

Johnson v. United States: The Impact on Texas' Habitual Offender Statute

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Introduction

Three-strike and habitual offender statutes enhance sentences for criminal offenders who commit repeated enumerated felonies. These habitual offender statutes are now ubiquitous throughout the United States, ostensibly seeking to both curb repeat criminal activity and prevent “dangerous persons” from reentering society.¹ In 2015, a federal habitual offender law took a hit with the Supreme Court’s ruling in *Johnson v. United States*.² In *Johnson*, the Supreme Court held the residual clause of a federal three-strike law enhancement scheme void for vagueness under the Fifth Amendment Due Process Clause.³ A year later, the Court ruled that because *Johnson* was a substantive rule change, it should be applied retroactively.⁴ Although the Court’s holding specifically applied to a federal sentencing enhancement scheme, the holding likely extends to state habitual offender statutes.

After reviewing a few state sentencing enhancement statutes that allow sentencing enhancement for crimes committed in other states, it became evident that the foreign jurisdiction clause in Texas’ habitual offender statute strikes chords of similarity with the residual clause held vague in *Johnson*. This Note will thus analyze *Johnson*’s effect on the foreign jurisdiction enhancement clause of the Texas habitual offender statute. By comparing

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1. U.S. SENTENCING COMM’N., 114TH CONG., REP. ON CAREER OFFENDER SENTENCING ENHANCEMENTS 2 (2016).

2. *Johnson v. United States*, 135 S. Ct. 2551, 2563 (2015).

3. *Id.* at 2563.

4. *Welch v. United States*, 136 S. Ct. 1257 (2016) (quoting *Schriro v. Summerlin*, 542 U.S. 348, 353 (2004) (explaining “by striking down the residual clause as void for vagueness, *Johnson* changed the substantive reach of the Armed Career Criminal Act, altering ‘the range of conduct or the class of persons that the [Act] punishes’”).

the federal statute with Texas's enhancement statute, this Note will highlight the Due Process issues similarly present in Texas' habitual offender statute.

To support the vagueness problems in Texas' habitual offender statute, this Note will first provide a history of vagueness doctrine and its evolution. The history of vagueness doctrine provides a context for understanding the Court's decision in *Johnson*, and accordingly, this section will lead into an outline of the considerations that supported the Court's decision to hold the residual clause unconstitutionally vague in *Johnson*. After explaining the *Johnson* holding, this analysis will then argue that state habitual offender statutes that allow sentencing enhancement for foreign crimes (crimes committed in other states) operate similarly to federal sentencing enhancement statutes and thus may be subject to *Johnson* problems. In particular, this Note will then apply the *Johnson* considerations, to Texas' Foreign Jurisdiction clause, and following this application, this Note will provide three potential remedies to this problem.⁵

I. The History of Three-Strike Laws

While an offender's past criminal activity has long played a role in sentencing, namely in enhancing the overall sentence of a particular offender, the crusade against repeat criminal conduct was bolstered in 1984 with the Armed Career Criminal Act ("ACCA").⁶ The ACCA created a sentencing scheme by which career offenders,⁷ or persons committing repeat "crimes of violence"⁸ and or "controlled substance offenses,"⁹ would receive sentencing enhancement if the offender had "previously been convicted of

5. The following represent appellate cases adjudicated under the foreign jurisdiction clause of Texas' habitual offender statute. It is worth mentioning that few cases adjudicated under the foreign jurisdiction clause are appealed, meaning many more cases not cited in this Note are likely affected by this statute. See generally *White v. State*, 2003 WL 865351 (Tex. App. Mar. 6, 2003, *pet. ref'd*); *Prudholm v. State*, 274 S.W.3d 236 (Tex. App. 2008) *aff'd*, 333 S.W.3d 590 (Tex. Crim. App. 2011); *Wagner v. State*, 2009 WL 838187, at *15 (Tex. App. Mar. 31, 2009); *Outland v. State*, 389 S.W.3d 346 (2012); *Anderson v. State*, 394 S.W.3d 531, 535–37 (Tex. Crim. App. 2013); *Lott v. State*, 2016 WL 1298962 (Tex. App. Mar. 31, 2016) *reh'g overruled* (May 11, 2016) *petition for discretionary review refused* (Aug. 24, 2016).

6. 28 U.S.C. § 994(h) (2016).

7. "Career criminal offenders" will be defined by this Note as persons convicted of previous crimes that qualify under the particular habitual offender statute in question. Statutes vary widely with respect to which crimes "count." That wide variance, and the unpredictability it brings, is what creates the vagueness problems in some of these statutes.

8. U.S. SENTENCING COMM'N., 114TH CONG., REP. ON CAREER OFFENDER SENTENCING ENHANCEMENTS, at 7 n.7 (quoting 28 U.S.C. § 994(h)).

