. L. & Criminology* 165, 172–73 (2019) (“Th[e] distinctive character [of burglary] comes from the common-law definition of burglary as the breaking and entering *of a dwelling*.”); Charles E. Silberman, *Criminal Violence*, *Criminal Justice* 24–25 (1978) (“[F]orced entry into one’s home is an invasion of the self. . . . One of the oldest and most sacred principles of Anglo-Saxon law held that no matter how humble a person’s cottage might be, not even the King could enter without his consent.”). Burglary relates to prototypical “assaultive violent offenses” in part because “an invasion of the dwelling may feel like such a profound intrusion into one’s private space as to seem almost like a violation of one’s bodily integrity” and because unauthorized entry into a home creates a substantial risk of physical confrontation with a resident. O’Hear, *supra*, at 172–73.

29. Ristroph, *supra* note 9, at 575.

30. See Cecelia Klingele, *Labeling Violence*, 103 *Marq. L. Rev.* 847, 852–53 (2020) (“In several states, enumerated crimes of violence also include behaviors whose connection to violence is tenuous at best, e.g., theft of a firearm or drug offenses.”); Zimring & Hawkins, *supra* note 22, at 43 (“By long-standing habit, Americans use the terms ‘crime’ and ‘violence’ interchangeably.”).

31. Ristroph, *supra* note 9, at 575.

32. O’Hear, *supra* note 28, at 170.

might include only prototypically violent crimes, like murder, robbery, and rape, while more expansive lists stretch the boundaries of violence classification by including burglary, theft, or even drug offenses.<sup>33</sup> Qualitative schemes take the opposite approach, focusing on the general rather than the specific. Qualitative schemes identify the defining characteristics of violence and include any crimes that display those characteristics.<sup>34</sup> The criteria are commonly grounded in conduct (e.g., the use of force) or results (e.g., bodily harm).<sup>35</sup> Like enumerative definitions, qualitative definitions may be narrow or broad, a distinction often dependent on the definition's treatment of mens rea and targets.<sup>36</sup> For example, one jurisdiction might classify as violent any conduct that causes harm to persons or property, and another jurisdiction might classify as violent only conduct that intentionally causes harm to a person.<sup>37</sup> Finally, mixed classification schemes utilize both enumerative and qualitative definitions of violence. Mixed schemes prove useful when a jurisdiction desirous of a qualitative scheme's flexibility also wishes to condemn certain crimes that deviate from the standard character of violence, but the legislature cannot (or cannot be bothered to) devise an appropriately encompassing qualitative definition.<sup>38</sup>

2. *Violence Classification in the Federal Criminal Code.* — Title 18 of the United States Code explicitly supplies violence classifications in §§ 16(b), 924(c), and 924(e). Section 16 defines “crime of violence” for the federal code in general.<sup>39</sup> It is notably relevant in the context of the Immigration and Nationality Act, which allows deportation of immigrants who commit “crimes of violence” as defined in § 16.<sup>40</sup> Rather than refer to § 16's

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33. Klingele, *supra* note 30, at 853; O'Hear, *supra* note 28, at 172–74; see also, e.g., Minn. Stat. § 624.712(5) (2021) (defining “crime of violence” to include solicitation, inducement, and promotion of prostitution; child neglect or endangerment; theft of a firearm, controlled substance, explosive, or an incendiary device; harassment; and drug offenses).

34. O'Hear, *supra* note 28, at 170–71.

35. See *id.*

36. *Id.*

37. See Ariz. Rev. Stat. § 13-901.03(b) (2021) (defining “violent crime” as “any criminal act that results in death or physical injury or any criminal use of a deadly weapon or dangerous instrument”); Ark. Code Ann. § 5-42-203(4) (2021) (defining “crime of violence” as “any violation of Arkansas law in which a person *purposely* or *knowingly* causes, or threatens to cause, death or physical injury to another person, specifically including rape” (emphasis added)); O'Hear, *supra* note 28, at 170–71.

38. See O'Hear, *supra* note 28, at 178.

39. 18 U.S.C. § 16 (2018).

40. See 8 U.S.C. § 1101(a)(43)(F) (2018) (“The term ‘aggravated felony’ means . . . a crime of violence (as defined in section 16 of title 18, but not including a purely political offense) . . .”); *id.* § 1227(a)(2)(A)(iii) (“Any alien who is convicted of an aggravated felony at any time after admission is deportable.”); *Sessions v. Dimaya*, 138 S. Ct. 1204, 1210–11 (2018) (“[R]emoval is a virtual certainty for an alien found to have an aggravated felony conviction, no matter how long he has previously resided here.”).



definition, § 924(c) offers its own “crime of violence” definition.<sup>41</sup> It uses its classification to impose enhanced sentences for individuals who commit crimes of violence or certain drug crimes while armed.<sup>42</sup> Lastly, § 924(e), commonly known as the Armed Career Criminal Act (ACCA), defines “violent felony.”<sup>43</sup> The ACCA mandates minimum sentences for armed individuals who have three prior violent felony convictions.<sup>44</sup>

Sections 16 and 924(c) offer nearly identical definitions for crime of violence, both employing qualitative criteria centered on the use of force.<sup>45</sup> Section 16 defines “crime of violence” as:

- (a) an offense that has as an element the use, attempted use, or threatened use of physical force against the person or property of another, or
- (b) any other offense that is a felony and that, by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense.<sup>46</sup>

Courts commonly refer to the first clause of the definition as the “elements clause” (because it is based on the elements of a given offense) and to the second clause as the “residual clause” (because it captures violent offenses that might slip through the cracks of the elements clause).<sup>47</sup> Section 924(c)’s definition employs essentially the same two clauses.<sup>48</sup> However, whereas § 16 leaves open the possibility for a misdemeanor to qualify under the elements clause, § 924(c) only counts felonies as crimes of violence.<sup>49</sup>

The ACCA uses similar language to define “violent felony,” but it contains some marked differences. The ACCA defines violent felony as any felony that:

- (i) has as an element the use, attempted use, or threatened use of physical force against the person of another; or
- (ii) is burglary, arson, or extortion, involves use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another . . .<sup>50</sup>

Courts refer to the first clause as the “elements clause;” to the list of burglary, arson, extortion, and crimes involving explosives as the “enumer-

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41. 18 U.S.C. § 924(c).

42. *Id.*

43. *Id.* § 924(e).

44. *Id.*

45. Compare *id.* § 16, with *id.* § 924(c).

46. *Id.* § 16.

47. See *United States v. Davis*, 139 S. Ct. 2319, 2324 (2019).

48. See 18 U.S.C. § 924(c)(3)(A)–(B).

49. *Id.*

50. *Id.* § 924(e)(2)(B).

ated offenses clause;” and to the remaining language regarding risk of injury as the “residual clause.”<sup>51</sup> Most obviously, the ACCA differs from §§ 16 and 924(c) in that it employs a mixed classification scheme with the enumerated offenses clause. Additionally, the ACCA elements and residual clauses differ from their §§ 16 and 924(c) counterparts in two significant ways. First, the ACCA elements clause does not reference the use of force against property, only persons.<sup>52</sup> Second, the ACCA residual clause centers on the risk of *harm* rather than the risk of *force*.<sup>53</sup>

All three statutory classification schemes are arguably broader than conventional conceptions of violence. None of the elements clauses condition themselves on harm; they are solely based on force. This classifies some noninjurious force as violence, potentially reaching conduct such as the physical restraint of another person or even, depending on the definition of “force,” merely touching them.<sup>54</sup> Moreover, the inclusion of property in the elements clauses of §§ 16 and 924(c) departs from the typical separation of violent crimes and property crimes in legal systems.<sup>55</sup> For their part, the residual clauses entirely contrast with conventional notions of violence because they focus on no actual conduct or injury.<sup>56</sup> Instead, the residual clauses entertain the notion of *potential risk* of force or injury—the “possibility of a possibility” of danger.<sup>57</sup> Stretched to their limits, the residual clauses could include offenses like “walking away from a prison honor camp,” “attempted theft of an unoccupied car,” or even polluting the air.<sup>58</sup>

### C. *Judicial Interpretation of Federal Violence Classifications*

Owing to the imprecise nature of federal classifications of violence and to the high personal stakes of cases that depend on those classifications, federal courts have promulgated intricate doctrines surrounding §§ 16 and 924(c) and the ACCA. While this Note focuses on the meaning of §§ 16 and 924(c), the doctrine surrounding all three statutes is informative and, in many ways, coextensive.

1. *The Categorical Approach*. — One key feature of judicial interpretations of the three violence statutes is the so-called categorical approach. A tool forced into the hands of federal judges by the Supreme Court,<sup>59</sup> the

51. See *Stokeling v. United States*, 139 S. Ct. 544, 551 (2019).

52. 18 U.S.C. § 924(e)(2)(B)(i).

53. *Id.* § 924(e)(2)(B)(ii).

54. See *O’Hear*, *supra* note 28, at 171. *O’Hear* addresses section 423.1(a) of the California Penal Code, a statute that uses language identical to § 924(c)’s elements clause. Compare 18 U.S.C. § 924(c)(3)(A), with Cal. Penal Code § 423.1(a) (2021).

55. *O’Hear*, *supra* note 28, at 171.

56. See *Ristroph*, *supra* note 9, at 603–04.

57. *Id.* at 606–07.

58. *Id.* at 607.

59. See *Taylor v. United States*, 495 U.S. 575, 600–02 (1990) (establishing the categorical approach in the ACCA context).

categorical approach is a method for deciding whether a particular offense qualifies as a crime of violence.<sup>60</sup> The approach demands that courts consider only the generic elements of the charged crime, disregarding the actual conduct underlying a specific conviction.<sup>61</sup> A crime qualifies as violent only if the elements of the generic crime satisfy the federal crime of violence definition.<sup>62</sup> For example, in the case of a defendant convicted of domestic abuse for strangling their partner, a court does not evaluate whether strangulation meets the violence criteria of the ACCA (or of §§ 16 or 924(c), whichever happens to apply). Instead, the court must consider whether domestic abuse, as an abstract offense criminalized in a certain jurisdiction, categorically meets the ACCA definition of violence in all cases.<sup>63</sup> The inquiry thus takes the form of a “least culpable conduct” analysis, focusing on the conduct furthest removed from violence that could still result in a conviction for a given crime.<sup>64</sup>

The categorical approach arose from considerations of statutory interpretation and constitutional law, as well as concerns of efficiency. First, the approach is rooted in the text of the crime of violence statutes.<sup>65</sup> The statutes use the word “element” in reference to “conviction,” revealing Congress’s intent to focus violence classification on convictions rather than conduct.<sup>66</sup> Second, the approach protects defendants’ Sixth Amendment right to trial by jury.<sup>67</sup> Under the categorical approach, a judge need

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60. Rachel E. Barkow, *Categorical Mistakes: The Flawed Framework of the Armed Career Criminal Act and Mandatory Minimum Sentencing*, 133 *Harv. L. Rev.* 200, 205 (2019).

