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# The Absurdity of Crime-Based Deportation

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# The Absurdity of Crime-Based Deportation

Kari Hong\*

*The belief that immigrants are crossing the border, in the stealth of night, with nefarious desires to bring violence, crime, and drugs to the United States has long been part of the public imagination. Studies and statistics overwhelmingly establish the falsehood of this rhetoric. The facts are that non-citizens commit fewer crimes and reoffend less often than citizens. But facts do not stop the myth. Even supporters of immigration reform often will point out that they will help deserving immigrants but will deport the undeserving ones, particularly those with criminal convictions, and especially those who committed violent crimes.*

*Despite the new administration's call to deport up to three million criminals, my Article counters that there will be — and should be — an end to crime-based deportation. It is already happening quickly and quietly in federal courts. Beginning in 2013, the Supreme Court decided *United States v. Descamps*, and in 2016, *Mathis v. United States*. These cases are highly technical decisions relating to the federal Armed Career Criminal Act (“ACCA”) and immigration law’s Illegal Immigration and Immigrant Responsibility Act (“IIRIRA”).*

*This Article draws upon empirical data to show that, as predicted by the Justices, a faithful adherence to *Descamps* and *Mathis* will eliminate numerous offenses from having ACCA and IIRIRA consequences on a case-by-case, statute-by-statute basis.*

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*As a normative matter, I contend that this result is the proper one. Prosecutors, judges, and policy makers are embracing this reality in the ACCA context. The same result should be embraced in the immigration context. IIRIRA's reliance on convictions to serve as immigration violations is too arbitrary, too expensive, and simply out of proportion to how the criminal courts considered the seriousness (or lack thereof) of the crime. Instead, Congress must repeal IIRIRA and return to a system whereby criminal offenders were subjected to individualized assessments. Those who made more contributions to the country stayed, and those who did not, left. The experiment of presuming that a conviction is a marker of character has failed. Immigration law must return to grading crimes by their actual seriousness instead of assuming that categories of crimes adequately sort out who should or should not remain.*

#### TABLE OF CONTENTS

INTRODUCTION .....	2071
I. OVERVIEW OF ACCA AND IIRIRA'S FRAMEWORKS AND JUDICIAL DETERMINATIONS OF COLLATERAL CONSEQUENCES..	2082
A. <i>Statutory Framework: How ACCA and IIRIRA Attach Consequences to Prior Criminal Convictions</i> .....	2083
B. <i>ACCA and IIRIRA Consequences Are Collateral Ones that Can Be Disaggregated from Prior Crimes</i> .....	2088
C. <i>Legal Framework Prior to 2013: The Taylor/Shepard/ Nijhawan Framework Was Haphazardly Applied</i> .....	2091
D. <i>Mass Confusion in the Pre-2013 Framework</i> .....	2096
II. DESCAMPS' CLARITY AND RESULTING SOURCES OF CONFUSION .....	2100
A. <i>Descamps Removed Conduct and Provided a Clear Definition of Divisibility that Had Been Lacking</i> .....	2100
B. <i>The Rise of the Elements/Mean Circuit Split</i> .....	2105
III. MATHIS AND DESCAMPS ARE QUIETLY ENDING ACCA'S LENGTHY SENTENCES AND CRIME-BASED DEPORTATION .....	2107
A. <i>In the "Real World," the Competing Approaches Resulted in Courts More Easily Ascertain Elements and Means Under State Law</i> .....	2108
B. <i>The Meaningful Difference Between the Approaches Lies in the Elimination of Collateral Consequences</i> .....	2114
C. <i>IIRIRA and ACCA — Not Descamps — Lead to Arbitrary Results</i> .....	2116
D. <i>Ending ACCA Consequences Serves Criminal Justice Goals</i> .....	2119

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2017]	<i>The Absurdity of Crime-Based Deportation</i>	2069
	E. <i>Why Simplicity Was Likely Valued in Descamps and Mathis</i> .....	2124
	F. <i>Proportionality Is Being Restored Through Descamps and Mathis</i> .....	2126
IV.	THE NEEDED END TO CRIME-BASED DEPORTATION .....	2128
	A. <i>Relying on Criminal Convictions to Deport Non-Citizens Is Overinclusive, Disproportionate, Irrational, Inefficient, and Expensive</i> .....	2130
	B. <i>The Immigration Law Should Return to Permit Individual Assessments of Offenses and Offenders Rather than Base Deportation on the Existence of Convictions</i> .....	2139
	C. <i>Responses to Potential Criticisms</i> .....	2142
	CONCLUSION.....	2145

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## INTRODUCTION

The belief that immigrants are crossing the border, in the stealth of night, with nefarious desires to bring violence, crime, and drugs to the United States has long been part of the public imagination. In 1994, this imagery was used in a notorious commercial in support of California's Proposition 187, an anti-immigration voter initiative (which passed by nearly 60% of the vote but was struck down by federal courts).<sup>1</sup> Donald Trump ratcheted up the rhetoric during the 2016 presidential campaign, calling Mexican nationals "rapists" and "killers" and promising to stop this newly-defined national problem of immigrants who cross the border to kill Americans.<sup>2</sup> Indeed, in his first interview after the election, President-Elect Trump promised to round up and deport<sup>3</sup> up to three million non-citizens who had committed crimes.<sup>4</sup> In one of his first significant acts as president, he enacted executive orders that expand the types of crimes that can serve as the basis for deportation.<sup>5</sup>

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<sup>1</sup> *California Proposition 187, Illegal Aliens Ineligible for Public Benefits (1994)*, BALLOTPEDIA, [https://ballotpedia.org/California\\_Proposition\\_187,\\_Illegal\\_Aliens\\_Ineligible\\_for\\_Public\\_Benefits\\_\(1994\)](https://ballotpedia.org/California_Proposition_187,_Illegal_Aliens_Ineligible_for_Public_Benefits_(1994)) (last visited Feb. 4, 2017). Pete Wilson's ad displayed the caption "Border Crossing" and showed video of people running, with the voiceover "they keep coming" and Governor Wilson's promise that "enough is enough." *PeteWilsonCA, Pete Wilson 1994 Campaign Ad on Illegal Immigration*, YOUTUBE (Feb. 15, 2010), <https://www.youtube.com/watch?v=lLzsz2HHgY>.

<sup>2</sup> See Cathleen Decker, *In Immigration Speech, Donald Trump Spurns Softened Tone and Threatens Republican Future*, L.A. TIMES (Sept. 1, 2016), <http://www.latimes.com/politics/la-na-pol-donald-trump-immigration-analysis-20160901-snap-story.html> ("He said that his immediate priority as president would be deporting those undocumented immigrants involved in crimes . . ."); Michelle Ye Hee Lee, *Donald Trump's False Comments Connecting Mexican Immigrants and Crime*, WASH. POST (July 8, 2015), <https://www.washingtonpost.com/news/fact-checker/wp/2015/07/08/donald-trumps-false-comments-connecting-mexican-immigrants-and-crime>; CNN, *Donald Trump on Trade, Healthcare and More (CNN interview with Jake Tapper)*, YOUTUBE (June 28, 2015), <https://www.youtube.com/watch?v=8fT7Np6PFao#t=4m53s>.

<sup>3</sup> After 1996, Congress ended the use of the term "deportation" and replaced it with the term "removal" to describe the order from an immigration court directing a non-citizen to depart the country. *Deportation*, U.S. CITIZENSHIP & IMMIGR. SERVS., <https://www.uscis.gov/tools/glossary/deportation> (last visited Mar. 22, 2017). Although the terms have specific legal meanings and are not always interchangeable, I will use the term "deportation" in this Article to reflect the term that is used by the general population.

<sup>4</sup> Emily Schultheis, *President-Elect Trump Says How Many Immigrants He'll Deport*, CBS NEWS (Nov. 13, 2016, 10:32 AM), <http://www.cbsnews.com/news/president-elect-trump-says-how-many-immigrants-hell-deport/>.

<sup>5</sup> See Exec. Order No. 13767, 82 Fed. Reg. 8793 (Jan. 25, 2017); Exec. Order No. 13768, 82 Fed. Reg. 8799 (Jan. 25, 2017); Memorandum on Enforcement of the Immigration Laws to Serve the National Interest from John Kelly, Sec'y, Dep't of Homeland

The studies and statistics overwhelmingly establish the falsehood of this rhetoric. The facts are that non-citizens commit fewer crimes and reoffend less often than citizens.<sup>6</sup> And, the facts also show that there are not three million non-citizens with criminal convictions that President Trump could target for deportation.<sup>7</sup> But facts do not stop the myth. Even those who support immigration reform often will be quick to point out that they want to help deserving immigrants but will deport the undeserving ones, those with criminal convictions, and especially those who committed violent crimes.

My Article counters that there will be — and should be — an end to crime-based deportation. It is already happening quickly and quietly in federal courts. Moreover, I suggest that as a normative matter, using criminal convictions as proxies to determine who can stay and who must leave is a doomed project: it is arbitrary, disproportionate, and unnecessary.

In Part I, I begin with a discussion of two specific federal laws that have led to a remarkable reform in federal courts. The 1984 Armed

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Sec., to Kevin McAleenan et al., Acting Comm'r, Customs & Border Prot. (Feb. 20, 2017), [https://www.dhs.gov/sites/default/files/publications/17\\_0220\\_S1\\_Enforcement-of-the-Immigration-Laws-to-Serve-the-National-Interest.pdf](https://www.dhs.gov/sites/default/files/publications/17_0220_S1_Enforcement-of-the-Immigration-Laws-to-Serve-the-National-Interest.pdf); Memorandum on Implementing the President's Border Security and Immigration Enforcement Improvement Policies from John Kelly, Sec'y, Dep't of Homeland Sec., to Kevin McAleenan et al., Acting Comm'r, Customs & Border Prot. (Feb. 20, 2017), [https://www.dhs.gov/sites/default/files/publications/17\\_0220\\_S1\\_Implementing-the-Presidents-Border-Security-Immigration-Enforcement-Improvement-Policies.pdf](https://www.dhs.gov/sites/default/files/publications/17_0220_S1_Implementing-the-Presidents-Border-Security-Immigration-Enforcement-Improvement-Policies.pdf).

<sup>6</sup> See Philip Bump, *Surprise! Donald Trump Is Wrong About Immigrants and Crime*, WASH. POST (July 2, 2015), <https://www.washingtonpost.com/news/the-fix/wp/2015/07/02/surprise-donald-trump-is-wrong-about-immigrants-and-crime/> (citing studies and results from multiple sources showing that there is “no correlation” between immigration and violent crime and that incarceration rates among young men are lowest for immigrant populations); Alex Nowrasteh, *Immigration and Crime — What the Research Says*, CATO INST. (July 14, 2015, 11:49 AM), <http://www.cato.org/blog/immigration-crime-what-research-says> (“[I]mmigrants are less crime prone than the native-born population.”).

<sup>7</sup> The non-partisan Migration Policy Institute has estimated that, based on Department of Homeland Security (DHS) data from 2012, in 2015 there were 820,000 undocumented individuals with criminal convictions and 1.1 million lawful permanent residents (or individuals with other legal status) with criminal convictions. Muzaffar Chishti & Michelle Mittelstadt, *Unauthorized Immigrants with Criminal Convictions: Who Might Be a Priority for Removal?*, MIGRATION POL'Y INST. (Nov. 2016), <http://www.migrationpolicy.org/news/unauthorized-immigrants-criminal-convictions-who-might-be-priority-removal>. 37% were felony convictions, 47% were serious misdemeanors (defined as more than a 90-day sentence in custody), and the remaining 16% presumably were less serious than misdemeanors with a 90-day sentence. See *id.*

Career Criminal Act (“ACCA”)<sup>8</sup> and the Illegal Immigrant Responsibility and Immigration Reform Act of 1996 (“IIRIRA”)<sup>9</sup> have schemes whereby collateral consequences — substantially increased federal sentences (ACCA) and potential and actual deportation (IIRIRA) — will attach if the person has a prior conviction for a different crime. These statutes are from the Tough on Crime era and add more than simply “direct consequences” to an offense, which the American Bar Association defines as a component of a sentence that the legislature authorized and the criminal court imposed at the time of punishment.<sup>10</sup>

In contrast to direct consequences, ACCA and IIRIRA are examples of statutes that impose collateral consequences.<sup>11</sup> A collateral consequence is a “penalty, disability, or disadvantage” that attaches (either by mandate or by discretion) to a criminal conviction — not by the sentencing court, but by legislatures, agencies, and officials in mostly civil contexts.<sup>12</sup> Under ACCA, if someone commits a federal firearm offense, instead of being punished for that particular crime, he or she will be subjected to at least an additional fifteen-year mandatory minimum prison sentence if he or she committed prior offenses that Congress has defined to be a crime of violence or involving controlled substances.<sup>13</sup> The prior offense attaches no matter which jurisdiction it occurred in and no matter how remote in time.<sup>14</sup> In an era when recidivism was believed to be a social ill, ACCA was the cure.

IIRIRA typically is not thought of as imposing collateral consequences because it is an entire scheme that regulates entries, admissions, and violations of immigration law. But its provisions related to criminal convictions very much are. Historically,

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<sup>8</sup> 18 U.S.C. § 924 (2012).

<sup>9</sup> Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Pub. L. No. 104-208, div. C, 110 Stat. 3009-546.

<sup>10</sup> See AM. BAR ASSOC., ABA STANDARDS FOR CRIMINAL JUSTICE: SENTENCING 18-2.2, 18-3.1–.22 (3d ed. 1994).

<sup>11</sup> There are currently up to 50,000 collateral consequences that may attach when someone is convicted of a felony, which include numerous civil disadvantages such as the loss of voting rights, denial of housing, discrimination in employment, and disqualification from educational loans. See *United States v. Nesbeth*, 188 F. Supp. 3d 179, 184, 190-93 (E.D.N.Y. 2016) (listing the collateral consequences).

<sup>12</sup> See AM. BAR ASSOC., ABA STANDARDS FOR CRIMINAL JUSTICE: COLLATERAL SANCTIONS AND DISCRETIONARY DISQUALIFICATIONS OF CONVICTED PERSONS 19-1.1 (3d ed. 2004) [hereinafter COLLATERAL SANCTIONS].

<sup>13</sup> 18 U.S.C. § 924(e)(1) (attaching consequences for three prior qualifying offenses).

<sup>14</sup> See *id.*



immigration law graded crimes based on how the criminal courts treated them. Crimes that state courts considered minor, not meriting lengthy sentences, or expunged under state law did not have immigration consequences.<sup>15</sup> IIRIRA changed that scheme. IIRIRA replaced the measured, individualized determinations with a new legal framework that subjected non-citizens to deportation by lumping types of crimes into crude categories, attaching consequences based on potential — and not actual — sentence length, no longer recognizing the lines between felony and misdemeanor and vacated versus continuing offenses, and no longer offering second chances to those whose equities outweighed their mistakes.<sup>16</sup> As a result, a college

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<sup>15</sup> Prior to IIRIRA, for non-citizens convicted of crimes, “[i]n determining discretionary relief, the BIA considered a wide range of equitable factors, including the seriousness of the offense, evidence of rehabilitation or recidivism, and the impact of deportation on the family.” *Tyson v. Holder*, 670 F.3d 1015, 1017 (9th Cir. 2012). Prior to IIRIRA, immigration law did not attach consequences to adjudications when the criminal court had accounted for mitigating circumstances in the plea, form of adjudication, length of sentence, type of sentence, and post-conviction relief in the form of expungements and pardons. By contrast, after IIRIRA,

[t]he INA’s definition of conviction qualifies nearly every Maryland adjudication, apart from a ‘stet’ or diversion, as a conviction. Mere unsupervised probation would constitute a form of punishment. Deferred adjudications, such as a probation before judgment conviction pursuant to Art. 27 §641, would remain a conviction for immigration purposes, even after the District or Circuit court had dismissed the conviction. A criminal offense expunged, pursuant to Art. 27 §735, similarly would be recognized as a conviction for immigration purposes. Juvenile adjudications are not grounds of deportation as they are seen as civil adjudications and usually not a grounds for inadmissibility except where the offense involved drug trafficking. A juvenile convicted in adult court will be vulnerable to removal. The INA does not recognize sentencing distinctions between time served and time suspended.

Rex B. Wingenter, *Consequences of Criminal Convictions*, 37 MD. B.J. 20, 24 (2004) (internal citations omitted).

<sup>16</sup> See, e.g., *Arias v. Lynch*, 834 F.3d 823, 836 (7th Cir. 2016) (Posner, J., concurring) (“If anything is clear it’s that ‘crime of moral turpitude’ shouldn’t be defined by invoking broad categorical rules that sweep in harmless conduct. Yet that’s what the Board of Immigration Appeals did in this case . . . .”); *Castillo v. Att’y Gen.*, 756 F.3d 1268, 1270 (11th Cir. 2014) (upholding BIA’s decision that under IIRIRA, a state pardon did not meet the heightened requirement to excuse immigration consequences of the conviction that no longer exists outside of immigration law); *Tyson v. Holder*, 670 F.3d 1015, 1017-18 (9th Cir. 2012) (“Before 1996, the INA allowed a permanent resident alien who had been convicted of a certain type of crime, but who had at least seven years of residence, to apply for discretionary relief from deportation pursuant to § 212(c). In determining discretionary relief, the BIA considered a wide range of equitable factors, including the seriousness of the offense,

student who urinates in public, who is convicted of a misdemeanor public indecency crime, and whose conviction is expunged under state law will be treated identically to a child molester who willfully preys on children in public.

The greatest value of a criminal statute is that it does cover both minor and serious conduct and lets the prosecutor charge and sentencing court impose the appropriate sentence. A prosecutor and criminal court judge will absolutely seek and impose a harsh sentence for the child molester who bears markers of being a public danger but will give the proverbial slap on the wrist for the drunken college student whose actions are borne of stupidity.<sup>17</sup> But, under immigration law, both the child molester and the college student are treated the same. Under IIRIRA, they committed the identical “sex offense,” which merits the denial or stripping away of legal status.

The fundamental problem with collateral consequences, and IIRIRA’s reliance on them, is that they impose an additional penalty for a crime in a separate context that is not willing or able to

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evidence of rehabilitation or recidivism, and the impact of deportation on the family. . . . Historically, an extremely large class of aliens qualified for discretionary relief and ‘a substantial percentage of their applications for § 212(c) relief have been granted.’” (citations omitted)); *Nunez-Reyes v. Holder*, 646 F.3d 684, 688-90 (9th Cir. 2011) (en banc) (agreeing with sister circuits and BIA that first-time drug possession offenses expunged under state statutes are a conviction for immigration purposes unless they were imposed before the date of this decision issued on July 14, 2011. The Court permitted non-citizens with convictions adjudged while *Lujan-Armandariz v. INS*, 222 F.3d 728 (9th Cir. 2000), was in effect to continue to receive the benefit of the Federal First Offender Act); *Biskupski v. Att’y Gen.*, 503 F.3d 274, 280 (3d Cir. 2007) (observing that in a prior case, “the Court considered ‘whether a misdemeanor can be an “aggravated felony” under a provision of federal law even if it is not, technically speaking, a felony at all.’ We answered that question in the affirmative and determined that a misdemeanor theft could be an aggravated felony under 8 U.S.C. § 1101(a)(43)(G)”); *Avendano-Garcia v. Gonzales*, 187 F. App’x 711, 715 (9th Cir. 2006) (“An aggravated felony is defined in 8 U.S.C. § 1101(a)(43)(F) as ‘a crime of violence . . . for which the term of imprisonment [is] at least one year.’ Section 1101(a)(48)(A) defines the term ‘conviction’ to include *nolo contendere* pleas followed by ‘some form of punishment, penalty, or restraint on the alien’s liberty.’ Section § 1101(a)(48)(B), in turn, provides that ‘[a]ny reference to a term of imprisonment or a sentence . . . is deemed to include the period of incarceration or confinement ordered by a court of law regardless of any suspension of the imposition or execution of that imprisonment or sentence in whole or in part.’ It is clear from the record that Avendano entered a plea of *nolo contendere* and received a three-year suspended sentence and five years of probation. This squarely qualifies as a conviction of an aggravated felony under 8 U.S.C. § 1227(a)(2)(A)(iii).”).

<sup>17</sup> See Josh Bowers, *Legal Guilt, Normative Innocence, and the Equitable Decision Not to Prosecute*, 110 COLUM. L. REV. 1655, 1657 (2010); Kate Stith, *The Arc of the Pendulum: Judges, Prosecutors, and the Exercise of Discretion*, 117 YALE L.J. 1420 (2008).

distinguish the degrees of harm swept up by criminal law. Direct consequences are related in a meaningful way to the underlying crime or to the offender's future rehabilitation. A person convicted of a DUI may be ordered to abstain from alcohol as a condition of probation but a person convicted of another crime not involving substance abuse often will not.<sup>18</sup> But collateral consequences, inherent to their nature, have no gradations or nuance, rendering them arbitrary and often disproportionate to the original crime. The current immigration law is failing in sorting out the dangerous from the non-dangerous individuals. In a rush to get the "bad guys" and "bad hombres" out, the law sweeps in too many people, which leads to absurdity. For example, a man who had been in the United States with a green card for forty years was deported over stealing a \$2 can of beer.<sup>19</sup> The Ninth Circuit reversed the deportation on a technical matter, but the case illustrates that figuring out who is dangerous and who is not based on a criminal record is not an efficient or effective method of immigration enforcement.

Part II looks at the practical reality of how the Supreme Court is quietly and effectively ending crime-based deportation. In 2013, in *Descamps v. United States*,<sup>20</sup> Michael Descamps was convicted of the federal crime of being a felon in possession of a firearm. Without ACCA, a federal judge would impose a sentence between zero and ten years, depending on the existing mitigating or aggravating circumstances of the possession offense. But that was not the sentence Mr. Descamps was facing. Mr. Descamps had a prior California burglary offense, which under ACCA, triggered a fifteen-year mandatory minimum sentence as a crime of violence. The prosecutor alleged that the California offense matched ACCA's generic definition of a burglary (unlawful entry of a residence with intent to commit a crime) because California criminalized an unlawful entry in defining the crime under state law. The Supreme Court disagreed. In a technical decision, the Court set forth a three-step framework to

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<sup>18</sup> See generally *People v. Lent*, 541 P.2d 545, 549 (Cal. 1975) (California requires conditions of probation to be related to the past or future criminal activity). Other states have found that alcohol use, even if not involved in the crime, may relate to rehabilitation. See, e.g., *State v. Corbin*, 184 P.3d 287, 288 (Mont. 2008) (upholding probation condition prohibiting alcohol even though alcohol was not involved in the crime).

<sup>19</sup> See *Lopez-Valencia v. Lynch*, 798 F.3d 863, 869 (9th Cir. 2015) (holding that, where the BIA had removed a 42-year-old lawful permanent resident who had been in the country since he was four years old because he shoplifted a \$2 can of beer, the offense was not an aggravated felony because the offense was indivisible).

<sup>20</sup> *Descamps v. United States*, 133 S. Ct. 2276 (2013).

analyze whether a California's burglary statute will have ACCA or IIRIRA consequences — which it clarified as being the categorical approach, divisibility step, and modified-categorical approach. As to the California statute at issue, the Court held it was overbroad and indivisible because California defined the element of entry as involving *both* lawful and unlawful entries and did not direct juries to agree on the actual method that occurred in that crime.<sup>21</sup> Mr. Descamps was not subjected to ACCA's sentencing enhancement, and any other person convicted of that crime would not be subjected to ACCA or IIRIRA's collateral consequences.

This area of the law had been mired with confusion, conflicting decisions, and ever-shifting doctrines. The *Descamps* majority decision, authored by Justice Kagan, announced that its three-step methodology was an obvious and natural extension of twenty-five years of precedent. Of note, in the divisibility step, the majority introduced the role of state law in interpreting statutes. In the above example, California jury instructions and case law would illuminate how a state defined the elements of the burglary offense.<sup>22</sup> In the sole justice writing in dissent, Justice Alito, made a pointed criticism that the purpose of the Court was to “simplify the work of ACCA courts.” Justice Alito argued that *Descamps*' new methodology was failing that end because parsing state law to figure out elements will be a difficult, technical rabbit hole.<sup>23</sup>

After *Descamps*, a circuit split arose over whether the text of a statute or state law authority would be best used in gleaning whether the elements of a prior offense were or were not divisible.<sup>24</sup> The majority of courts followed Justice Alito's warning to avoid looking to

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<sup>21</sup> See *id.* at 2281-83.

<sup>22</sup> See *id.* at 2284-85; see also *Rendon v. Holder*, 764 F.3d 1077, 1086 (9th Cir. 2014).

<sup>23</sup> *Descamps*, 133 S. Ct. at 2301-02 (Alito, J., dissenting) (“The only way to be sure whether particular items are alternative elements or simply alternative means of satisfying an element may be to find cases concerning the correctness of jury instructions that treat the items one way or the other. And such cases may not arise frequently. One of the Court's reasons for adopting the modified categorical approach was to simplify the work of ACCA courts but the Court's holding today will not serve that end.” (citation omitted)).

<sup>24</sup> Compare *United States v. Mathis*, 786 F.3d 1068, 1075 (8th Cir. 2015) (relying on text), *rev'd*, *Mathis v. United States*, 136 S. Ct. 2243 (2016), *United States v. Ozier*, 796 F.3d 597, 561-62 (6th Cir. 2015) (same), *overruled in part by Mathis*, 136 S. Ct. 2243, and *United States v. Trent*, 767 F.3d 1046, 1055 (10th Cir. 2014) (same), *overruled in part by Mathis*, 136 S. Ct. 2243, with *Rendon*, 764 F.3d at 1088-89 (relying on state law), and *Omargharib v. Holder*, 775 F.3d 192, 198-200 (4th Cir. 2014) (same).

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state law, and only two — the Ninth Circuit and the Fourth Circuit — instead referred to state law — jury instructions, court decisions, and other statutes — to determine the meaning of the predicate crime. In 2016, *Mathis v. United States*<sup>25</sup> resolved the technical dispute in favor of relying on state law to determine divisibility.

Part III focuses on two significant empirical aspects of the operation of *Descamps* and now *Mathis*. In weighing in on the Justice Kagan and Justice Alito debate, there is evidence to strongly suggest that Justice Kagan was likely correct in asserting that *Descamps*' approach is more consistent and workable compared not just to pre-*Descamps* case law — but also to the textual approach recommended by Justice Alito's dissent. In the pre-2013 landscape, courts often employed Justice Alito's recommended methodology, gleaning a defendant's conduct from court records.<sup>26</sup> The result was ever-shifting doctrines, methodologies, and confusion. Compared to the pre-2013 cases, *Descamps*' return to an elements-only approach introduced clarity that had been lacking.