9. *Id.*

two or more prior felonies.”^{10,11} Drafters argued that previous criminal activity was important to sentencing for its predictive value.¹² Prior convictions warranted sentencing enhancements because “a defendant’s record of past criminal conduct is directly relevant . . . the specific factors included in §4A1.1 and §4A1.3 [of the United States Sentencing Guidelines] are consistent with the extant empirical research assessing correlat[ions] of recidivism and patterns of career criminal behavior.”¹³ The ACCA has undergone many changes since its original passage,¹⁴ though the original intent of the statute has remained intact. The ACCA has provided the states with a model for their own habitual offender laws.¹⁵

Opponents of habitual offender sentencing have long raised constitutional objections, primarily that such sentencing violates the Eighth Amendment’s prohibition on cruel and unusual punishment.¹⁶ The following are commonly repeated claims against the constitutionality of three-strike and other habitual offender statutes under the Eighth Amendment: recidivist statutes (1) punish a defendant’s status, not the underlying crime; (2) add punishment for crimes and sentences previously served; (3) and these sentencing enhancements are imposed only at the will of the prosecuting attorney.¹⁷ Courts have rejected each of these Eighth Amendment arguments.¹⁸ However, some habitual offender laws may violate a different constitutional prohibition, namely the Due Process Clause’s prohibition against vagueness.

10. *Felony*, BLACK’S LAW DICTIONARY (10th ed. 2014). The term felony is defined as “A serious crime usu[ally] punishable by imprisonment for more than one year or by death.”

11. 18 U.S.C. § 924(e) (2006).

12. U.S. SENTENCING COMM’N., 114TH CONG., REP. ON CAREER OFFENDER SENTENCING ENHANCEMENTS, at 6 n.6.

13. *Id.*

14. *Id.* at 5–9. (the statute has changed over the years to include consideration of “number and nature of prior convictions in an offender’s background . . . [and has also changed to] increase sentences for certain kinds of offenses, such as drug trafficking, firearms and sex offenses”).

15. See Cal. Penal Code § 667.71 (2006); see N.Y. Pen. Law §70.04(b) (1999).

16. Romualdo P. Eclavea, Annotation, *Imposition of Enhanced Sentence Under Recidivist Statute as Cruel and Unusual Punishment*, 27 A.L.R. FED. 110 at § 2(a) (1976).

17. *Id.* (citations omitted).

18. *Id.* See also *Lockyer v. Andrade*, 538 U.S. 63, 77 (2003) (the Eighth Amendment based “gross disproportionality principle reserves a constitutional violation for only the extraordinary case. In applying this principle for § 2254(d)(1) purposes, it was not an unreasonable application of our clearly established law for the California Court of Appeal to affirm Andrade’s sentence of two consecutive terms of 25 years to life in prison”); *Ewing v. California*, 538 U.S. 11, 30–31 (2003) (“[A] sentence of 25 years to life in prison, imposed for the offense of felony grand theft under the three strikes law, is not grossly disproportionate and therefore does not violate the Eighth Amendment’s prohibition on cruel and unusual punishments.”).

II. Constitutional Vagueness and the *Johnson* Problem

The central holding of *Johnson* was that the so-called “residual clause”¹⁹ of the ACCA violated the Fifth Amendment’s Due Process Clause on grounds of vagueness.²⁰ Before analyzing *Johnson*, however, this Note will briefly review the vagueness doctrine and its origins.

A. A Brief History of the Vagueness Doctrine

Three-strike and other habitual offender laws are unconstitutionally vague when they provide inadequate “notice” to persons that certain prior convictions will result in a sentencing enhancement.²¹ The “notice” requirement was first articulated in *United States v. Reese*, where the United States Supreme Court struck down a federal statute prohibiting voting discrimination because the statute’s construction prohibited more than authorized under the Fifteenth Amendment²² and further failed to adequately distinguish between punishable crimes and crimes that are not punishable.²³ The Court held the statute unconstitutional, highlighting issues of notice:

Penal statutes ought not to be expressed in language so uncertain. If the legislature undertakes to define by statute a new offence, and provide for its punishment, it should express its will in language that need not deceive the common mind. Every man should be able to know with certainty when he is committing a crime.²⁴

The heightened consequences present in criminal, as opposed to civil, cases impelled the Court to demand more specificity in the drafting process.²⁵ *Int’l Harvester Co. of America v. Kentucky* expanded upon the “notice” requirement outlined in *Reese*.²⁶ *Int’l Harvester* in many ways foreshadows *Johnson*, not in judgment or facts, but in theory of analysis.²⁷

19. See *Johnson*, 135 S. Ct. at 2557. The *Johnson* Court explains the residual clause of the ACCA required courts to analyze whether the typical commission of a crime “‘involves conduct’ that presents too much risk of physical injury.”

20. *Id.* at 2558.

21. *United States v. Reese*, 92 U.S. 214 (1875).

22. *Id.* at 221–222.

23. *Id.* at 219 (“The law ought not to be in such a condition that the elector may act upon one idea of its meaning, and the inspector upon another.”).

24. *Id.* at 220.

25. *Id.*

26. *Int’l Harvester Co. of America v. Com. Kentucky*, 234 U.S. 216 (1914).