61. Amit Jain & Phillip Dane Warren, *An Ode to the Categorical Approach*, 67 *UCLA L. Rev. Discourse* 132, 137–38 (2019).

62. *Id.*

63. See *United States v. Curry*, No. 1:17-CR-15-TLS, 2018 WL 1835907, at \*5 (N.D. Ind. Apr. 18, 2018) (“[T]his Court concludes that it is constrained to reach the conclusion that, because a conviction under the Indiana domestic battery statute does not necessarily require proving violent physical force, but is satisfied by slight offensive physical contact that causes minimal pain, it is not a crime of violence . . .”). Note that, if the defendant happens to be charged in a jurisdiction with such a specific crime as “domestic battery by strangulation,” then the categorical approach would closely resemble a conduct-based approach. See *United States v. Moss*, 678 F. App’x 953, 956–57 (11th Cir. 2017) (“Because Florida’s domestic-battery-by-strangulation statute requires the knowing and intentional use of force capable of causing physical pain or injury to another, [the] prior conviction under the statute qualifies as a predicate violent felony under the ACCA.” (citation omitted)).

64. See *United States v. Stokeling*, 684 F. App’x 870, 873 (11th Cir. 2017) (Martin, J., concurring), *aff’d*, 139 S. Ct. 544 (2019).

65. *United States v. Davis*, 139 S. Ct. 2319, 2328 (2019) (“[T]he statutory text commands the categorical approach.”).

66. See *Taylor v. United States*, 495 U.S. 575, 600 (1990) (holding that the language of the ACCA “generally supports the inference that Congress intended the sentencing court to look only to the fact that the defendant had been convicted of crimes falling within certain categories, and not to the facts underlying the prior convictions”).

67. Jain & Warren, *supra* note 61, at 140 (observing that permitting a judge to “determine the facts underlying a prior conviction in order to determine whether a statutory sentence enhancement applies” raises Sixth Amendment concerns avoided by the categorical approach).

only recognize the existence of a prior conviction and then apply the sentencing enhancement if the legal elements of that conviction satisfy the crime of violence criteria.<sup>68</sup> Under an alternative conduct-based approach (and particularly consequential in ACCA cases, in which the first two of a defendant's three strikes may have come from verdicts or plea bargains that gave no thought to possible future ACCA implications), a judge would have to make specific findings regarding the facts of the defendant's prior actions—a task constitutionally delegated to a jury.<sup>69</sup> Third, the approach avoids the “practical difficulties and potential unfairness” inherent in a conduct-based approach.<sup>70</sup> The categorical approach eliminates the need for a costly mini-trial on the issue of violence classification.<sup>71</sup> In all these ways, the categorical approach strives for an administrable, sensible, and fair application of the crime of violence statutes. However, as this Note explores, the approach also produces complications.

2. *Invalidation of the Residual Clauses.* — The categorical approach made one aspect of violent crime classification too much to bear for the Supreme Court. The Court struck down as unconstitutionally vague the residual clause of the ACCA in 2015,<sup>72</sup> the residual clause of § 16 in 2018,<sup>73</sup> and the residual clause of § 924(c) in 2019.<sup>74</sup> Recall that the residual clauses had supplemented their related elements clauses by encompassing crimes that present a *risk* of force or harm, even when the elements of such crimes contain no force requirement.<sup>75</sup>

A criminal law must not be so vague that ordinary people cannot ascertain the conduct that the law punishes.<sup>76</sup> “The prohibition of vagueness in criminal statutes ‘is a well-recognized requirement, consonant alike with ordinary notions of fair play and the settled rules of law,’ and a statute that flouts it ‘violates the first essential of due process.’”<sup>77</sup> Punishment under a vague law violates due process by “den[ying] fair notice to defendants and invit[ing] arbitrary enforcement by judges.”<sup>78</sup>

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68. *Id.*

69. See *Mathis v. United States*, 136 S. Ct. 2243, 2252 (2016) (“[A] construction of ACCA allowing a sentencing judge to go any further [than finding the existence of a conviction] would raise serious Sixth Amendment concerns because only a jury, and not a judge, may find facts that increase the maximum penalty.”).

70. *Taylor*, 495 U.S. at 601.

71. See *id.* (“In all cases where the Government alleges that the defendant’s actual conduct would fit the [statutory criteria], the trial court would have to determine what that conduct was.”).

72. *Johnson v. United States*, 576 U.S. 591, 604–06 (2015).

73. *Sessions v. Dimaya*, 138 S. Ct. 1204, 1223 (2018).

74. *United States v. Davis*, 139 S. Ct. 2319, 2336 (2019).

75. See *supra* section I.B.2.

76. *Connally v. Gen. Constr. Co.*, 269 U.S. 385, 391 (1926).

77. *Johnson*, 576 U.S. at 595 (quoting *Connally*, 269 U.S. at 391 (1926)).

78. *Id.* at 597.

The Court applied the vagueness doctrine in *Johnson v. United States*, voiding the ACCA's residual clause and starting a chain reaction that ultimately took down the analogous provisions in §§ 16 and 924(c). The ACCA's residual clause defined a violent felony as any felony that "involves conduct that presents a serious potential risk of physical injury to another."<sup>79</sup> Importantly, the clause references *conduct* involved in a crime, not the defining *elements* of the crime.<sup>80</sup> The focus on conduct invites a case-by-case evaluation of actions, but the categorical approach forbids case-by-case inquiry.<sup>81</sup> Consequently, courts had no consistent reference point for judging risk of harm. "Conduct" meant they had to look beyond the concrete elements of the crime, but they couldn't look so far as the concrete facts of the case at hand.<sup>82</sup> The best they could do was to postulate the "ordinary case" of a crime and gauge the risk of harm from that.<sup>83</sup> Thus, the residual clause demanded the application of an already imprecise "risk of harm" standard to a doubly imprecise "judge-imagined abstraction" of the "ordinary case" of a crime.<sup>84</sup> That combined indeterminacy, the Court held, "produces more unpredictability and arbitrariness than the Due Process Clause tolerates."<sup>85</sup>

When the time came to examine the constitutionality of § 924(c)'s residual clause, the question for the Court was whether the categorical approach was truly mandatory for cases involving § 924(c).<sup>86</sup> If not, and if courts could make § 924(c) violence classifications on a case-by-case basis, the statute would avoid any vagueness problem inherent in a categorical "ordinary case" inquiry.<sup>87</sup> The Court decided the issue in *United States v. Davis*.<sup>88</sup> Its ruling gave important insight into how the Court constructs § 924(c)'s text, insight that may be helpful for understanding the meaning of the use of "force against property."

In *United States v. Davis*, the government argued that a specific construction of the word "offense" in § 924(c) permits the use of a case-specific analysis.<sup>89</sup> The clause encompasses "an *offense* that is a felony and . . . that by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense."<sup>90</sup> According to the government, "offense" in this context refers to the specific conduct underlying a crime, not the general

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79. 18 U.S.C. § 924(e)(2)(B)(ii) (2018).

80. *Johnson*, 576 U.S. at 596.

81. See *id.* at 596–97.

82. See *id.*

83. *Id.*

84. *Id.* at 597–98.

85. *Id.*

86. *United States v. Davis*, 139 S. Ct. 2319, 2327 (2019).

87. *Id.* at 2326–27.

88. *Id.*

89. *Id.*

90. 18 U.S.C. § 924(c)(3) (2018) (emphasis added).

crime as an abstract idea.<sup>91</sup> Courts, the argument continued, therefore are statutorily permitted to use a defendant's actual conduct as the reference point for ascertaining risk.<sup>92</sup> This approach would save the statute's constitutionality, since "there would be no vagueness problem with asking a jury to decide whether a defendant's 'real-world conduct' created a substantial risk of physical violence."<sup>93</sup>

But the Court noted that § 924(c) uses a single instance of the word "offense" and distributes the word to both the elements clause and residual clause:

an offense that is a felony and—

(A) has as an element the use, attempted use, or threatened use of physical force against the person or property of another, or

(B) that by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense.<sup>94</sup>

The Court said the elements clause (subsection A) undoubtedly refers to "offense" in the categorical, abstract sense (after all, only in the abstract sense can an offense have legal elements).<sup>95</sup> Therefore, the residual clause (subsection B) cannot refer to "offense" in the case-by-case sense because the single appearance of "offense" must carry a single meaning throughout subsections A and B.<sup>96</sup> The Court refused to hold that offense "bears a split personality in § 924(c)."<sup>97</sup> The categorical approach therefore applied, and the § 924(c) residual clause met the same fate as its counterpart in the ACCA.<sup>98</sup>

Two important lessons came from *Davis*. First, the Court closed the door on case-by-case approaches to § 924(c), even when such approaches could save a piece of the statute from unconstitutionality. Second, the Court's statutory interpretation of the crime of violence provisions was exacting. In particular, its rejection of a word's "split personality" may have important implications for the interpretation of the solitary appearance of "force" as distributed to both persons and property in § 924(c)'s elements clause: "physical force against the person or property of another."<sup>99</sup>

3. *Force Doctrine Under the Elements Clause.* — The elements clauses took center stage after the residual clauses' demise, but elements clause doctrine had already been developing. As *the* element in the "elements clause," physical force is the key to elements clause analysis.

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91. *Davis*, 139 S. Ct. at 2327.

92. *Id.* at 2328.

93. *Id.* (quoting *Sessions v. Dimaya*, 138 S. Ct. 1204, 1215–16 (2018)).

94. See 18 U.S.C. § 924(c)(3); *Davis*, 139 S. Ct. at 2328.

95. *Davis*, 139 S. Ct. at 2328.

96. *Id.*

97. *Id.*

98. See *id.* at 2328, 2336.

99. 18 U.S.C. § 924(c)(3)(A) (emphasis added).