But more to the heart of *Descamps*, Part III compares the Eighth Circuit's textual analysis (Justice Alito's dissenting approach) with the Fourth Circuit's state-law approach (*Descamps*' majority approach). Looking at the published cases issued in the time period between *Descamps* and *Mathis*, there is a strong argument that the state-law approach is surprisingly workable. Among the fourteen Eighth Circuit decisions, one panel disagreed over whether the state statute could be interpreted by text or by a case that provided a different interpretation in context. Among the eleven published Fourth Circuit decisions, not a single judge disagreed with whether state law resolved the divisibility question. To the extent that consensus across political ideologies is evidence of consistency, this survey of cases suggests that *Descamps* in fact is providing more clarity and workability than its critics forewarned.

But a more notable discovery from the different approaches is that the state-law approach — the one endorsed by *Mathis* — is scaling back collateral consequences of convictions in a much more pronounced way. When *Descamps* was properly applied in the circuits,

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<sup>25</sup> 136 S. Ct. 2243 (2016).

<sup>26</sup> See, e.g., *Mathis*, 786 F.3d at 1075 (examining charging documents). In the Eighth Circuit decision underlying the Supreme Court *Mathis* decision, the Eighth Circuit erroneously relied on conduct at the modified categorical approach stage by relying on the information's allegation of a garage to (erroneously) hold that the defendant was convicted of the subsection involving a building that met the generic burglary definition. See *id.*

there were noticeably fewer prior convictions that aligned with the generic offenses set forth in ACCA and IIRIRA.<sup>27</sup> Stated another way, under *Descamps* and *Mathis*, there will be fewer statutes to which ACCA and IIRIRA consequences will attach. Federal judges have long voiced concern over the arbitrariness in ACCA and IIRIRA cases, colloquially described as one bad guy wrongfully getting off and another long-term resident being deported over a petty offense.<sup>28</sup> I argue that the arbitrariness attributed to *Descamps* is in fact the fault of ACCA and IIRIRA and inherent to the very nature of collateral consequences. Whereas direct consequences of criminal law — conviction and sentence — metes out a tailored punishment to any given offender, ACCA and IIRIRA in particular are resulting in the absurdity of sweeping in minor and non-serious offenses. The greatest value of *Descamps* and *Mathis* is their ability to restore proportionality to ACCA and IIRIRA by eliminating their collateral consequences in their entirety.

In Part IV, I contend that, as a normative matter, the actual result of reducing crime-based deportations is the correct one to reach. After *Mathis* and *Descamps*, in the ACCA context, prosecutors, judges, and policy makers are embracing the reduction and even elimination of collateral consequences. That is to be expected given that ACCA's additional mandatory punishment is superfluous. Whatever the crime the defendant did when committing a federal firearm offense, the prosecutor and sentencing judge can assess the appropriate sentence. Avoiding a mandatory and lengthy sentencing enhancement for a past crime whose sentence was already served is neither unreasonable nor undesirable. In the Tough on Crime era, the additional penalty was believed to end recidivism. Mass incarceration has exposed this premise to be misguided and some contend that lengthy sentences are a leading contributor to recidivism.

This Article suggests that that same result should be embraced in full in the immigration context. IIRIRA's use of criminal convictions to sort out desirable from undesirable immigrants has failed. The use of a conviction does not distinguish who is dangerous from who is not. This existing system results in a man with a green card, who has a citizen wife and children and has been in the United States since his childhood, to be deported over stealing a \$2 can of beer.<sup>29</sup> Limiting the crimes to only violent ones also fails under this approach. Under

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<sup>27</sup> See *infra* notes 150–52.

<sup>28</sup> See *Lopez-Valencia v. Lynch*, 798 F.3d 863, 869 (9th Cir. 2015).

<sup>29</sup> See *id.*

IIRIRA's definition, many individuals are included as violent offenders even though their offenses would not be viewed as such. For instance, until the Supreme Court corrected the issue, numerous individuals were deported because the federal courts wrongfully found their DUI convictions to be violent crimes.<sup>30</sup> Likewise, a teenager who spat at a police officer during an arrest has been found to commit a crime of violence, even though few would deem that conduct serious, dangerous, or worthy of lost immigration status.<sup>31</sup>

It is time then to reconsider and repeal IIRIRA and its emphasis on deporting individuals based on convictions alone. I am far from alone in calling for such reform. A number of immigration scholars have been arguing for this result out of principles of proportionality, fairness, and human rights norms.<sup>32</sup> Likewise, criminal law scholars are engaged in an invigorating project to question the reason for — and unintended costs of — collateral consequences.<sup>33</sup> This article

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<sup>30</sup> See *Leocal v. Ashcroft*, 543 U.S. 1 (2004) (reversing Eleventh Circuit decision holding that a DUI offense under Florida law that punished negligent conduct was not a crime of violence and not an aggravated felony under the INA).

<sup>31</sup> See *infra* notes 53–54, 185–86, 221–49 and accompanying text.

<sup>32</sup> See generally Kevin R. Johnson, Symposium, *Doubling Down on Racial Discrimination: The Racially Disparate Impacts of Crime-Based Removals*, 66 CASE W. RES. L. REV. 993, 1029–37 (2016) [hereinafter *Doubling Down on Racial Discrimination*] (arguing that greater attention should be paid to the racial consequences of the linking of the criminal justice and immigration removal systems, and recommending reforms to U.S. immigration law due to the “racially disparate impacts” of the criminal justice system); Daniel Kanstroom, *Smart(er) Enforcement: Rethinking Removal, Structuring Proportionality, and Imagining Graduated Sanctions*, 30 J.L. & POL. 465, 487 (2015) (“Most fundamentally, one might first ask why we deport long-term legal residents who commit crimes, instead of simply punishing them in the criminal justice system as we do citizens.”); Jennifer Lee Koh, *The Whole Better than the Sum: A Case for the Categorical Approach to Determining the Immigration Consequences of Crime*, 26 GEO. IMMIGR. L.J. 257, 262 (2012) (arguing for a more robust version of the categorical approach to “correct[] for the absence of procedural and substantive rights for the noncitizen”); Stephen H. Legomsky, *The New Path of Immigration Law: Asymmetric Incorporation of Criminal Justice Norms*, 64 WASH. & LEE L. REV. 469, 475–81 (2007) (criticizing IIRIRA's expanded immigration grounds that are based on criminal offenses and advocating for a more “civil regulatory model”); Rebecca Sharpless, *Clear and Simple Deportation Rules for Crimes: Why We Need Them and Why It's Hard to Get Them*, 92 DENV. U. L. REV. 933, 935–36 (2015) (arguing to “repeal the current crime-based grounds of removal and create a new ground based on a trigger of over five years actual incarceration for a crime”).

<sup>33</sup> See MICHELLE ALEXANDER, *THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS* 139–41 (2010) (making a forceful argument about the myriad ways by which collateral consequences lead to disenfranchisement); Gabriel J. Chin, Symposium, *The New Civil Death: Rethinking Punishment in the Era of Mass Incarceration*, 160 U. PA. L. REV. 1789, 1790–93, 1831 (2012) (arguing for such reforms as discretionary instead of mandatory impositions); Eisha Jain, *Prosecuting*

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contributes to the existing conversations by embracing the practical realities that are happening in the federal courts and voicing a normative defense of that result.

In the current political climate, defending non-citizens who commit crimes as valuable members of our country is not popular. But as a matter of history, it is IIRIRA's radical reconfiguration for a great number of convictions to result in deportation that is the aberration. For 100 years, criminal aliens were only seven percent of all deportations. In 1996, IIRIRA expanded the types of crimes that could kick someone out of the country from the most serious felonies to minor crimes, including drug possession, misdemeanors, and even those that are expunged and pardoned. Now, six out of every ten deportations are for crimes, at a tangible cost in billions of dollars in heightened enforcement.

But not everyone who breaks the criminal law is a hardened recidivist or even dangerous. Some have served in our military, have children and spouses who are citizens, have lengthy employment histories, have been paying taxes, and are good neighbors. Some commit crimes that in fact involve non-serious conduct. Criminal judges who knew the facts of a case used to be able to stop deporting someone whose crime arose from stupidity rather than depravity. Moreover, these crime-based deportation grounds apply retroactively, meaning individuals who pose no risk of any criminal activity are newly subjected to deportation based on a crime they committed — and reformed from — decades ago. Immigration judges too used to have power to weigh the good and the bad and give a second chance to individuals who exhibited remorse, rehabilitation, and contributions to the community. IIRIRA simply ended giving anyone a second chance. As illustrated in the cases described above, kicking these people out, and disrupting their families, over drug possession and minor offenses is harsh and absurd.

This article was written before the election of Donald Trump. It has taken on new meaning in light of the Trump administration's heightened commitment to increasing crime-based deportations. In light of this shift in immigration enforcement priorities, it is critical to ask why are crimes used as a means to deport people? As argued here, the main problem is that the current use of categories to identify which crimes will have immigration consequences is incredibly

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*Collateral Consequences*, 104 GEO. L.J. 1197, 1210-15 (2016) (discussing prosecutorial decisions to impose or avoid the collateral consequences when entering plea bargains).



overinclusive. A deportable offense includes misdemeanors;<sup>34</sup> a violent crime includes spitting at a police officer during an arrest.<sup>35</sup> The Trump administration is taking the absurdity found in existing law and making it ridiculous. The new policies do not fix the overinclusive problem. To the contrary, someone is now a priority for deportation if they have been arrested or engaged in conduct that could be a crime.<sup>36</sup>

Instead of sorting out immigrants based on how they entered or penalizing them for minor crimes, immigration law needs to sort out contributing from non-contributing immigrants. Criminal convictions are neither effective nor efficient in drawing these lines. After *Mathis*, the federal courts will be significantly reducing collateral consequences on a case-by-case, statute-by-statute basis. The federal courts will reach this result out of the technical dissection of individual criminal statutes. This Article argues that this practical result is the better way to avoid the absurd and arbitrary results that otherwise attach when criminal convictions are considered relevant to the questions of who can stay and who can remain in this country. Those who pay taxes, have citizen children, serve in the military, work in jobs citizens will not take, or help those around them, need a path to legalization. And those who cause more harm than good should be deported. Criminal convictions can no longer be the only factor in this consideration. A full repeal of IIRIRA and a defense of non-citizens who commit crimes is in order.

#### I. OVERVIEW OF ACCA AND IIRIRA'S FRAMEWORKS AND JUDICIAL DETERMINATIONS OF COLLATERAL CONSEQUENCES

As much as ACCA and IIRIRA involve two very different contexts — heightened sentences for firearm felons with past crimes and removal (technical term for deportation) for non-citizens who are convicted of crimes — both laws attach consequences for prior criminal convictions. For ACCA, certain prior offenses trigger longer sentences for the federal firearm offense. For IIRIRA, certain prior offenses trigger deportation, and at times, potentially permanent exile. Despite the different contexts, the federal courts rely on the same

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<sup>34</sup> See *Carachuri-Rosendo v. Holder*, 560 U.S. 563, 570-71 (2010) (involving misdemeanor offense for possession of one Xanax tablet).

<sup>35</sup> See *United States v. Carthone*, 726 F.3d 503, 516-17 (4th Cir. 2013) (affirming on procedural grounds the district court's treatment of defendant's prior conviction, arising from defendant having spat on a police officer, as a "crime of violence").

<sup>36</sup> See Memorandum on Enforcement of the Immigration Laws to Serve the National Interest from John Kelly, *supra* note 5, at 2.

doctrine and same methodology to determine if a prior offense is a predicate offense.<sup>37</sup> As set forth below, the 2013 *Descamps* decision and 2016 *Mathis* decision significantly changed how and when these consequences are determined.

A. *Statutory Framework: How ACCA and IIRIRA Attach Consequences to Prior Criminal Convictions*

In 1984, when the United States wanted an aggressive response to recidivism, Congress enacted ACCA. Borne out of the finding that a “large percentage” of crimes of theft and violence “are committed by a very small percentage of repeat offenders,”<sup>38</sup> ACCA “was intended to supplement the States’ law enforcement efforts against ‘career’ criminals.”<sup>39</sup>

ACCA then imposed a fifteen-year mandatory minimum sentence on specific individuals who possessed and received firearms in commerce after having had three prior convictions that were considered violent felonies, serious drug offenses, or both.<sup>40</sup> The prior convictions could have arisen in state or federal court, at any point in time, and included juvenile adjudications.<sup>41</sup> As will be discussed below, although the

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<sup>37</sup> Prior to 2013, many Courts applied the case law interchangeably. As recognized by the BIA, “*Descamps* itself makes no distinction between the criminal and immigration contexts and the circuit courts have held that the approach to statutory divisibility announced there applies in removal proceedings in the same manner as in criminal sentencing proceedings.” *In re Chairez-Castrejon*, 26 I. & N. Dec. 349, 354 (2014), *vacated in part on other grounds*, 26 I. & N. Dec. 478, 478 (2015).

<sup>38</sup> *Taylor v. United States*, 495 U.S. 575, 581 (1990) (quoting and citing to the legislative history found at H.R. REP. NO. 98-1073, at 1, 3 (1984) and S. REP. NO. 98-190, at 5 (1983)).

<sup>39</sup> *Id.* Critics have raised concerns about ACCA’s lack of maximum sentence, its inclusion of juvenile crimes, its failure to account for the remoteness of the crimes, and the seeming arbitrariness that arises from absurd consequences attaching to minor crimes. *See, e.g., United States v. Davis*, 801 F.2d 754, 755 (5th Cir. 1986) (“[W]e uphold the constitutionality of the Act against the charge that, because it fixes a minimum but not a maximum sentence, it denies due process . . . .”); Ethan Davis, Comment, *The Sentence Imposed Versus the Statutory Maximum: Repairing the Armed Career Criminal Act*, 118 YALE L.J. 369, 370-71 (2008) (arguing for a series of reforms to ACCA out of concern that minor offenses are swept in); James G. Levine, Note, *The Armed Career Criminal Act and the U.S. Sentencing Guidelines: Moving Toward Consistency*, 46 HARV. J. ON LEGIS. 537, 540 (2009) (arguing against ACCA’s inclusion of crimes that are remote, juvenile offenses, or part of the same information).

<sup>40</sup> 18 U.S.C. § 924(e)(1) (2012). *See generally* 18 U.S.C. § 922(g) (2012) (listing certain persons for whom it is illegal to ship or transport firearms or ammunition in interstate or foreign commerce).

<sup>41</sup> *See* Jenny W.L. Osborne, *One Day Criminal Careers: The Armed Career Criminal Act’s Different Occasions Provision*, 44 J. MARSHALL L. REV. 963, 966-94 (2011)

selected categories of crimes appeared to narrow the prior offenses to serious matters, in practice, ACCA swept in convictions whose underlying conduct did not involve violence and swept in drug offenses that involved possession and were not punished with prison terms by the state courts.<sup>42</sup> ACCA's targeting of drug offenses as serious crimes arose from an assumption that drug use involved or led to violence. Whether it be from the empathy afforded those currently afflicted with the opioid addiction or the racial difference from the perceived drug user of today (white) from one from the 1980s and 1990s (black), there is a growing disaggregation from the assumption that drug addiction is a gateway to crime instead of a social harm that needs treatment. But at the time of ACCA's enactment, the notion that drug use leads to violent crime was entrenched in the public imagination.<sup>43</sup>

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(discussing "ACCA's overinclusive and arbitrary application" and summarizing reform proposals).

<sup>42</sup> David M. Zlotnick, *The Future of Federal Sentencing Policy: Learning Lessons from Republican Judicial Appointees in the Guidelines Era*, 79 U. COLO. L. REV. 1, 53 (2008) ("Thus, petty offenders, especially drug addicts desperate for a 'fix,' could easily amass the requisite three convictions to qualify for the fifteen-year mandatory, simply by selling small amounts of drugs or breaking into a store at night. As a result, some of these alleged 'career criminals' had never been to state prison for their crimes, having received either probation or short stints in county facilities.").

<sup>43</sup> Although a number of studies do establish a correlation, if not causation, between drug abuse and crime, violent crimes arising from alcohol use — a legal substance — are perpetuated at similar rates. See generally *United States v. Carter*, 750 F.3d 462, 467-70 (4th Cir. 2014) (after citing recent studies: "[w]e have little trouble concluding that the studies presented to the district court by both the government and Carter indicate a strong link between drug use and violence"). In *Carter*, the Court cited a 2004 study recording "that almost 50% of all state and federal prisoners who had committed violent felonies were drug abusers or addicts in the year before their arrest, as compared to only 2% of the general population." *Id.* at 467. According to the National Council on Alcoholism, "Alcohol is a factor in 40% of all violent crimes today, and according to the Department of Justice, 37% of almost 2 million convicted offenders currently in jail, report that they were drinking at the time of their arrest." *Alcohol, Drugs and Crimes*, NAT'L COUNCIL ON ALCOHOLISM & DRUG DEPENDENCE, <https://www.ncadd.org/about-addiction/alcohol-drugs-and-crime> (last updated June 27, 2015, 2:32 PM). By contrast, in contemporary times, those currently afflicted with the opioid addiction are not presumed to be violent and are given treatment. See C.J. Arlotta, *Obama Signs Opioid Legislation, Despite Funding Concerns*, FORBES (Jul. 23, 2016), <https://www.forbes.com/sites/cjarlotta/2016/07/23/obama-signs-opioid-legislation-despite-funding-concerns>; Katharine Q. Seelye, *Massachusetts Chief's Tack in Drug War Steer Addicts to Rehab, Not Jail*, N.Y. TIMES (Jan. 24, 2016), <https://www.nytimes.com/2016/01/25/us/massachusetts-chiefs-tack-in-drug-war-steer-addicts-to-rehab-not-jail.html>; Ekow N. Yankah, *Opinion, When Addiction Has a White Face*, N.Y. TIMES (Feb. 9, 2016), <https://www.nytimes.com/2016/02/09/opinion/when-addiction-has-a-white-face.html> ("It is hard to describe the bittersweet sting that many African-Americans feel witnessing this national embrace of addicts. It is heartening to see

In 1996, Congress overhauled immigration enforcement by amending the Immigration Nationality Act (“INA”) with IIRIRA. The INA, enacted in 1952, is embraced as the framework for modern immigration regulation.<sup>44</sup> The INA identified a limited number of crimes that were grounds of exclusion (applied to those outside of the country) and deportation (applied to those inside the country). At the time, the type of conviction that would result in deportation was a crime involving moral turpitude, an elusive term but one intending to reach debased and depraved criminality.<sup>45</sup> As the Courts struggled to define the scope, these crimes generally involved theft (where deceit occurred), violence (but more than mere assault), and certain sex offenses. In 1952, Congress further limited these offenses by requiring that they have either a specific length of sentence, occur more than once, or occur within five years of a non-citizen’s entry into the United States.<sup>46</sup>

Before IIRIRA, a criminal conviction was the start, not the end, of the inquiry as to whether a lawful permanent resident could remain in the country. Since 1917, Congress permitted criminal courts to grant Judicial Recommendations Against Deportation (“JRAD”), which were binding stops on deportation to which immigration courts deferred.<sup>47</sup> Even for criminal convictions that were without JRADs, in immigration courts, if non-citizens established strong ties to residents and citizens of

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the eclipse of the generations-long failed war on drugs. But black Americans are also knowingly weary and embittered by the absence of such enlightened thinking when those in our own families were similarly wounded. When the face of addiction had dark skin, this nation’s police did not see sons and daughters, sister and brothers. They saw ‘brothas,’ young thugs to be locked up, rather than ‘people with a purpose in life.’”)

<sup>44</sup> Immigration and Nationality Act of 1952 (INA), Pub. L. No. 82-414, 66 Stat. 163 (codified as amended in scattered sections of 8 U.S.C.).

<sup>45</sup> See *Arias v. Lynch*, 834 F.3d 823, 831 (7th Cir. 2016) (Posner, J., concurring) (“Congress has never defined ‘moral turpitude,’ but courts and the immigration agencies have tended to adopt a slight variant of the definition in *Black’s Law Dictionary*: an ‘act of baseness, vileness, or the depravity in private and social duties which man owes to his fellow man, or to society in general. . . . [An] act or behavior that gravely violates moral sentiment or accepted moral standards of [the] community and is a morally culpable quality held to be present in some criminal offenses as distinguished from others.’”). Judge Posner, among others, have been critical of the vagueness of this definition: “It’s difficult to make sense of these definitions, which approach gibberish yet are quoted deferentially in countless modern opinions.” See *id.*

<sup>46</sup> Mary Holper, *Deportation for a Sin: Why Moral Turpitude Is Void for Vagueness*, 90 NEB. L. REV. 647, 651 (2012) (“The 1952 Immigration and Nationality Act (INA), which completely revised the immigration laws, contained the same [crime involving moral turpitude (“CMT”)] provisions of the 1917 act, rendering a noncitizen inadmissible for a CMT and deportable for two CMTs, or a single CMT committed within five years of admission if a sentence of one year or longer was imposed.”).

<sup>47</sup> See Jason A. Cade, *Return of the JRAD*, 90 N.Y.U. L. REV. ONLINE 36, 38 (2015).

this country — equities such as military service, lengthy employment, and community service, and rehabilitation — immigration judges had the discretion to provide non-citizen with a second chance to remain in the United States.<sup>48</sup> These remedies were conditioned on being granted once, and only once, to prevent recidivists from remaining. Because many remedies remained available to those with criminal convictions, practitioners usually did not expend resources on contesting whether a crime fit the immigration charge. Indeed, crime-based deportation was small part of immigration enforcement, accounting for seven percent of all deportations from 1908 to 1986.<sup>49</sup>

IIRIRA changed this scheme in a dramatic manner. Among its numerous provisions, IIRIRA expanded the number and category of crimes that constitute aggravated felonies. An aggravated felony, with only narrow exceptions, usually results in the deportation and permanent exile of a non-citizen from the country.<sup>50</sup> The term

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<sup>48</sup> See *INS v. St. Cyr*, 533 U.S. 289, 296 n.5 (2001) (permitting section 212(c) to remain available for certain individuals). For lawful permanent residents, Congress permitted Section 212(c) as a remedy for LPRs whose equities outweighed the debits. Section 212(c) referred to the code in the INA that was a remedy for LPRs who had committed crimes. As noted in *St. Cyr*, Section 212(c) cases were granted at a national rate of at least 51.5%. See *id.*; *infra* notes 219–49 and accompanying text. For non-citizens who were first seeking to be lawful permanent residents, they could apply for suspension of deportation, which barred the remedy for those who had assisted the Nazi government persecute others. See 8 C.F.R. § 1240.65 (2017) (enumerating eligibility for suspension of deportation under former section 244(a)(1) of the INA, which ceased to be in effect on April 1, 1997). In 1952, the crimes that categorically barred this remedy were those that would prevent someone from being found to be a person of good moral character or having an actual period of confinement in a penal institution for more than 180 days pursuant to 8 U.S.C. § 1101(f) (1994). The provision was updated in 1997 to bar eligibility for those who committed aggravated felonies and drug crimes.

<sup>49</sup> Legomsky, *supra* note 32, at 488 n.92 (“From 1908 through 1986 there were large fluctuations, but, for that era as a whole, approximately 7% of all deportations were on crime-related post-entry grounds.”).

<sup>50</sup> Most aggravated felonies bar certain relief such as asylum, cancellation, and citizenship, regardless of whether the ground was used to commence removal proceedings. See 8 U.S.C. § 1158(b)(2)(B)(i) (2012) (asylum); § 1229a(a)(3) (2012) (cancellation for lawful permanent residents); § 1229a(b)(1)(C) (2012) (cancellation for non-lawful permanent residents); § 316(d) (2012) (lack of good moral character bar to citizenship); § 1101(f)(8) (2012) (aggravated felony is bar to good moral character). For those who fear returning to their native country, an aggravated felony would not preclude the grant of protection under the Convention Against Torture. See § 1231(b)(3)(B) (2012) (aggravated felony bar to withholding of removal only if accompanied by 5 year prison sentence); 8 C.F.R. § 1208.16 (2016) (withholding of removal under CAT); 8 C.F.R. § 1208.17 (2016) (deferral of removal under CAT). Certain exceptions also arise if the aggravated felony is not related to drugs and the person is eligible to re-adjust status. See 8 U.S.C. § 1182(h) (2012) (waiver available

“aggravated felony” is a misnomer because it implies that the offense is the worst of the worst. Congress first created the term aggravated felony in 1988, which it limited to murder, drug trafficking crimes, illicit trafficking in firearms, and illicit trafficking in explosives.<sup>51</sup> In 1990, Congress expanded the definition to notably include particular violent crimes if an imposed sentence was five years or more, and more drug offenses.<sup>52</sup> In 1996, Congress passed IIRIRA and expanded the nature and number of crimes that constitute aggravated felonies to approximately twenty-one categories of crimes.<sup>53</sup> The current definition includes non-violent drug offenses, misdemeanors, minor offenses, offenses for which sentences were suspended in their entirety, and convictions that were vacated and expunged under state and federal law.<sup>54</sup> Stated another way, an “aggravated felony” now no longer needs apply to a crime that was either aggravated or even a felony.

In addition to aggravated felonies, inadmissibility grounds (applied to non-citizens who are first requesting lawful status, regardless of whether they are at the border or in the country) and deportability grounds (applied to people in lawful status in the country) regulate who can enter and remain in the country.<sup>55</sup> Katherine Brady developed the analogy of a dinner party to explain the difference between these terms.<sup>56</sup> When having a dinner party, invited guests must engage in somewhat serious conduct to be ejected. Not using a napkin, for instance, may keep a host from extending an initial invitation to

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to crimes not involving drug offenses); *see also* § 1101(a)(15)(T) & (U) (aggravated felony not a bar to T and U visas, available to those who cooperate with law enforcement authorities under certain conditions).

<sup>51</sup> *See* Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, 102 Stat. 4181, 4469.

<sup>52</sup> *See* Immigration Act of 1990, Pub. L. No. 101-649, § 602, 104 Stat. 4978.

<sup>53</sup> *See* 8 U.S.C. § 1101(a)(43) (1996).

<sup>54</sup> *See supra* notes 15–18 and accompanying text (discussing how IIRIRA captures misdemeanors, minor offenses, and expunged convictions); *infra* note 222–32 accompanying text (discussing how IIRIRA is retroactive). Many individuals who were convicted and served their sentences years ago, are newly vulnerable to removal even though the offense did not have serious, or even any, immigration consequences at the date of the conviction. For a discussion of how citizens are being wrongfully removed under this scheme, *see* Kari E. Hong, *Removing Citizens: Parenthood, Immigration Courts, and Derivative Citizenship*, 28 GEO. IMMIGR. L.J. 277, 278, 310-15 (2014).

<sup>55</sup> Deportability grounds attach to individuals who have been admitted into the United States. Although the term “admission” is a term of art that has different meanings in different federal circuits, a lawful permanent resident and tourist both are examples of individuals who have been admitted into the country and thus subjected to deportability grounds. *See* 8 U.S.C. §1101(a)(13) (2016).

<sup>56</sup> 1 KATHERINE A. BRADY ET AL., IMMIGRANT LEGAL RES. CTR., DEFENDING IMMIGRANTS IN THE NINTH CIRCUIT 1-12 to 1-13 (10th ed. 2008).