27. Compare *Johnson*, 135 S. Ct. at 2557–58, with *Int’l Harvester Co. of America*, 234 U.S. at 223.

In particular, the *Int'l Harvester* Court explained the dangers of requiring purchasers to contemplate their actions in an imaginary or hypothetical world as opposed to focusing on the real and present facts of a particular case:

[I]t shows how impossible it is to think away the principal facts of the case as it exists and say what would have been the price in an imaginary world. . . . The reason is not the general uncertainties of a jury trial but that the elements necessary to determine the imaginary ideal are uncertain both in nature and degree of effect to the acutest commercial mind. . . . [A] criminal law is not unconstitutional merely because it throws upon men the risk of rightly estimating a matter of degree—what is an undue restraint of trade. That deals with the actual, not with an imaginary condition other than the facts. . . . [T]o guess . . . to divine prophetically what the reaction of only partially determinate facts would be upon the imaginations and desires of purchasers, is to exact gifts that mankind does not possess.²⁸

If *Reese* was the progenitor of “lack of notice” as vagueness, *Int'l Harvester* marked the start of a subspecies of the notice concept,²⁹ namely, “forcing citizens to gauge the criminality of their contemplated acts on a hypothetical, rather than factual, predicate.”³⁰ The dangers highlighted in *Int'l Harvester* foreshadowed the opinion in *Johnson*, which struck down a statute requiring judges to imagine how crimes would be committed in the “ordinary” or hypothetical sense as opposed to looking at the actual facts and commission of the crime.³¹ Notice doctrine continued to evolve through case law, and the emergence of a second approach began to take form in *Connally v. General Construction Co.*³² The notice problem in *Connally* resulted from

28. *Int'l Harvester Co. of America*, 234 U.S. at 222–23 (citations omitted).

29. *Id.*

30. Evan Lee, *Why California's Second-Degree Felony Murder Rule Is Now Void for Vagueness*, 43 HASTINGS CONST. L.Q., 1, 6 (2015).

31. Compare *Johnson*, 135 S. Ct. at 2557–58, with *Int'l Harvester Co. of America*, 234 U.S. at 223 (The “categorical approach” (referred to hereinafter without quotation marks) applied in *Johnson* focuses on a judicial inquiry into the “hypothetical” commission of a crime, whereas *International Harvester* focused on the purchaser’s hypothetical contemplation of the conduct under question.).

32. In *Johnson*, Justice Scalia effectively merges the holdings of *International Harvester* and *Connally* and explores the dangers of using a hypothetical or categorical approach when the crux of the statutory analysis relies upon judicial interpretation of an ambiguous phrase. Moreover, *Johnson* does not strike down the residual clause for its use of the “categorical approach,” or even simply because the language of the statute was unclear, but because the intersection of these two factors created an overly ambiguous judicial determination.

a compounding of ambiguities in the statute.³³ The *Connally* court examined an Oklahoma statute that “create[d] an eight-hour day for all persons employed by or on behalf of the state [and provided the worker be paid] ‘not less than the *current rate of per diem wages* in the *locality* where the work is performed.’”³⁴ The Court pointed to the interaction between the phrases “current rate of wages” and “locality” to illustrate the compounding point:

The “current rate of wages” [includes] from so much (the minimum) to so much (the maximum), [and] all between; and to direct the payment of an amount which shall not be less than one of several different amounts, without saying which, is to leave the question of what is meant incapable of any definite answer.³⁵

In the second place, additional obscurity is imparted to the statute by the use of the qualifying word “locality.” Who can say, with any degree of accuracy, what areas constitute the locality where a given piece of work is being done? . . . It is said *State v. Tibbetts* . . . [settled the issue b]ut all the court did there was to define the word “locality” as meaning “place,” “near the place,” “vicinity,” or “neighborhood.” Accepting this as correct . . . the result is . . . to offer a choice of uncertainties. The word “neighborhood” is quite as susceptible of variation as the word “locality.” Both terms are elastic and, dependent upon circumstances.³⁶

The vagueness problem outlined in *Reese*, *Int’l Harvester*, and *Connally* provided the foundation for the Supreme Court’s decision in *Johnson*.

B. The Vagueness Doctrine as Applied in *Johnson*

In *Johnson*, after years of unsuccessful attempts, Justice Scalia finally persuaded enough of his colleagues that the ACCA residual clause was hopelessly and unconstitutionally vague.³⁷ The residual clause purported to describe the last of several categories of convictions to be considered a “violent felony” under the ACCA.³⁸ In relevant part, the statute reads:

33. *Connally v. General Constr. Co.*, 269 U.S. 385, 388 (1926).

34. *Connally*, 296 U.S. at 388 (emphasis added).

35. *Id.* at 394.

36. *Id.* at 394–95 (emphasis added) (citations omitted).

37. *See generally Johnson v. United States*, 135 S. Ct. 2551 (2015).

38. *Id.* at 2554.