A Supreme Court definition for physical force first came in the 2010 ACCA case *Johnson v. United States*.<sup>100</sup> The case involved a man who faced an ACCA sentencing enhancement due to three prior “violent felony” convictions.<sup>101</sup> The issue on appeal was whether one of the convictions—for simple battery under Florida law—qualified as an ACCA predicate conviction.<sup>102</sup> The Court recognized that, under Florida law, “any intentional physical contact, ‘no matter how slight’” can satisfy the elements of simple battery.<sup>103</sup> This identified the act of touching a person as the “least culpable conduct” that would serve as the reference point for the Court’s violence classification endeavor.<sup>104</sup> Applying this least culpable conduct to the ACCA’s elements clause, the Court had to determine whether the offense of battery by intentionally touching another person “has as an element the use . . . of physical force against the person of another.”<sup>105</sup>

In making its determination, the Court had to define “physical force.”<sup>106</sup> Given no definition in the ACCA itself, the Court adopted the term’s ordinary meaning.<sup>107</sup> It first isolated “physical” and swiftly concluded that the adjective refers to force “exerted by and through concrete bodies” (as opposed to “intellectual force or emotional force”).<sup>108</sup> Regarding “force,” the Court turned to various dictionary definitions, all of which indicated an action exerting an elevated degree of power, violence, or pressure.<sup>109</sup> Considering those definitions in the context of the ACCA (i.e., a focus on violent felonies), the Court concluded that physical force means “violent force—that is, force capable of causing physical pain or injury to another person.”<sup>110</sup> *Johnson* effectively created a bodily harm standard for physical force under the ACCA.

The Court refined the bodily harm standard in *Stokeling v. United States*, in which it clarified the meaning of “capable” in *Johnson*’s phrase: “force capable of causing physical pain or injury to another person.”<sup>111</sup> Facing an ACCA enhancement, Denard Stokeling argued that his prior

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100. 559 U.S. 133 (2010).

101. *Id.* at 135.

102. *Id.*

103. *Id.* at 138 (quoting *State v. Hearn*, 961 So. 2d 211, 218 (Fla. 2007)).

104. See *id.*; supra section I.C.2 (explaining the categorical approach and the “least culpable conduct” inquiry).

105. *Johnson*, 559 U.S. at 135–38 (internal quotation marks omitted) (quoting 18 U.S.C. § 924(e)(2)(B)(1)(i)).

106. *Id.* at 138–39.

107. *Id.* at 138.

108. *Id.*

109. *Id.* at 138–39.

110. *Id.* at 140.

111. 139 S. Ct. 544, 553 (2019) (internal quotation marks omitted) (quoting *Johnson*, 559 U.S. at 140); see also *id.* at 554 (“‘Capable’ means ‘susceptible’ or ‘having attributes . . . required for performance or accomplishment’ or ‘having traits conducive to or features permitting.’” (alteration in original) (quoting Webster’s Ninth New Collegiate Dictionary 203 (1983))).

conviction for robbery in Florida was not a predicate violent felony.<sup>112</sup> The least culpable conduct for a Florida robbery conviction is “resistance by the victim that is overcome by the physical force of the offender.”<sup>113</sup> Indeed, Stokeling’s actual crime involved trying to remove a woman’s necklaces as she attempted to hold onto them around her neck.<sup>114</sup> Stokeling contended that the force necessary to overcome resistance does not reach the threshold established in *Johnson*, which he said required force “reasonably expected to cause pain or injury.”<sup>115</sup> The Court answered that such a standard based on “the statistical probability that harm will befall a victim” would be “exceedingly difficult” to apply.<sup>116</sup> Instead, the Court held that *Johnson* requires no threshold degree of likelihood that a force will cause pain or injury; all it requires is “potentiality.”<sup>117</sup> Overcoming resistance, the Court stated, necessarily involves a physical confrontation that is capable of causing injury; therefore, it is violent.<sup>118</sup>

The Court has worked hard to lay out a standard for “physical force” that lower courts can efficiently apply and that harmonizes with the ACCA’s framework. Significantly, though, that standard has nothing to do with property.<sup>119</sup> The carefully constructed standard therefore hardly resolves all the complications of statutory violence classification within §§ 16 and 924(c), which, unlike the ACCA statute and related doctrine, have everything to do with property. The concept of violence against property will vividly expose the limitations of existing “physical force” doctrine.

## II. VIOLENCE AGAINST PROPERTY

In 2011, Judge G. Steven Agee of the Fourth Circuit bemoaned the great volume of judicial resources spent on figuring out what Congress meant by its classifications of violent crimes: “The dockets of our court and all federal courts are now clogged with these cases.”<sup>120</sup> Indeed, since 2007, the Supreme Court alone has decided at least twenty cases on the issue of

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112. *Id.* at 549.

113. *Id.* (internal quotation marks omitted) (quoting *Robinson v. State*, 692 So. 2d 883, 886 (Fla. 1997)).

114. *Id.*

115. *Id.* at 554 (internal quotation marks omitted) (quoting Brief for Petitioner at 12, *Stokeling*, 139 S. Ct. 544 (No. 17-5554), 2018 WL 2960923, at \*12).

116. *Id.*

117. *Id.*

118. See *id.* at 553 (concluding that “the force necessary to overcome a victim’s physical resistance is inherently ‘violent’ in the sense contemplated by *Johnson*”).

119. The Court had no reason to consider harm to property in *Johnson* or *Stokeling* because both were ACCA cases, and the ACCA lacks a property provision. See *supra* section I.B.2. But that has not stopped some courts from adapting the *Johnson* standard to property cases. See *infra* section II.C.2.

120. *United States v. Vann*, 660 F.3d 771, 787 (4th Cir. 2011) (Agee, J., concurring) (referring to cases that ask courts to determine which offenses meet the ACCA’s “violent felony” criteria).



“crime of violence” or “violent felony.”<sup>121</sup> As the Court’s decisions develop the doctrine, new problems inevitably emerge to destabilize it. The answers to such new problems drive the ever-sprawling violence definition further.

This Part discusses the idea of “violence against property” as another problem that threatens to push the Court’s doctrine to a breaking point. The problem is twofold. First, § 924(c)’s property provision clashes with the categorical approach. The categorical approach purposefully limits the scope of § 924(c) and excludes some inarguably violent instances of crimes if those crimes are not categorically violent in all other instances.<sup>122</sup> But the property provision cuts the other way. This is because the combination of the categorical approach and the property provision means § 924(c) can incorporate nonviolent instances of crimes so long as those crimes categorically involve nominal damage to property.<sup>123</sup> Second, the courts have failed to form a definition for the “use of physical force against the . . . property of another”<sup>124</sup> that is doctrinally consistent and constitutionally valid. Before analyzing these problems, this Part examines why such analysis is needed.

#### A. *The Violence Against Property Issue Has Real Implications*

Notwithstanding the glut of crime of violence cases in general, appeals courts very rarely confront cases that require examining the use of force against property.<sup>125</sup> From the lack of real-world cases, however, it does not follow that § 924(c)’s property provision bears little consequence. First, quite plainly, a lack of past cases does not mean that cases will never arise in the future. Second, if the sheer gravity of § 924(c)’s sentencing enhancements stimulates plea bargains, the dearth of § 924(c) property convictions understates the property provision’s power in the hands of prosecutors.<sup>126</sup> The point is this: The vagueness of the property provision

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121. See Sheldon A. Evans, *Categorical Nonuniformity*, 120 Colum. L. Rev. 1771, 1777 (2020) (“The complexities of navigating the nonuniformity of the categorical approach have demanded more of the Supreme Court’s docket . . .”).

122. See *Borden v. United States*, 141 S. Ct. 1817, 1832 (2021) (“[The categorical] approach is under-inclusive by design: It *expects* that some violent acts, because charged under a law applying to non-violent conduct, will not trigger enhanced sentences.”).

123. See, e.g., *United States v. Hill*, 890 F.3d 51, 53–57 (2d Cir. 2018), cert. denied, 139 S. Ct. 844 (2019) (stating that where the elements of a crime could be met by merely throwing paint on a house, § 924(c) could still apply).

124. 18 U.S.C. § 924(c)(3)(A) (2018).

125. See *United States v. Bowen*, 936 F.3d 1091, 1115 (10th Cir. 2019) (McHugh, J., dissenting) (“I have found only three cases directly addressing this question—the amount of force required to injure property—in the context of § 924(c).”).

126. See Nat’l Ass’n of Crim. Def. Laws., *The Trial Penalty: The Sixth Amendment Right to Trial on the Verge of Extinction and How to Save It* 48 (2018), <https://www.nacdl.org/getattachment/95b7f0f5-90df-4f9f-9115-520b3f58036a/the-trial-penalty-the-sixth-amendment-right-to-trial-on-the-verge-of-extinction-and-how-to-save-it.pdf> [https://perma.cc/GV5C-XXPT] (describing how prosecutors can use the threat of § 924(c) mandatory

exposes a vast range of conduct to very harsh consequences, and the law seems to leave it to prosecutors to determine when application of the provision is warranted.

Section 924(c)'s mandatory minimums afford prosecutors extraordinary leverage in plea bargaining. The crucial detail is that § 924(c) is often a tacked-on charge that accompanies an underlying offense—prosecutors have the discretion to charge a defendant with only the underlying crime (e.g., robbery) or to charge both the underlying crime and the § 924(c) offense (e.g., robbery and commission of a crime of violence while armed).<sup>127</sup> Because sentences under § 924(c) are mandatory and run consecutively to sentences for the underlying offense,<sup>128</sup> defendants facing the threat of § 924(c) have an enormous incentive to settle for charges that include only their underlying offenses.<sup>129</sup> Evidence suggests that prosecutors frequently forgo § 924(c) charges in cases where § 924(c) could legally apply.<sup>130</sup> Between FY2003 and FY2009, for example, prosecutors brought 26,680 § 924(c) charges in cases that ultimately ended with a plea, with forty-five percent of those charges being dismissed prior to or as part of a plea agreement.<sup>131</sup> In this way, the mere availability of § 924(c) can have significant ramifications for the ultimate result of a defendant's case, and an overbroad crime of violence definition can influence plea bargaining in a huge variety of cases.

With the force of § 924(c) largely in the hands of federal prosecutors, what assurance is there that those prosecutors will appropriately wield their power? The federal response to property crimes committed during widespread protests in 2020 shows that prosecutorial discretion may not be an adequate protection against unreasonable application of § 924(c)'s property provision.

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minimums to prompt defendants to plead guilty in a “wide variety of circumstances” that “extend well beyond the traditional notion of violent crime”).