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dinner. But once at the table, most hosts would let someone stay until they engaged in disruptive or offensive conduct such as intentionally insulting the host or harming another guest.<sup>57</sup> In keeping with this analogy, Congress developed deportability grounds to identify what bad conduct non-citizens with lawful status — such as lawful permanent residents, students, or tourists — would have to engage in to result in their deportation. Although some grounds include conduct (such as falsely claiming to be a citizen), the grounds relating to crime require an actual conviction, and as a whole, are fewer in number than the inadmissibility grounds.

Returning to the dinner party analogy, for strangers who have not yet been invited to a party, the reasons for keeping them out would involve less serious conduct and would be greater in number. Just as not using a napkin could offend a host enough to decide against inviting someone to dinner, the inadmissibility grounds include minor and even unintentional violations such as students working too many hours or in campus jobs not previously approved for compensation.<sup>58</sup> Likewise, inadmissibility grounds subject non-citizens — such as non-citizens who are married to citizens or hired by U.S. companies and are first requesting admission to the country — to exclusions for less serious reasons. In contrast to the deportability grounds, inadmissibility grounds arise based on criminal activity — even in the absence of a conviction or arrest — and a wider range of misconduct (for instance, having a likelihood of being a public charge or abandoning citizenship to avoid paying taxes).

Whether it be predicate ACCA offenses, aggravated felonies, deportability grounds, or inadmissibility grounds, all are subject to the same methodology when determining if specific convictions (or criminal conduct) will trigger collateral consequences in federal criminal court (ACCA) or federal immigration court (IIRIRA).

*B. ACCA and IIRIRA Consequences Are Collateral Ones that Can Be Disaggregated from Prior Crimes*

Despite their seeming disparate contexts, ACCA and IIRIRA share a common purpose and methodology that impose severe consequences based on prior crimes that occurred in state or federal court. Known as collateral consequences, the precise definition of that term is in order.

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<sup>57</sup> See text accompanying notes 15–18 and 217–27.

<sup>58</sup> See *Can You Work Part Time With A U.S. Student Visa*, TOPUNIVERSITIES (Dec. 9, 2015) <https://www.topuniversities.com/student-info/studying-abroad/can-you-work-part-time-us-student-visa>.

The American Bar Association defines a direct consequence as a punishment, condition, or restriction being imposed by a sentencing court within its authority as contemplated by a legislature.<sup>59</sup> A collateral consequence, by contrast, is a penalty, disability, or disadvantage that is imposed by a different authority in a different context arising from a prior conviction.<sup>60</sup>

Scholars and courts have noted that these definitions are much more nebulous than the ABA suggests. Even though a direct consequence would be a conviction and punishment that ends upon release from prison, as a general matter, the societal costs from a conviction include stigma and opprobrium that attach to the person who committed the crime and even to their family members.<sup>61</sup> Unlike a pure direct consequence, the stigma extends to multiple contexts, and in many ways is more difficult to erase because it does not end when someone is released from prison.

In the immigration context, what is and is not a collateral consequence is also arguably blurred. In *Padilla v. Kentucky*, the Supreme Court pointedly observed that deportation as resulting from criminal convictions is “uniquely difficult to classify as either a direct or a collateral consequence” because “of its close connection to the criminal process.”<sup>62</sup> There is much scholarship on how post-*Padilla*, the line between criminality and immigration violations has collapsed, and perhaps even should continue to collapse.<sup>63</sup>

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<sup>59</sup> See AM. BAR ASSOC., COLLATERAL SANCTIONS, *supra* note 12.

<sup>60</sup> See *supra* notes 12–13 and accompanying text.

<sup>61</sup> See Michael Pinard, *An Integrated Perspective on the Collateral Consequences of Criminal Convictions and Reentry Issues Faced by Formerly Incarcerated Individuals*, 86 B.U. L. REV. 623, 623–90 (2006) (providing a thorough discussion on collateral consequences, barriers to reentry, and state and local programs seeking to offset those factors in the interest of reducing recidivism); *id.* at 623 n.1 (citing to Mirjan R. Damaska, *Adverse Legal Consequences of Conviction and Their Removal: A Comparative Study*, 59 J. CRIM. L. CRIMINOLOGY & POLICE SCI. 347, 347 (1968)) (defining the social consequences of criminal convictions such as ostracism or denial of employment); *id.* (citing to George P. Fletcher, *Disenfranchisement as Punishment: Reflections on the Racial Uses of Infamia*, 46 UCLA L. REV. 1895, 1897 (1999)) (discussing the stigma that attaches to convicted felons); Dina R. Rose & Todd R. Clear, *Incarceration, Reentry and Social Capital: Social Networks in the Balance*, in PRISONERS ONCE REMOVED 313, 326–34 (Jeremy Travis & Michelle Waul eds., 2003) (discussing social reentry problems including problems with finances, identity, and relationships with others).

<sup>62</sup> *Padilla v. Kentucky*, 559 U.S. 356, 366 (2010). I wish to thank Ingrid Eagly and Eisha Jain for emphasizing the importance of this ambiguity when considering collateral consequences.

<sup>63</sup> The seminal piece discussing the collapse is Gabriel J. Chin & Richard W. Holmes, Jr., *Effective Assistance of Counsel and the Consequences of Guilty Pleas*, 87 CORNELL L. REV. 697, 699 (2002), noting “[t]he idea that collateral consequences are



In respectful disagreement to these thoughtful arguments, I accept the premise that ACCA and IIRIRA comport with the ABA's definition of collateral consequences. In 1988 and 1996, Congress made express decisions to impose additional ACCA and IIRIRA penalties at a future time in a separate context (federal court and immigration court) than the forum where the original conviction was adjudicated. These consequences were never part of the initial criminal conviction and were never imposed (or known) by the court that sentenced the defendant. Given that IIRIRA imposed retroactive application to criminal convictions, for many sentencing courts and criminal defendants, it was impossible to have known that even a conviction that had no immigration consequences at the time of sentencing would some day in the future be classified as an aggravated felony compelling deportation.<sup>64</sup> Returning to the JRAD example, starting in 1917, Congress authorized criminal court judges to make a binding recommendation against deportation (known as "JRADs") if they believed mitigating circumstances in those crimes or in offenders existed.<sup>65</sup> In 1990, Congress repealed the JRAD.<sup>66</sup> Since 1990 then, deportation then has very much met the definition of a collateral consequence — an additional penalty imposed by a different court for punishment for a crime adjudicated previously.

As a normative matter, drawing clear distinctions between future consequences and prior convictions is an important reminder that they do not need to be combined. Stated another way, disaggregating IIRIRA consequences from the original triggering criminal conviction underscores the reality that immigration policy is not necessarily related to the goals of criminal justice. In 1996, Congress made express policy decisions to impose and expand additional immigration

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divorced from the criminal process has never really been true . . . ." Post *Padilla*, others have robustly discussed the dimensions of how immigration law is uniquely tied to criminal grounds. See generally Daniel Kanstroom, *Padilla v. Kentucky and the Evolving Right to Deportation Counsel: Watershed or Work-in-Progress?*, 45 NEW ENG. L. REV. 305, 307 (2011) ("[I]t remains clear that the constitutional norms applicable to criminal cases should inform our approach to deportation far more specifically than they have in the past." (internal quotation marks omitted)).

<sup>64</sup> See *Tyson v. Holder*, 670 F.3d 1015 (9th Cir. 2012) (a 53-year-old LPR was charged with committing an aggravated felony based on a crime that had occurred in her twenties. At the time of the conviction, it had no immigration consequences.)

<sup>65</sup> See Immigration Act of 1917, Pub. L. No. 64-301, ch. 29, § 19, 39 Stat. 874, 889-90.

<sup>66</sup> See Immigration Act of 1990, Pub. L. No. 101-649, § 505, 104 Stat. 4978, 5050 ("Elimination of Judicial Recommendations Against Deportation").

penalties where none previously existed.<sup>67</sup> At the time, recidivism was feared as a social ill that was due to the character of the criminal. After the United States has incarcerated over 20% of the world's inmates (while producing 5% of its population), and spends eighty billion dollars a year on a prison system that has a 77% recidivism rate, mass incarceration is seen as its own social problem that is generating more problems than any incarceration is in fact solving.<sup>68</sup>

As explained below, ACCA is more readily reaching the conclusion that increased sentencing enhancements for punishing prior crimes is not necessary. My argument in this Article is that only once immigration and crime are accepted as separate concepts, can normative questions be posed regarding why, how, and whether criminal convictions should continue to be a part of immigration policy. In Parts II and III, I explain why crimes should be reduced as proxies for determining who can and cannot remain in this country. Before that can be explored in depth, understanding the judicial framework of how consequences attach to IIRIRA and ACCA is necessary.

*C. Legal Framework Prior to 2013: The Taylor/Shepard/Nijhawan Framework Was Haphazardly Applied*

Even though federal firearm offenses and federal immigration violations do not appear to share common features, the federal courts employ the same methodology and same court decisions when determining whether specific prior offenses have consequences under ACCA and IIRIRA.<sup>69</sup> In June 2016, the Supreme Court announced that

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<sup>67</sup> *Supra* note 15; see Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Pub. L. No. 104-208, div. C, 110 Stat. 3009-546.

<sup>68</sup> *National Statistics of Recidivism*, NAT'L INST. JUST., <http://www.nij.gov/topics/corrections/recidivism/pages/welcome.aspx> (last updated June 17, 2014); see Alana Samuel, *What Incarceration Costs American Families*, ATLANTIC (Sept. 15, 2015), <http://www.theatlantic.com/business/archive/2015/09/the-true-costs-of-mass-incarceration/405412/> (describing the ongoing financial burdens faced by families of those who have been incarcerated).

<sup>69</sup> See, e.g., *In re Chairez-Castrejon*, 26 I. & N. Dec. 819, 819-20 (B.I.A. 2016) (“[W]e now clarify that the understanding of statutory ‘divisibility’ embodied in *Descamps* and *Mathis* applies in immigration proceedings nationwide to the same extent that it applies in criminal sentencing proceedings.”). A notable exception is the crime of violence definition because IIRIRA and ACCA have slightly different statutory definitions of violence, which at times requires the different forum to distinguish precedent from applying. See *Dimaya v. Lynch*, 803 F.3d 1110, 1114 (9th Cir. 2015) (“The INA provides for the removal of non-citizens who have been ‘convicted of an aggravated felony.’ 8 U.S.C. § 1227(a)(2)(A)(iii). Its definition of an

“[f]or more than 25 years, we have repeatedly made clear that application of ACCA involves, and involves only, comparing elements [of the predicate offenses to the generic definitions of crimes that warrant enhanced sentences].”<sup>70</sup> This is true for both ACCA and the INA.<sup>71</sup> Of the facts underlying a given crime, “ACCA (so we have held, over and over) does not care.”<sup>72</sup> This is how *Mathis* described its decisions, and the lower courts’ application of them. Despite *Mathis*’ decisiveness, over the past twenty-five years, federal courts have been employing confusing, conflicting, and haphazard approaches to ACCA and IIRIRA. As set forth below, the proceeding sections provide an overview of how the law operated before the 2013 *Descamps* decision, the circuit splits after the *Descamps* decision, and the resolution reached in the 2016 *Mathis* decision.

Beginning in 1990, *Taylor v. United States* set forth what is known as the categorical approach and modified-categorical approach in assessing consequences of prior crimes.<sup>73</sup> The issue presented in *Taylor* was that Congress had provided for a fifteen-year mandatory minimum sentence for burglary offenses without providing any definition as to what crimes were and were not predicate burglaries.<sup>74</sup>

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aggravated felony includes numerous offenses, including ‘a crime of violence (as defined in section 16 of Title 18 . . .).’”), *cert. granted*, 137 S. Ct. 31 (2016). 8 U.S.C. § 1101(a)(43)(F). The subsection of 18 U.S.C. § 16 that the BIA relied on in this case defines a crime of violence as 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.” 18 U.S.C. § 16(b) (2012). Had Congress written out the relevant definition in full instead of relying on cross-referencing, a lawful permanent resident would be removable if “convicted of 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” (emphasis added). The language in ACCA that *Johnson* held unconstitutional is similar. The ACCA provision defined a “violent felony” as “any crime punishable by imprisonment for a term exceeding one year [i.e., a felony] . . . that . . . involves conduct that presents a serious potential risk of physical injury to another.” 18 U.S.C. § 924(e)(2)(B)(ii) (2012) (emphasis added). Importantly, both the provision at issue here and ACCA’s residual clause are subject to the same mode of analysis.”

<sup>70</sup> *Mathis v. United States*, 136 S. Ct. 2243, 2257 (2016).

<sup>71</sup> In discussing the determination of crimes defined by ACCA and IIRIRA, “[b]oth are subject to the categorical approach, which demands that courts ‘look to the elements and the nature of the offense of conviction, rather than to the particular facts relating to petitioner’s crime.’” *Dimaya v. Lynch*, 803 F.3d 1110, 1114-15 (9th Cir. 2015) (quoting *Leocal v. Ashcroft*, 543 U.S. 1, 7 (2004)), *cert. granted*, 137 S. Ct. 31 (2016).

<sup>72</sup> *Id.*

<sup>73</sup> See *Taylor v. United States*, 495 U.S. 575, 575 & 602 (1990).

<sup>74</sup> *Id.* at 581-82 (defining the “problem presented in this case” as arising when

In defining which state and federal crimes met the generic burglary term in ACCA, the Supreme Court settled on the categorical approach — a comparison of the elements of a state or federal offense to the generic definition of a crime. Relying simply on the statute’s name for an offense was not an adequate option given that some states did not even use term “burglary,” opting to call the same conduct “breaking and entering.”<sup>75</sup> *Taylor* then formulated the categorical approach whereby the elements of a predicate statute would be compared with a generic definition of the offense (if not defined in the statute, developed by the courts).<sup>76</sup>

The advantages of using elements of an offense instead of determining what any given defendant did, as explained in 1990, was that the ACCA definition would sweep in a “range of predicate offenses” that had “certain common characteristics.”<sup>77</sup> The sweep would reach certain offenses that had indicia of dangerousness that Congress believed were accurate predictors of who would go on to commit more serious offenses against people.<sup>78</sup> But also, relying on elements was a check on fairness. Tasking a court with the discovery of the defendant’s conduct underlying the prior offense is mired with “practical difficulties and potential unfairness.”<sup>79</sup> As a matter of fairness, most criminal records contain little information beyond a charge and fact of conviction. Attaching consequences on conduct then would penalize those whose states or courts had the facts in the record while letting others — who may have engaged in more serious conduct — without penalty based on discrepancies in record keeping. Even of greater concern, by definition, a plea agreement dispatches of the need to find out what in fact happened. For many defendants, they had no incentive to contest allegations of what drug (or level of violence or type of taking or any other number of elements that carry significance in ACCA and IIRIRA) was involved in an initial crime when the penalty for the substance (or contact or taking) was the same. It then becomes unfair to require these individuals to conduct a

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Congress expanded ACCA’s predicate offenses “from ‘robbery or burglary’ to ‘a violent felony or a serious drug offense’; it defined the term ‘violent felony’ to include ‘burglary’; and it deleted the pre-existing definition of burglary”).

<sup>75</sup> *Id.* at 591 (citing to Michigan’s criminal code that does not use the term “burglary”).

<sup>76</sup> *Id.* at 599. The decision had concurring opinions but no dissenting ones. *See id.* at 602.

<sup>77</sup> *Id.* at 588.

<sup>78</sup> *See id.*

<sup>79</sup> *Id.* at 601.

trial in immigration court or federal court years later to newly dispute allegations that were not proven or of significance in the criminal proceeding. While how a crime occurred was relevant, *Taylor* mused on the absurdity of having a prosecutor engage in a trial that never happened below to determine how and why a defendant was convicted. By comparison, the elements-based test seemed straightforward.

The modified-categorical step was the next in line for the Court to define. Starting in *Taylor*, the Supreme Court noted that the categorical approach would not resolve whether all prior crimes triggered enhancements. In what it predicted would be a “narrow range of cases,” an ACCA court would need to look at specific parts of the criminal records to determine — not whether a defendant engaged in prior conduct — but whether “a jury was actually required to find all the elements of [the] generic burglary [offense]” when convicting the defendant of the predicate crime.<sup>80</sup>

*Taylor* used the example of a state burglary statute criminalizing in separate elements entry of both cars and buildings — the former is overbroad to the generic definition and the latter is a match. In such example, *Taylor* directed a sentencing court to examine the prior offense’s statutory definition, charging documents, and jury instructions to determine if the defendant was charged and convicted of the element involving entry into a building, which would trigger ACCA consequences.<sup>81</sup>

In 2005, *Shepard v. United States*<sup>82</sup> further added the plea agreement, transcript of the plea colloquy, or other comparable judicial record as documents that may also be examined when determining if a conviction matched the generic offense.<sup>83</sup> The Government had requested police reports to be included on this list, arguing that absent a means to examine specific crimes, ACCA (and by then IIRIRA) consequences will attach based on the “idiosyncrasies of record-keeping in any particular State.”<sup>84</sup> The Supreme Court rejected this concern, explaining that having a collateral mini-trial would be a much greater evil.<sup>85</sup> Although not express, both the Government and

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<sup>80</sup> *Id.* at 602.

<sup>81</sup> *See id.*

<sup>82</sup> 544 U.S. 13 (2005).

<sup>83</sup> *Id.* at 26.

<sup>84</sup> *Id.* at 22.

<sup>85</sup> *Id.* at 24 (“The Court thus anticipated [in, *inter alia*, *Apprendi v. New Jersey*, 530 U.S. 466 (2000)] the very rule later imposed for the sake of preserving the Sixth Amendment right, that any fact other than a prior conviction sufficient to raise the

Supreme Court acknowledged the inherent arbitrariness in relying on past convictions as relevant in future proceedings.

In 2009, in *Nijhawan v. Holder*,<sup>86</sup> a unanimous Supreme Court<sup>87</sup> threw a slight curve ball, by making a limited modification to the categorical approach. Recognizing that immigration grounds sometimes defined crimes with specific attendant circumstances, the Supreme Court announced that only in these circumstances may an immigration court broaden its examination of the judicial record.<sup>88</sup> For example, although there are numerous state and federal crimes defining a theft crime that matches the aggravated felony defined as a “theft offense,”<sup>89</sup> there are fewer than a dozen state and federal crimes that could fit into the specific aggravated felony defined as “fraud or deceit in which the loss to the victim exceeds \$10,000.”<sup>90</sup>

When applying these “circumstance-specific” grounds, the Supreme Court permitted a reviewing court to look at documents beyond the *Shepard* documents.<sup>91</sup> If the documents were “fundamentally fair” and the defendant had had a meaningful “opportunity” to contest any finding set forth in them, a reviewing court could expand its search to determine if a defendant’s conduct matched the grounds.<sup>92</sup> Since

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limit of the possible federal sentence must be found by a jury, in the absence of any waiver of rights by the defendant.”). The questions over how *Taylor* squares with *Apprendi* arose again in the concurring and dissenting opinions in *Mathis*. See *Mathis v. United States*, 136 S. Ct. 2243, 2258-71 (2016). For an excellent discussion of this issue, see Rebecca Sharpless, *Finally a True Elements Test: Mathis v. U.S. and the Categorical Approach* (Univ. of Miami Legal Studies, Research Paper No. 16-34, 2017), [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2820398](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2820398).

<sup>86</sup> *Nijhawan v. Holder*, 557 U.S. 29 (2009).

<sup>87</sup> Elena Kagan was the Solicitor General arguing the *Nijhawan* case. *Id.* at 31.

<sup>88</sup> *Id.* at 38 (when discussing the INA’s general versus circumstance-specific subsections, observing that the INA “has other provisions that contain qualifying language that certainly seems to call for circumstance-specific application”).

<sup>89</sup> 8 U.S.C. § 1101(a)(43)(G) (2012).

<sup>90</sup> See 8 U.S.C. § 1101(a)(43)(M)(i); *Nijhawan*, 557 U.S. at 39-40 (in developing the circumstance-specific approach, the Court observed that there was no federal fraud statute with the specific amount of \$10,000 mentioned; in addition, when IIRIRA was enacted, 29 states had no relevant statute, 13 had states with higher monetary thresholds, “leaving only 8 States with statutes in respect to which subparagraph (M)(i)’s \$10,000 threshold, as categorically interpreted, would have full effect. We do not believe Congress would have intended (M)(i) to apply in so limited and so haphazard a manner”).

<sup>91</sup> Although developed in the immigration context, the circumstance-specific approach applies to ACCA. See *United States v. Price*, 777 F.3d 700, 708 (4th Cir. 2015) (acknowledging other courts’ application of this approach to ACCA and noting “we agree with those courts of appeals”).

<sup>92</sup> *Nijhawan*, 557 U.S. at 41.

*Nijhawan*, restitution orders and federal presentencing reports have met the expanded criteria.<sup>93</sup>

D. *Mass Confusion in the Pre-2013 Framework*

Despite the Supreme Court's narrative that the law had been settled for the past twenty-five years, as a practical matter, the federal courts and Board of Immigration Appeals (BIA) were truly developing confusing, conflicting, and ever-shifting rules in an attempt to be faithful to *Taylor*, *Shepard*, and *Nijhawan*.

First, starting with *Nijhawan*, the circumstance-specific approach crept into unexpected — and later renounced — contexts. For instance, the BIA and some circuit courts extended this expanded factual inquiry into drug crimes.<sup>94</sup> In *Mellouli v. Lynch*, the lawful permanent resident pled guilty to a Kansas state misdemeanor offense — possession of drug paraphernalia to store or conceal a controlled substance.<sup>95</sup> Kansas regulated more substances than the federal schedule, rendering the statute overbroad at the categorical approach. At the modified categorical approach, the non-citizen had been charged with possessing a sock in which he had four unidentified orange pills. The complaint and plea agreement did not identify what substance those pills contained, which under *Taylor* would have prevented collateral consequences.

The BIA nonetheless ordered him removed, arguing that *Nijhawan* permitted it to look at the arresting officer's probable cause affidavit alleging that the defendant was arrested with what was believed to have been Adderall.<sup>96</sup> Although the deportability ground was the generic controlled substance offense, the BIA reasoned — and Eighth Circuit affirmed — that *Nijhawan* applied because the immigration violation included a safe-harbor for those convicted of possessing 30

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<sup>93</sup> On the question of applying the *Nijhawan* test to appropriate grounds of inadmissibility, deportability, and aggravated felonies, the circuits do appear to be in relative agreement over when certain documents may be examined. *See Fuentes v. Lynch*, 788 F.3d 1177, 1183 (9th Cir. 2015) (“We therefore join the Second, Third, and Tenth Circuits in concluding that the BIA's reliance on a PSR in conducting the circumstance-specific approach does not render a removal proceeding fundamentally unfair.”). In *Hernandez-Zavala v. Lynch*, 806 F.3d 259, 266 (4th Cir. 2015), the Fourth Circuit extended *Nijhawan* to a crime of domestic violence as defined by 8 U.S.C. § 1227(a)(2)(E)(i).

<sup>94</sup> In the deportability ground involving a conviction relating to a controlled substance, Congress excluded those offenses related to possession of 30 grams or less of marijuana. 8 U.S.C. § 1227(a)(2)(B)(i) (2012).

<sup>95</sup> *Mellouli v. Lynch*, 135 S. Ct. 1980, 1983 (2015).

<sup>96</sup> *See id.* at 1985.

grams or less of marijuana, which was akin to an attendant circumstance. Supreme Court reversed in forceful language, contending that the BIA's *Nijhawan* interpretation "of the federal removal statute stretches to the breaking point," reaching generic offenses not at all intended to be circumstance specific.<sup>97</sup>

As the most glaring expansion, in 2008, Attorney General Michael Mukasey criticized the categorical approach when applied to crimes involving moral turpitude.<sup>98</sup> Because the categorical approach focused on elements of a crime and not the actual conduct, the Attorney General argued that the categorical approach — as devised in *Taylor* — inherently would not mete out removal in a measured manner. His proposal was to breach the elements-only inquiry and permit documents that were not even on the *Shepard* list to be relevant. His examples included police reports (even though they usually excluded as hearsay in federal courts) and when a crime involved a minor, the victim's birth certificates that were not even submitted at a criminal trial.<sup>99</sup> The Attorney General justified the departure from elements on the basis that the Sixth Amendment limitation on fact-finding does not apply in the immigration context.<sup>100</sup> By 2015, four circuits had overruled *Silva-Trevino* and two had endorsed the methodology.<sup>101</sup> In

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<sup>97</sup> *Id.* at 1990. In a footnote, the Supreme Court clarifies that *Nijhawan* should not have applied in this context because the 30 grams or less phrase is not a triggering attendant circumstance, noting "the provision at issue here, has no such circumstance-specific thrust; its language refers to crimes generically defined." *Id.* at 1986 n.3. On remand, the Eighth Circuit did not accept this decision, remanding the BIA to consider a related question again employing this methodology. See *Mellouli v. Lynch*, No. 12-3093, 2015 WL 4079087, at \*3 (8th Cir. July 6, 2015).

<sup>98</sup> *In re Silva-Trevino*, 24 I. & N. Dec. 687, 695 (U.S. Att'y Gen. 2008) (arguing that the CIMT's categorical analysis is under inclusive for looking only to what is the minimum conduct involved; such an approach prevents the IJ from removing individuals whose conduct met the CIMT but the statute of conviction does not).

<sup>99</sup> *Id.* at 699 ("[I]mmigration judges should be permitted to consider evidence beyond that record if doing so is necessary and appropriate to ensure proper application of the Act's moral turpitude provisions.") In resolving a question of a crime involving a minor, *Silva-Trevino* suggested that the immigration court look at the victim's birth certificate, regardless of that document was even admitted into the criminal trial. *Id.* at 709.

<sup>100</sup> *Id.* at 701 ("First, immigration proceedings 'are not criminal prosecutions, so the Sixth Amendment . . . [does] not come into play. Second, 'how much time the agency wants to devote to the resolution of particular issues is . . . a question for the agency itself rather than the judiciary.'" (internal citations omitted)).