[T]he term “violent felony” means any crime punishable by imprisonment for a term exceeding one year, or any act of juvenile delinquency involving the use or carrying of a firearm, knife, or destructive device that would be punishable by imprisonment for such term if committed by an adult, that

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

(ii) is burglary, arson, or extortion, involves use of explosives, *or otherwise involves conduct that presents a serious potential risk of physical injury to another.*³⁹

Under this provision, a conviction qualifies as a “violent felony” in one of three ways: (1) if the crime is specifically enumerated as a “violent felony” in the ACCA;⁴⁰ (2) if the elements of the underlying crime require the use of physical force in some way;⁴¹ or (3) if the crime falls into the catchall provision (residual clause), which covers crimes whose elements necessarily encompass conduct that “presents a serious potential risk of physical injury to another.”⁴²

The residual clause, though convenient for prosecutors who could not fit convictions into either of the first two definitions of “violent felony,” provided defendants with little notice of which crimes would qualify for enhancement.⁴³ The *Johnson* Court stated that the “government violates [the Due Process Clause of the United States Constitution] . . . by taking away someone’s life, liberty, or property under a criminal law so vague that it fails to give ordinary people fair notice of the conduct it punishes, or [is] so standard-less that it invites arbitrary enforcement.”⁴⁴ The Court’s opinion, cites to both *Kolender* and *Connally* to articulate the Fifth Amendment Due Process problems with the “catch-all provision,” and states “the prohibition of vagueness in criminal statutes ‘is a well-recognized requirement, consonant alike with ordinary notions of fair play and the settled rules of law’ [A] statute that flouts t[his] ‘violates the first essential of due process.’”⁴⁵ Thus, a statute that in effect fails to provide fundamental notice

39. See 18 U.S.C. § 924(e) (emphasis added).

40. *Id.* (“is burglary, arson, or extortion”).

41. *Id.* (“has as an element the use, attempted use, or threatened use of physical force”).

42. *Id.*

43. *Johnson*, 135 S. Ct. at 2557.

44. *Id.* at 2556 (quoting *Kolender v. Lawson*, 103 S. Ct. 1855, 1858 (1983)).

45. *Id.* at 2557.

to criminal defendants as to which crimes will qualify for enhancement, is unconstitutionally vague.

It is important to note that Justice Scalia's majority opinion set forth multiple factors for finding a statute unconstitutionally void for vagueness under the Due Process Clause. In the case of the ACCA residual clause, these factors tipped the balance from validity toward unconstitutionality. *Johnson* identified the following factors as playing into its decision: (1) "Grave uncertainty about how to estimate the risk posed by a crime . . . [because i]t ties the judicial assessment of risk to a judicially imagined 'ordinary case' of a crime, not to real-world facts or statutory elements"⁴⁶ in conjunction with (2) the inconsistent and ambiguous nature of the words "serious potential risk;" and (3) "the failure of 'persistent efforts . . . to establish a standard' [which] can provide evidence of vagueness."⁴⁷ Thus, there are three principal factors in finding an anti-recidivism statute unconstitutionally vague under *Johnson*. The first has to do with the methodology employed by courts in interpreting the underlying convictions. With respect to the ACCA residual clause, courts were interpreting the underlying convictions in a "categorical" manner, which is to say, based on hypothetical facts rather than on the actual facts of the crimes committed by the offender. The second factor has to do with the anti-recidivist statute's textual scope defining which convictions "qualify" for sentencing enhancement. With the ACCA residual clause, "serious potential risk" was too open-ended to provide predictability or notice. The third factor concerns courts' track records in interpreting the scope of the anti-recidivist statute in question. With the ACCA residual clause, the Supreme Court itself had decided four cases in a relatively short period of time—*James*, *Chambers*, *Begay*, and *Sykes*—and still felt it needed to grant certiorari in *Johnson* to clarify the scope of the clause.⁴⁸ Justice Scalia's reasoned arguments ultimately convinced his colleagues that they were never going to succeed.

1. The Categorical Approach and Johnson

Justice Scalia's rationale for striking the ACCA residual clause as unconstitutionally vague began with a discussion of the categorical approach. The vagueness problem in *Johnson* stemmed from the application

46. *Johnson*, 135 S. Ct. at 2557.

47. *Id.* at 2558 (quoting *United States v. L. Cohen Grocery Co.*, 255 U.S. 81, 91 (1921)).

48. See generally *James v. United States*, 550 U.S. 192, 208 (2007); *Begay v. United States*, 553 U.S. 137, 144–145 (2008); *Chambers v. United States*, 555 U.S. 122, 128–129 (2009); *Sykes v. United States*, 564 U.S. 1, 10 (2011).

of a pure⁴⁹ categorical approach, a test derived (in the criminal context, at least) from an earlier Supreme Court case, *Taylor v. United States*.⁵⁰ In *Taylor*, the Supreme Court adopted a type of categorical approach⁵¹ when determining if a prior burglary conviction qualified as burglary under the burglary clause of the ACCA.⁵² The categorical approach used in *Taylor* has been labeled by some courts as a “least culpable conduct test”⁵³ in the sense that it ‘look[s] to the elements of the statutory state offense, not to the specific facts,’ reading the applicable statute to ascertain the least culpable conduct necessary to sustain conviction under the statute.’⁵⁴ The *Taylor* analysis requires judges to compare the elements of the underlying offense with a listed or qualifying offense under the enhancing statute.⁵⁵ Where a statute has no list of qualifying felonies, courts must conduct an analytically distinct kind of categorical approach. The distinct categorical analysis used in the ACCA residual clause cases, instead imagines a set of facts that could

49. The “pure” categorical approach is an approach that does not allow judges to consult the underlying facts of an individual’s case during the sentencing enhancement stage. See *Descamps v. United States*, 133 S. Ct. 2276, 2287 (2013) (quoting *Taylor v. United States*, 495 U.S. 575, 601(1990) and *Nijhawan v. Holder*, 557 U.S. 29, 36 (2009)) (“Congress intended the sentencing court to look only to the fact that the defendant had been convicted of crimes falling within certain categories, and not to the facts underlying the prior convictions . . . other statutes require[d] a . . . ‘circumstance-specific,’ not a ‘categorical,’ . . . approach”).