127. See Firearms Pol’y Team, U.S. Sent’g Comm’n, Sentencing for the Possession or Use of Firearms During a Crime: Possible Commission Responses to Pub. L. No. 105-386 and Other Issues Pertaining to 18 U.S.C. § 924(c), at 15–16 (2000), <https://www.uscc.gov/sites/default/files/pdf/research-and-publications/working-group-reports/firearms/20000106-use-firearms-during-crime/firearms.pdf> [<https://perma.cc/SD5F-VNVA>]. The prosecutor may also elect to charge a defendant solely under § 924(c). *Id.*

128. See 18 U.S.C. § 924(c)(1)(A), (D).

129. See Nat’l Ass’n of Crim. Def. Laws., *supra* note 126, at 49 (“Defendants will know that they have no hope of leniency at sentencing because the enhancements are mandatory. Thus, exercising one’s right to trial becomes a treacherous route, and the severity of the consequences can easily sway defendants to plead guilty.”).

130. See Firearms Pol’y Team, *supra* note 127, at 17 (“[Studies] strongly suggest that potential section 924(c) charges are declined or dismissed in a sizeable number of cases in which they could apply, and that different regions and prosecutors have varying practices in this regard.”).

131. Kyle Graham, Crimes, Widgets, and Plea Bargaining: An Analysis of Charge Content, Pleas, and Trials, 100 *Calif. L. Rev.* 1573, 1603 (2012).

In the wake of George Floyd's killing by Minneapolis police in May of 2020, thousands of New Yorkers joined nationwide protests.<sup>132</sup> Among them were two Brooklynites, Colinford Mattis and Urooj Rahman.<sup>133</sup> Both had grown out of working-class backgrounds to become lawyers—Mattis graduated from Princeton University and New York University School of Law, and Rahman graduated from Fordham University and its law school.<sup>134</sup> By all accounts, Mattis and Rahman never showed a propensity for violence, but they were deeply concerned about civil rights and police reform.<sup>135</sup> As demonstrators' fervor ignited widespread property damage on the night of May 29, Rahman remarked to an on-the-scene news reporter, "Destruction of property is nothing compared to the murder of a human life. So I understand why people are doing it. It's a way to show their pain, their anger, because it just never stops."<sup>136</sup> After her short interview with the news, Rahman rode around Brooklyn with Mattis in a minivan.<sup>137</sup> They stopped at a vandalized police car in Fort Greene.<sup>138</sup> Rahman got out and threw a Molotov cocktail through the police car's already smashed window.<sup>139</sup> Mattis and Rahman drove away, but police later arrested them.<sup>140</sup>

Prosecutors with the U.S. Attorney's Office in Brooklyn elected to charge Mattis and Rahman in federal court, indicting the pair on seven charges, including use of explosives and arson.<sup>141</sup> Former prosecutors criticized the U.S. Attorney's Office's handling of the case, surmising that the prosecution was a politically motivated attempt to "punish people charged in these protests as harshly as possible."<sup>142</sup> Noting that the case should have been charged in state court, one former prosecutor stated, "This seems

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132. Nicole Hong & William K. Rashbaum, *The 2 Lawyers, the Anti-Police Protests and the Molotov Cocktail Attack*, N.Y. Times (June 7, 2020), <https://www.nytimes.com/2020/06/07/nyregion/molotov-cocktail-lawyers-nyc.html> (on file with the *Columbia Law Review*).

133. *Id.*

134. *Id.*

135. See *id.*; Erica Orden, *How Two Promising Lawyers Found Themselves Facing Life in Prison for Alleged Molotov Cocktail Attack During Protests in NY*, CNN (June 18, 2020), <https://www.cnn.com/2020/06/17/us/brooklyn-molotov-lawyers-protests/index.html> [<https://perma.cc/4B65-Q3AN>].

136. Orden, *supra* note 135.

137. *Id.*; Hong & Rashbaum, *supra* note 132.

138. Dina Temple-Raston, *Lawyers Charged With Seven Felonies in Molotov Cocktail Attack Out on Bail*, WFAE (July 1, 2020), <https://www.wfae.org/latest-national-and-international-headlines/2020-07-01/lawyers-charged-with-seven-felonies-in-molotov-cocktail-attack-out-on-bail> [<https://perma.cc/NRD3-2HEH>].

139. Hong & Rashbaum, *supra* note 132; Orden, *supra* note 135.

140. Hong & Rashbaum, *supra* note 132; Orden, *supra* note 135.

141. See *Indictment*, *supra* note 13, at 1–4.

142. Jim Mustian, *Federal Charges in NYPD Firebombing Case Called Draconian*, AP News (June 23, 2020), <https://apnews.com/article/fb27e526be599c1f9a58fd95741500f7> (on file with the *Columbia Law Review*).

more than anything like scare tactics and trumped-up charges by the federal government.”<sup>143</sup> The critical responses were partly directed at the harsh sentences that would await Mattis and Rahman upon conviction in federal court—at least forty-five years in prison.<sup>144</sup> A chunk of that forty-five-year sum comes from count five of the indictment, which charges the defendants for use of a firearm in furtherance of a crime of violence under § 924(c).<sup>145</sup> The applicable crime of violence is the use of fire and explosives against the empty car, and the “firearm” is the Molotov cocktail.<sup>146</sup> As a destructive device, the Molotov cocktail sets off the sentencing enhancement of § 924(c)(1)(B)(ii): “If the firearm possessed by a person convicted of a violation of this subsection . . . is a machinegun or a destructive device . . . the person shall be sentenced to a term of imprisonment of not less than 30 years.”<sup>147</sup> The thirty-year sentence would be mandatory, could not run concurrently with any other sentence, and could never be mitigated by parole.<sup>148</sup> Ultimately, Mattis and Rahman each avoided the § 924(c) mandatory minimum by pleading guilty to possessing and making a destructive device, the last charge on the seven-count indictment.<sup>149</sup> They both await sentencing.<sup>150</sup>

The Mattis and Rahman case illustrates the difficulty of defining violence with respect to offenses committed against property. Under most circumstances, it would be hard to argue that throwing firebombs is not in some way violent. But context is key. Fools playing with gasoline and beer bottles in an empty field seems several degrees separated from terrorists lobbing Molotovs into a crowd, for instance. Setting fire to an abandoned police cruiser probably falls somewhere in between those two extremes, so how should the law respond? Protesters got carried away one night; do they deserve more than thirty years in prison? Prosecutors are seemingly free to answer in the affirmative, irrespective of the danger actually posed by the crime.

But whether prosecutors decide one way or another does not matter in the grand scheme—perhaps they were right to throw the book at the protesters in this instance. What matters more is that leaving the decision to prosecutors creates an unconstitutional black box of criminality under

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143. *Id.*

144. *Id.*

145. See Indictment, *supra* note 13, at 3.

146. See *id.*

147. 18 U.S.C. § 924(c)(1)(B)(ii) (2018); see also Indictment, *supra* note 13, at 3.

148. See 18 U.S.C. § 924(c)(1)(A), (D).

149. See Minute Entry for Change of Plea Hearing as to Colinford Mattis and Urooj Rahman, *United States v. Mattis*, No. CR 20 203 (E.D.N.Y. filed October 20, 2021) (“Plea entered by Colinford Mattis and Urooj Rahman: Guilty to Count 7 of the Indictment.”); Indictment, *supra* note 13, at 4.

150. See Rescheduling Order as to Urooj Rahman, *Mattis*, No. CR 20 203 (E.D.N.Y. filed March 9, 2022) (scheduling sentencing for May 25, 2022); Rescheduling Order as to Colinford Mattis, *Mattis*, No. CR 20 203 (E.D.N.Y. filed March 9, 2022) (scheduling sentencing for May 31, 2022).

§ 924(c). This Note, then, does not necessarily call for reform to § 924(c) in the name of social policy. Section 924(c)'s problem is not just about a few outrageous cases that disquiet sympathetic minds. The problem goes down to the legal mechanics of the statute and doctrine, to the grinding of jurisprudential gears resulting from § 924(c)'s reference to property. Therefore, this Note's paramount concern is showing that, even to the most unsympathetic legal thinker, the doctrine surrounding "crime of violence" does not logically accommodate property crimes. In a purely legal sense, the property provisions break the crime of violence statutes.

B. *The Property Provisions Clash With the Categorical Approach*

Use of the categorical approach is central to the legal complications inherent in § 924(c). Under the approach, courts test the limits of statutory language to determine whether an offense categorically involves violence. Such tests overemphasize technical details and fringe scenarios, and they can sometimes lead to inequitable and absurd legal conclusions. Including property in §§ 16 and 924(c) adds yet another technicality for courts to consider, one that is inconsistent with logical classifications of criminal violence.

1. *Anomalies Created by the Categorical Approach in General.* — The categorical approach inspires broad criticism for the results it reaches. One criticism is that identical conduct can receive different treatment depending on where a crime occurs.<sup>151</sup> Returning to the domestic abuse example from section I.C, suppose a person in Montana batters a household member, and a person in Rhode Island does the same. Both are convicted of domestic abuse in their respective states. Montana has a fairly narrow domestic abuse statute, requiring bodily injury or the reasonable apprehension of bodily injury.<sup>152</sup> A domestic abuse conviction in Montana could almost certainly qualify as a crime of violence under the federal criminal code because any such conviction categorically involves actual or threatened harm to a person.<sup>153</sup> Rhode Island has a comparatively broad statute that encompasses acts like stalking and cyberstalking.<sup>154</sup> Assuming cyberstalking does not categorically involve the use of force against a person, no domestic abuse conviction in Rhode Island could ever stand as a crime of violence. Even though the *actual conduct* underlying the hypothetical *convictions* in Montana and Rhode Island is identical, federal law regards the crimes differently because the least "violent" *possible conduct* underlying the *statutes* is different.

A second, closely related criticism is that the categorical approach can classify crimes as violent or not based on technicalities that deprive "crime

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151. Barkow, *supra* note 60, at 237.

152. See Mont. Code Ann. § 45-5-206 (West 2021).

153. See *infra* section II.B.1 (discussing the relation of physical force to bodily harm).

154. See 15 R.I. Gen. Laws § 15-15-1 (2021).

of violence” of any “real or logical meaning.”<sup>155</sup> The “least culpable conduct” inquiry can foreclose violence classification for (almost) invariably violent crimes, such as second-degree murder, because the relevant statute allows conviction for technically nonviolent conduct.<sup>156</sup> Consider a particularly egregious example involving a sex crime. Deciding whether a conviction for aggravated sexual assault of a minor qualified as a violent felony under the ACCA, the Eighth Circuit reasoned that, “[b]ecause a defendant can violate this statute by having a child touch *him* for sexual gratification, an act that does not necessarily require ‘the use, attempted use, or threatened use of physical force against the person of another,’ the statute on its face cannot qualify as an ACCA predicate.”<sup>157</sup> The categorical analysis thus can reduce to an examination of technicalities far removed from a reasonable conception of violence or harm.