<sup>101</sup> See *Olivas-Motta v. Holder*, 746 F.3d 907, 911-16 (9th Cir. 2013) (as amended April 1, 2014); *Bobadilla v. Holder*, 679 F.3d 1052, 1057 (8th Cir. 2012); *Prudencio v. Holder*, 669 F.3d 472, 480-84 (4th Cir. 2012); *Fajardo v. U.S. Att'y Gen.*, 659 F.3d 1303, 1307-11 (11th Cir. 2011); *Mata-Guerrero v. Holder*, 627 F.3d 256, 260 (7th



2015, Attorney General Loretta Lynch vacated *Silva-Trevino*, recognizing that the Supreme Court twice rejected attempts to expand the circumstance-specific approach into the drug contexts.<sup>102</sup>

Second, the most common error was simply utter and total confusion over how to interpret a state statute that did not match the generic definition of a crime but seemed to reach the generic crime. Before *Descamps*, federal courts had trouble ascertaining how to go about this. In *United States v. Aguila-Montes de Oca*,<sup>103</sup> a non-citizen who had been convicted under California's burglary statute was alleged to have committed an aggravated felony as a burglary offense. In his later federal conviction for entry after an aggravated felony, he was subjected to a ten-year sentencing enhancement on this basis. California defined burglary as having an element of "entry," without specifying if it was lawful or unlawful. The *Aguila-Montes* court agreed that under the categorical approach, the California statute was overbroad to generic burglary definition.<sup>104</sup> It then proceeded to the modified-categorical approach to examine whether the facts underlying Mr. Aguila-Montes's conviction evinced a lawful or unlawful entry.<sup>105</sup>

*Descamps* reversed *Aguila-Montes*, explaining that the California statute was indivisible and merited no further inquiry (and no consequences attached). Prior to *Descamps*, no other circuit had resolved that question so simply. When confronted with the issue, *Aguila-Montes* detailed its own complicated procedural history and the Ninth Circuit's ongoing struggle in devising various modifications to the approaches. "In the twenty years since *Taylor*, [the Ninth Circuit] ha[s] struggled to understand the contours of the Supreme Court's framework. Indeed, over the past decade, perhaps no other area of the law has demanded more of our resources."<sup>106</sup> In an attempt to reach resolution, the Ninth Circuit developed the "missing element" approach and the "modified-factual approach" tests that ultimately proved unwieldy as facts derived from a defendant's conduct were

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Cir. 2010); *Jean-Louis v. Att'y Gen. of U.S.*, 582 F.3d 462, 472-82 (3d Cir. 2009).

<sup>102</sup> See *In re Silva-Trevino*, 26 I. & N. Dec. 550, 552-53 (2015) (noting that both *Carachuri-Rosendo v. Holder*, 560 U.S. 563 (2010), and *Moncrieffe v. Holder*, 133 S. Ct. 1678 (2013), declined to apply the circumstance-specific approach past the *Nijhawan* context, which "cast doubt on the continued validity of the third step of the framework set out by Attorney General Mukasey's opinion").

<sup>103</sup> 655 F.3d 915 (9th Cir. 2011) (per curiam), *abrogated by* *Descamps v. United States*, 133 S. Ct. 2276 (2013).

<sup>104</sup> *Id.* at 943-44.

<sup>105</sup> *Id.* at 945-46.

<sup>106</sup> *Id.* at 917 (citing nine cases with differing applications of the framework).

haphazardly included or excluded from judicial inquiry.<sup>107</sup> The doctrinal confusion was not limited to the Ninth Circuit. Four circuits developed tests but could not explain how they were grounded in the Supreme Court precedent.<sup>108</sup> Two circuits simply always applied the modified categorical approach when faced with this issue.<sup>109</sup> Three others were ambiguous regarding when and how they examined criminal records for the defendant's conduct.<sup>110</sup>

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<sup>107</sup> See *id.* at 915, 943. In criticizing this practice, in *Descamps*, the Supreme Court noted that *Aguila-Montes* applied the modified categorical approach to § 459, but that other circuits were split on whether the modified categorical approach applies to statutes like § 459. *Descamps v. United States*, 133 S. Ct. 2276, 2282-83 (2013). Other circuits were uncertain as to the types of statutes to which the modified categorical approach would apply. Compare *United States v. Armstead*, 467 F.3d 943, 945-50 (6th Cir. 2006) (applying that approach to a similar, indivisible statute), with *United States v. Beardsley*, 691 F.3d 252, 268-74 (2d Cir. 2012) (holding that the modified categorical approach applies only to divisible statutes).

<sup>108</sup> See *United States v. Rivers*, 595 F.3d 558, 562-65 (4th Cir. 2010) (declining to apply the modified categorical approach to determine whether a state conviction for failure to stop for a blue light contained the element of criminal intent); *United States v. Lipscomb*, 619 F.3d 474, 491-92 (5th Cir. 2010) (limiting the modified categorical approach to cases involving “a statutory provision that covers several different generic crimes”); *United States v. Boaz*, 558 F.3d 800, 807-08 (8th Cir. 2009) (“Neither we nor the Supreme Court have approved a methodology that would decouple the limited review of record materials from an element-by-element analysis of the predicate offense.”); *United States v. Giggey*, 551 F.3d 27, 40 (1st Cir. 2008) (“Under the categorical approach, a federal sentencing court may not create a series of federal subcategorizations to fit the facts of a particular case.”).

<sup>109</sup> See *United States v. Townley*, 472 F.3d 1267, 1276-77 (10th Cir. 2007) (reaching a similar result on procedural grounds); *Armstead*, 467 F.3d at 947-48 (applying the modified categorical approach “[i]f the statutory definition embraces both violent and non-violent crimes or is otherwise ambiguous”).

<sup>110</sup> See *Oouch v. U.S. Dep’t of Homeland Sec.*, 633 F.3d 119, 122 (2d Cir. 2011) (noting that it “ha[s] not yet fixed on an approach for determining when a statute is . . . divisible”); *Jean-Louis v. Att’y Gen. of U.S.*, 582 F.3d 462, 467 (3d Cir. 2009) (suggesting that the modified categorical approach cannot be applied to a missing element but not disavowing contrary precedent); *Obasohan v. U.S. Att’y Gen.*, 479 F.3d 785, 788-90 (11th Cir. 2007) (applying the modified categorical approach without limitation).

## II. DESCAMPS' CLARITY AND RESULTING SOURCES OF CONFUSION

*The Supreme Court's recent decision in Descamps v. United States . . . which adopted the elements-versus-means distinction, is the source of much of the confusion. . . . [I]t dismissed the concern that "distinguishing between 'alternative elements' and 'alternative means' is difficult," telling us not "to worry."*

— Fourth Circuit Judge Niemeyer, concurring in *Omargharib v. Holder*<sup>111</sup>

*I will be the first to admit, though, that the correct reading of Descamps (and in particular its footnote 2) is open to debate . . . .*

— Ninth Circuit Judge Watford, concurring in *Almanza-Arenas v. Lynch*<sup>112</sup>

As illustrated in the above quotes, *Descamps* was not embraced as providing clarity in what is a highly technical field. The resulting circuit split was based on conflicting doctrinal interpretations of what in fact the decision meant. Some circuits understood *Descamps* to interpret criminal statutes by reference to state law sources; others accepted Justice Alito's criticism that "parsing state law" would result only in headache and confusion. The following section examines the disagreement between the *Descamps*' majority and minority, the ways by which *Descamps*' provided clarity to the prior problems outlined in Part I, and the nature of the resulting circuit split that predated *Mathis*.

A. *Descamps Removed Conduct and Provided a Clear Definition of Divisibility that Had Been Lacking*

Some federal judges, such as Judges Niemeyer and Judge Watford as quoted above criticized *Descamps* for being too confusing to apply. But, as illustrated in Part I, such criticisms overlook that in the pre-*Descamps*' era, the federal courts were rife with uncertainty and confusion over how to determine if ACCA or IIRIRA consequences applied. Before *Descamps*, federal courts had not developed consistent methodologies to figure out this question. Instead, the different circuits developed ad hoc methodologies — and some even gave up altogether — on how best to use facts or elements in determining if a particular statute was a match to its generic counterpart set forth in

<sup>111</sup> *Omargharib v. Holder*, 775 F.3d 192, 201 (4th Cir. 2014) (Niemeyer, J., concurring).

<sup>112</sup> *Almanza-Arenas v. Lynch*, 815 F.3d 469, 483 (9th Cir. 2016) (en banc) (Watford, J., concurring).

ACCA and IRRIRA. *Descamps* and *Mathis* clarified the answer to be never outside of circumstance-specific grounds. As set forth in the next few sections, this clarity has made a confusing field less so.

If a statute was overbroad, prior to *Descamps*, the puzzle of whether a prior conviction matched the ACCA or immigration ground was resolved at random. Although the various circuits did not agree on how to employ the modified-categorical approach, they did agree that it would be applied in some manner that took into account what the defendant did. If the person's conduct aligned with an element found in the generic offense, a match was found. The reason these courts proceeded to the modified-categorical approach was due mostly to the fact that there was no uniform definition of divisibility — neither between the circuits nor even within them. The 2009 *Lanferman v. Board of Immigration Appeals* decision is such an example.<sup>113</sup> In *Lanferman*, a lawful permanent resident had allegedly threatened his wife with a gun. After his arrest, he pled guilty to a misdemeanor offense of menacing in the second degree, in violation of New York Penal Law section 120.14. The United States Citizenship and Immigration Services (“USCIS”) charged him with a deportability offense relating to a conviction of a firearm offense.<sup>114</sup>

The difficulty in this case arose because the menacing statute had one subsection with three separate clauses — demarcated with an “or” — identifying how the statute could be violated.<sup>115</sup> The first part of the statute modified the actus reus with “by displaying a deadly weapon, dangerous instrument or what appears to be [types of guns]”; the second part modified the actus reus with placing a person in reasonable fear of physical injury; the third part was the knowing violation of protection order.<sup>116</sup> Because the first part involved firearms and the last two did not, this statute presented the conundrum to the Court on whether Mr. Lanferman was convicted of an offense that met the definition of a generic firearms offense.

The Second Circuit was at a loss on how to proceed with this statute. It outlined three possible means to divine divisibility: first by

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<sup>113</sup> See *Lanferman v. Bd. of Immigration Appeals*, 576 F.3d 84, 91 (2d Cir. 2009).

<sup>114</sup> See 8 U.S.C. § 1227(a)(2)(C) (2008) (“Any alien who at any time after admission is convicted under any law of purchasing, selling, offering for sale, exchanging, using, owning, possessing, or carrying, or of attempting or conspiring to purchase, sell, offer for sale, exchange, use, own, possess, or carry, any weapon, part, or accessory which is a firearm or destructive device (as defined in section 921(a) of title 18) in violation of any law is deportable.”).

<sup>115</sup> N.Y. PENAL LAW § 120.14(1) (2016).

<sup>116</sup> *Id.* § 120.14.

whether the statute used disjunctives or subsections to demarcate the non-removable conduct from removable conduct; second by when the use of “or” in a statute “expresses such a specificity of fact that it almost begs an adjudicator to examine the facts at issue,” and third looking at the elements alone.<sup>117</sup> (The last one was ultimately adopted in *Descamps*.) The Second Circuit did not resolve this question in 2009, electing instead to remand the issue to the BIA. Even two years later when the same issue came up in a different case, the Second Circuit again punted by explaining that it “ha[d] not yet fixed on an approach for determining when a statute is thus divisible.”<sup>118</sup> It was not alone. The Ninth Circuit, like others, was also shifting in devising its only divisibility test. By 2012, the Ninth Circuit’s defined a divisible statute as one expressly listing a finite list of how it can be violated and an indivisible one as having an implied list, which the Courts would figure out on their own.<sup>119</sup>

The significance of the conflict illustrated in the Second Circuit’s and Ninth Circuit’s case law is that it underscores that two of *Descamps*’ greatest contributions was clarifying that divisibility has a set meaning and that it is the second step of the three-step doctrinal framework.

Starting with the latter, *Descamps* clarified that divisibility was its own step. If a statute was indivisible, the inquiry ended and the modified categorical approach “has no role to play.”<sup>120</sup> It cannot be overstated how significant this announcement was. Prior to *Descamps*, the Ninth Circuit admitted that this conception of divisibility and its usage in the analytic framework was “absent from our jurisprudence.”<sup>121</sup>

As to the actual definition, a divisible statute was newly defined as one that could be met when a person violates the statute through different elements and an indivisible one was met by violating it through different means.<sup>122</sup> Put another way, a divisible statute is one that creates several different crimes. An indivisible statute, by contrast,

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<sup>117</sup> *Lanferman*, 576 F.3d at 90 (citations and internal quotation marks omitted).

<sup>118</sup> *Oouch v. U.S. Dep’t of Homeland Sec.*, 633 F.3d 119, 122 (2d Cir. 2011) (“We have not yet fixed on an approach for determining when a statute is thus divisible.”).

<sup>119</sup> *United States v. Aguila-Montes de Oca*, 655 F.3d 915, 927 (9th Cir. 2011) (per curiam).

<sup>120</sup> *Descamps v. United States*, 133 S. Ct. 2276, 2285 (2013) (citing *Nijhawan v. Holder*, 557 U.S. 29, 41 (2009)).

<sup>121</sup> *Lopez-Valencia v. Lynch*, 798 F.3d 863, 868 (9th Cir. 2015).

<sup>122</sup> *Descamps*, 133 S. Ct. at 2291.

simply enumerates the different manners by which a singular crime can be committed.

To make this concrete, returning to *Lanferman*, the statute at issue as it is written very much appears to be indivisible in that the crime of “menacing” is accomplished through three different types of actus reus that are set forth in the alternative as mutually independent means of violating the statute. Because all of the separate means are listed under a singular subsection, it appears that a violation of the generic statute cannot be further broken down to ascertain what precise means are in an actual conviction. This is significant because the fact that Mr. Lanferman used a gun against his wife is now immaterial. Whereas the courts previously looked at the conduct first to turn a conviction into a firearm offense because a gun was involved in the crime, *Descamps* demanded that the statute’s elements be examined without regard to specific facts. This change cannot be understated.

Prior to *Descamps*, the courts erred in turning a number of offenses into ACCA and IIRIRA grounds that the state statute did not actually meet. As criticized by Justice Kagan, with unlimited “imagination” courts were rewriting old convictions into convictions that met the ACCA or IIRIRA ground. Such an error was critical because after *Padilla v. Kentucky*, defense counsel was advised to negotiate for a charged crime that would be without consequences.<sup>123</sup> For courts to then turn New York’s menacing statute — one where guns were not a part of every element — into a firearms offense was attaching many more ACCA and IIRIRA consequences than what the statutes themselves demanded. If New York’s statute had been rewritten into three clear subsections that created three separate crimes defined as using a gun, stalking, and violating a protective, the statute would be divisible and the modified categorical approach could assist in identifying which subsection was the subject of the conviction. That methodology, however, was used first, whereas *Descamps* reserved it only for divisible statutes.

Unlike the pre-*Descamps* landscape, the focus of the current modified categorical approach is on the construction of the statute and not on any conduct committed by the person. Even in circuits that used the textual approach that was rejected in *Mathis*, the courts often recognized that *Descamps* was a sea change. In 2015, the Eighth

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<sup>123</sup> See generally *Seeking Post-Conviction Relief Under Padilla v. Kentucky after Chaidez v. U.S., IMMIGRANT DEF. PROJECT* (Feb. 28, 2013), <http://immigrantdefenseproject.org/wp-content/uploads/2013/03/Chaidez-advisory-FINAL-201302281.pdf>.

Circuit found a Minnesota obstruction of justice statute divisible because the enumerated actus reus could be achieved by physical force (meeting the definition of a crime of violence) and “resistance,” which did not involve violence because that actus reus could be met when a person curled up in the fetal position as a form of civil disobedience.<sup>124</sup> In *Ortiz*, the court used the textual approach (after *Mathis*, erroneously) to find the statute divisible. However, when proceeding to the modified categorical approach, the *Ortiz* case focused only on the conviction documents. When the records identify any statutory subsection that encompassed just the removable conduct, *Ortiz* held there was no match and no consequences attached. In this respect, even under the rebuked textual approach, an error made at the divisibility stage was corrected when courts narrowed the modified categorical approach as directed by *Descamps*.<sup>125</sup>

*Descamps* thus did provide clarity that was missing in this doctrinal area. It provided a clear definition of divisibility and carved out a clear second step to what had been simply the categorical and modified categorical approaches. As much as confusion did remain (as discussed below), that confusion pales in comparison to the pre-*Descamps* landscape when courts did not have a consistent and lasting definition of what a divisible statute was.

As explained later, the significance of focusing on the elements of statute instead of the underlying conduct was that ACCA and IIRIRA consequences are less likely to attach.<sup>126</sup> This means that fewer people are subjected to longer prison sentences and fewer non-citizens are deportable. Before examining that aspect of the doctrine, it is useful to see how *Mathis* resolved the circuit split that arose after *Descamps*.

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<sup>124</sup> *Ortiz v. Lynch*, 796 F.3d 932, 935-36 (8th Cir. 2015) (holding MINN. STAT. § 609.50 divisible). But this appears wrong. Under *Mathis*, the statute appears indivisible because the different actus reus are within a singular subsection and no other part of state law suggests that a jury must agree which conduct was involved in the crime.

<sup>125</sup> But the correction did not always occur. As directed by *Descamps*, when a statute is indivisible, the records are not looked at, which means that if someone’s record identifies removable conduct the courts never should have relied on it when properly applying the divisibility analysis. Not all cases followed *Descamps* as faithfully as *Ortiz* did. The Eighth Circuit decision underlying the Supreme Court *Mathis* decision relied on conduct at the modified categorical approach stage too by relying on the information’s allegation of a garage to (erroneously) hold that the defendant was convicted of the subsection involving a building that met the generic burglary definition. See *United States v. Mathis*, 786 F.3d 1068, 1075 (8th Cir. 2015).

<sup>126</sup> See *infra* Part III.F.

B. *The Rise of the Elements/Meaning Circuit Split*

As much as I argue *Descamps* ushered in clarity by asserting a meaningful definition of divisibility, the decision was not embraced as a panacea. To the contrary, the first questions for federal courts were what exactly is the difference between an element and mean and how would the courts know the difference. Returning to the quotes at the beginning of this Part, federal judges wrote pointed criticisms in concurrences and dissents, lamenting that the *Descamps* Court had yet to offer the keys to the code.<sup>127</sup>

The grumblings grew into a circuit split as judges debated what exactly *Descamps* meant. Justice Alito appears to have successfully cast doubt over the scope of *Descamps* in his dissent. He began by clarifying that an element is something that the jury agrees on.<sup>128</sup> Although elements generally are stated in a text, courts have at times construed unmentioned elements in subsequent cases. Justice Alito continued to argue that knowing what is a means versus an element is a much more difficult proposition. In a Michigan statute not mentioned in the case, Justice Alito illustrated that the layers of complexity are many, requiring that a court can only ascertain what part of the statute is an element by looking to charging documents and other criminal record documents. In the course of demonstrating the difficulty, he cited to various states' procedures that arrived at different results relying on different documents as evidence of an element. After establishing that there is no one method that all states follow, Justice Alito refutes the majority's confidence by arguing that cases giving meaning to jury instructions do "not arise frequently."<sup>129</sup>

In footnote 2, the majority opinion responded to Justice Alito's criticisms by refuting the notion that the difference between knowing ends and means is a "difficult" one to divine.<sup>130</sup> The majority argued that as a practical matter, the *Shepard* documents will "reflect the crime's elements."<sup>131</sup> Post-*Descamps*, the Ninth Circuit and Fourth Circuit followed this directive and relied on jury instructions and state cases that interpreted them. However, the footnote continued by assuring the readers that "a court need not parse state law in the way the dissent suggests: When a state law is drafted in the alternative, the court merely resorts to the approved documents and compares the

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<sup>127</sup> See *supra* notes 24–25 and accompanying text.

<sup>128</sup> *Descamps v. United States*, 133 S. Ct. 2276, 2296 (2013) (Alito, J., dissenting).

<sup>129</sup> *Id.* at 2302.

<sup>130</sup> *Id.* at 2285 n.2 (majority opinion).

<sup>131</sup> *Id.*



elements revealed there to those of the generic offense.”<sup>132</sup> It is this warning against parsing state law that the majority of circuits, led by the Eighth Circuit, relied upon when arguing that one need only look at the statute’s text to determine what elements are set forth in the statute.

To illustrate the circuit split, in *Lopez-Valencia v. Lynch*, the Ninth Circuit reasoned that California’s theft statute was overbroad because the offense criminalized larceny (meeting the generic definition of theft) and fraud, theft of labor, and false credit reporting (outside of the generic definition of theft).<sup>133</sup> On the divisibility question, California jury instructions and California Supreme Court cases were “unequivocal[]” in explaining that although jurors must agree that the defendant committed some form of theft enumerated in the statute, they do not need to agree on which one.<sup>134</sup> Relying on state law as authority, the statute was held indivisible. The Fourth Circuit joined the Ninth Circuit in contending that this is the method that *Descamps* intended for federal courts to use to divine divisibility.<sup>135</sup>

The majority of circuits departed from the majority in *Descamps* and followed the advice of Justice Alito’s dissent to employ a broader modified categorical approach to ascertain “what the jury in that case necessarily found or what the defendant, in pleading guilty, necessarily admitted . . . .”<sup>136</sup> *Descamps* was an 8–1 decision, but Justice Alito’s dissent received much attention for its criticism that state law does not hold clear answers.

The counter-textual approach was adopted by the majority of circuits, notably the Tenth, Eighth, Seventh, Sixth, and First Circuits.<sup>137</sup> In *United States v. Ozier*, a Tennessee burglary statute had

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<sup>132</sup> *Id.*

<sup>133</sup> *Lopez-Valencia v. Lynch*, 798 F.3d 863, 868 (9th Cir. 2015).

<sup>134</sup> *Id.* at 869.

<sup>135</sup> *Omargharib v. Holder*, 775 F.3d 192, 198-99 (4th Cir. 2014) (“As we have previously held, however, use of the word ‘or’ in the definition of a crime does not automatically render the crime divisible. . . . Elements, as distinguished from means, are factual circumstances of the offense the jury must find ‘unanimously and beyond a reasonable doubt.’ In analyzing this distinction, we must consider how Virginia courts generally instruct juries with respect to larceny.” (citations omitted) (citing *Rendon v. Holder*, 764 F.3d 1077, 1086-87 (9th Cir. 2014), to support the reliance on state law in the divisibility inquiry)).

<sup>136</sup> *Descamps*, 133 S. Ct. at 2300 (Alito, J., dissenting).

<sup>137</sup> See *United States v. Mathis*, 786 F.3d 1068, 1074-75 (8th Cir. 2015); *United States v. Rodriguez*, 768 F.3d 1270, 1273-74 (10th Cir. 2014); *United States v. Carter*, 752 F.3d 8, 17-18 (1st Cir. 2014); *United States v. Mitchell*, 743 F.3d 1054, 1065-66 (6th Cir. 2014); *United States v. Clinton*, 591 F.3d 968, 972-73 (7th Cir. 2010).

four distinct elements defining how burglary is committed, and in relevant part, had a separate definition statute defining “habitation” in three separate subsections.<sup>138</sup> The Sixth Circuit recognized that the third subsection of habitation was overbroad to the generic burglary offense in that it criminalized the burglary of tool sheds and outhouses. The Sixth Circuit nonetheless reasoned that the burglary statute was divisible and the overbreadth of habitation was immaterial because state law was not relevant. In supporting this reasoning (which was abrogated in *Mathis*), the Sixth Circuit quoted blocks of Justice Alito’s dissent for the contention that “*Descamps* expressly rejected defendant’s finite parsing of state law as to the difference between ‘means’ and ‘elements’ . . . .”<sup>139</sup>

*Mathis* resolved the split by affirming the reference to state law to parse out what is an element in a divisible statute and a means in an indivisible one. In the next Part, I look at how difficult the state law and textual approaches were to apply in practice. I also posit that the decisions’ emphasis on simplicity is not in fact relevant to “real world” considerations.

### III. *MATHIS* AND *DESCAMPS* ARE QUIETLY ENDING ACCA’S LENGTHY SENTENCES AND CRIME-BASED DEPORTATION

As set forth in Part II, *Descamps* was not embraced as providing clarity to what is a highly technical field. In this Part, I look at actual cases to determine if those criticisms bore out in practice. A comparison of cases before and after *Descamps*, and a comparison between those that used the *Descamps* majority and dissenting approaches, yields interesting results. As a doctrinal matter, Justice Kagan was correct in asserting that *Descamps*’ approach is more consistent and workable compared not just to pre-*Descamps* case law but to the textual approach that *Mathis* refuted. As a practical matter, the result is that fewer criminal convictions serve as predicate crimes to ACCA and IIRIRA’s consequences. As a normative matter, prosecutors and judges are accepting, and even welcoming, this change. I argue that reducing crime-based deportation is also a normatively valuable result.

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<sup>138</sup> See *United States v. Ozier*, 796 F.3d 597, 600 (6th Cir. 2015) (citing Tennessee statute).

<sup>139</sup> *Id.* at 602-03.

A. *In the “Real World,” the Competing Approaches Resulted in Courts More Easily Ascertaining Elements and Means Under State Law*

*Mathis* resolved the circuit split by contending that the Fourth Circuit and Ninth Circuit approach was the correct one — that the answer to whether a statute lists elements or means is found in state law and not simply the text of a statute. If the answer was not immediately known by reading jury instructions, then state cases and other parts of state criminal procedure provided answers.

What is interesting is that in a dispute between the *Mathis* majority (again authored by Justice Kagan) and Justice Alito’s dissenting opinion, both asserted that their methodology was the easier one in the “real world.” Whereas in *Descamps*, Justice Alito noted that “[d]etermining whether a statute is divisible will often be harder than the Court acknowledges,”<sup>140</sup> in *Mathis*, Justice Alito escalated his attacks. He noted that he had “warned that [Descamps’ divisibility inquiry is a] novel inquiry that would prove to be difficult.”<sup>141</sup> He then cited to an en banc denial from the Ninth Circuit in which eight judges wrote separately. He addressed federal courts tasked with applying *Mathis* with “I wish them good luck,”<sup>142</sup> and then continued with his critique that “[i]n the real world,” the easy cases will be hard to find.<sup>143</sup>

Justice Kagan continued the same tone that she adopted in *Descamps*, asserting that applying *Descamps* (and now *Mathis*) was “a straightforward case.”<sup>144</sup> Like Alito, she too doubled-down from the assertions of workability that she made in *Descamps*. In *Descamps*, Justice Kagan had argued that the elements-only approach was “long recognized” in precedent, that the contrary approach in *Aguila-Montes* was against clear Congressional intent, and it reached that result by “flout[ing]” Supreme Court precedent.<sup>145</sup> In *Mathis*, the majority responded to Justice Alito’s “criticisms” with equal certainty that the elements or means methodology, announced in *Descamps* and affirmed in *Mathis*, is “easy in this case, as it will be in many others.”<sup>146</sup>

Despite recognizing the “real world” and using its workability as a defense to their respective decisions’ legal reasoning, neither Justice

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<sup>140</sup> *Descamps*, 133 S. Ct. at 2301 (Alito, J., dissenting).

<sup>141</sup> *Mathis v. United States*, 136 S. Ct. 2243, 2268 (2016) (Alito, J., dissenting).

<sup>142</sup> *Id.*

<sup>143</sup> *Id.*

<sup>144</sup> *See id.* at 2257.

<sup>145</sup> *Descamps*, 133 S. Ct. at 2287-88.

<sup>146</sup> *Mathis*, 136 S. Ct. at 2268.

Kagan nor Justice Alito actually attempted to quantify their assertions. This article then starts with an attempt to do just that.