50. *Johnson*, 135 S. Ct. at 2557 (referencing *Taylor*, 495 U.S. at 600).

51. Jennifer Lee Koh, *Crimmigration and the Void for Vagueness Doctrine*, 6 WISC. L. REV. 1127, 1147 (2016) (emphasis added). There are two types of categorical approaches. The first type of categorical approach was defined in *Taylor v. United States* and will be explained more fully in the text of this Note. The second test is similar to the first, and differs only in that it lacks the aid of a “generic definition” or defined elements to assist in the analysis. The second type of categorical approach is defined as follows: “In the absence of a limited set of elements ascertainable through the naming of a generic crime in the residual clause, courts developed a unique variation on the ‘categorical approach.’ Under the so-called ‘ordinary case approach’ established by the Supreme Court in a 2007 case, *James v. United States* . . . ‘the proper inquiry is whether the conduct encompassed by the elements of the offense, in the ordinary case, presents a serious potential risk of injury to another.’ The *James* Court provided only rough guidance on how courts should identify this mythical ‘ordinary case.’”

52. *Taylor*, 495 U.S. at 600.

53. The term “least culpable conduct” is used in some cases to explain the categorical analysis envisioned by *Taylor*. See generally *Jean-Louis v. Attorney General of United States*, 582 F.3d 462, 465–66 (3d Cir. 2009) (quoting *Wilson v. Ashcroft*, 350 F.3d 377, 381 (3d Cir.2003)); *United States v. Harris*, 844 F.3d 1260, 1268 n.9 (10th Cir. 2017) (referencing the analysis required by *Descamps*, 133 S. Ct. at 2290–91 (2013)). The term “least culpable conduct” has also been referred to as the “minimum conduct” test. See Lee, *supra* note 29, at 12. The term “least culpable conduct” has also been referred to as an “elements-based” test. See Koh, *supra* note 50, at 1170 n.279.

54. *Jean-Louis*, 582 F.3d at 465–66 (citing *Knapik v. Ashcroft*, 384 F.3d 84, 89 (3d Cir. 2004)) (and quoting *Wilson*, 350 F.3d at 381)).

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

be characterized as the “ordinary” or “typical” commission of a crime.⁵⁶ Courts must then ask whether that imagined set of facts falls within the essential elements of the underlying statute of conviction. Although the least culpable conduct and typical commission types of categorical analysis differ, they share one critical attribute relevant to the vagueness doctrine: they both rely heavily on the unforeseeable imaginings of judges.

Courts could not use the *Taylor* least culpable conduct categorical approach in examining the residual clause because the clause provided no list of qualifying felonies to compare the elements of offenses.⁵⁷ Instead, judges relied on the ordinary commission version of the categorical approach used in *James*, which required judges to “picture the kind of conduct that the crime involve[d] in ‘the ordinary case,’ and [to decide] whether that abstraction present[ed] a serious potential risk of physical injury”⁵⁸ absent any neatly defined elements of an offense when making their judgment.⁵⁹ As with any form of categorical analysis, the ordinary commission approach does not look at the actual facts underlying the defendant’s convictions but instead imagines the facts of the ordinary or typical commission of the statutory code provision under which the defendant has been convicted.⁶⁰ The categorical approach of convictions, as opposed to looking at the actual facts underlying a conviction, always requires some judicial hypothesizing, but as Justice Scalia explained, combining this level of abstraction with an already vague statute (“serious potential risk of injury”) provided too little notice.⁶¹ The Supreme Court in *Johnson* cited a Connecticut offense, “rioting at a correctional institution,” to explain the difficulties in the levels of judicial imagining required by the vague residual clause.⁶²

Specifically, the Court explained the Connecticut statute “‘rioting at a correctional institution’ . . . certainly sounds like a violent felony—until one realizes that Connecticut defines this offense to include taking part in ‘any disorder, disturbance, strike, riot or other organized disobedience to the rules

56. See Koh, *supra* note 50.

57. See 18 U.S.C. § 924(e).

58. *Johnson*, 135 S. Ct. at 2557 (citing *James*, 550 U.S. at 208).

59. For posterity sake, this Note will explain both the *James*-type categorical approach and the *Taylor*-variety “categorical approach.” But this Note will also explain that, while *Johnson*’s holding *specifically* applies to the *James* approach, this Note will show that *either* the *James* or the *Taylor* approach can lead to vagueness issues under *Johnson*.

60. *James*, 550 U.S. at 202, 208.

61. *Johnson*, 135 S. Ct. at 2556–58.