The focus on technicalities can also work in the opposite direction, forcing courts to strain the definition of force in order to bring obviously violent conduct under the ambit of “crime of violence.” An Eleventh Circuit case from 2013 shows the court’s response to a defendant who argued that, even though he acted violently, the crime of his conviction does not always involve the use of force and therefore is not a crime of violence.<sup>158</sup>

*United States v. McGuire* involved the case of Jason McGuire, who, after drunkenly firing a handgun down the empty streets of his neighborhood, fired one shot in the direction of a responding police helicopter.<sup>159</sup> A jury convicted McGuire under 18 U.S.C. § 32, which prohibits any attempt to “set[] fire to, damage[], destroy[], disable[], or wreck[] an[] aircraft in the special aircraft jurisdiction of the United States.”<sup>160</sup> The trial judge determined that the offense qualified as a crime of violence under § 924(c),

155. *United States v. Begay*, 934 F.3d 1033, 1042–43 (9th Cir. 2019) (Smith, J., dissenting in part) (“MURDER in the second-degree is NOT a crime of violence??? Yet attempted first-degree murder, battery, assault, exhibiting a firearm, criminal threats (even attempted criminal threats), and mailing threatening communications are crimes of violence. How can this be? ‘I feel like I am taking crazy pills.’” (footnotes omitted) (quoting *Zoolander* (Paramount Pictures 2001))).

156. See *id.* The majority in *Begay* held that a crime of violence “requires the intentional use of force.” *Id.* at 1040 (majority opinion). The elements of the relevant homicide statute required only reckless indifference for a second-degree murder conviction. Because “the underlying offense must require proof of an *intentional* use of force” and because “[r]eckless conduct, no matter how extreme, is not intentional,” the *Begay* majority concluded that second-degree murder was not categorically a crime of violence. *Id.* (quoting *United States v. Gomez-Leon*, 545 F.3d 777, 787 (9th Cir. 2008)).

157. *Lofton v. United States*, 920 F.3d 572, 576 (8th Cir. 2019) (emphasis added) (quoting 18 U.S.C. § 924(e)(2)(B)(i) (2018)).

158. *United States v. McGuire*, 706 F.3d 1333, 1337 (11th Cir. 2013), overruled by *Ovalles v. United States*, 905 F.3d 1231 (11th Cir. 2018) (en banc), abrogated by *United States v. Davis*, 139 S. Ct. 2319 (2019).

159. *Id.* at 1335.

160. *Id.* (alterations in original) (internal quotation marks omitted) (quoting 18 U.S.C. § 32(a)(1)).

and McGuire appealed.<sup>161</sup>

The Eleventh Circuit applied the categorical approach in ruling on McGuire's appeal, stating that, "even though firing a gun at a flying helicopter is unmistakably violent, we must ask whether the crime, in general, plausibly covers any non-violent conduct."<sup>162</sup> As specified by the text of § 32, the "crime, in general," covers five actions: setting fire to, damaging, destroying, disabling, and wrecking an aircraft.<sup>163</sup> Therefore, McGuire's offense could not be a crime of violence unless all five of the statute's enumerated actions individually met the criteria of § 924(c).<sup>164</sup> Looking to § 924(c)'s elements clause, the court easily concluded that four of the five actions (setting fire to, damaging, destroying, and wrecking an aircraft) indeed have "as an element, the use, attempted use, or threatened use of physical force against the . . . property of another."<sup>165</sup> The court noted that those four actions meet the elements clause definition—and thus qualify as crimes of violence—because they all involve the "the attempted or threatened destruction of very sensitive property—and quite probably lives as well."<sup>166</sup>

With four actions easily classified as violent, the Eleventh Circuit's opinion hinged on whether the remaining action, disabling an aircraft, also qualified as a crime of violence. Here, the court acknowledged one important point about violence classification under § 924(c): It is centered on the use of force, not the risk of danger or injury. The Supreme Court had already made this clear when it previously held that drunk driving was not a crime of violence since, although drunk driving is extremely dangerous, it nevertheless does not categorically involve the use of force.<sup>167</sup> Along the same lines, McGuire argued that one could disable an aircraft without the use of force, such as by disconnecting its critical electronics.<sup>168</sup> The court was unpersuaded. Regardless of the method used to disable the aircraft, the court opined that disabling an aircraft in-flight "is itself an act of force in the meaningful sense."<sup>169</sup>

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161. *Id.*

162. *Id.* at 1337. The Eleventh Circuit overruled *McGuire's* use of the categorical approach in an en banc decision. See *Ovalles*, 905 F.3d at 1234. However, the Supreme Court later rebuffed the Eleventh Circuit in *United States v. Davis*, holding that § 924(c)'s language compels the use of the categorical approach in all cases. See 139 S. Ct. at 2328 ("[T]he statutory text commands the categorical approach."); *supra* section I.C.2.

163. See 18 U.S.C. § 32(a)(1); *McGuire*, 706 F.3d at 1337.

164. *McGuire*, 706 F.3d at 1337 ("Only if the plausible applications of the statute of conviction all require the use or threatened use of force can McGuire be held guilty of a crime of violence.").

165. *Id.* (alteration in original) (quoting 18 U.S.C. § 924(c)(3)(A)).

166. *Id.*

167. See *Leocal v. Ashcroft*, 543 U.S. 1, 9–11 (2004).

168. *McGuire*, 706 F.3d at 1337.

169. *Id.*

Broken down and taken literally, the court's opinion states that pushing buttons can constitute the use of force sufficient for a crime of violence. The categorical approach forced the court to make this determination, lest it decide that purposefully disabling a plane during flight is not a violent act. The immediate outcome, that shooting at a helicopter is a crime of violence, might be desirable. The lasting implication, that button pressers are violent, only adds to the confusion inherent in the crime of violence doctrine.

2. *Consequences of Including Property in a Categorical Analysis.* — A property-based definition of violence makes property crimes disproportionately significant in the categorical classification of crimes of violence. The categorical approach comes down to the “least culpable conduct” prohibited by a law. No matter how violent a battery, assault, or other crime may be in the most heinous example, the reference point for classification is always the opposite extreme—the *least* heinous example. Only if the least culpable version of a crime still involves “the use of force against the person or property of another” can that crime be a crime of violence. If transgressions against property are generally less culpable than transgressions against persons, then property crimes stand out as the “least culpable” reference points for judging a variety of crimes.<sup>170</sup> Thanks to the categorical approach, the meaning of “the use of force against the . . . property of another” under §§ 16 and 924(c) thus becomes a decisive factor in some cases that do not even involve property damage.<sup>171</sup> Yet property lies outside the consensus understanding of violence.<sup>172</sup> Therefore, by defining violence with respect to property, §§ 16 and 924(c) relegate enormous influence to a factor that hardly relates to the statutes’ underlying principle.

The potentially strong influence of the property provision creates a tension between the over- and under-inclusiveness of the crime of violence statutes. Courts may use the flexibility of the property provision as a way to implement a quasi-conduct-based approach. For example, when faced with the facts of a very violent crime, a court might be apt to adopt a liberal construction of “use of force against the . . . property of another” that allows § 924(c)’s crime of violence label to technically apply to a far less fearsome form of the same crime.<sup>173</sup> In other words, a court might sacrifice a bit of logic on an ancillary issue—saying that nominal property damage is

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170. See *supra* section I.A.

171. See, e.g., *United States v. Bowen*, 936 F.3d 1091, 1104–05 (10th Cir. 2019) (examining the least culpable conduct sufficient for a witness retaliation conviction—spray-painting a witness’s car).

172. See *supra* section I.A.

173. See, e.g., *United States v. Hill*, 890 F.3d 51, 53–57 (2d Cir. 2018), cert. denied, 139 S. Ct. 844 (2019) (stating that the act of throwing paint on a house could constitute the use of force against the property of another for the purpose of bringing a Hobbs Act robbery under § 924(c)).



necessarily violent—in order to accomplish a sensible result on the immediate issue—bringing most instances of a violent crime (which in other instances might be accomplished with mere property damage) under § 924(c)'s crime of violence definition.<sup>174</sup>

When a court adopts a liberal construction of the property provision, the nonsensical ancillary step can become a valuable precedent for broadly applying § 924(c) to far less dangerous crimes in the future. Here, the property provision directly conflicts with the categorical approach's otherwise restrictive effect on § 924(c). Like the disparities caused by textual differences in two jurisdictions' criminal statutes,<sup>175</sup> the property provision thus creates disparities based on whether property damage happens to satisfy the elements of a defendant's charge. The result is a world in which second-degree murder is not categorically violent,<sup>176</sup> but "injuring a building within the special and maritime jurisdiction of the United States" is.<sup>177</sup> That is, the result is a system that weighs harm to property more than harm to humans.

### C. *The Definition of "Physical Force Against Property" Is Unsettled*

The incongruity between *harm* to humans and *harm* to property relates to another significant problem raised by § 924(c)'s property provision: the incongruity between the use of *force* against persons and the use of *force* against property. The Supreme Court has addressed only the concept of the "use of physical force against persons," basing its definition on the force's ability to harm persons.<sup>178</sup> Lower courts struggle to figure out whether and how the Court's person-based force doctrine applies to property. This section argues that the phrase "physical force against persons *or property*" is internally inconsistent and inoperable if its meaning depends on a force's capacity to cause harm. The phrase's failure stems mainly from the fact that force capable of harming property is a lower threshold than force capable of harming persons.<sup>179</sup>

1. *Definition of "Physical Force" Under the ACCA.* — While the Court has defined "physical force," it has done so only in the context of the ACCA.<sup>180</sup> The ACCA elements clause references only persons, not property, and the Court's definition of physical force—force capable of harming a person—seems tailored to that fact. It is therefore unclear how the ACCA definition extends to §§ 16 or 924(c), if it does so at all. Making things especially unclear, the two principles underlying the ACCA force definition contra-

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174. See *id.*

175. See *supra* section II.B.1.

176. See *United States v. Begay*, 934 F.3d 1033, 1041 (9th Cir. 2019).

177. See *United States v. Abu Khatallah*, 316 F. Supp. 3d 207, 209–14 (D.D.C. 2018).

178. See *supra* section I.C.3.

179. See *infra* section II.D.2.

180. See *Johnson v. United States*, 559 U.S. 133, 140 (2010).

dict each other when applied to property. First, the Court refused to accept a low threshold for force. A slight touch or a push might technically require some degree of force, but such conduct is not what the ACCA was meant to include.<sup>181</sup> Second, the Court based the force requirement in harm. De minimis force does not count because it will not result in harm.<sup>182</sup> The two principles complement each other with respect to the use of force against humans. When property enters the analysis, the principles collide and break down. This is because de minimis force *can* harm property. Property damage can easily result from minimally forceful conduct, like smearing mud on the pages of a book or trudging through a flowerbed.