As it turns out, in the two-year period between *Descamps* and *Mathis*, the circuits that used either state law or textual analysis were able to reach their conclusions with relative ease. To compare the contrasting approaches to divisibility, I look at two of the federal circuits that produced roughly the same number of decisions during that time — the Fourth Circuit and the Eighth Circuit — which employed the contrasting approaches to divisibility. What is interesting is that the Eighth Circuit approach — the one predicted to be more simple — was actually not. Although the sample size is small, the similarities and differences are notable.

Before discussing the result of this survey, it is important to note the methodology, value, and limitation of this comparison. Only two circuits — the Fourth Circuit and the Ninth Circuit — were available to use to compare how the divisibility approach ultimately adopted in *Mathis* was working. The Ninth Circuit is a difficult circuit to use in any comparison because, based on 2015 statistics, it alone adjudicates 48.70% of the nation's immigration cases.<sup>147</sup> The second highest circuit is the Second Circuit, which decides 15.2% of the nation's immigration cases. Indeed, during the two-year window at issue, the Ninth Circuit issued over sixty published cases relating to the application of *Descamps*. By contrast, the Fourth Circuit adjudicates 5.8% of the nation's immigration cases and the Eighth Circuit adjudicates 2.4%, which is makes their caseload — with respect to immigration cases — fairly comparable.<sup>148</sup>

The most immediate concern in comparing circuits is whether the results reflect a political bias rather than non-partisan information. Critics may assume that a comparison between the Fourth Circuit — comprised of fifteen active judges of whom nine were appointed by Democratic presidents — and the Eighth Circuit — comprised of nine active judges of whom eight were appointed by Republican presidents — will only reveal political preferences.<sup>149</sup> But such assumptions are

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<sup>147</sup> See David North, *Immigration, the Courts, and Statistics*, CTR. FOR IMMIGR. STUD. (Mar. 4, 2016), <http://cis.org/north/immigration-courts-and-statistics> (citing statistics published by *Immigration Law Advisor*, U.S. DEPT JUST. (Jan. 2016), [https://www.justice.gov/sites/default/files/pages/attachments/2016/02/02/vol10no1\\_final.pdf](https://www.justice.gov/sites/default/files/pages/attachments/2016/02/02/vol10no1_final.pdf)).

<sup>148</sup> See *id.*

<sup>149</sup> *Compare Judges of the Fourth Circuit, Since 1801*, U.S. CT. APPEALS FOR FOURTH CIR., <http://www.ca4.uscourts.gov/docs/pdfs/historyjudges.pdf> (last visited Mar. 24, 2017) (list of Fourth Circuit judges by appointment), with *Active and Senior Judges*, U.S. CT. APPEALS FOR EIGHTH CIR., <http://www.ca8.uscourts.gov/active-and-senior>

belied by the fact that both the Fourth Circuit and Eighth Circuit defy ideological predictions when adjudicating general immigration cases. Both circuits are in the bottom three circuits that grant relief to non-citizens. From 2015, when comparing the rates of deciding a case in favor of a non-citizen, the Seventh Circuit was the most favorable forum (ranked first) granting 25% of its claims, and the Fifth Circuit (ranked eleventh) was the least favorable forum, granting 2.5% of the claims presented to it. The mean for all eleven federal circuits is 10.8%. The Fourth Circuit was ranked ninth with a 6.3% grant rate and the Eighth Circuit was tenth with a 4.3% grant rate. In this respect, when it comes to adjudicating general immigration cases, both circuits are predisposed towards denying 94% and 96% of the cases that come before it.<sup>150</sup>

Given their circuits' strong predisposition towards denying claims arising from immigration cases, the following findings that show a significantly higher grant rate among cases involving non-citizens with criminal convictions is a departure from their adjudications of these cases. The comparison between circuits is valuable, but an equally, if not more, important insight is the intra-circuit comparisons in which both circuits that start with a low adjudication rate reach consensus in reaching significantly higher favorable adjudication rates for non-citizens with criminal convictions.

A final concern in comparing circuits is why published and not unpublished cases are used. For all cases decided after January 1, 2007, the Federal Rules of Appellate Procedure permits litigants to cite to unpublished decisions "for its persuasive value or for any other reason."<sup>151</sup> However, not all federal courts vet unpublished cases with the same procedures used for published decisions. For instance, whereas judges in the Third Circuit circulate drafts of published decisions to all judges to permit comment or request en banc review, it does not for unpublished decisions.<sup>152</sup> My survey then just focuses on

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judges (last visited Mar. 24, 2017) (list of Eighth Circuit judges).

<sup>150</sup> North, *supra* note 147. By comparison, from 2015, the other Circuits were in order of grant rate are Seventh Circuit (25%), Ninth Circuit (18.1%), Tenth Circuit (16.4%), First Circuit (13.9%), Third Circuit (11.1%), Eleventh Circuit (8.5%), Second Circuit (6.9%), Sixth Circuit (6.9%), Fourth Circuit (6.3%), Eighth Circuit (4.3%), Fifth Circuit (2.5%). *Id.*

<sup>151</sup> FED. R. APP. P. 32.1 (advisory committee's notes to 2006 amendment).

<sup>152</sup> See Daniel Schlein, *Rethinking the Role of Unpublished Authority*, 2013 N.J. LAW. 59, 62 ("The Third Circuit, by tradition and internal rule, does not cite to its own unpublished opinions as authority on the basis that they are not distributed to the full court for review and comment before filing. In contrast, a precedential opinion circulates to all members of the court for eight days before it is filed, allowing active

published decisions out of the belief that they are better reflections of reasoning employed by the whole court.<sup>153</sup>

Turning to the comparison with these recognized limitations, the Fourth Circuit followed the approach relying on state law to determine the meaning of whether the statute described elements or means. In the Fourth Circuit, there were eleven published decisions between 2013 and 2015 that addressed whether a state or federal law was divisible. Of those cases, six were reached without any disagreement among the three judges regarding the proper outcome of the divisibility analysis.<sup>154</sup> This is true even though these decisions were made by panels compromised of both Republican and Democratic appointees.<sup>155</sup> Another five decisions were reached with a concurring opinion on a different matter.<sup>156</sup>

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judges who were not on the panel hearing the case to make comments or request an *en banc* hearing if ‘a judge believes that the issue requires the consideration of and determination by the full court.’”).

<sup>153</sup> Some scholars have suggested that some judges make the decision to publish or not publish a case out of ideological or political reasons. See David S. Law, *Strategic Judicial Lawmaking: Ideology, Publication, and Asylum Law in the Ninth Circuit*, 73 U. CIN. L. REV. 817, 820 (2005) (“The results suggest that voting and publication are, for some judges, strategically intertwined: for example, judges may be prepared to acquiesce in decisions that run contrary to their own preferences, and to vote with the majority, as long as the decision remains unpublished, but can be driven to dissent if the majority insists upon publication.”). Even if that were true, focusing on published cases then is a further means to ensure that the published cases capture the mood of the court and not just the preferences of a judge as suggested by Professor Law.

<sup>154</sup> *United States v. Barcenas-Yanez*, 826 F.3d 752, 754 (4th Cir. 2016) (Texas aggravated assault crime is indivisible); *United States v. Gardner*, 823 F.3d 793, 802-03 (4th Cir. 2016) (North Carolina robbery statute is indivisible); *United States v. Berry*, 814 F.3d 192, 200 (4th Cir. 2016) (New Jersey child endangerment statute is divisible); *Castillo v. Holder*, 776 F.3d 262, 270 n.7 (4th Cir. 2015) (Virginia theft statute is overbroad and indivisible); *United States v. Royal*, 731 F.3d 333, 340-41 (4th Cir. 2013) (Maryland second-degree assault conviction is indivisible statute); *United States v. Cabrera-Umanzor*, 728 F.3d 347, 350 (4th Cir. 2013) (Maryland’s child abuse statute is indivisible).

<sup>155</sup> Of the eleven cases, only one was decided by a panel of appointees from only one party. See *Barcenas-Yanez*, 826 F.3d at 754 (heard by two judges appointed by President Obama and one appointed by President Clinton); U.S. CT. APPEALS FOR FOURTH CIR., *supra* note 149.

<sup>156</sup> See *United States v. Faulls*, 821 F.3d 502, 514 (4th Cir. 2016) (federal “offense of interstate domestic violence” is divisible for ACCA purposes). Concurring opinion raised policy concerns over the result of *Descamps*’ methodology that “we do not consider what the individual to be sentenced has actually done, but the most lenient conduct punished by his statute of conviction.” *Id.* at 516 (Shedd, J., concurring); *United States v. Vinson*, 805 F.3d 120, 125 (4th Cir. 2015) (*en banc*) (resolving the earlier disagreement over whether North Carolina assault statute is not a triggering offense under ACCA, by resorting to the categorical approach. “Assuming without

The Fourth Circuit thus did not have a single disagreement over the meaning of whether state law resolved the question of divisibility, which comports with Justice Kagan's pronouncement in *Mathis* that most cases will be readily resolvable.

By contrast, the Eighth Circuit employed the textual analysis, the approach heralded as the simplest, given that the text should resolve most matters. The Fourth Circuit had fourteen published cases in the relevant two-year period that addressed divisibility. There were eleven cases that had no disagreement among the judges.<sup>157</sup> Among these unanimous decisions, four were by panels where all three judges were

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deciding that the assault formulations amount to alternate elements creating separate forms of the offense, none of the forms of the offense require the level of intent necessary to qualify as an MCDV."); *Omargharib v. Holder*, 775 F.3d 192, 194 (4th Cir. 2014) (Virginia crime of larceny is indivisible). The concurrence agreed that precedent reached that result but advocated for using Justice Alito's more expansive modified categorical approach. "Were the Supreme Court willing to take another look at this area of law, it might well be persuaded, when focusing on the goals of the categorical approach, to simply allow lower courts to consider *Shepard* documents in any case where they could assist in determining whether the defendant was convicted of a generic qualifying crime." *Id.* at 202 (Niemeyer, J., concurring); *United States v. Montes-Flores*, 736 F.3d 357, 368 (4th Cir. 2013) (the South Carolina common law crime of violent injury was indivisible). Judge Shedd wrote a dissenting opinion relating to harmless error and did not take issue with the divisibility analysis of the majority. In *United States v. Carthorne*, 726 F.3d 503, 512 (4th Cir. 2013) (Maryland's assault and battery of a police officer is divisible), the concurring and dissenting judge took issue with the Court's failure to take up a sentencing error as meeting the plain error standard. Of note, the judge criticized the "prison-industrial complex" that reaches lengthy sentences from absurd results, such as this case in which a teenager spit on a police officer and received twenty-five years in prison for that conduct. See *id.* at 523-24 (Davis, J., concurring and dissenting).

<sup>157</sup> *Alonzo v. Lynch*, 821 F.3d 951, 962 (8th Cir. 2016) (Iowa's assault statute is divisible as a CIMT); *United States v. Garcia-Longoria*, 819 F.3d 1063, 1067 (8th Cir. 2016) (Neb. Rev. Stat. § 28-931(1) is divisible and modified categorical approach resolves issue); *Kelly v. United States*, 819 F.3d 1044, 1050 (8th Cir. 2016) (Iowa's assault statute is textually divisible as an ACCA crime of violence); *United States v. Shockley*, 816 F.3d 1058, 1062 (8th Cir. 2016) (Missouri's resisting arrest statute is divisible); *United States v. Boman*, 810 F.3d 534, 542 (8th Cir. 2016) (a maritime assault conviction is divisible "because the bases for his conviction were separated by the disjunctive 'or'"); *Ortiz v. Lynch*, 796 F.3d 932, 936 (8th Cir. 2015) (Minnesota obstruction statute is divisible); *United States v. Patrie*, 794 F.3d 998, 1003 (8th Cir. 2015) (Iowa burglary statute divisible), *vacated*, 136 S. Ct. 2539 (2016); *United States v. Mathis*, 786 F.3d 1068, 1074-75 (8th Cir. 2015) (Iowa burglary statute divisible), *rev'd*, 136 S. Ct. 2243 (2016); *United States v. Thornton*, 766 F.3d 875, 877 (8th Cir. 2014) (Kansas burglary statute is divisible); *United States v. Martinez*, 756 F.3d 1092, 1097-98 (8th Cir. 2014) (Arizona weapons misuse statute is divisible and modified categorical approach does not permit conduct in information to render it a match); *United States v. Pate*, 754 F.3d 550, 554-56 (8th Cir. 2014) (Minnesota offense fleeing from police statute is divisible).

appointed by Republican presidents and seven were by panels where the judges were appointed by both Republican and Democratic Presidents. There was also one case in which the judge concurred with the divisibility analysis but raised policy objections to *Descamps*.<sup>158</sup> The majority of cases were then as Justice Alito predicted — if assuming that unanimity reflects agreement — easy to resolve.

However, the Eighth Circuit did have two split decisions. In one case, the dissenting judge actually did disagree with the majority's analysis rendering the statute divisible.<sup>159</sup> The dissenting judge looked to Minnesota court cases to establish that the plain meaning of the statute had a different interpretation in practice. This dissenting judge is the sole judge appointed by a Democratic President who sits on the circuit with nine active judges.<sup>160</sup> In the second case, which was an en banc decision, the concurring judge concurred with the divisibility analysis but raised concerns over its application to ACCA's residual clause, a point that the Supreme Court later recognized in *Johnson v. United States*.<sup>161</sup> This judge was a Republican appointee.

Despite Justice Alito's warning that looking to state law would be an endless morass, the Fourth Circuit and Ninth Circuit showed that the state law methodology has provided consistency in the decisions, no disagreement among judges on the panel, no notable political differences were part of the decision-making process, and clarity in state law interpretation of criminal statutes.<sup>162</sup> But as explored later,

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<sup>158</sup> *United States v. Bankhead*, 746 F.3d 323, 326 (8th Cir. 2014) (Illinois dangerous weapons statute indivisible). In a concurrence, Judge Loken did not elaborate on why he felt bound by *Descamps* and what his policy disagreement with the case law was. *See id.* at 327 (Loken, J., concurring).

<sup>159</sup> *See Avendano v. Holder*, 770 F.3d 731, 734 (8th Cir. 2014) (Kelly, J., concurring and dissenting). Judge Kelly disagreed about the divisibility analysis and cited to Minnesota state law that ran counter, and gave context to, the text of the statute. The majority and dissent ultimately disagreed over whether Minnesota's statute for terroristic threats was divisible as a CIMT. Judge Kelly was appointed by President Obama and the other two judges were appointed by President George W. Bush.

<sup>160</sup> *See U.S. CT. APPEALS FOR EIGHTH CIR.*, *supra* note 149.

<sup>161</sup> *Johnson v. United States*, 135 S. Ct. 2551, 2554 (2015) (residual clause void for vagueness). In what turned to be a prescient concurrence, Judge Loken predicted the vagueness defect later announced in *Johnson*. *See United States v. Tucker*, 740 F.3d 1177, 1184-87 (8th Cir. 2014) (en banc) (Loken, J., concurring) (subsection of Nebraska escape statute is indivisible). President George H.W. Bush appointed Judge Loken to the bench.

<sup>162</sup> The Ninth Circuit was the only other Circuit to look to state law to determine divisibility. In the same time frame, the Ninth Circuit published over 60 cases involving divisibility. From a random sample, the agreement among the judges is also found here. Due to the lack of a comparably sized circuit that employed the disjunctive test, culling those results does not appear to add much to the simplicity



the value of simplicity in the *Descamps/Mathis* doctrinal methodology is not a meaningful means to assess whether there are dire collateral consequences to criminal convictions.<sup>163</sup>

*B. The Meaningful Difference Between the Approaches Lies in the Elimination of Collateral Consequences*

As stated above, there was not much difference in the different circuits' ability to interpret a criminal statute under either the state law or textual approaches. Despite the centrality that "simplicity" had in the debate between Justice Kagan and Justice Alito, under either approach, the federal judges were able to reach consensus on which parts of a criminal statute are its elements and which ones are its means. Simplicity did not bear out as a lasting concern after *Descamps*. But, there is a very meaningful distinction in what happened when the circuits applied those different approaches.

The Eighth Circuit textual approach resulted in just over half of its statutes no longer having ACCA or IRRIRA consequences. Specifically, the rates were eight cases divisible with consequences (57%),<sup>164</sup> four divisible without consequences (29%),<sup>165</sup> and two cases that were indivisible without consequences (14%).<sup>166</sup>

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question.

<sup>163</sup> See *infra* Part III.C.

<sup>164</sup> *United States v. Garcia-Longoria*, 819 F.3d 1063, 1067 (8th Cir. 2016) (Neb. Rev. Stat. § 28-931(1) is divisible and a match under modified categorical approach); *Alonzo v. Lynch*, 821 F.3d 951, 963 (8th Cir. 2016) (Iowa's assault statute is divisible as a CIMT and remanded to determine if it is a match); *Kelly v. United States*, 819 F.3d 1044, 1050-51 (8th Cir. 2016) (Iowa's assault statute is textually divisible and a match); *United States v. Boman*, 810 F.3d 534, 542 (8th Cir. 2016) (a maritime assault conviction is a match); *United States v. Patrie*, 794 F.3d 998, 1003 (8th Cir. 2015) (Iowa burglary statute divisible and a match); *United States v. Mathis*, 786 F.3d 1068, 1074 (8th Cir. 2015) (Iowa burglary statute divisible and a match), *rev'd*, 136 S. Ct. 2243 (2016); *Avendano*, 770 F.3d at 736 (Minnesota's statute for terroristic threats was a CIMT based on conduct in crime); *United States v. Pate*, 754 F.3d 550, 554 (8th Cir. 2014) (Minnesota fleeing from police statute is an ACCA crime of violence under 16(b)).

<sup>165</sup> See *United States v. Shockley*, 816 F.3d 1058, 1062-63 (8th Cir. 2016) (insufficient evidence to establish match to resisting arrest); *Ortiz v. Lynch*, 796 F.3d 932, 938 (8th Cir. 2015) (obstruction statute divisible but not a match); *United States v. Thornton*, 766 F.3d 875, 879 (8th Cir. 2014) (Kansas burglary statute divisible but not a match); *United States v. Martinez*, 756 F.3d 1092, 1098 (8th Cir. 2014) (Arizona weapons misuse statute is divisible not a match); *Pate*, 754 F.3d at 554 (Minnesota fleeing from police statute is divisible).

<sup>166</sup> See *United States v. Bankhead*, 746 F.3d 323, 326-27 (8th Cir. 2014) (Illinois dangerous weapons statute indivisible); *Tucker*, 740 F.3d at 1181 (subsection of Nebraska escape statute is indivisible).

By contrast, the Fourth Circuit state law approach resulted in nearly three-fourths of its statutes being deemed indivisible, at a rate of eight statutes deemed indivisible (72% of prior crimes without collateral consequences)<sup>167</sup> and three statutes held divisible (18% of prior crimes with collateral consequences).<sup>168</sup>

These statistics are both limited and profound. They obviously do not provide accurate predictive value, given the sample size of the circuits and nature of the cases.

But what they do show is that as a snapshot, the state law approach will result in a much more significant rate of eliminating collateral consequences for prior offenses. This is particularly true when considering that as a whole, in 2015, immigrant litigants succeeded at rates of 6.4% in the Fourth Circuit and 4.3% in the Eighth Circuit.<sup>169</sup> In 2014 and 2015, success for non-citizens with criminal convictions whose petitions presented the technical *Descamps* issue jumped to 75% and 50% in these same circuits.<sup>170</sup> At a minimum, it is unconvincing to write off judges who reach these results as ideologues who are expressing deep sympathy for non-citizens who commit crimes. To the contrary, such an extraordinary departure from the circuit's ordinary predisposition to deny petitions from non-citizens suggests that the success rate is not driven by political allegiances. Rather, the marked departure from prior practice suggests that the judges are reaching this result through faithful application to a profound and new doctrine.

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<sup>167</sup> See *United States v. Barcenas-Yanez*, 826 F.3d 752, 758 (4th Cir. 2016) (Texas aggravated assault crime is indivisible); *United States v. Gardner*, 823 F.3d 793, 802-03 (4th Cir. 2016) (North Carolina robbery statute is indivisible); *Castillo v. Holder*, 776 F.3d 262, 270 n.7 (4th Cir. 2015) (Virginia theft statute is indivisible); *Omargharib v. Holder*, 775 F.3d 192, 194 (4th Cir. 2014) (Virginia crime of larceny is indivisible); *United States v. Montes-Flores*, 736 F.3d 357, 368 (4th Cir. 2013) (South Carolina common law crime of violent injury was indivisible); *United States v. Royal*, 731 F.3d 333, 340 (4th Cir. 2013) (Maryland second-degree assault conviction is indivisible); *United States v. Cabrera-Umanzor*, 728 F.3d 347, 350-51 (4th Cir. 2013) (Maryland's child abuse statute is indivisible); see also *United States v. Vinson*, 805 F.3d 120, 125 (4th Cir. 2015) (assuming divisible but no consequences attach).

<sup>168</sup> See *United States v. Faulls*, 821 F.3d 502, 514-15 (4th Cir. 2016) (federal "offense of interstate domestic violence" is divisible for ACCA purposes); *United States v. Berry*, 814 F.3d 192, 199 (4th Cir. 2016) (New Jersey child endangerment statute is divisible); *United States v. Carthorne*, 726 F.3d 503, 512 (4th Cir. 2013) (Maryland's assault and battery of a police officer is divisible).

<sup>169</sup> See *supra* note 150 and accompanying text. See generally *supra* note 149 and accompanying text (listing Fourth and Eighth Circuit judges).

<sup>170</sup> See *supra* notes 165-67 and accompanying text.

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The *Mathis* majority did not discuss this aspect of *Descamps*. Justice Alito's dissent did. He analogized the entire *Taylor* project to a Belgian driver who stubbornly and accidentally drove through two wrong countries before realizing that her GPS was malfunctioning.<sup>171</sup> He argued that the end of collateral consequences is analogous in that *Descamps* has driven the *Taylor* doctrine off a cliff. Justice Alito noted that

Congress indisputably wanted burglary to count under ACCA; our course has led us to the conclusion that, in many States, no burglary conviction will count; maybe we made a wrong turn at some point (or perhaps the Court is guided by a malfunctioning navigator). But the Court is unperturbed by its anomalous result. Serenely chanting its mantra, "Elements," the Court keeps its foot down and drives on.<sup>172</sup>

The *Mathis* majority opinion was silent in response, but Justice Kennedy, in a separate concurrence was not. Justice Kennedy lamented the hypothetical problem that the proper application of *Descamps* may result in a career offender "escap[ing] his statutorily mandated punishment" when the conviction records show that he committed the conduct that meets the generic definition at issue.<sup>173</sup> However, Justice Kennedy noted that it is the "Congressional inaction" and not the Supreme Court's doctrine that is the cause of any undesirable policy outcome.<sup>174</sup>

I contend that the problem with *Descamps* and now *Mathis* is not the bad guy getting off. The greater injustice arises when there is over-punishment in that a minor crime becomes the basis to impose a ten- or fifteen- or twenty-year sentence or result in permanent banishment from this country. The greater flaw in ACCA and IIRIRA is the predicate assumption that collateral consequences can mete out fair and non-arbitrary results.

### C. IIRIRA and ACCA — Not *Descamps* — Lead to Arbitrary Results

In struggling with its understanding of *Descamps*, federal judges themselves have criticized the "unfair" result of the hardened criminal escaping sentencing consequences and a sympathetic offender being saddled with ACCA's lengthy sentence or IIRIRA's harsh

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<sup>171</sup> *Mathis v. United States*, 136 S. Ct. 2243, 2266-67 (2016) (Alito, J., dissenting).

<sup>172</sup> *Id.* at 2268.

<sup>173</sup> *Id.* at 2258 (Kennedy, J., concurring).

<sup>174</sup> *Id.*

deportation.<sup>175</sup> Too often, these critiques are dismissed as only relating to arbitrariness.<sup>176</sup>

But such a critique is lacking without understanding what exactly is wrong with arbitrariness. As observed by Professor Wright, “arbitrariness may be a bit harder to define than one might have imagined. One should carefully distinguish an arbitrary decision-making process from a particular decision-making process that is arbitrarily unfair or biased.”<sup>177</sup> Starting with the former definition, the state law approach set forth in *Descamps* (and endorsed by *Mathis*) is not arbitrary with respect to process that can reach a decision in a predictable manner. As evident in Part III’s comparison between the Fourth Circuit and Eighth Circuit approaches, federal judges, across ideologies and interests, are reaching the same conclusion with respect to the predicate questions asked in this legal inquiry.

After *Descamps*, avoiding the reach of ACCA or IIRIRA is getting less arbitrary in that it is simply less likely to occur under the proscribed methodology. But, I argue arbitrariness — in terms of a lack of fairness — arises in this scheme because ACCA and IIRIRA — by design — lack any meaningful or measured fit to underlying offense that triggers these consequences. Under law, sentencing enhancements and deportation are technically not punishment.<sup>178</sup> As a result, they cannot be curbed under the Eighth Amendment proportionality doctrine, ex post facto clause, substantive due process, equal protection, or other constitutional provisions that curb criminal punishment.<sup>179</sup>

But this technicality does not foreclose the intuitive unease that arises when identical conduct is being penalized outside of criminal courts in different ways for different reasons. The fundamental problem with collateral consequences for criminal offenses, and

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<sup>175</sup> See *supra* notes 111–12. See generally *Hairston v. Wilson*, No. 1:14CV1067 (TSE/MSN), 2015 WL 3622463, at \*5 (E.D. Va. June 8, 2015) (“It is important to note that the result reached here is arrived with some reluctance, because the result — that petitioner must serve nearly 22 years in prison instead of perhaps as few as ten years or less — seems unfair under the circumstances.”).

<sup>176</sup> See *Almanza-Arenas v. Lynch*, 809 F.3d 515, 528 (9th Cir. 2016) (Owens, J., concurring) (lamenting *Descamps* because too often “[t]he only consistency in these cases is their arbitrariness”).

<sup>177</sup> R. George Wright, *Arbitrariness: Why the Most Important Idea in Administrative Law Can’t Be Defined, and What This Means for the Law in General*, 44 U. RICH. L. REV. 839, 841 (2010).

<sup>178</sup> See Sandra G. Mayson, *Collateral Consequences and the Preventive State*, 91 NOTRE DAME L. REV. 301, 310–14 (2015) (after discussing various challenges and why they failed, noting that “[c]ollateral consequences have thus escaped serious constitutional scrutiny [and] have effectively been held constitutionally immune”).

<sup>179</sup> *Id.*

particularly IIRIRA's reliance on them, is that they impose an additional penalty for a crime in a separate context that is not willing or able to distinguish the degrees of harm swept up by criminal law.