62. *Id.* at 2560 (citing *United States v. Johnson*, 616 F.3d 85, 95 (2d Cir. 2010) (Parker, J., dissenting)).

and regulations’ of the prison.”⁶³ As the Supreme Court in *Johnson* continued to question “[w]ho is to say which the *ordinary* ‘disorder’ most closely resembles—a full-fledged prison riot, a food-fight in the prison cafeteria, or a ‘passive and nonviolent [act] such as disregarding an order to move?’”⁶⁴ The Connecticut statute provided the anecdote by which Justice Scalia explained the arbitrary level of abstraction and judicial imagining required by a categorical analysis. Justice Scalia’s explanation of the aforementioned inquiry reinforced the Court’s holding in *Johnson*, because the rationale for striking down the residual clause of the ACCA rested critically on the problematic intersection of the abstraction required by the categorical approach and the ambiguities in the ACCA statute:

Two features of the residual clause conspire to make it unconstitutionally vague. In the first place, the residual clause leaves grave uncertainty about how to estimate the risk posed by a crime

At the same time, the residual clause leaves uncertainty about how much risk it takes for a crime to qualify as a violent felony. It is one thing to apply an imprecise “serious potential risk” standard to real world facts; it is quite another to apply it to a judge imagined abstraction. By asking whether the crime “otherwise involves conduct that presents a serious potential risk”

By combining indeterminacy about how to measure the risk posed by a crime with indeterminacy about how much risk it takes for the crime to qualify as a violent felony, the residual clause produces more unpredictability and arbitrariness than the Due Process Clause tolerates.⁶⁵

Justice Scalia argued not that the phrase “serious risk” was alone impermissibly vague,⁶⁶ but, that requiring a judge to determine what constitutes an “ordinary” commission of a given offense, while simultaneously asking a judge to determine how much risk is “serious,” and

63. *Johnson*, 135 S. Ct. at 2560.

64. *Id.*

65. *Johnson*, 135 S. Ct. at 2557–58 (citations omitted).

66. See Lee, *supra* note 29, at 14; and Koh, *supra* note 50, at 1149–50.

then applying the two findings to each other, results in an impermissibly vague and arbitrary judicial determination.⁶⁷

2. *Demonstrated Judicial Inability to Establish a Workable Standard*

Justice Scalia's second rationale for striking down the residual clause relied on a review of the Supreme Court's own fruitless history of trying to establish a clear and consistent standard for determining which crimes fell within the residual clause.⁶⁸ The review began with *James v. United States*, which involved a Florida attempted burglary statute. The issue was whether "the risk posed by attempted burglary is comparable to that posed by its closest analog among the enumerated offenses,' namely completed burglary; we concluded that it was."⁶⁹ This settled once and for all whether attempted burglary in Florida fell within the ACCA residual clause but provided no help in determining which other crimes fell within the residual clause.⁷⁰ It did not even settle whether attempted burglary in other states qualified, given that each state has its own definitions of both burglary and attempt.

Next up was the New Mexico drunk driving statute presented in *Begay v. United States*.⁷¹ Realizing that it needed to start giving guidance to lower courts by setting forth some general principles about which crimes qualified under the residual clause, the Court propounded a new limit, namely that the residual clause only applies to crimes that typically involve "purposeful, violent, and aggressive conduct."⁷² Applying this new standard to the New Mexico DUI statute, the Court found "drunk driving insufficiently similar to the listed crimes [in the ACCA], because it typically does not involve 'purposeful, violent, and aggressive conduct.'"⁷³ The *Begay* court departed from *James*'s, "h[olding] that in order to qualify as a violent felony under the residual clause, a crime must resemble the [ACCA] enumerated offenses 'in kind as well as in degree of risk posed.'"⁷⁴ However, as the Court would later admit, the holding in *Begay* was ultimately unsuccessful in providing clarity to the residual clause

67. *Johnson*, 135 S. Ct. at 2557–58; see also Lee, *supra* note 29, at 14; and Koh, *supra* note 50, at 1149–50.

68. *Id.* at 2560.

69. *Johnson*, 135 S. Ct. at 2558 (quoting *James*, 550 U.S. at 203).

70. *Id.*

71. See generally *Begay v. United States*, 553 U.S. 137 (2008).

72. *Johnson*, 135 S. Ct. at 2559 (quoting *Begay*, 553 U.S. at 144–45).

73. *Id.*

74. *Id.* (quoting *Begay*, 553 U.S. at 143).

analysis because “it did not (and could not) eliminate the need to imagine the kind of conduct typically involved in a crime.”⁷⁵

The very next term, continuing its quest to impart predictability to the residual clause, the Court granted review in *Chambers v. United States*, involving an Illinois statute criminalizing the failure to report to a penal institution.⁷⁶ Justice Breyer’s majority opinion accentuated the importance of statistics in determining whether particular offenses presented “a serious potential risk of physical injury.”⁷⁷ *Chambers* “relied principally on a statistical report prepared by the Sentencing Commission to conclude that an offender who fails to report to prison is not ‘significantly more likely than others to attack, or physically to resist, an apprehender, thereby producing a ‘serious potential risk of physical injury.’”⁷⁸ Clearly, Justice Breyer believed that empirical data held promise as a way of sorting which crimes fell within and outside the residual clause. Dissenting, Justice Scalia rejected statistics as a guide for two reasons.⁷⁹ First, although a study happened to be available and applicable to the statute in *Chambers*, the Court would still be left without a consistent standard for “the tens of thousands of federal and state crimes for which no comparable reports exist.”⁸⁰ Second, even where studies exist, “those studies . . . available might suffer from methodological flaws, be skewed toward rarer forms of the crime, or paint widely divergent pictures of the riskiness of the conduct that the crime involves.”⁸¹