2. *Circuit Split on the Definition of Physical Force Against Property Under § 924(c)*. — Circuit courts are divided on how to define the use of force against property under § 924(c)'s elements clause. Two approaches have emerged.

The Second Circuit addressed the property question in deciding whether a Hobbs Act robbery, a federal charge for robbery affecting interstate commerce, constitutes a crime of violence.<sup>183</sup> The case involved Elvin Hill, who was charged under the Hobbs Act after robbing and shooting a taxi driver.<sup>184</sup> Hill claimed his robbery charge was not a crime of violence under § 924(c) because one could commit a Hobbs Act robbery without the use of force.<sup>185</sup> The Hobbs Act defines robbery as “the unlawful taking or obtaining of personal property from the person or in the presence of another, against his will, by means of actual or threatened force, or violence, or fear of injury, immediate or future, to his person or property.”<sup>186</sup> Hill argued that one could accomplish “fear of injury, immediate or future, to . . . property” through nonforceful means, such as by throwing paint on the victim’s house, and therefore a Hobbs Act robbery was not categorically a crime of violence.<sup>187</sup> The court responded that throwing paint on a victim’s house *could* constitute the use of force, at least insofar as the Supreme Court had defined force in *Johnson v. United States*.<sup>188</sup> To reach this conclusion, the court effectively appended “or property” to the end of the Supreme Court’s harm-to-humans standard of force promulgated in *Johnson* (an ACCA case, and thus a case that did not concern § 924(c)’s property provision).<sup>189</sup> With this approach, physical force under

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181. See *id.* at 139–40 (rejecting that “physical force” in the ACCA context encompasses “the slightest offensive touching”).

182. See *id.* at 140 (“[T]he phrase ‘physical force’ means *violent* force—that is, force capable of causing physical pain or injury to another person.”).

183. See 18 U.S.C. § 1951 (2018); *United States v. Hill*, 890 F.3d 51, 53 (2d Cir. 2018).

184. *Hill*, 890 F.3d at 53–54.

185. See *id.*

186. 18 U.S.C. § 1951(b)(1).

187. *Hill*, 890 F.3d at 57.

188. See *id.*

189. See *id.* at 58.

§ 924(c) means force that can cause injury to persons *or property*.<sup>190</sup> The court accepted this definition of physical force without much analysis, seemingly assuming that the “capable of causing injury” standard would apply to property just as appropriately as it does to persons.<sup>191</sup>

In *United States v. Bowen*, a case involving a charge of witness retaliation, the Tenth Circuit undertook a more rigorous analysis of the violence issue and ultimately declined to follow the approach of the Second Circuit.<sup>192</sup> Like Hill in the robbery case, Aaron Bowen argued that witness retaliation was not categorically a crime of violence because it could be committed without the use of force.<sup>193</sup> He pointed to a case in which a defendant was convicted for witness retaliation after asking another person to spray-paint a witness’s car.<sup>194</sup> The court agreed with Bowen and refused to follow an approach that would classify as violent any conduct that merely causes property damage.<sup>195</sup> Whereas the Second Circuit had broadly applied the Supreme Court’s language regarding *harm*, the Tenth Circuit focused intently on the Supreme Court’s guidance that the qualifying force must be *violent*.<sup>196</sup> Although painting a car does damage property, it cannot reasonably be characterized as a “violent act.” The term “crime of violence,” the court reasoned, suggests a category of *inherently* “violent, active” crimes.<sup>197</sup> The court did not explain exactly what that category of inherently violent crimes looks like, only that mere property damage does not make the cut.<sup>198</sup>

D. *Both Circuits’ Approaches to the Force Against Property Issue Are Questionable*

Both sides of the circuit split are susceptible to constitutional vagueness challenges. The “violent force” standard of the Tenth Circuit depends on individual judges’ estimations of what constitutes inherently

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190. *Id.* The Second Circuit assumed the applicability of *Johnson*, an ACCA case, for the purposes of addressing the appellant’s argument that *Johnson* set a threshold for force that is higher than the amount of force required for the appellant’s crime. See *id.*

191. See *id.* (“Assuming *arguendo Johnson*’s relevance to the construction of § 924(c)(3)(A), ‘physical force’ as used in the provision at issue here means no more nor less than force capable of causing physical pain or injury to a person *or* injury to property.”). The District Court for the District of Columbia has taken a similar approach. See *United States v. Abu Khatallah*, 316 F. Supp. 3d 207, 214–15 (D.D.C. 2018) (“*Johnson*’s definition of physical force simply requires that all of the prohibited acts involve ‘force capable of causing physical injury.’” (quoting *Johnson v. United States*, 559 U.S. 133, 140 (2010))).

192. See *United States v. Bowen*, 936 F.3d 1091, 1095 (10th Cir. 2019).

193. See *id.* at 1104.

194. See *id.*

195. See *id.* at 1101.

196. See *id.*; *Hill*, 890 F.3d at 59.

197. *Bowen*, 936 F.3d at 1105 (internal quotation marks omitted) (quoting *Leocal v. Ashcroft*, 543 U.S. 1, 11 (2004)).

198. See *id.* at 1107–08.

violent force. The harm-based approach of the Second Circuit employs inconsistent definitions of force as applied to property versus persons.

1. *The Tenth Circuit's Problem: The Circularity of "Violent"*. — The Tenth Circuit's approach is vague. The court presciently recognized that an injury-to-property standard would inappropriately include offenses that are not characteristically violent, but it offered a solution that circularly uses violence to define violence. It held that "property crimes of violence under § 924(c)(3) are those that require *violent* force, not merely the force required to damage property."<sup>199</sup> It is true that the Tenth Circuit relied on the reasoning of *Johnson*.<sup>200</sup> And it is true that the Supreme Court exhibited similar circularity when it held in *Johnson* that "physical force" in the ACCA means "violent force."<sup>201</sup> But the *Johnson* Court, using the context of the ACCA, explicitly stated what it meant by violent force: "force capable of causing physical pain or injury to another person."<sup>202</sup> The Tenth Circuit offered no such insight. It only offered a determination that the degree of force involved in property damage does not necessarily exceed the threshold for violence, whatever that threshold is.<sup>203</sup> This omission is particularly glaring given that the court anchored its decision—a decision in a § 924(c) case that significantly implicated the meaning of physical force against property—on the holding in a case (*Johnson*) about a statute (the ACCA) that has nothing at all to do with the use of force against property.<sup>204</sup> The Tenth Circuit borrowed an incongruous violence standard instead of tailoring one for the statute at hand.<sup>205</sup> Deciding whether a use of force is inherently violent completely obviates the § 924(c) elements clause. Why would Congress even offer a definition of crime of violence if the word "violence" can speak for itself? A "violence" standard of "violence" invites the same sort of arbitrary enforcement by judges that doomed the residual clauses.

2. *The Second Circuit's Problem: The Split Personality of "Force"*. — Defining "physical force" as "force capable of causing injury to persons *or property*" assigns to force the same sort of "split personality" that the Court previously refused to give to "offense" in § 924(c)'s residual clause.<sup>206</sup> The elements clause uses the word only once, categorizing as a crime of violence any felony that "has as an element the use, attempted use, or threatened use of physical *force* against the person or property of another."<sup>207</sup> Just as "offense" must carry the same meaning in the elements clause and

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199. *Id.* at 1103–04 (emphasis in original).

200. See *id.*

201. See *Johnson v. United States*, 559 U.S. 133, 140 (2010); *supra* section I.C.3.

202. *Johnson*, 559 U.S. at 140.

203. See *Bowen*, 936 F.3d at 1103–04.

204. See *supra* section I.C.3.

205. See *Johnson*, 559 U.S. at 143 ("We have interpreted the phrase 'physical force' only in the context of a statutory definition of 'violent felony.'").

206. See *supra* section I.C.2.

207. 18 U.S.C. § 924(c)(3)(A) (2018) (emphasis added).

the residual clause, “force” must carry the same meaning with respect to persons and property.<sup>208</sup> It cannot do so under the approach offered by the Second Circuit.

“Physical force against the person or property of another” comprises two key components: an action (physical force) and a target of that action (person or property).<sup>209</sup> An individual might exert physical force in any number of ways: with a punch, a shove, a swing, or a throw.<sup>210</sup> And an individual might direct that force at any number of targets: a person, a tree, a window, or thin air. Applying the crime of violence definition therefore requires a determination as to whether an individual exerted physical force and a separate determination as to whether the individual directed that physical force at the person or property of another.<sup>211</sup>

The harm-based definition of physical force improperly blends the action and target analyses. Force capable of causing injury to a person and force capable of causing injury to property are not the same thing. Throwing wine at a rug certainly injures property, for example, but throwing wine on a person hardly causes harm to anyone’s body.<sup>212</sup> A harm-based definition of force could thus regard the same action as physical force in one set of circumstances but not another.

Moreover, “property” is too indefinite a term to characterize the harmfulness of force. In the context of crime of violence statutes, person

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208. Cf. *United States v. Davis*, 139 S. Ct. 2319, 2327–29 (2019) (“The language of the residual clause itself reinforces the conclusion that the term ‘offense’ carries the same ‘generic’ meaning throughout the statute.”).

209. This follows the piecemeal approach to defining “physical force” that the Court used in *Johnson*. See *Johnson*, 559 U.S. at 138–39; supra section I.C.3. It stands to reason that “physical force against the person or property of another” contains several components, given that the ACCA omits the property component. See *Borden v. United States*, 141 S. Ct. 1817, 1824 (2021) (noting that “the sole difference between § 16(a) and the elements clause [of ACCA] is the phrase ‘or property’” and stating that the “‘critical aspect’ of § 16(a) is its demand that the perpetrator use physical force ‘against the person or property of another’” (quoting *Leocal v. Ashcroft*, 543 U.S. 1, 9 (2004))).