Criminal statutes are designed to sweep in both minor and serious conduct, permitting prosecutors to use discretion in electing which offenses merit prosecution.<sup>180</sup> Likewise, when defendants are adjudged guilty, indeterminate sentencing schemes direct judges to choose from a term in prison, a grant of probation, or a suspension of sentence to reflect the seriousness of the crime or the depravity of the offender. But collateral consequences, inherent to their nature, have no gradations or nuance, rendering them arbitrary and often disproportionate to the original crime.

When a crime is a minor one, it becomes difficult to justify why deportation is a proportionate sanction. This is particularly true for a long-term lawful resident who has familial ties, has served in the military, or otherwise contributed to his or her community, in both small or large ways. Exiling non-citizens who are contributing ones, those that benefit the lives of citizens and the country as a whole is nonsensical, especially when the triggering crime is one that the criminal courts prosecuted as infractions — less serious than even misdemeanors, or the criminal court did not deem worthy of prison, jail, or even probation. At a minimum, there is a sense of disproportionality if deportation — in essence exile — can result for a offenses that the criminal courts did not consider serious, dangerous, or even worthy of punishment. In this context, what is being called unfair arises when — as noted by Eisha Jain — “[t]he underlying criminal record is used as a proxy, even though it may not correlate in

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<sup>180</sup> For instance, Congress enacted the Sarbanes–Oxley Act in the hopes of preventing, or at least punishing, those responsible for another crisis that arose from “Enron’s massive accounting fraud and revelations that the company’s outside auditor, Arthur Andersen LLP, had systematically destroyed potentially incriminating documents.” *Yates v. United States*, 135 S. Ct. 1074, 1081 (2015). To reach conduct that the prior laws did not, Congress thus elected to criminalize those who falsified or destroyed evidence that interfered with a federal investigation. In *Yates*, the government prosecuted a commercial fisherman under this statute when he threw undersized fish overboard to evade civil violations for catching undersized grouper. *Id.* at 1076. The Supreme Court rejected the prosecutor’s interpretation to apply this statute outside of the financial fraud context. Nonetheless, the Supreme Court recognized that the terms of the statute were written in a manner that the ordinary meaning would cover such breadth through the term “tangible object.” *Id.* at 1081-87 (“We agree with *Yates* and reject the Government’s unrestrained reading. ‘Tangible object’ in § 1519, we conclude, is better read to cover only objects one can use to record or preserve information, not all objects in the physical world.”).

a meaningful way to risk assessment or to the relevant regulatory priority.”<sup>181</sup>

By their very definition then, collateral consequences set forth in ACCA and IRRIRA are inherently arbitrary and unfair because they punish the past and neither are in accord with present circumstances nor the goals of the subsequent federal firearm offense or immigration status.

#### *D. Ending ACCA Consequences Serves Criminal Justice Goals*

In the ACCA context, prosecutors, federal judges, and policy-makers are openly receptive to this real-world impact that *Descamps* is ending collateral consequences. In 2015, after the Supreme Court struck down ACCA’s residual clause as being void for vagueness,<sup>182</sup> federal prosecutors “urged courts to grant prisoners permission to file successive petitions” that would allow them to eliminate the additional time imposed by their ACCA sentencing enhancement.<sup>183</sup> Permitting the reduction of a prison sentence is a remarkable departure from prior practices whereby federal prosecutors were criticized for seeking heightened sentences that bordered on zealotry.<sup>184</sup>

In 2013, a federal judge made a pointed criticism of ACCA for supporting the “prison-industrial complex” that arises from lengthy sentences.<sup>185</sup> The Fourth Circuit Judge Andre Davis wrote a dissent in

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<sup>181</sup> Eisha Jain, *Prosecuting Collateral Consequences*, 104 GEO. L.J. 1197, 1209-10 (2016).

<sup>182</sup> *Johnson v. United States*, 135 S. Ct. 2551, 2554-55 (2015) (striking down ACCA’s residual clause as unconstitutionally vague).

<sup>183</sup> Leah M. Litman & Luke C. Beasley, *Jurisdiction and Resentencing: How Prosecutorial Waiver Can Offer Remedies Congress Has Denied*, 101 CORNELL L. REV. ONLINE 91, 92 (2016) (“It waived the argument that prisoners who were sentenced under ACCA’s residual clause have not satisfied the conditions to file successive petitions for post-conviction review.”).

<sup>184</sup> The most outrageous example of seeking a lengthy sentence regardless of the merits of a case is the practices used in securing plea agreements for drug convictions. Prosecutors often included a clause in a plea agreement requiring the defendant to waive any right to bring collateral challenge to his conviction even when there was undisputed evidence of innocence. The federal prosecutors would also expedite convictions by giving defendants 30 days to accept a lengthy sentence in exchange for not charging a prior offense that trigger a mandatory 10-year or 20-year minimum sentence for past crimes. See HUMAN RIGHTS WATCH, AN OFFER YOU CAN’T REFUSE: HOW U.S. FEDERAL PROSECUTORS FORCE DRUG DEFENDANTS TO PLEAD GUILTY 1-9, 88-89 (2013), [https://www.hrw.org/sites/default/files/reports/us1213\\_ForUpload\\_0\\_0\\_0.pdf](https://www.hrw.org/sites/default/files/reports/us1213_ForUpload_0_0_0.pdf).

<sup>185</sup> *United States v. Carthorne*, 726 F.3d 503, 523 (4th Cir. 2013) (Davis, C.J., concurring in part and dissenting in part) (“For years now, all over the civilized world, judges, legal experts, social scientists, lawyers, and international human rights

which he criticized the absurd result of the particular decision upholding a twenty-five year prison sentence for an offense, committed as a teenager, when he spit on a police officer. Because that conduct was prosecuted as an assault and battery it was deemed a crime of violence under ACCA.<sup>186</sup>

In May 2016 — in a forty-two-page decision — U.S. District Court Judge Frederic Block went further than mere commentary. In imposing a sentence, Judge Block significantly departed downward from the United States sentencing guidelines' recommended prison term of 33 to 41 months and granted a one-year probationary sentence.<sup>187</sup> Judge Block did so to avoid what he called a "civil death," arising from the myriad collateral consequences that attach to a felony drug conviction.<sup>188</sup> Judge Block also noted that state and federal governments impose up to 50,000 collateral consequences to any one who commits a felony, which prevents people from getting housing, employment, student loans for education, and public assistance for disabilities or medical care.<sup>189</sup> Judge Block's decision is remarkable in that he avoided a recommended prison sentence to prevent the imposition what he called disproportionate consequences arising from the thousands of collateral consequences that attach to a felony drug conviction.

In August 2016, the United States Sentencing Commission recommended to Congress that it amend the ACCA to eliminate drug predicates in their entirety.<sup>190</sup> This recommendation was based on higher rates of recidivism correlating to those convicted of violent crimes and not drug trafficking offenses.<sup>191</sup> It no doubt must have

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and social justice communities have been baffled by the 'prison-industrial complex' that the United States has come to maintain. If they want answers to the 'how' and the 'why' we are so devoted to incarcerating so many for so long, they need only examine this case. Here, a 26-year-old drug-addicted confessed drug dealer, abandoned by his family at a very young age and in and out of juvenile court starting at age 12, has more than fourteen years added to the top of his advisory sentencing guidelines range (387 months rather than 211 months), because, as a misguided and foolish teenager, he spit on a police officer." (citation omitted)).

<sup>186</sup> *Id.* at 516 (majority opinion).

<sup>187</sup> *United States v. Nesbeth*, 188 F. Supp. 3d 179, 180 (E.D.N.Y. 2016).

<sup>188</sup> *Id.*

<sup>189</sup> *Id.* at 184-85.

<sup>190</sup> U.S. SENTENCING COMM'N, REPORT TO THE CONGRESS: CAREER OFFENDER SENTENCING ENHANCEMENTS 2-3 (2016), [http://www.ussc.gov/sites/default/files/pdf/news/congressional-testimony-and-reports/criminal-history/201607\\_RtC-Career-Offenders.pdf#page=5](http://www.ussc.gov/sites/default/files/pdf/news/congressional-testimony-and-reports/criminal-history/201607_RtC-Career-Offenders.pdf#page=5).

<sup>191</sup> *Id.*

been informed by the societal shift in treating opioid addiction with treatment instead of incarceration.<sup>192</sup>

Not since the 1970s has the larger society been engaged in serious questions about the nature and effects of the criminal justice system are being raised and considered. The numbers are well known: the United States has 5% of the world's population and over 20% of its prison inmates.<sup>193</sup> This current mass incarceration has not been the norm, with a 400% increase in the prison population in the past forty years.<sup>194</sup> It is now widely recognized that mass incarceration has been too costly with respect to long prison sentences, the loss of human capital, the racial disparities in convictions, the financial toll of mass incarceration, and the ineffectual nature of prisons to stop crime.<sup>195</sup>

Whether it be out of ideals of justice or the more mundane fidelity to costs, even those traditionally calling on tough on crime measures are now seeking a reduction of prisoners through Smart on Crime

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<sup>192</sup> See, e.g., Editorial, *Congress Wakes Up to the Opioid Epidemic*, N.Y. TIMES, May 16, 2016, at A22 (discussing the 18 bills Congress has passed and the proposed \$1.1 billion in funding President Obama is seeking for drug treatment); Tom Howell Jr., *Senate Overwhelmingly Approves Bill to Fight Deadly Opioid, Heroin Epidemic*, WASH. TIMES (Mar. 10, 2016), <http://www.washingtontimes.com/news/2016/mar/10/senatepassesbillfightopioidheroinepidemic> (reporting on Senate passing a bill by a 94–1 vote to support additional funding for opioid treatment); Robert Pear, *Governors Devise Bipartisan Effort to Reduce Opioid Abuse*, N.Y. TIMES, Feb. 21, 2016, at A9 (“Alarmed at an epidemic of drug overdose deaths, the National Governors Association decided over the weekend to devise treatment protocols to reduce the use of opioid painkillers.”); Katharine Q. Seelye, *Massachusetts Chief’s Tack in Drug War: Steer Addicts to Rehab, Not Jail*, N.Y. TIMES, Jan 24, 2016, at A1 (reporting on Gloucester’s police department informing addicts that if they come to the station asking for help, the police will not arrest them but will direct them to a program that assists them in securing treatment seek help they will not be arrested).

<sup>193</sup> *The Prison Crisis*, ACLU (Jan. 20, 2011), <https://www.aclu.org/prison-crisis>.

<sup>194</sup> Jonathan Wroblewski, Assistant Att’y Gen., Office of Legal Policy, U.S. Department of Justice Sentencing and Corrections Reform: Where We Are and Where We’re Headed 5 (June 2016) (on file with author). This current mass incarceration has not been the norm. To the contrary, in 1972, there were 196,092 prisoners in federal and state prisons. By 2014, the numbers had risen over 400%, to a population of 1,508,636.

<sup>195</sup> See, e.g., ALEXANDER, *supra* note 33, at 96-97 (discussing racial disparities and the exponential rise in the U.S. prison population); Sharon Dolovich, *Cruelty, Prison Conditions, and the Eighth Amendment*, 84 N.Y.U. L. REV. 881, 886-87 (2009) (“Over the last 35 years, the population of America’s prisons and jails has soared from approximately 360,000 to over 2.3 million people. More than one in a hundred American adults is currently behind bars.”); Emily Badger, *The Meteoric, Costly and Unprecedented Rise of Incarceration in America*, WASH. POST (Apr. 30, 2014), <https://www.washingtonpost.com/news/wonk/wp/2014/04/30/the-meteoric-costly-and-unprecedented-rise-of-incarceration-in-america/>.



initiatives.<sup>196</sup> Common reforms include shorter sentences for non-violent crimes, alternatives to prison sentences for low-level crimes, improvement in reentry programs, and a reinvestment of funding into community services.<sup>197</sup> At the federal level, the Attorney General's Smart on Crime initiative, began in 2013, brought an eleven percent reduction of the prison population by 2016.<sup>198</sup>

Federal and state governments are in agreement by enacting policy measures that reduce many of those collateral consequences. President Obama and state governments are championing the "ban the box" policies in an effort to permit former prisoners to obtain gainful employment.<sup>199</sup> States are restoring voting rights to those convicted of

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<sup>196</sup> See, e.g., Molly Ball, *Do the Koch Brothers Really Care About Criminal-Justice Reform?*, ATLANTIC (Mar. 3, 2015), <https://www.theatlantic.com/politics/archive/2015/03/do-the-koch-brothers-really-care-about-criminal-justice-reform/386615> (discussing the alliance between the liberal activist Van Jones and the conservative Koch brothers on criminal justice reform efforts).

<sup>197</sup> See DEP'T OF JUSTICE, THE ATTORNEY GENERAL'S SMART ON CRIME INITIATIVE 1-3 (2015), <https://www.justice.gov/ag/attorney-generals-smart-crime-initiative> (explaining the programs, providing policy documents and fact sheets, and showcasing local successful reentry programs); Samantha Finch, *America's Recidivism Problem Will Be Fixed Through Prison Education Programs*, PARENT HERALD (June 21, 2016), <http://www.parentherald.com/articles/50251/20160621/america-s-recidivism-problem-will-fixed-through-prison-education-programs.htm> (discussing offender reentry programs that are preventing recidivism in California, Texas, and Idaho); Maggie Kreins, *Is Proposition 47 Working the Way It Was Sold to Voters?*, L.A. DAILY NEWS (Feb. 24, 2016), <http://www.dailynews.com/opinion/20160224/is-proposition-47-working-the-way-it-was-sold-to-voters-guest-commentary> (discussing successes and drawbacks to Proposition 47, which reduced the prison population and promised community resources to prevent crime); Robin Respaut, *California Prison Reforms Have Reduced Inmate Numbers, Not Costs*, REUTERS (Jan. 6, 2016), <http://www.reuters.com/article/idUSKBN0UK0J520160106> (discussing how California reduced its prison population by 30,000 within five years).

<sup>198</sup> Wroblewski, *supra* note 194 at 18. The number of total inmates sentenced to federal prisons dropped from 214,149 in 2013 to a projected 195,933 in 2016.

<sup>199</sup> Bouree Lam, *Obama's Proposal to 'Ban the Box' for Government Jobs*, ATLANTIC (May 2, 2016), <https://www.theatlantic.com/business/archive/2016/05/obama-memorandum-opm/480909> (discussing the proposed federal rule to bar federal agencies from asking about past criminal history, a proposal that would impact the 70 million Americans "who have some kind of criminal record"); see *About: The Ban the Box Campaign*, BAN BOX, <http://bantheboxcampaign.org/about> (last visited Feb. 11, 2017) ("The campaign challenges the stereotypes of people with conviction histories by asking employers to choose their best candidates based on job skills and qualifications, *not* past convictions. Since 1 in 4 adults in the U.S. has a conviction history, the impact of this discrimination is widespread and affects other aspects of life in addition to employment opportunity."). The website lists the "over 45 cities and counties" and 7 states that have removed such a question from their own employment applications. *Id.* "Some cities and counties and the state of Massachusetts have also required their vendors and private employers to adopt these fair hiring policies. In some areas, private employers are also voluntarily adopting ban

felonies.<sup>200</sup> Policies are no longer targeting recidivism through longer prison sentences.<sup>201</sup> The new initiatives have a different approach, giving released offenders access to the community — such as short-term housing and food and continuing relationships with community volunteers and law enforcement members who assist in their reintegration.<sup>202</sup> It is an intuitive solution. If we want people to belong to a community, it makes sense to surround released offenders with the means to do so.

It is not of any surprise that the rollback of ACCA's lengthier sentences is not causing alarm among prosecutors, judges, or policy makers. Adding additional prison time in the federal firearm-sentencing context for prior conduct — that is often remote or not seemingly related — is not furthering any identifiable need. ACCA's legislative goal of preventing recidivism of violent career criminals (and especially non-violent drug offenders) has been outweighed by the scars of mass incarceration. What is interesting to me is that there has not been an equal embrace of reducing immigration consequences of the over-punishment arising from deporting non-citizens for minor crimes. The following sections suggest that there should be.

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the box hiring policies." *Id.*

<sup>200</sup> See Michael Wines, *Virginia Governor Says Fight for Felons' Voting Rights Is Not Over*, N.Y. TIMES, July 25, 2016, at A18. After the Virginia Supreme Court blocked Governor Terry McAuliffe's blanket declaration to restore voting rights for 206,000 ex-felons, the governor vowed to sign 206,000 restoration orders on an individual basis. The governor justified his policy on the basis that Virginia would join the 40 other states that restore voting rights after felony convictions. *Id.*; see BRENNAN CTR. FOR JUST., CRIMINAL DISENFRANCHISEMENT LAWS ACROSS THE UNITED STATES (2016), [http://www.brennancenter.org/sites/default/files/analysis/Criminal\\_Disenfranchisement\\_Map.pdf](http://www.brennancenter.org/sites/default/files/analysis/Criminal_Disenfranchisement_Map.pdf) (updated data and procedure by state).

<sup>201</sup> On average, a defendant in the United States will receive a sentence two to five times longer than the same crime receives in Western Europe. JUSTICE POL'Y INST., FINDING DIRECTION: EXPANDING CRIMINAL JUSTICE OPTIONS BY CONSIDERING POLICIES OF OTHER NATIONS 1-4 (2011), <http://www.justicepolicy.org/uploads/justicepolicy/documents/sentencing.pdf>. The shorter sentences are important because housing, feeding, and caring for elderly and ill prisoners comes at a steep financial cost to taxpayers. See DIRK K. GREINER, MASSACHUSETTS INCARCERATION: HOW JUSTIFIED AND HOW MUCH PUBLIC SAFETY DOES IT ACTUALLY BUY? 24-25 (2011), [http://www.realcostofprisons.org/writing/Greiner\\_Mass\\_achusetts\\_Incarceration.pdf](http://www.realcostofprisons.org/writing/Greiner_Mass_achusetts_Incarceration.pdf).

<sup>202</sup> *Reentry Services*, IDAHO DEP'T CORR., [https://www.idoc.idaho.gov/content/probation\\_and\\_parole/reentry\\_services](https://www.idoc.idaho.gov/content/probation_and_parole/reentry_services) (last visited Feb. 11, 2017) (listing support and services that released offenders receive). The state claims that since it has been adopted in 2009, it has had an "important role" in reducing recidivism. *Id.*

E. *Why Simplicity Was Likely Valued in Descamps and Mathis*

In *Mathis*, when navigating what was obviously a very difficult doctrine, Justice Kagan took almost a scolding tone towards the Eighth Circuit and suggested that the *Descamps* result was obvious and clear-cut. Justice Kagan made stinging rebukes against the Eighth Circuit, arguing that its approach in *Aguila-Montes* was against clear Congressional intent and announcing that the elements-only rule had been the law for the past twenty-five years.<sup>203</sup> In *Descamps* itself, Kagan, who wrote for the majority, almost made fun of the Ninth Circuit's reasoning, illustrating the soundness of its (new) divisibility definition with reference to the children's Clue board game, a glib jab that borders on mockery.<sup>204</sup>

Nowhere in the opinion does the Supreme Court recognize how much all of the circuits — not just the Ninth Circuit — struggled mightily with when and how to apply the categorical and modified categorical approaches. There was no mention that all of the circuits lacked a uniform definition of divisibility and some even had stopped trying to develop one. Further, there was no mention that divisibility was a new step, for the first time defined and defended in *Descamps*.

As a result, I think that the majority's dismissive tone towards the difficulties courts had applying ACCA and IIRIRA contributed to the incongruous result of a dissent in an 8–1 decision becoming the holding in over half of the circuits. Justice Alito started his dissent by recognizing that the Supreme Court's pronouncement that a rule is simple does not make it so. To the contrary, Justice Alito began by contending that as much as “the concept . . . for burglary might seem simple, things have not worked out that way under our case law.”<sup>205</sup> Justice Alito then acknowledged that the elements/mean distinction “is not required by ACCA or by our prior cases” and further argued that this new rule — not ordained by precedent or Congress — “will cause serious practical problems.”<sup>206</sup> This empathetic approach worked as an effective appeal to the circuits.

As a legal matter, I do agree that the debunked textual approach is lacking for many reasons. As recognized by Justice Alito himself in the *Descamps* dissent, state and federal courts often will amend a statute to interpret an element in a narrow or broad way or even write in a modified element without such changes being expressly noted in the

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<sup>203</sup> See *Mathis v. United States*, 136 S. Ct. 2243, 2257 (2016).

<sup>204</sup> See *Descamps v. United States*, 133 S. Ct. 2276, 2291 (2013).

<sup>205</sup> *Id.* at 2295 (Alito, J., dissenting).

<sup>206</sup> *Id.* at 2297.

statutory text.<sup>207</sup> Justice Alito cited *Neder v. United States* as such an example whereby the Supreme Court wrote in a materiality element into a federal mail fraud statute “even though that element is not mentioned in the statutory text.”<sup>208</sup> As observed by Justice Alito, it is difficult to “think of any reason why an authoritative decision of this sort should be ignored . . . .”<sup>209</sup> Relying only a statute’s text to divine its full meaning was a method mired in inaccuracies.

A secondary problem from relying only on the text of the statute is that words alone overlook that state courts interpreting these statutes do so based on actual facts that are often difficult to imagine. The earlier-mentioned *Avendano v. Holder* case illustrates just this aspect of statutory construction. In *Avendano*, a Minnesota statute defined the offense of terroristic threats as occurring when someone “threaten[s], directly or indirectly to commit a crime of violence” and with alternative mens rea of a “purpose to terrorize another” or “in a reckless disregard of the risk of causing such terror.”<sup>210</sup> The Eighth Circuit reasoned that this statute was divisible as defined by *Descamps* “because it provides alternative culpable mental states [of purpose and reckless].”<sup>211</sup>

Assuming that the plain meaning of the text is the entirety of the statute’s meaning is an intellectually inadequate approach to statutory construction. As noted by the concurring and dissenting opinion, Minnesota cases defined the reckless element in the terrorist threat statute to include conduct that fell outside of the immigration law’s definition of what is a crime involving moral turpitude (“CIMT”). For instance, the Minnesota Court of Appeals permitted a conviction based

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<sup>207</sup> When determining that a North Carolina statute is not a crime of violence under ACCA, the Fourth Circuit noted that the statute’s text provided that it is a crime for a person to “willfully or wantonly discharge[] or attempt[] to discharge any firearm . . . into any building, structure, vehicle, [or other specified physical structure] while it is occupied.” *United States v. Parral-Dominguez*, 794 F.3d 440, 445 (4th Cir. 2015) (quoting statute). The text alone did not resolve this matter because “[a]lthough not listed as an element in the statute, the Supreme Court of North Carolina has read a knowledge element into the offense.” *Id.* (citations omitted).

<sup>208</sup> *Descamps*, 133 S. Ct. at 2296-97 (Alito, J., dissenting) (citing *Neder v. United States*, 527 U.S. 1, 20 (1999) (federal mail fraud, wire fraud, and bank fraud statutes require proof of materiality even though such element is absent from the statutory text)).

<sup>209</sup> The full quote is “I cannot think of any reason why an authoritative decision of this sort should be ignored, and the Court has certainly not provided any. I therefore proceed on the assumption that a statute is divisible if the offense, as *properly construed*, has the requisite elements.” *Id.* at 2296-97.

<sup>210</sup> *Avendano v. Holder*, 770 F.3d 731, 733 (8th Cir. 2014).

<sup>211</sup> *Id.* at 734.

on evidence of a “joke or flippant remark,” one made out of “transitory anger,” and one when no one in fact experienced fear.<sup>212</sup> Although *Avendano* case was resolved based on the later reversed *Silva-Trevino* doctrine, it shows that the textual approach was far from reliable as an accurate measure of what conduct was actionable under any given statute.

*Mathis* corrected this inaccuracy when overturning the Eighth Circuit’s approach. But what is more interesting is why in a dispute over what happens in the “real world,” real world considerations of how collateral consequences operate was absent from the defense of *Descamps*’ approach.<sup>213</sup>

#### F. Proportionality Is Being Restored Through *Descamps* and *Mathis*

Returning to the debate between Justice Kagan and Justice Alito over whether *Descamps* provides a framework that simplifies the work that courts have to undertake when applying ACCA and IIRIRA consequences, a more salient question is whether ACCA and IIRIRA consequences further proportionality. To date, proportionality has not been an effective lens by which to examine immigration law and collateral consequences. Because deportation proceedings are classified as civil ones, the Eighth Amendment’s proportionality doctrine has not applied.<sup>214</sup> In the past decade, the Supreme Court has revived the Eighth Amendment as a check on limiting capital punishment, certain lengths of sentences, and prison conditions.<sup>215</sup>

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<sup>212</sup> *Id.* at 739 (Kelly, J., concurring in part and dissenting in part).

<sup>213</sup> Not mentioned in this Article was the various decisions’ focus on *Apprendi* and fact-finding. For an excellent discussion of this, see generally Sharpless, *supra* note 85.

<sup>214</sup> “The contention that the application of the deportation statute to an alien with near lifelong residence in this country and no connections with the country to which deportation is to be made is a violation of the Fifth and Eighth Amendments presents an emotional but not a legal argument.” *LeTourneur v. INS*, 538 F.2d 1368, 1370 (9th Cir. 1976). “Deportation is strictly a Congressional policy question in which the judiciary will not intervene as long as procedural due process requirements have been met. This court has also held that deportation is not cruel and unusual punishment under the Eighth Amendment even though the penalty may be severe. . . . Deportation is not criminal punishment. . . .” *Id.* at 1370 (citations omitted). *But see* Angela M. Banks, *The Normative and Historical Cases for Proportional Deportation*, 62 EMORY L.J. 1243, 1267-69, 1278 (2013) (discussing some problems with the lack of proportionality in deportation matters and arguing that the proportionality concerns protected by the Eighth Amendment may normatively and legally be imported into the immigration context).

<sup>215</sup> See *Miller v. Alabama*, 132 S. Ct. 2455, 2464 (2012) (LWOP for juveniles violates the Eighth Amendment); *Brown v. Plata*, 563 U.S. 493, 499-503 (2011) (upholding order for California to reduce its prison population because overcrowding

Even in the criminal context, proportionality has yet to emerge as a meaningful check on recidivism statutes.<sup>216</sup>

But in the law, the past does not always predict the future. The *Descamps* methodology has resulted — and will continue to result — in widespread elimination of collateral consequences.<sup>217</sup> The judges who properly apply *Descamps* and *Mathis* are not intending to create policy or even attempting to enter a larger discussion about the reform of collateral consequences. But as a practical matter, federal courts are eliminating ACCA and IIRIRA consequences on a case-by-case, statute-by-statute basis.

In this respect, Justice Alito's call for having a test that promotes simplicity, that makes it easy for courts to figure out what the result will be, sorely misses what ACCA and IIRIRA implicate. As Fourth Circuit Judge Andre Davis observed in a dissent in an ACCA case, "Our disagreement as to the outcome in this case stems, I think, less over the content and application of relevant precedent and more from a fundamental disagreement regarding our role as arbiters of a flailing federal sentencing regime." Judge Davis forcefully argued for judges to reduce lengthier sentences to avoid "the harmful effects of over-incarceration that every cadre of social and political scientists (as well

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inflicts cruel and unusual punishment to mentally and physically ill prisoners); *Roper v. Simmons*, 543 U.S. 551, 555-560 (2005) (capital punishment for juveniles violates the Eighth Amendment proportionality clause). *But see* *Glossip v. Gross*, 135 S. Ct. 2726, 2731 (2015) (upholding execution using midazolam did not constitute cruel and unusual punishment).