Only two years later, the Court again granted certiorari to review a mandatory minimum sentence under the residual clause.⁸² *Sykes v. United States* involved an Indiana statute making it a crime to use a motor vehicle to flee a police officer.⁸³ Holding that such a crime did present a “serious potential risk of physical injury,” the Court cited statistics from many sources to make the empirical case.⁸⁴ Yet Justice Kennedy’s majority opinion seemed to step back from the Court’s position in *Chambers* that statistics

75. *Johnson*, 135 S. Ct. at 2559.

76. *See generally* *Chambers v. United States*, 555 U.S. 122 (2009).

77. *Id.* at 128–29.

78. *Johnson*, 135 S. Ct. at 2558–59 (quoting *Chambers*, 555 U.S. at 128–29).

79. *Id.* at 2559.

80. *Id.*

81. *Id.*

82. *See generally* *Sykes v. United States*, 564 U.S. 1 (2011).

83. *Id.*

84. *Johnson*, 135 S. Ct. at 2559 (citing *Sykes*, 564 U.S. at 2274, 2289–90).

were the main factor.⁸⁵ Statistics were only relevant “[to] confirm the commonsense conclusion that Indiana’s vehicular flight crime is a violent felony.”⁸⁶ Kennedy and the majority simply found it hard to believe that the typical case of vehicular flight from a police officer isn’t very dangerous.⁸⁷ In terms of setting a precedent that would give everyone sufficient notice of what falls within the residual clause, however, *Sykes* did little. Its nuanced use of statistics and common sense was too specific to vehicular flight from a police officer; whether other types of crimes presented a sufficient amount of risk would continue to have to be gauged on a crime-by-crime basis.⁸⁸ This would lead to the Court granting certiorari in *Johnson* four years later to once again try to give the residual clause a determinate and predictable meaning.⁸⁹

Johnson presented the issue of whether the Minnesota statute punishing unlawful possession of a short-barreled shotgun fell within the residual clause.⁹⁰ The Court refused to answer that question, instead striking down the residual clause altogether for vagueness.⁹¹ One important factor behind the Court’s decision was its own demonstrated inability (in *James*, *Begay*, *Chambers*, and *Sykes*) to create a working standard for analysis:

This Court has acknowledged that the failure of “persistent efforts . . . to establish a standard” can provide evidence of vagueness . . . repeated attempts and repeated failures to craft a principled and objective standard out of the residual clause confirm its hopeless indeterminacy. . . .

85. See *Sykes*, 564 U.S. at 10 (“Although statistics are not dispositive, here they confirm the commonsense conclusion that Indiana’s vehicular flight crime is a violent felony. See *Chambers*, 555 U.S. at 129 . . . (explaining that statistical evidence sometimes ‘helps provide a conclusive . . . answer’ concerning the risks that crimes present.”)).

86. *Johnson*, 135 S. Ct. at 2559 (quoting *Sykes*, 564 U.S. at 10).

87. *Sykes*, 564 U.S. at 10 (stating “the commonsense conclusion that Indiana’s vehicular flight crime is a violent felony.”).

88. See *Johnson*, 135 S. Ct. at 2558–59 (The court critiqued the reliance of statistics and also stated, “Common sense has not even produced a consistent conception of the degree of risk posed by each of the four enumerated crimes; there is no reason to expect it to fare any better with respect to thousands of unenumerated crimes. All in all, *James*, *Chambers*, and *Sykes* failed to establish any generally applicable test that prevents the risk comparison required by the residual clause from devolving into guesswork and intuition.”).

89. See generally *Johnson*, 135 S. Ct. 2551 (2015).

90. *Id.*

91. *Id.*

It has been said that the life of the law is experience. Nine years' experience trying to derive meaning from the residual clause convinces us that we have embarked upon a failed enterprise.⁹²

Thus, *Johnson* mandates a finding of vagueness where the categorical approach intersects with an ambiguously worded statute, and where persistent judicial efforts to provide a clear and consistent standard have failed.

III. Texas and the *Johnson* Problem

Although *Johnson* deals specifically with a federal three-strikes law, *Johnson* is equally applicable to state career—or habitual—offender laws that similarly fail to provide adequate notice, or consistency in judgment for criminal defendants.⁹³ This is because the Fifth Amendment Due Process Clause is incorporated within the Due Process Clause of the Fourteenth Amendment and therefore applies equally against the states.⁹⁴ This section demonstrates that the vagueness doctrine, particularly as explicated by *Johnson*, invalidates the state habitual offender foreign jurisdiction clause in Texas Penal Code Section 12.42.