210. See *United States v. Castleman*, 572 U.S. 157, 170 (2014) (“[A]s we explained in *Johnson*, ‘physical force’ is simply ‘force exerted by and through concrete bodies,’ as opposed to ‘intellectual force or emotional force.’” (quoting *Johnson*, 559 U.S. at 138)).

211. See *Torres v. Lynch*, 578 U.S. 452, 466 (2016) (noting that arson would not qualify as a crime of violence in jurisdictions where arson can include the destruction of one’s *own* property, rather than the destruction of only the property of another).

212. See *United States v. Edwards*, 321 F. App’x 481, 485 (6th Cir. 2009) (holding that a threat to spray-paint a car satisfied the property damage element of the federal witness retaliation statute). The federal witness retaliation statute, for example, defines bodily injury as “(A) a cut, abrasion, bruise, burn, or disfigurement; (B) physical pain; (C) illness; (D) impairment of the function of a bodily member, organ, or mental faculty; or (E) any other injury to the body, no matter how temporary.” *United States v. Allred*, 942 F.3d 641, 647 (4th Cir. 2019), cert. denied, 140 S. Ct. 1235 (2020) (quoting 18 U.S.C. § 1515(a)(5)); see also *United States v. Hernandez-Hernandez*, 817 F.3d 207, 215 (5th Cir. 2016) (rebutting appellant’s argument that one can violate 18 U.S.C. § 111’s bodily injury requirement by spitting or projecting bodily fluids onto the person of another).

means the human body,<sup>213</sup> but property has endless possible forms.<sup>214</sup> Just as “force capable of causing harm to humans” and “force capable of causing harm to property” are not the same thing, “force capable of causing harm to glass property” and “force capable of causing harm to iron property” are entirely distinct. What is the proper reference point for “property”? One possible reference point is *any* property. In that case, nearly every action would constitute physical force: Blowing on a building is physical force because such airflow can disintegrate a dandelion. Another possible reference point is the specific piece of property that a person targets with their action: Blowing on a building is not violent because mild airflow cannot harm a building.

The considerations explored in this Part show how the property provisions cause the crime of violence statutes to break down. One problem is that property flips the categorical approach from a limiting force to an expansive force that subsumes nonviolent property offenses and injudiciously shifts violence classification away from a human focus. Another problem is that existing doctrine cannot accommodate a consistent and constitutional definition of the “use of force against the person or property of another.” With the categorical approach firmly in place,<sup>215</sup> a solution must come via congressional intervention or a new doctrinal definition of the “use of force against the person or property of another” that is constitutionally valid.

### III. ESCAPING UNCONSTITUTIONAL VAGUENESS

If the Second Circuit’s approach is untenable as a matter of statutory interpretation, and the Tenth Circuit’s approach fails for vagueness, what is the answer? This Part argues that, in one way or another, the answer must follow a human-based standard of violence.

#### A. *Legislative Solutions*

Congress can save § 924(c) from the pitfalls of a property-based violence classification scheme by adapting a crime of violence definition that eschews property altogether or that specifically enumerates the property crimes that are categorically violent. In fact, Congress has already done as much with the ACCA.

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213. In *Johnson*, the Court closely linked “physical force” to *bodily* harm in the context of the ACCA’s text concerning the use of “physical force against the person of another.” See *supra* section I.C.2.

214. For example, property can be tangible or intangible. See *United States v. Mathis*, 932 F.3d 242, 266 (4th Cir. 2019) (“[W]e do not discern any basis in the text of either statutory provision for creating a distinction between threats of injury to tangible and intangible property for purposes of defining a crime of violence.”).

215. See *supra* section I.C.2.

1. *The 1986 ACCA Amendments.* — The original version of the ACCA, passed in 1984, contained no “violent felony” provision at all.<sup>216</sup> Instead, the statute named only two predicate offenses: burglary and robbery.<sup>217</sup> Senator Arlen Specter, who introduced the bill, rationalized the focus on those two offenses by noting, “Robberies and burglaries are the most damaging crimes to society.”<sup>218</sup> Within two years, Specter was eager to extend the ACCA’s reach to other, presumably less damaging crimes.<sup>219</sup> The amendment he introduced in 1986 would have made any “crime of violence” an ACCA predicate offense. Copying the text from § 16, the bill defined crime of violence as “an offense that has as an element the use, attempted use, or threatened use of physical force against the person *or property* of another.”<sup>220</sup>

Specter’s counterparts in the House considered two competing ACCA amendments in 1986.<sup>221</sup> A bill introduced by Representative Ron Wyden followed Specter’s crime of violence approach, including its property provision.<sup>222</sup> A second bill, introduced by Representative Bill McCollum, took a more limited approach.<sup>223</sup> McCollum’s bill substituted “violent felony” for “crime of violence” and confined violent felonies to offenses against persons only.<sup>224</sup> In committee hearings, legislators recognized the dangers of opening the ACCA to “garden variety” property crimes.<sup>225</sup> Indeed, a representative from the National Association of Criminal Defense Lawyers specifically warned that Wyden’s property provision “could be used to lock up a three-time vandal, graffiti artist or misdemeanor trespasser for the mandatory 15 year minimum sentence.”<sup>226</sup> The Department of Justice brushed off such concerns, assuring the House Subcommittee on Crime that prosecutions under the ACCA would occur only when “the fifteen year minimum mandatory sentence is clearly warranted.”<sup>227</sup> It contended that the property provision was necessary in order to encompass certain

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216. See Armed Career Criminal Act of 1984, Pub. L. No. 98-473, 98 Stat. 2185.

217. *Id.*

218. H.R. Rep. No. 98-1073, at 3 (1984).

219. The Armed Career Criminal Act Amendments: Hearing on S. 2312 Before the Subcomm. on Crim. L. of the S. Comm. on the Judiciary, 99th Cong. 1 (1986) (statement of Sen. Specter) (“The time seems ripe in many quarters, including the Department of Justice, to expand the armed career criminal bill to include other offenses . . .”).

220. *Id.* at 14 (emphasis added).

221. 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. 1–2 (1986).

222. *Id.* at 4.

223. *Id.* at 2.

224. *Id.* at 6.

225. *Id.* at 12 (statement of Rep. Wyden).

226. *Id.* at 33 (statement of Bruce M. Lyons, President-Elect, National Association of Criminal Defense Lawyers).

227. *Id.* at 24 (statement of James Knapp, Deputy Assistant Att’y Gen., Criminal Division, U.S. Department of Justice).

crimes against property “which are inherently dangerous.”<sup>228</sup> Representative Wyden similarly stressed the importance of including especially dangerous property offenses like arson, where “the loss of life could be serious.”<sup>229</sup>

The 1986 debates over property crimes put ACCA violence classification on a human-oriented path that diverged from the classification scheme used in §§ 16 and 924(c).<sup>230</sup> The Subcommittee on Crime settled its disagreements by adopting McCollum’s limited “violent felony” approach and supplementing it with language that would capture the inherently dangerous property crimes that so alarmed Wyden and the DOJ.<sup>231</sup> The new ACCA explicitly included certain crimes that would have failed to meet a “use of force against persons” criterion but were nevertheless judged to be dangerous: burglary, arson, extortion, and offenses involving the use of explosives.<sup>232</sup> The new ACCA also contained the ill-fated residual clause, intended to pull in any additional crimes that threatened human safety.<sup>233</sup> In contrast to the §§ 16 and 924(c) residual clauses, which concern the risk of *force* against *persons or property*, the Subcommittee’s new ACCA residual clause concerned the risk of *harm to persons*.<sup>234</sup> The distinction allowed the ACCA to cover dangerous property crimes (dangerous to humans, that is) without reaching all property crimes broadly.<sup>235</sup>

2. *Removing Property From §§ 16 and 924(c)*. — The current Congress could take a cue from 1986. The 1986 House Subcommittee on Crime questioned the consequences of property’s inclusion in a violence classification statute. It understood the possible reach of the “use of force against . . . property” language and ultimately decided that ACCA sentencing enhancements were inappropriate for all crimes against property.<sup>236</sup> As a result, in the ACCA’s three-strikes rule for armed offenders, three property crimes with a gun do *not* earn an ACCA sentencing enhancement. Why, then, should one property crime with a gun earn a § 924(c) enhancement? Congress should ask itself whether and how property offenses relate to the purposes of §§ 16 and 924(c). If it did, it might repeat its 1986 realization that its real concern is those property offenses that pose a danger

228. *Id.* at 15.

229. *Id.* at 12 (statement of Rep. Wyden).

230. See *supra* section I.B.2. The ACCA’s scheme is unique in that its elements clause does not address property, its residual clause references harm rather than the use of force, and it contains a supplemental enumerated offenses clause.

231. See Career Criminals Amendment Act of 1986, Pub. L. 99-570, § 1402, 100 Stat. 3207-39 to -40 (codified as amended at 18 U.S.C. § 924(e) (2018)); H.R. Rep. No. 99-849, at 3 (1986).

232. See § 1402, 100 Stat. at 3207-40; H.R. Rep. No. 99-849, at 3.

233. See § 1402, 100 Stat. at 3207-40; H.R. Rep. No. 99-849, at 3.

234. See § 1402, 100 Stat. at 3207-40; H.R. Rep. No. 99-849, at 3.

235. See H.R. Rep. No. 99-849, at 3.

236. See *id.* at 6, 15.



to humans. And while the ACCA's unconstitutional residual clause can inspire no legitimate solution, its enumerated offenses clause provides a useful precedent. Congress can escape much of the vagueness of §§ 16 and 924(c) by defining the specific property crimes it wants those statutes to encompass.<sup>237</sup>

### B. *Doctrinal Solutions*

In the case of a constitutional challenge to a statute, courts make a ruling of unconstitutionality only as a last resort.<sup>238</sup> Courts must not invalidate a statute if any reasonable construction can bring the statute within constitutional limitations.<sup>239</sup> This principle of constitutional avoidance applies to vagueness challenges.<sup>240</sup> Thus, the vagueness concerns raised in this Note call for a careful consideration of the various constructions available to the text of §§ 16 and 924(c). From the relevant language—"an offense that has as an element the use, attempted use, or threatened use of physical force against the person or property of another"<sup>241</sup>—the terms "physical force" and "of another" each offer potentially statute-saving constructions.