<sup>216</sup> See *Ewing v. California*, 538 U.S. 11, 28, 30-31 (2003) (upholding California's three strikes law when the last strike involved the theft of golf clubs). There is ambiguity on this issue. On the one hand, the Supreme Court is not taking up challenges to lengthy prison terms imposed for drug crimes. However, the old precedent that permitted these sentences did so in an era when drugs were presumed to be part of violent crimes. Now that drug addiction is seen as a disease, opioid addiction is being met with treatment and not incarceration. It appears that the old Supreme Court cases from the 1980s and 1990s are due for reconsideration as the premise for imposing lengthy sentences on drug crimes is reconfigured by society at large.

<sup>217</sup> In *Vera-Valdevinos*, the Ninth Circuit held that Arizona's statute that prohibits the possession, selling, manufacturing, administering, procuring, transporting, importing, and offering to transport a "narcotic drug." The statute was held indivisible as to both an aggravated felony (as "illicit trafficking in a controlled substance") and as a deportable ground (a controlled substance offense). See *Vera-Valdevinos v. Lynch*, 649 F. App'x 597, 597-98 (9th Cir. 2016). Unlike other states such as California, the Arizona jury instructions do not direct jurors to find the actual identity of a narcotic. The operation of Arizona law means that those individuals who are convicted under this statute no longer have immigration consequences — if they have lawful status, they cannot be removed or if they are without lawful status, this crime cannot bar from relief. See *id.*

as an ever-growing cohort of elected and appointed officials, state and federal, as well as respected members of the federal judiciary) has recognized as unjust and inhumane, as well as expensive and ineffectual.”<sup>218</sup>

In this respect, restoration of proportional consequences for crimes, not easy tests for courts to follow, is the salient impact the *Descamps* and *Mathis* is having. For ACCA, eliminating a mandatory sentencing enhancement for federal firearm offenses does not interfere with the appropriate sentence that the current offender will receive. Likewise, under IIRIRA, eliminating criminal convictions as immigration grounds does not undermine immigration enforcement. Criminal convictions have been a crude, overinclusive means to deny and take away immigration status. Their elimination is restoring proportionality to IIRIRA’s mistaken assumption that all offenses are serious and all offenders are dangerous. Although the justices did not consider proportionality in their defense of *Descamps*, there is no doubt that the restoration of proportionality to immigration law is the most compelling impact that *Descamps* is having in the real world.

#### IV. THE NEEDED END TO CRIME-BASED DEPORTATION

It is difficult to think of a more politically charged issue than immigration policy, especially on the treatment of non-citizens who commit crimes. In the public arena, one need not look past the 2016 presidential campaign for examples of how the public debate is heated and can delve quickly into inflammatory rhetoric.<sup>219</sup> But as a practical matter, in five years, numerous state and federal crimes will be mitigated or eliminated as removal offenses.<sup>220</sup> Given that likely

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<sup>218</sup> *United States v. Valdovinos*, 760 F.3d 322, 330 (4th Cir. 2014) (Davis, J., dissenting) (“Our disagreement as to the outcome in this case stems, I think, less over the content and application of relevant precedent and more from a fundamental disagreement regarding our role as arbiters of a flailing federal sentencing regime. . . . I deeply regret the panel’s failure to take advantage of the opportunity to do so here.”).

<sup>219</sup> See Christopher N. Lasch, *Sanctuary Cities and Dog-Whistle Politics*, 42 *NEW ENG. J. ON CRIM. & CIV. CONFINEMENT* 159, 185-86 (2016) (discussing recent contemporary events and commenting on “[t]he ease with which the agenda-setting move was accomplished betrays the depth of the identification of immigrants with criminality”); Patrick Healy, *A Second President Clinton? Mapping out Her First 100 Days*, *N.Y. TIMES*, July 3, 2016, at A1 (contrasting Hillary Clinton’s promise for immigration reform and Donald Trump’s to build a wall along the Mexican border).

<sup>220</sup> See *Lopez-Valencia v. Lynch*, 798 F.3d 863, 868-69 (9th Cir. 2015) (holding California’s theft statute, *CAL. PENAL CODE* § 484(a), overbroad and indivisible. This decision has the effect of eliminating convictions under this statute as serving as aggravated felonies); *Vera-Valdevinos*, 649 F. App’x at 597-99 (holding that *Ariz. Rev.*

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reality, why not ask the normative question of whether this is in fact the better policy goal. I argue it is. Attaching immigration consequences to criminal convictions — in the over-inclusive manner that IIRIRA does based on convictions alone — is a project that will never succeed in reaching proportionality. Immigration law's current reliance on convictions does not ascertain who is dangerous and who is not and errs by rendering inconsequential, minor crimes to be treated the same as serious ones. Instead of focusing just on offenders who are violent, the current scheme deems both a man who shoots a gun at a stranger to be as dangerous as a teenager who spat at a police officer during an arrest. Both can be convicted under an assault and battery statute that is deemed to be a crime of violence. But no rational criminal judge would mete out identical punishment for the offenders. It is time to return to an immigration system that effectively distinguishes between this conduct as well.

In addition to expanding the number and types of crimes that have immigration consequences, IIRIRA eliminated second chances. Prior to 1990, Congress gave criminal courts authority to make a recommendation against deportation at criminal sentencing based on an assessment that neither the nature of the offense nor the character of the offender warranted such severe sanction. Prior to 1996, Congress gave immigration judges discretion to also give out second chances to those convicted of crimes if their equities outweighed any showing of harm, lack of remorse, or future dangerousness. The current experiment that denies second chances and expands the types of crimes that cause non-citizens to lose status has failed. Crimes do not effectively serve as proxies for character. Rather, immigration law must return to determining which non-citizens contribute to the country, their communities, and their families and which ones do not. Those determinations are based on numerous fact-specific factors and better separate out who is truly dangerous and who is not. The following Part thus outlines the problems arising from the current system, argues for the return to the pre-IIRIRA scheme whereby offenders were given individualized assessments of harm and reform, and responds to potential criticisms of reform.

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Stat. § 13–3408, which prohibits the possession, selling, manufacturing, administering, procuring, transporting, importing, and offering to transport a narcotic drug, is overbroad and indivisible). This decision is unpublished. However, once its analysis is published, it will have the impact of eliminating convictions under this statute as to both deportability grounds and aggravated felonies.



A. *Relying on Criminal Convictions to Deport Non-Citizens Is Overinclusive, Disproportionate, Irrational, Inefficient, and Expensive*

Just as the prosecutors and federal courts are accepting the elimination of ACCA consequences so too are there compelling reasons not to accept criminal convictions as a rational basis to deny or take away immigration status. Contrary to the critiques of *Descamps* being the source of arbitrariness, it is IIRIRA's underlying scheme that assigns consequences to a type of criminal conviction that leads to absurdity.<sup>221</sup> Criminal law is designed to account for a range of conduct falling within a specific statute. Indeterminate sentencing, including probation and suspended sentences, permits criminal courts to impose sentences that match the seriousness of a specific defendant's conduct. IIRIRA, however, no longer permits deference to criminal court findings, instead grading crimes by general categories than actual seriousness. Of note, the following four reasons stand out for criminal convictions as lacking proportionality with respect to immigration status.

First, the current immigration law's means of attaching consequences is crude and overinclusive. Since IIRIRA, the seriousness of a state offense is based on general categories — theft offense, crime of violence, controlled substance offense, etc. — rather than how criminal courts in fact viewed the crime. The problem with attaching consequences by categories is that a rapist who violently attacks strangers may be placed in the same category as a college student who urinates in public after drinking too much at a party. Both individuals have committed a sex offense, which depending on which state statute the conduct is prosecuted under, could fall within a crime of moral turpitude — a category that may both commence proceedings and bar particular remedies.<sup>222</sup> As much as there is a

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<sup>221</sup> Stephen H. Legomsky eloquently made this argument in 1989, after Congress first made criminal grounds aggravated felonies in his article, *Reforming the Criteria for the Exclusion and the Deportation of Alien Criminal Offenders*, 12 DEF. ALIEN 64 (1989). This Article revives this argument in the current context that has revealed IIRIRA to be even more haphazard than the 1988 change that first started the trend to heightened criminalization of immigration law.

<sup>222</sup> In *Pannu v. Holder*, a lawful permanent resident was convicted under California Penal Code § 314.1 of misdemeanor indecent exposure. *Pannu v. Holder*, 639 F.3d 1225, 1226 (9th Cir. 2011). This crime prohibits a person who “exposes his person, or the private parts therefore, in any public place, or in any place where there are present other persons to be offended or annoyed thereby.” CAL. PENAL CODE § 314 (2017). A second conviction constitutes a felony under this provision and requires individuals to register as sex offenders under California Penal Code section 290(c). See *Pannu*, 639 F.3d at 1226; see also CAL. PENAL CODE §§ 290(c), 314. In *Pannu*, the lawful

compelling argument to exclude dangerous rapists, it is harder to exclude a drunken college student based on the same reasoning.

Second, IIRIRA made changes that elide the sentencing considerations that a criminal court imposed. Even if charged with the same statute, a criminal court has the means to sentence a rapist to a much longer period of incarceration than the college student who exposed himself in public. But IIRIRA does not consider that difference when attaching consequences to a crime.

IIRIRA makes a notable mistake in determining that, when defining some crimes aggravated felonies, the seriousness of particular crimes is based on whether a court imposed a sentence of “one year or more,” which means 365 days or more. Congress was most likely trying to draw the line between a felony and a misdemeanor and wanting to classify the felonies as aggravated felonies. IIRIRA, however, collapsed this distinction through inartful drafting. Regardless, the problem is that most states and the federal government draw the line at a sentence of “more than a year,” meaning 366 days.<sup>223</sup> As a consequence, the actual distinction of felonies from misdemeanors is missing when classifying certain crimes as aggravated felonies. As said above, crimes that are considered aggravated felonies no longer need to be aggravated nor felonies.

Third, in a related error, IIRIRA also refuses to take into account actual, instead of potential, sentences. In California, manslaughter can be punished by probation or an eleven-year prison term.<sup>224</sup> In

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permanent resident was arrested a second time for indecent exposure and subject to mandatory requirements to register as a sex offender under California Penal Code § 290(c). See *Pannu*, 639 F.3d at 1226. His failure to do so was a misdemeanor offense. *Id.* The IJ and BIA found that Mr. Pannu’s convictions under section 314.1 were categorically CIMTs. *Id.* at 1227. In *Pannu*, the Ninth Circuit took issue with the BIA’s analysis and remanded the issue for reconsideration. *Id.* at 1229. The facts underlying Pannu’s initial conviction are unknown but would encompass the college student hypothetical. Moreover, even if the BIA reverses course in the Ninth Circuit, it is free to assert its finding in all other circuits. See *In re Chairez-Castrejon*, 26 I. & N. Dec. 478, 478 (B.I.A. 2015) (explaining how immigration courts apply the law of the circuit in which they are located). For a compelling argument that the category of CIMTs is unconstitutionally vague, see generally Holper, *supra* note 46.

<sup>223</sup> This too is a misnomer as some states draw the line between felonies and misdemeanors at two-year rather than one-year sentences.

<sup>224</sup> By statute, “Voluntary manslaughter is punishable by imprisonment in the state prison for 3, 6, or 11 years.” CAL. PENAL CODE § 193 (2011). However, a defendant convicted of voluntary manslaughter may petition for a judge to “reduce [the conviction] to involuntary manslaughter and if the judge after so doing grants the motion, then to entertain her application for probation.” *People v. Doyle*, 328 P.2d 7, 11 (Cal. Dist. Ct. App. 1958); see also CAL. PENAL CODE § 1203 (2017) (listing conditions under which a defendant may be eligible and ineligible for this request).

Montana, rape is prosecuted by a sentencing range of two to one hundred years.<sup>225</sup> A criminal court is directed to impose a term that reflects the seriousness of the criminal conduct. And it does so, using surgical precision to determine which offender is serious and a risk to the community and which one was simply reckless or stupid. IIRIRA fails to follow this grading, often relying on potential sentences to be as serious as an actual one that a sentencing court imposed.<sup>226</sup> Treating all crimes the same under immigration law, without regard to the individual circumstances that mitigated or aggravated a sentence, serves an efficiency purpose but not one born of common sense.

Fourth, IIRIRA no longer permits established rehabilitation and reform to matter. State courts permit individuals who later establish rehabilitation or reform to expunge or vacate their convictions. Under state law, a juvenile adjudication, an expunged conviction, a vacated conviction, and a pardoned one are deemed to no longer exist. A person can truthfully state that he or she was not convicted under these circumstances, which prevents exposure to the up to 50,000 collateral consequences that can attach in the numerous contexts of housing, employment, and education. Prior to IIRIRA, immigration law took juvenile adjudications, and expunged and vacated convictions into account and would not attach consequences to them.<sup>227</sup>

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<sup>225</sup> MONT. CODE ANN. § 45-5-503 (2015) (“A person convicted of sexual intercourse without consent shall be punished by life imprisonment or by imprisonment in the state prison for a term of not less than 2 years or more than 100 years . . .”). Compare VT. STAT. ANN. tit. 13 § 1 (2017) (felony where maximum sentence is more than two years) with CAL. PENAL CODE § 17(a) (2017) (sentence of more than one year).

<sup>226</sup> See *Alberto-Gonzalez v. INS*, 215 F.3d 906, 909 (9th Cir. 2000) (“Further, while Congress used the phrase ‘for which the term of imprisonment is one year’ in some sections of section 1101(a)(43), in other sections, Congress explicitly provided that the term to consider is the sentence that *may* be imposed.” (emphasis in original)) (comparing 8 U.S.C. §§ 1101(a)(43)(F), (P), (R), (S) with 8 U.S.C. §§ 1101(a)(43)(J), (T)); *Lopez-Elias v. Reno*, 209 F.3d 788, 791 (5th Cir. 2000) (“That Lopez–Elias’s four-year sentence was suspended is of no significance, for IIRIRA makes plain that ‘[a]ny reference to a term of imprisonment or a sentence with respect to an offense is deemed to include the period of incarceration or confinement ordered by a court of law regardless of any suspension of the imposition or execution of that imprisonment or sentence in whole or in part.’” (quoting 8 U.S.C. § 1101(a)(48)(B))).

<sup>227</sup> See *Resendiz-Alcaraz v. U.S. Att’y Gen.*, 383 F.3d 1262, 1266-68, 1271 (11th Cir. 2004) (in a break from prior immigration law, “a state conviction is a conviction for immigration purposes, regardless of whether it is later expunged under a state rehabilitative statute, so long as it satisfies the requirements of § 1101(a)(48)(A)”; *Vieira Garcia v. INS*, 239 F.3d 409, 412 (1st Cir. 2001) (“The BIA stated that ‘[i]n

In a marked departure from prior law, IIRIRA no longer recognizes expungements, commuted sentences, vacated sentences, and other extraordinary relief — including some pardons — that states have given to those worthy of second chances.<sup>228</sup> Continuing to recognize a conviction that the originating court no longer recognizes is not a rational approach to sorting out those who are a continuing danger to the community from those who are not. In 1996, at the height of the Tough on Crime movement, there was no desire to do so. But, proportionality demands grading offenses and offenders by their seriousness.

Fifth, because immigration law is civil, the collateral consequences of criminal convictions are retroactive.<sup>229</sup> The categorical retroactivity reveals a further lack of fit with rehabilitation. In *Tyson v. Holder*,

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passing this legislation [the IIRIRA], Congress could have, but did not, exclude juvenile offenses . . . .’ The BIA also commented on the legislative history of the IIRIRA, noting that the definition of conviction was deliberately broadened beyond that of the prior definition.”).

<sup>228</sup> See *Balogun v. U.S. Att’y Gen.*, 425 F.3d 1356, 1362 (11th Cir. 2005) (“Balogun argues that he is entitled to a waiver of his inadmissible status under 8 U.S.C. § 1227(a)(2)(A)(v) because he ‘has been granted a full and unconditional pardon . . . by the Governor of any of the several States.’ The government responds that Balogun’s new pardon is not ‘full and unconditional’ because, while all his civil and political rights under state law were restored, he is still subject to the federal consequences of his federal embezzlement convictions (for example, federal felon in possession laws and federal habitual offender laws). Although we are inclined to agree with the BIA, we need not decide what Congress intended by ‘full and unconditional pardon’ because Balogun is ineligible for the pardon-waiver provision of section 1227(a)(2)(A)(v) in any event.”); Pickering, 23 I. & N. Dec. 621, 624 (B.I.A. 2003) (“In accord with the federal court opinions applying [IIRIRA’s] definition of a conviction at section 101(a)(48)(A) of the Act, we find that there is a significant distinction between convictions vacated on the basis of a procedural or substantive defect in the underlying proceedings and those vacated because of post-conviction events, such as rehabilitation or immigration hardships. Thus, if a court with jurisdiction vacates a conviction based on a defect in the underlying criminal proceedings, the respondent no longer has a ‘conviction’ within the meaning of section 101(a)(48)(A). If, however, a court vacates a conviction for reasons unrelated to the merits of the underlying criminal proceedings, the respondent remains ‘convicted’ for immigration purposes.”).

<sup>229</sup> See *INS v. St. Cyr*, 533 U.S. 289, 290 (2001). In *St. Cyr*, the Supreme Court held that IIRIRA’s reclassification of crimes as aggravated felonies was permissible as long as defendants who pled guilty to pre-1996 crimes would receive the benefit of the pre-IIRIRA’s remedies that potentially forgave those crimes in individualized hearings. See *id.* at 326. It was not until 2012, that the Ninth Circuit extended the protections of the pre-1996 remedies to those who also had had a bench trial. See *Tyson v. Holder*, 670 F.3d 1015, 1016 (9th Cir. 2012). The Supreme Court extended additional protections to lawful permanent residents by also extending the reentry rules in effect at the time of their conviction to them. See *Vartelas v. Holder*, 132 S. Ct. 1479, 1491-93 (2012).

when a lawful permanent resident was twenty-eight years old, she entered the country and was found to have \$350 worth of heroin in her possession.<sup>230</sup> In 1980, when she had a bench trial, the federal judge did not sustain a more serious charge of possession with intent to distribute, finding that the conduct was intended for personal consumption.<sup>231</sup> He did, however, sustain the charge of importation. At the time, Ms. Tyson had been a lawful permanent resident for three years, and her offense, which was the importation of heroin, had no immigration consequences. Indeed, this conviction was sustained eight years before Congress even created the category of aggravated felonies and sixteen years before IIRIRA expanded the category to include this conviction. Ms. Tyson thus retained her green card, and built her life in the United States, which included raising two citizen children and making monetary and volunteering contributions to the local schools and community organizations.

In 2005, Ms. Tyson travelled abroad, which brought her to the attention of immigration authorities. She was placed in removal proceedings, charged with an aggravated felony, and ordered removed.<sup>232</sup>

Although Ms. Tyson prevailed on a technical matter on her appeal, applying consequences to remote crimes, after the individual has decades of rehabilitation and contributions, is difficult to understand. Attaching immigration consequences to criminal convictions, by its innate operation, sweeps in individuals who are not a present or future danger.

Sixth, using crimes as proxies for desirable immigrants is also proven to be an expensive, inefficient use of resources. The Secure Communities program, run from 2008 to 2014, and its current formulation called Priority Enforcement Program, has been met with much criticism.<sup>233</sup> These programs ask cities, counties, and states to

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<sup>230</sup> *Tyson*, 670 F.3d at 1016.

<sup>231</sup> *Id.* at 1016-17.

<sup>232</sup> *Id.* at 1017.

<sup>233</sup> Many scholars have provided excellent and thorough discussions of the concerns arising from immigration detention practices. *See, e.g.*, Ming H. Chen, *Trust in Immigration Enforcement: State Noncooperation and Sanctuary Cities After Secure Communities*, 91 CHI.-KENT L. REV. 13 (2016) (a neutral assessment of the issue but noting the criticisms made by cities and localities in the operation Secure Communities); Johnson, *Doubling Down on Racial Discrimination*, *supra* note 32, at 1014-19, 1037 (discussing racial disparities in crime-based removals); Juliet P. Stumpf, *D(E)volving Discretion: Lessons from the Life and Times of Secure Communities*, 64 AM. U. L. REV. 1259, 1261-65 (2015) (discussing the myriad criticisms of Secure Communities and discussing whether PEP can avoid them). *See generally* Phillip L.

run background checks on all whom they arrest to identify non-citizens.<sup>234</sup> Those who are not citizens are placed in immigration detention under an immigration officer or judge determines if their crimes warrant removal.

Although the government heralds this system as valuable in identifying, detaining, and removing criminal aliens, critics have been less kind. Critics point to the ineffectual nature of sweeping in non-dangerous individuals. Under this program, in 2016, the government is contracted to pay for the detention of 34,000 each day (410,000 a year) at a cost of approximately \$5.05 million a day (totaling over \$2 billion a year).<sup>235</sup> Of those detained, 40% did not have any criminal conviction (either due to dismissed charges or acquittals) and another 16% committed minor crimes, such as a parent driving without a license who was arrested when dropping off their child at school. According to studies by Professor Ingrid Eagly, a sizeable number of “criminal aliens” (a term that does not differentiate between those with and without legal status) who were removed under the auspice of crime-based removals in fact had been brought to the attention of the authorities due to traffic violations.<sup>236</sup> Indeed, among those detained, it is estimated that fewer than ten percent were actually convicted of violent crimes.<sup>237</sup> Despite the rhetoric of protecting the public from harm, the reality appears that taxpayers have spent billions of dollars

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Torrey, *Rethinking Immigration’s Mandatory Detention Regime: Politics, Profit, and the Meaning of Custody*, 48 U. MICH. J.L. REFORM 879, 897-906 (2015) (criticizing private prisons, their profits, and their lobbying influence in operating immigrant detention centers).

<sup>234</sup> Stumpf, *supra* note 233, at 1268-69 (“Ordinarily after booking an individual, police submit the arrestee’s fingerprint information to Federal Bureau of Investigations (FBI) and DHS databases to search for outstanding warrants. Secure Communities’ innovation was to send matching fingerprints to ICE for comparison with immigration databases and a determination whether to seek custody of the arrested individual. Immigration agents had already started entering civil immigration warrants into these databases, resulting in state and local arrests both for crimes and civil immigration violations. Secure Communities took advantage of these databases in a different way and used them to check all arrestees across the nation to identify removable noncitizens.”).

<sup>235</sup> Sharita Gruberg, *How For-Profit Companies Are Driving Detention Policies*, CTR. FOR AM. PROGRESS (Dec. 18, 2015, 9:29 AM), <https://www.americanprogress.org/issues/immigration/report/2015/12/18/127769/how-for-profit-companies-are-driving-immigration-detention-policies>.

<sup>236</sup> Ingrid V. Eagly, *Criminal Justice for Noncitizens: An Analysis of Variation in Local Enforcement*, 88 N.Y.U. L. REV. 1126, 1218 (2013).

<sup>237</sup> Gruberg, *supra* note 235. For a strong criticism of immigration detention policies see generally César Cuauhtémoc García Hernández, *Naturalizing Immigration Imprisonment*, 103 CALIF. L. REV. 1449 (2015).

to remove those with non-existent crimes, minor offenses, or traffic violations.

Those who did benefit — and continue to benefit — from this program have been the private prisons who run nine of the ten largest immigration detention centers and two out of every three immigration detention centers.<sup>238</sup> These private corporations enter contracts guaranteeing payment regardless of whether the existing 34,000 beds are actually filled.<sup>239</sup> In August 2016, the Obama administration announced its intent to phase out the use of private prisons to detain criminal offenders because private prisons “simply do not provide the same level of correctional services, programs, and resources; they do not save substantially on costs; and as noted in a recent report by the Department’s Office of Inspector General, they do not maintain the same level of safety and security.”<sup>240</sup> Despite these concerns in the criminal context, in November 2016, the Obama administration recommended increasing the use of immigration detention, including the use of facilities that were deemed unsafe for use in criminal detention.<sup>241</sup> In October 2016, the number of detained non-citizens increased to over 40,000 with 47,000 planned for summer of 2017.<sup>242</sup>

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<sup>238</sup> Gruberg, *supra* note 235 (reporting that for-profit prisons run 62% of immigration detention centers and 8.4% of state and federal prisons); Erica Hellerstein, *A Shocking Glimpse Inside America’s Privatized Detention Facilities for Immigrants*, THINK PROGRESS (Mar. 10, 2016), <http://thinkprogress.org/justice/2016/03/10/3757575/secretive-world-of-privatized-immigrant-detention> (reporting that 9 out of the 10 largest detention centers are privately run); *see also* Chico Harlan, *Inside the Administration’s \$1 Billion Deal to Detain Central American Asylum Seekers*, WASH. POST (Aug. 14, 2016), [https://www.washingtonpost.com/business/economy/inside-the-administrations-1-billion-deal-to-detain-central-american-asylum-seekers/2016/08/14/e47f1960-5819-11e6-9aee-8075993d73a2\\_story.html](https://www.washingtonpost.com/business/economy/inside-the-administrations-1-billion-deal-to-detain-central-american-asylum-seekers/2016/08/14/e47f1960-5819-11e6-9aee-8075993d73a2_story.html) (reporting that a four year, \$1 billion contract to the private Corrections Corporation of America is a “boon for CAA, which in an unusual arrangement, gets the money regardless of how many people are detained at the facility”).

<sup>239</sup> *Immigration Detention 101*, DETENTION WATCH NETWORK, <https://www.detentionwatchnetwork.org/issues/detention-101> (last visited Mar. 24, 2017) (“The system also operates under a congressionally mandated quota that requires ICE to maintain 34,000 detention beds at any given time. This policy, known as the detention bed quota, is unprecedented; no other law enforcement agency operates on a quota system.”); *see also* *Immigration Detention Map and Statistics*, CIVIC ENDISOLATION, <http://www.endisolation.org/resources/immigration-detention> (last visited Mar. 24, 2017) (interactive map about current detention facilities based on government data).

<sup>240</sup> Memorandum from Sally Yates, Deputy Att’y Gen., to the Acting Director, Federal Bureau of Prisons (Aug. 18, 2016), <https://www.justice.gov/opa/file/886311/download>; *see also* Julia Zorthian, *Justice Department Will Stop the Use of Private Prisons*, TIME.COM (Aug. 18, 2016, 3:02 PM), <http://time.com/4457597/private-prisons-justice-department>.