1. *Alternative Construction of "Physical Force"*. — A construction of "physical force" that maintains a singular meaning as to persons and property could alleviate vagueness concerns.<sup>242</sup> In the context of the ACCA and §§ 16 and 924(c), the Court has emphasized the relation of "physical force" to violence and power.<sup>243</sup> For the Court, the threshold for physical force falls somewhere between the degree of power required to merely touch someone and the degree of power required to overcome the slightest resistance of a robbery victim.<sup>244</sup> In more general terms, "physical

237. See *supra* section I.B.1 (describing enumerated and mixed schemes for classifying crimes of violence).

238. *Hooper v. California*, 155 U.S. 648, 657 (1895) ("The elementary rule is that every reasonable construction must be resorted to in order to save a statute from unconstitutionality.").

239. See *U.S. Civ. Serv. Comm'n v. Nat'l Ass'n of Letter Carriers, AFL-CIO*, 413 U.S. 548, 571 (1973) ("As we see it, our task is not to destroy the Act if we can, but to construe it, if consistent with the will of Congress, so as to comport with constitutional limitations.").

240. See *id.* at 568–72 (heeding the constitutional avoidance canon to rule that a provision in the Hatch Act was not unconstitutionally vague).

241. 18 U.S.C. §§ 16(a), 924(c)(3)(A) (2018).

242. See *supra* section II.C.2 (describing the "split personality" of force).

243. See *Stokeling v. United States*, 139 S. Ct. 544, 553 (2019) ("[T]he force necessary to overcome a victim's physical resistance is inherently 'violent' in the sense contemplated by *Johnson*, and 'suggest[s] a degree of power that would not be satisfied by the merest touching.'" (alteration in original) (quoting *Johnson v. United States*, 559 U.S. 133, 139 (2010))); *Leocal v. Ashcroft*, 543 U.S. 1, 11 (2004) ("The ordinary meaning of [crime of violence], combined with § 16's emphasis on the use of physical force against another person (or the risk of having to use such force in committing a crime), suggests a category of violent, active crimes . . .").

244. See *Stokeling*, 139 S. Ct. at 555.

force” is “force capable of causing physical pain or injury to another person.”<sup>245</sup> But while the Court has only defined “physical force” in cases involving the use of force against persons,<sup>246</sup> it is not imperative for the harm-to-persons standard to change to a harm-to-property standard in property cases. Quite simply, the same person-based standard for physical force could reasonably apply, without adaptation, to offenses against property. Persons would always be the reference point, even if the target of the force is property. This unwaveringly literal application of the Court’s definition would cure any “split personality” resulting from force’s dissimilar effects on persons and property.

A singular, person-based definition of force might fix the vagueness issue legally, but it does not make §§ 16 and 924(c) satisfactorily sensible in practice. The standard would essentially ask courts to imagine the harm that could result from a property crime if the targeted piece of property suddenly transformed into a person at the moment of the crime’s commission or if a fragile bystander suddenly appeared within range of the crime’s collateral damage. Certainly, the person-based construction would reduce some of the overinclusiveness of §§ 16 and 924(c). A court need not spend long, for example, to decide that “pour[ing] chocolate syrup on [a] passport” would not cause bodily harm if the pouring were directed at a person.<sup>247</sup> But what about keying a car?<sup>248</sup> With what force does a key scratch fiberglass, and is it the same for human skin? What about shooting a gun at an empty railroad car?<sup>249</sup> The fact remains that the results of actions directed at property are not always analogous to the results of actions directed at people,<sup>250</sup> and even a felicitous construction of “physical force” fails to resolve this central problem of the property provisions in §§ 16 and 924(c).

2. *Alternative Construction of “Property of Another”*. — This Note has alluded to the need to center violence classifications on humans. An alternative construction of “of another” can recenter § 924(c) on humans by requiring a nexus between property and persons. Section 924(c) states that an offense qualifies as a crime of violence if an element of the offense is the “use of physical force against the person *or property of another*.”<sup>251</sup> Perhaps such language carries a meaning distinct from “the use of physical force against a person *or property*.” That is, perhaps “property of another” signifies a special class of property, one that has a sufficiently strong connection to another person.

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245. *Johnson*, 559 U.S. at 140; see also *Stokeling*, 139 S. Ct. at 555.

246. See *supra* section I.C.3.

247. *United States v. Hill*, 890 F.3d 51, 57 (2d Cir. 2018).

248. See *United States v. Harris*, 323 F. Supp. 3d 1065, 1068 (E.D. Wis. 2018).

249. See *United States v. Rabb*, 248 F. App’x 133, 135 (11th Cir. 2007).

250. See *supra* section II.C.2.

251. 18 U.S.C. § 924(c)(3)(A) (2018) (emphasis added).

*McGuire*, the case described in Part II involving shots fired at a police helicopter, comports with this notion of a special class of property.<sup>252</sup> The Eleventh Circuit ruled that four of the five actions specified in § 32 (setting fire to, damaging, destroying, and wrecking an aircraft) meet the § 924(c) crime of violence definition because they all involve “the attempted or threatened destruction of very sensitive property—and quite probably lives as well.”<sup>253</sup> In this way, the court implied a standard for “the use of force against property” that contemplates how destruction of the property would endanger human lives.

The *McGuire* court again called on notions of sensitive property to decide whether the fifth action specified in § 32 (disabling an aircraft) necessarily involves the use of force. Disabling an aircraft that is in flight, the court stated, is a criminal action that intentionally targets property and shows “extreme and manifest indifference to the owner of that property and the wellbeing of the passengers.”<sup>254</sup> Therefore, disabling an aircraft in-flight “is itself an act of force in the meaningful sense.”<sup>255</sup> The court thus applied its force analysis to the disabling of an aircraft *and* everything implicated by such an act. Further, it based its definition of force at least partly on an action’s capability of endangering the well-being of others.

Although the *McGuire* court made no effort to support its standard of force through any particular statutory construction, its decision is consistent with a context-specific, “special class” construction of “property of another.” Suppose “property of another” means property with a sufficient connection to “another” that damage to the property threatens harm to the person. An aircraft that is in flight is a perfect example of such a class of property. Damaging an aircraft that is in flight, as the Eleventh Circuit concluded, necessarily threatens lives.<sup>256</sup>

Construing “property of another” as “property with a sufficient connection to another that damage to the property threatens harm to a person” reconciles many of the difficulties explored in this Note. As a matter of fairness and social policy, the construction makes “crime of violence” more reasonably connected to human peril. It forecloses crime of violence classification for nondangerous property damage and secures crime of violence classification for inherently dangerous conduct. Per the categorical approach, the threat to humans must be part of the elements of the crime. Therefore, a criminal law for which the least culpable conduct is property damage must require a person–property nexus, either explicitly (e.g., arson of an *occupied* dwelling; intimidation of a *witness*) or by necessity given

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252. *United States v. McGuire*, 706 F.3d 1333, 1337 (11th Cir. 2013), overruled by *Ovalles v. United States*, 905 F.3d 1231 (11th Cir. 2018), abrogated by *United States v. Davis*, 139 S. Ct. 2319 (2019); see also *supra* section II.B.1 (discussing *McGuire* in detail).

253. *McGuire*, 706 F.3d at 1337.

254. *Id.*

255. *Id.*

256. *Id.*

the nature of the property (e.g., destruction of a plane that is in flight). Pure property crimes like vandalism obviously would not count. Nor would some other destructive offenses, so long as the elements of the relevant crime create no nexus to persons. In the case of the protesters' Molotov cocktail, a strong argument could be made that the defendants' primary offenses—arson and use of explosives—have no categorical nexus to persons under federal law.<sup>257</sup> Both crimes can be committed through the destruction of *any* real or personal property.<sup>258</sup>

Most importantly, at least from a doctrinal standpoint, the special construction of “property of another” allows a consistent meaning of “physical force” to extend through the entirety of the crime of violence definition. The construction can fully accommodate the Supreme Court's holding that physical force means “force capable of causing physical pain or injury to another person.”<sup>259</sup> The special construction of “property of another” itself predicates the definition of property on the possibility of bodily harm. Therefore, “physical force” as applied to the property of another is

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257. See Indictment, *supra* note 13, at 1–2 (charging defendants under 18 U.S.C. § 844(f)(1) (2018) (use of explosives) and 18 U.S.C. § 844(i) (arson)). Section 844(f)(1) reads:

Whoever maliciously damages or destroys, or attempts to damage or destroy, by means of fire or an explosive, any building, vehicle, or other personal or real property in whole or in part owned or possessed by, or leased to, the United States, or any department or agency thereof, or any institution or organization receiving Federal financial assistance, shall be imprisoned for not less than 5 years and not more than 20 years, fined under this title, or both.

18 U.S.C. § 844(f)(1). Section 844(i) reads, in part:

Whoever maliciously damages or destroys, or attempts to damage or destroy, by means of fire or an explosive, any building, vehicle, or other real or personal property used in interstate or foreign commerce or in any activity affecting interstate or foreign commerce shall be imprisoned for not less than 5 years and not more than 20 years, fined under this title, or both . . . .

*Id.* § 844(i).

Section 844(i) actually does contemplate a nexus to persons, but in doing so, it effectively creates a new crime with additional elements: “[I]f death results to any person, including any public safety officer performing duties as a direct or proximate result of conduct prohibited by this subsection, [the offender] shall also be subject to imprisonment for any term of years, or to the death penalty or to life imprisonment.” *Id.* In this way, the approach advocated by this Note would facilitate a limited consideration of the underlying facts of the criminal conduct. If the arson harmed or killed a person, the defendant would be charged per the additional elements of the arson statute, the elements that do create a nexus to persons. If the arson did not harm a person, the defendant would only be charged per the elements that have no person nexus. Thus, the “crime of violence” label of § 924(c) could apply to arguably violent arsons (fires causing harm to humans) but not to arguably nonviolent arsons (fire posing no danger to humans).

258. See 18 U.S.C. § 844(f)(1), (i).

259. *Johnson v. United States*, 559 U.S. 133, 140 (2010).

exactly the same as “physical force” as applied to the person of another: “force capable of causing physical pain or injury to another person.”

#### CONCLUSION

Violence earns harsh consequences under the law. Vague schemes for classifying violence put those harsh consequences where they might not belong. With complicated doctrine stacked on top of vague statutory text, §§ 16 and 924(c) currently prove unworkable. The statute’s reference to property removes classification from traditional conceptions of violence and introduces concerns of unconstitutional vagueness. People’s liberty hangs on federal classifications of violence, and thanks to the categorical approach, federal classifications of violence hang on the meaning of physical force used against the property of another. The meanings offered by federal courts largely fail to resolve the statutes’ problems. To restore equity and predictability to §§ 16 and 924(c), Congress should strike property from the statutes, or the Supreme Court should heed a human-centric conception of violence and require a nexus between persons and property.