<sup>241</sup> *New SPLC Report Uncovers Abuse and Neglect at Immigrant Detention Centers in*

A more recent problem of this program is that even when non-citizens are found to have relevant convictions, after being fed and housed in detention, removal does not happen because countries are refusing to accept the deportees.<sup>243</sup> The countries “often refuse to take individuals identified for deportation because of a lack of proper identification, problems in confirming citizenship, or poor record-keeping.”<sup>244</sup>

Seventh, the expense of processing the current number of non-citizens with criminal convictions is costly. For those who are detained, based on numbers from 2016, the annual cost to the taxpayer at the rate of 34,000 beds (used by the 440,600 immigrants who are detained annually) is over \$2 billion each year.<sup>245</sup>

But for the vast majority of those who are and are not detained, most are entitled to hearings before an immigration judge. Currently immigration courts are at a breaking point, requiring an average two-

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*the South*, S. POVERTY L. CTR. (Nov. 21, 2016), <https://www.splcenter.org/news/2016/11/21/new-splc-report-uncovers-abuse-and-neglect-immigrant-detention-centers-south> (“In the wake of the DOJ decision, the DHS announced it would also re-examine its use of privatized immigration facilities. But the agency quickly renewed or finalized contracts for thousands of additional beds. The agency has also expanded the number of individuals it plans to detain every night by 10,000 people — pushing the total number of detainees to an estimated 45,000 people. What’s more, the agency’s new contracts include a facility — the Cibola County Correctional Center in Milan, New Mexico — that lost its contract with the DOJ after reports of abuse and medical neglect. The DHS’s actions suggest that the private prisons no longer used by the DOJ, including some of the worst in the country, could simply become immigration detention centers.”); see also Hanna Kozłowska, *The American Private Prison Industry Has Scored Another Big Win with the US Government*, QUARTZ (Dec. 1, 2016), <https://qz.com/850810/the-department-of-homeland-security-wants-to-keep-using-private-prisons-for-immigration-detention/> (“In October [2016], ICE was holding more than 40,000 people in detention, more than ever before, the Wall Street Journal reported.”).

<sup>242</sup> Kozłowska, *supra* note 241 (“The agency is projected to be detaining as many as 47,000 immigrants by June 2017.”).

<sup>243</sup> Ron Nixon, *Nations Hinder U.S. Effort to Deport Immigrants Convicted of Crime*, N.Y. TIMES (July 1, 2016), <http://www.nytimes.com/2016/07/02/us/homeland-security-immigrants-criminal-conviction.html> (citing government statistics showing 8,000 non-citizens — both undocumented and lawful permanent residents — who have been released from detention based on their native countries’ refusal to accept their return).

<sup>244</sup> *Id.* In addition, some countries subject those with criminal convictions to inhumane conditions, some rising to torture, because of the stigma and fear of U.S. deportees who have criminal convictions. See *Ridore v. Holder*, 696 F.3d 907, 909 (9th Cir. 2012) (remanding case for BIA to reconsider evidence that Haitian authorities engaged in systematic means to torture returning U.S. deportees with criminal convictions).

<sup>245</sup> Gruberg, *supra* note 235.



year-wait to adjudicate approximately 500,000 cases each year.<sup>246</sup> Some cities are experiencing an eight-year delay in scheduling cases.<sup>247</sup> For decades, Congress has rejected repeated requests to hire immigration judges, provide them with staff, and reduce their unwieldy case load — averaging 4,000 cases each year — to reduce the delay.<sup>248</sup>

The hearings are not mere technicalities. Over 50% of those who appear at these hearings have a legal means to remain in the United States — either as an asylee or lawful permanent resident.<sup>249</sup> The current system then is operating at an enormous cost that has the end of providing legal status to more than half of those who are detained and placed in proceedings.

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<sup>246</sup> See Julia Preston, *Deluged Immigration Courts, Where Cases Stall for Years, Begin to Buckle*, N.Y. TIMES (Dec. 1, 2016), <http://www.nytimes.com/2016/12/01/us/deluged-immigration-courts-where-cases-stall-for-years-begin-to-buckle.html> (“Weighed down by a backlog of more than 520,000 cases, the United States immigration courts are foundering, increasingly failing to deliver timely, fair decisions to people fighting deportation or asking for refuge, according to interviews with lawyers, judges and government officials. With too few judges, overworked clerks and an antiquated docket based on stacks of paper files, many of the 56 courts nationwide have become crippled by delays and bureaucratic breakdowns.”).

<sup>247</sup> Ronica Cleary, *Arlington Immigration Court Cases Being Scheduled as Far out as 2024*, FOX 5 (Sept. 1, 2016, 7:30 PM), <http://www.fox5dc.com/news/local-news/199158534-story>.

<sup>248</sup> Stephanie Mencimer, *Why Our Immigration Courts Can't Handle the Child Migrant Crisis*, MOTHER JONES (Jul. 14, 2014, 5:00 AM), <http://www.motherjones.com/politics/2014/07/immigration-courts-backlog-child-migrant-crisis> (reporting on repeated denials of funding to hire more immigration judges, while the backlog has more than doubled during the past ten years); see also Kari E. Hong, *Famigration (Fam-Imm): The Next Frontier in Immigration Law*, 100 VA. L. REV. ONLINE 63, 72-73, 72-74 nn.29-36 (2014) (citing to statistics, reports, scholars, and immigration judges who report on the delay arising from “immigration judges who are overworked, understaffed”). In addition, the immigration courts are unique in that they do not have separation from the prosecutors who appear in front of them and have been fired for issuing decisions that were perceived as too favorable towards non-citizens. See *id.* at 73-74 & nn.34-35.

<sup>249</sup> See Ingrid Eagly & Steven Shafer, *Access to Counsel in Immigration Court*, AM. IMMIGR. COUNCIL (Sept. 28, 2016), <https://www.americanimmigrationcouncil.org/research/access-counsel-immigration-court>. Based on data from 2007 to 2012, 53% of all non-citizens facing removal proceedings during that period were granted relief, totaling just 144,544 out of 272,352 cases decided. The report documents that there is a significant disparity in grant rates based on whether the applicant does or does not have counsel, which unlike criminal law, is not guaranteed in immigration proceedings. But there are states that are attempting to provide legal assistance to non-citizens. See Octavio Blanco, *New York To Provide Lawyers for Immigrants Facing Deportation*, CNN MONEY (Apr. 13, 2017), <http://money.cnn.com/2017/04/13/news/economy/new-york-immigrant-legal-defense-fund/>.

B. *The Immigration Law Should Return to Permit Individual Assessments of Offenses and Offenders Rather than Base Deportation on the Existence of Convictions*

IIRIRA's reliance on categories of crimes and sentences as proxies for dangerousness and undesirability has been an unsuccessful project. By its very operation, attempting to assign blameworthiness through convictions does not reach proportional ends. IIRIRA fails to account for how serious the criminal courts deemed the initial crime and fails to account for any rehabilitation that occurs — both recognized by state courts and in real life. The absurdity in results does not arise from *Descamps*. Rather, the absurdity is found in the underlying IIRIRA scheme that attempts to collapse disparate convictions into categories deserving of the same punishment in immigration law.

In this respect, I join the call others have made in repealing the failed approach that IIRIRA took with respect to using criminal convictions to increase crime-based deportation.<sup>250</sup>

In 1996, Congress enacted IIRIRA and fundamentally altered the way by which immigration violations were expanded to include numerous crimes. As others have catalogued, in the first 100 years of our nation — from 1789 to 1875 — Congress was not particularly active in excluding or deporting non-citizens on any basis, mostly due to state governments taking on this function and the lack of national infrastructure to effectuate any policy goals.<sup>251</sup> Beginning in 1875, Congress began to pass legislation to exclude certain nationals from entry into the country if they had specific criminal convictions. Targeting Chinese and Japanese nationals, “Congress first passed a statute barring convicts and prostitutes from entering the country.”<sup>252</sup> In 1917 — during a period of national isolationism — Congress expanded immigration policy to also take away status from those who committed particular crimes within the United States borders.<sup>253</sup> The

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<sup>250</sup> See generally sources cited *supra* note 32.

<sup>251</sup> Compare *Padilla v. Kentucky*, 559 U.S. 356, 360 (2010) (citing GORDON & H. ROSENFELD, IMMIGRATION LAW AND PROCEDURE § 1.(2)(a), 5 (1959), for the proposition of the era of unregulated federal immigration), with Gerald L. Neuman, *The Lost Century of American Immigration Law (1776–1875)*, 93 COLUM. L. REV. 1833, 1833-34 (1993) (“This pervasive myth asserts that the borders of the United States were legally open until the enactment of federal immigration legislation in the 1870s and 1880s. . . . Nonetheless, the borders were not legally open. Regulation of transborder movement of persons existed, primarily at the state level, but also supplemented by federal legislation.”).

<sup>252</sup> *Padilla*, 559 U.S. at 360 (citing Act of Mar. 3, 1875, ch. 141, 18 Stat. 477).

<sup>253</sup> *Id.* (citing Immigration Act of 1917, Pub. L. 301, 29 Stat. 874 (Feb. 5, 1917)). Even though the law provided for deportation, Congress did not create a formal or

deportable offenses were limited to either multiple convictions involving moral turpitude or a singular conviction involving moral turpitude for which a sentence of one year or more was served, and the crimes occurred within five years of the non-citizens' admission.<sup>254</sup>

For the next eighty years, using criminal convictions to exclude and deport non-citizens was not widespread. In this time period, crime-related deportations accounted for seven percent of all deportations.<sup>255</sup>

As mentioned in Part I, during the Tough on Crime era, 1988 ushered a dramatic change to immigration law, which cumulated with IIRIRA's current conception of numerous, non-violent, misdemeanor, and expunged offenses serving as a basis for inadmissibility, deportability, and aggravated felonies.<sup>256</sup> Not surprising the number of crime-based removals since 1988 increased from 20% in 1986, 50% in 1995, and currently 59% for all deportations in 2015.<sup>257</sup> Such a rate is particularly notable given that not only has President Obama's 2.5 million deportations been the most that any president has overseen, but that amount exceeds the total combined number of deportations that occurred under nineteen presidents from 1892 to 2000.<sup>258</sup>

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systemized means to do so until the 1940s under the auspices of the Department of Justice. See Juliet Stumpf, *The Crimmigration Crisis: Immigrants, Crime, and Sovereign Power*, 56 AM. U. L. REV. 367, 387-88 (2006).

<sup>254</sup> *Padilla*, 559 U.S. at 361. This provision remains part of the immigration law at 8 U.S.C. § 1227(a)(2).

<sup>255</sup> Legomsky, *supra* note 32, at 488 n.92 ("From 1908 through 1986 there were large fluctuations, but, for that era as a whole, approximately 7% of all deportations were on crime-related post-entry grounds.").

<sup>256</sup> See *supra* Part I.A.

<sup>257</sup> U.S. IMMIGRATION & CUSTOMS ENF'T, U.S. DEP'T HOMELAND SEC., ICE ENFORCEMENT AND REMOVAL OPERATIONS REPORT 3 (2015) ("ICE has continued to increase its focus on identifying, arresting, and removing convicted criminals in prisons and jails, and also at-large arrests in the interior. In FY 2015, ICE sustained the improved quality of its removals by focusing on serious public safety and national security threats. ICE increased the percentage of removals of convicted criminal by 3 percent over FY 2014. In FY 2015, ICE removed 139,368 convicted criminals, which represented 59 percent of total ICE removals."); Legomsky, *supra* note 32, at 489 n.93 (citing statistics for 1986, 1993, 1994, and 1995).

<sup>258</sup> Tim Rogers, *Obama Has Deported More Immigrants than Any Other President. Now He's Running up the Score*, FUSION (Jan. 7, 2016, 5:35 PM), <http://fusion.net/story/252637/obama-has-deported-more-immigrants-than-any-other-president-now-hes-running-up-the-score> ("Since coming to office in 2009, Obama's government has deported more than 2.5 million people — up 23% from the George W. Bush years. More shockingly, Obama is now on pace to deport more people than the sum of all 19 presidents who governed the United States from 1892–2000, according to government data.").

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After twenty years of IIRIRA's scheme, many have accepted the premise that crimes should be a basis to exclude and remove non-citizens. But this scheme is an aberration from our history. As *Descamps* is revealing, collateral consequences for prior convictions appears to be entirely unnecessary and arbitrary when implemented in practice.

Moreover, this scheme's failure — described in Part II and Part III — that results in overinclusive and arbitrary outcomes arises because IIRIRA does not distinguish serious crimes from non-serious ones. To use prior examples, a drunk college student who urinates is treated the same as a rapist and child molester. Immigration law used to be able to distinguish between these two individuals by using the prior mechanisms.

First, in 1917, when Congress first created crimes as a basis for immigration violations, it did so by introducing the JRAD, which permitted a criminal court to make a binding recommendation against deportation. This extended to state and federal courts who were the ones evaluating what criminal punishment was appropriate for the offender and offense. Such power is critical as the criminal court judge has the best vantage point to assess the seriousness of the offense and dangerousness of the offender. In 1990, amid the Tough on Crime era, Congress eliminated JRAD.<sup>259</sup> It did so without providing reason or reflection for doing so.<sup>260</sup> The repeal of JRAD is a significant loss in the check on absurd results. Its absence prevents the criminal court from ensuring that non-serious crimes and non-dangerous offenders are not deported.

Second, the immigration courts no longer have the authority to make individualized determinations before criminal convictions have consequences. Prior to IIRIRA, Congress gave defenses to deportations — such as suspension of deportation and section 212(c) relief — that permitted immigration courts and officers to weigh the facts of an offense against the character and circumstances of the non-citizen. This process provided an opportunity for an immigration court to evaluate a crime and defendant before imposing consequences.<sup>261</sup> The

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<sup>259</sup> Immigration Act of 1990, Pub. L. No. 101-649, § 505, 104 Stat. 4978, 5050.

<sup>260</sup> See Cade, *supra* note 47, at 40 n.17. Professor Cade provides an excellent discussion of the JRAD and reasons for its return in this essay.

<sup>261</sup> In 1996, Congress eliminated the immigration remedy known as “Section 212(c)” relief. Section 212(c) referred to the code in the INA that was a remedy for LPRs who had committed crimes. The LPR appeared before the immigration judge, and that one immigration judge would look at the nature of the crime and whether any rehabilitation had occurred. The immigration judge would also consider the non-

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authority was far reaching because criminal convictions that now commence proceedings and bar remedies, including those classified as aggravated felonies, were often forgiven under these schemes. A person was given only one second chance, but for those who were reformed and rehabilitated, that second chance prevented the imposition of hardship on citizen children, spouses, relatives, neighbors, and community members that benefited from their documented contributions.

In this respect, the call for reform is not simply a repeal of IIRIRA's expansion of crimes as having relevance under immigration law. But the reform must also restore the legal mechanisms by which judges were able to make individual determinations on whether a person was dangerous or rehabilitated.

### C. Responses to Potential Criticisms

Those in support of the status quo may argue that this proposal overlooks that the aggressive removal of criminal aliens has worked in keeping down crime rates. Any policy that returns criminals into society runs the risk of hurting citizens. But this response errs in assuming immigration policy has the means to effectuate reform that the criminal justice system does not. If someone is a continuing danger to society after committing a crime, the criminal justice system has the means to incapacitate them from harming another through lengthy sentences, life terms, and capital punishment. Immigration law — as a civil matter — has no role in this determination or execution.

Likewise, to the extent that immigration law is being sought to prevent crime, it is not an effective means to do so. Nationally, 76.6% of prisoners commit a crime within five years of release.<sup>262</sup> Even the most critical of studies place the recidivism rate for non-citizens at under half that rate.<sup>263</sup> The mass incarceration problem is being

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citizen's equities, which were defined to include family ties to U.S. citizens or LPRs, length of residence in the United States, employment history, service to the community, and other factors that demonstrated their inter-connectedness to the community. As noted in *St. Cyr*, Section 212(c) cases were granted at a national rate of at least 51.5%. See *INS v. St. Cyr*, 533 U.S. 289, 296 n.5 (2001).

<sup>262</sup> Office of Justice Programs, *Recidivism*, NAT'L INST. JUST. (June 17, 2014), <http://www.nij.gov/topics/corrections/recidivism/pages/welcome.aspx> (compiling data from 404,638 prisoners in 30 states after their release in 2005).

<sup>263</sup> Maria Sacchetti, *Criminal Immigrants Reoffend at Higher Rates than ICE Has Suggested*, BOS. GLOBE (June 4, 2016), <https://www.bostonglobe.com/metro/2016/06/04/criminal-immigrants-reoffend-higher-rates-than-ice-has-suggested/>

addressed in myriad ways through various national and local measures.<sup>264</sup> Among the more salient reforms to prevent recidivism are shorter sentences, alternative sentencing programs for first offenders, and rehabilitation measures. When states and the federal government are tasked with stopping recidivism, immigration status has not once been on the list of innovative programs or measures.<sup>265</sup> Outside of anti-immigration rhetoric, there has been no documented correlation, let alone causation, that immigration status has on current or future crime. To the extent that criminal reform needs to occur, the criminal justice system is better suited to redress the needs of the offender. Using immigration law to punish or prevent crime is not borne out to be of value to this process.

A second criticism that may arise is that the good old days may look better now than they did in 1996. But this overlooks the facts that criminal convictions were not crude, overinclusive mechanisms that resulted in automatic deportation, regardless of how much a loss of a non-citizen was to his or her citizen children, spouse, or community. Advocates had a system to contend that lawful permanent residents who committed minor crimes could not lose status for that reason and undocumented individuals — if they had ties to citizen family members, were needed by U.S. employers, or were afraid to return to their country — could contribute if their value outweighed the crime. Weighing individual equities and providing second opportunities is not mere nostalgia but the reflection of a nuanced and compassionate immigration enforcement system.

Moreover, the experiment in ratcheting up crime-based deportation was not a thoughtful, considered proposal to an existing problem. Instead, IIRIRA was at best a political calculation by each party to woo voters who were concerned with the optics of being tough on immigration along with being tough on crime, welfare fraud, and gay marriages. IIRIRA was part of legislation authored by a Republican Congress and signed by President Bill Clinton in a now-infamous two-month period that was weeks before his reelection. On August 22,

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10OpCWfTdCuTNLIAfxApAO/story.html (criticizing ICE practices and noting that “[t]he review does not indicate that immigrants are any more likely to commit crimes than native-born Americans — and in fact studies have shown that not to be the case”). In addition, according to their study: just 30% of non-citizens reoffend, which is half the recidivism rate of Massachusetts (60%) and quite a bit less than the national average (76%). *Id.*

<sup>264</sup> See the Smart on Crime and reentry programs listed at *supra* text accompanying notes 196–98.

<sup>265</sup> See the Smart on Crime and reentry programs listed at *supra* text accompanying notes 196–98.

1996, President Clinton ended welfare by signing the Personal Responsibility and Work Opportunity Act,<sup>266</sup> and in early September 1996, he signed the Defense of Marriage Act, a law later found constitutional at the time to defend heterosexual marriages from the threat of same-sex marriages.<sup>267</sup> In that very same month, on September 30, 1996 in an election year, President Clinton also signed IIRIRA.<sup>268</sup>

IIRIRA is a product of its time — one that many now recognize to have produced policy based on bad impulses rather than considered evidence. Three other laws signed during that time — the 1994 Crime Bill, DOMA, and welfare reform — have since been renounced for substituting hysteria for policy and in the case of DOMA, declared unconstitutional. Of import, these other laws have been recognized as being birthed by political calculations rather than meaningful political reform.<sup>269</sup>

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<sup>266</sup> “By 1996, Clinton was running for reelection and comprehensive welfare reform legislation was moving through in Congress. Named the ‘Personal Responsibility and Work Opportunity Act,’ the bill truly ended welfare as we knew it. Although Gingrich’s orphanages were nowhere to be seen, the legislation ended the welfare entitlement, a heretofore sixty-year federal guarantee that all poor people who qualified would receive the benefit. It instituted work requirements and limited the number of years parents could receive welfare over their lifetimes. AFDC would be replaced by a program termed Temporary Assistance to Needy Families (TANF).” Margaret O’Mara, *Welfare as We Knew It: The 1996 Personal Responsibility and Work Opportunity Act*, BLACKPAST.ORG, <http://www.blackpast.org/perspectives/welfare-we-knew-it-1996-personal-responsibility-and-work-opportunity-act> (last visited Mar. 25, 2017) (discussing political calculations that went into the formulation and enactment of the bill); see also Greg Kaufmann, *This Week in Poverty: Welfare Reform — from Bad to Worse*, NATION (Mar. 9, 2012), <https://www.thenation.com/article/week-poverty-welfare-reform-bad-worse>.

<sup>267</sup> Steve Kornacki, *Why Bill Clinton Really Signed DOMA*, MSNBC (Oct. 27, 2015, 3:19 PM), <http://www.msnbc.com/msnbc/why-bill-clinton-really-signed-doma> (“A profile in courage moment? Hardly. But a coldly rational judgment from a politician who had gotten too far ahead of the public on gay rights and paid dearly for it?”).

<sup>268</sup> See Carrie Johnson, *20 Years Later, Parts of Major Crime Bill Viewed As Terrible Mistake*, NPR (Sept. 12, 2014, 3:32 AM), <http://www.npr.org/2014/09/12/347736999/20-years-later-major-crime-bill-viewed-as-terrible-mistake>; Dara Lind, *The Disastrous, Forgotten 1996 Law that Created Today’s Immigration Problem*, VOX (Apr. 28, 2016, 8:40 AM), <http://www.vox.com/2016/4/28/11515132/iirira-clinton-immigration>.

<sup>269</sup> See, e.g., Johnson, *20 Years Later*, *supra* note 268 (quoting a policy expert, “Criminal justice policy was very much driven by public sentiment and a political instinct to appeal to the more negative punitive elements of public sentiment rather than to be driven by the facts”); Kornacki, *supra* note 267 (explaining President Clinton’s calculus in signing the bill: “A profile in courage moment? Hardly. But a coldly rational judgment from a politician who had gotten too far ahead of the public on gay rights and paid dearly for it?”); O’Mara, *supra* note 266 (discussing political calculations that went into the formulation and enactment of the bill). Compare Lily Rothman, *Why Bill Clinton Signed the Welfare Reform Bill, as Explained in 1996*,

IIRIRA's desire to be tough on immigration and tough on crime then arose from the same impulses that are now recognized as not responding to real problems and creating untold harms.<sup>270</sup> Indeed, one pundit's current explanation as to why President Clinton signed IIRIRA is "essentially, that on some level the Clinton administration really did want to look tough on immigration. And that was more important than vetoing a bill because some in the administration didn't like its policy provisions."<sup>271</sup>

IIRIRA's unprecedented crackdown on non-citizens who commit crimes, then, did not arise from an identified harm or part of a desired solution. Instead, it was merely craven politics instead of rationality. At the time, using a larger number and types of crimes to exclude and deport non-citizens was unnecessary and inhumane. Instead of focusing on which non-citizens contributed to the country, served the military, or provided for citizen family members, a criminal conviction was enough to end their status and residence in this country. In the twenty years since IIRIRA, its enforcement has also proven expensive — in the form of billions of dollars spent on detention — and inefficient — in clogging up overburdened courts with cases that prior to IIRIRA, involved either offenses too minor to be deportable offenses or filled with equities too compelling to ignore. The continued operation of an irrational system that was produced by political calculations is no longer tenable.

#### CONCLUSION

At first blush, *Descamps* and *Mathis* are highly technical decisions relating to a highly complicated field. But they arrive when society, prosecutors, the courts, and policy makers are engaged in larger conversations over the myriad contributors to mass incarceration in general and whether the costs of collateral consequences to crimes

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TIME.COM (Aug. 19, 2016), <http://time.com/4446348/welfare-reform-20-years> (noting that President Clinton "himself was said to have remarked that it was 'a decent welfare bill wrapped in a sack of s-t,' but, as TIME reported, he signed"), with Kaufman, *supra* note 266 (reporting that the number of families living on \$2 a day in the United States rose 130% since 1996 due to the structural problems with this law).

<sup>270</sup> See Lind, *supra* note 268 (documenting how the Republican congress authored the bill and the White House felt pressured to sign it: "If IIRIRA was as terrible a bill as Meissner claims, why did Panetta celebrate signing it? For that matter, why did President Clinton sign the bill at all? The answer is, essentially, that on some level the Clinton administration really did want to look tough on immigration. And that was more important than vetoing a bill because some in the administration didn't like its policy provisions.").

<sup>271</sup> *Id.*



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outweigh their benefits. It is impossible to view the impact of these cases in isolation. *Mathis* and *Descamps*, in a faithful adherence to jurisprudence, will be reducing and eliminating numerous offenses from having ACCA and IIRIRA consequences. In the ACCA context, prosecutors are embracing this result by permitting those impacted to be resentenced to shorter terms. In August 2016, the U.S. Sentencing Commission recommended that Congress eliminate all drug offenses as being subjected to ACCA.

This Article calls on the same normative result to be embraced in the immigration context. Upon examination, IIRIRA's reliance on crimes to serve as immigration grounds is too arbitrary and out of proportion to how the criminal courts considered the seriousness (or lack thereof) of the crime. The problem with relying on criminal convictions to determine which non-citizens can remain, and which ones must leave the United States, is that they sweep in such a breadth of conduct that they do not serve as effective proxies for dangerousness and desirability. Regulating immigration in an effective and meaningful way is hampered when people are classified by criminal categories in lieu of individualized determinations of benefit and harm. The federal courts are restoring common sense and proportionality by eliminating immigration consequences for crimes. This presents an opportunity for Congress to follow suit, repeal IIRIRA, and restore proportionality and common sense to immigration enforcement.

Much will be written about the Trump administration's heightened immigration enforcement efforts. But President Trump is not their origin. For the past twenty years, IIRIRA has dramatically expanded who could be deported and cut off numerous ways people used to earn status. President Bill Clinton enacted this law — based on political calculations rather than sound policy reasons — and President Barack Obama relied upon it to deport a record-breaking 2.5 million individuals, more than all presidents who oversaw deportations from 1900 to 2000, combined.<sup>272</sup>

Trump is taking the absurdity found in existing law and making it ridiculous. But this Article highlights that the problems in our immigration policy pre-dated Trump and will persist after him unless legislative reform occurs. Federal courts are quietly and slowly

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<sup>272</sup> Serena Marshall, *Obama Has Deported More than Any Other President*, ABC NEWS (Aug. 16, 2016, 2:05 PM) (“According to governmental data, the Obama administration has deported more people than any other president’s administration in history. In fact, they have deported more than the sum of all the presidents of the 20th century.”).

revealing that the reliance on crimes as a reason to deport someone is overinclusive, leads to arbitrary results, and is at odds with how state courts determined whether the offender was dangerous or engaged in a dangerous conduct. The lasting absurdity would be for the public not to demand legislative fixes to ensure that enforcement of immigration is not the only response to immigration matters. By repealing IIRIRA, we can return to the old common sense rules that let those who contribute to our country — parents of citizens, good neighbors, good workers, tax payers, and veterans — earn a way to remain and deport only those whose contributions do not outweigh any harm they cause.