As explored previously, a *Johnson* issue can *only* occur where courts apply a pure categorical approach. Thus this analysis will begin by reinforcing what makes a pure categorical approach and also will argue that Texas courts apply a pure *Taylor*-variety least culpable conduct categorical approach to the Texas habitual offender statute. After establishing that Texas courts in fact apply a *Taylor*-variety approach and therefore in fact engage in a level of “judicial imagining,” this Note argues that the application of this approach raises vagueness issues when combined with Texas’ ambiguously worded foreign jurisdiction clause. In particular, this Note explains that

92. *Johnson*, 135 S. Ct. at 2560; see also *Johnson*, 135 S. Ct. at 2558–60 (quoting *Chambers*, 555 U.S. at 133) (“The clause has ‘created numerous splits among the lower federal courts,’ where it has proved ‘nearly impossible to apply consistently.’”).

93. The holding in *Johnson*, and the vagueness doctrine in general, derives from the Fourteenth Amendment’s Due Process Clause. The Fifth Amendment Due Process Clause, which applies to states, is incorporated within the Fourteenth Amendment’s Due Process Clause. States must therefore similarly enact laws that do not flout the underlying constitutional protections afforded to all individuals. And although *Johnson* struck down a federal habitual offender sentencing scheme, the holding is also relevant to a protection of due process rights of individuals facing state induced criminal sentencing enhancement.

94. See generally *Hurtado v. People of State of Cal.*, 110 U.S. 516, 534–35 (1884) (holding “the natural and obvious inference is that, in the sense of the constitution, ‘due process of law’ was not meant or intended to include, ex vi termini, the institution and procedure of a grand jury in any case. The conclusion is equally irresistible, that when the same phrase was employed in the Fourteenth Amendment to restrain the action of the states, it was used in the same sense and with no greater extent.”).

because Texas' foreign jurisdiction clause uses ambiguous and often confusing language, the intersection of that open-ended language with the judicial imaginings inherent in the least culpable conduct approach, denies criminal offenders constitutionally sufficient notice of which prior convictions will enhance their sentences. Finally, this Note argues just as the United States Supreme Court struggled to give a clear meaning to the ACCA residual clause, the Texas courts have repeatedly encountered difficulty in crafting a clear and consistent test for applying the least culpable conduct test to the foreign jurisdiction clause of the habitual offender statute. This analysis argues the Texas courts' failure to establish a clear and consistent standard of application constitutes a second independent ground for finding the foreign jurisdiction clause unconstitutionally vague under *Johnson*.

A. The Categorical Approach and Texas Penal Code §12.42

Under the Texas "habitual offender" statute—Texas Penal Code section 12.42—criminal offenders receive sentencing enhancement for "foreign convictions" (offenses committed outside of Texas) if the conviction "contain[s] elements that are *substantially similar* to the elements of a [qualifying Texas] offense."⁹⁵ To aid the inquiry, Texas' habitual offender statute provides an exhaustive list of all crimes under Texas law that qualify offenders for enhancement.⁹⁶ However, because this list only includes crimes committed in Texas,⁹⁷ judges must consider whether the elements of the out-of-state crime committed could *similarly* have qualified the criminal defendant for conviction under one of the enumerated Texas crimes.⁹⁸ And, because state criminal laws differ from state to state, the elements constituting a given crime may be vastly different in one state than another. This phenomenon creates the precise problem the United States Supreme Court faced in *Taylor*.⁹⁹ For example, the elements required for a conviction of "burglary" in California may not qualify as a "burglary" in Texas.¹⁰⁰ Unless the Texas legislature wanted to exempt all non-Texas convictions from qualifying under its habitual offender statute, the legislature had to

95. Tex. Penal Code § 12.42 (c)(2)(B)(v) (emphasis added). Most state three-strike statutes contain a similar provision, but most of those provisions are interpreted by their respective state courts on a "factual" rather than "categorical" basis and therefore present no *Johnson* problem.

96. *Id.*

97. *Id.*

98. *Id.*

99. See generally *Taylor v. United States*, 495 U.S. 575 (1990).

100. *Id.*

provide some method of determining which foreign (non-Texas) convictions qualified and which did not.

We have now seen that the foreign jurisdiction clause draws the border between qualifying and non-qualifying foreign convictions by asking whether elements of the crime are “substantially similar” to the elements of a Texas offense that qualifies for enhancement.¹⁰¹ Because the statute compares the “elements” of a crime, the Texas courts could not use a factual approach to determine which foreign convictions are “substantially similar” to qualifying Texas convictions.¹⁰² The Texas courts could not examine facts underlying the foreign conviction to determine whether the defendant’s actual conduct would have constituted a crime under an analogous Texas criminal statute.¹⁰³ They had no choice but to adopt an approach tethered to the elements of offenses, which required some kind of categorical approach.

Texas courts adopted the pure categorical approach (least culpable conduct approach) in *White v. State*.¹⁰⁴ The *White* court explained: “for enhancement purposes, section 12.42(c)(2)(B)(v) requires only that a defendant’s prior conviction . . . contain ‘elements that are substantially similar to the elements of an offense’ . . . [t]he statute does not require that the facts and circumstances of the out-of-state offense be substantially similar.”¹⁰⁵ The “substantially similar” inquiry requires a judge to compare the statute of conviction against the generic definition of the enhancing Texas offense.¹⁰⁶ This inquiry mirrors the *Taylor* least culpable conduct categorical approach in the following ways: (1) *Taylor*’s approach, like the Texas approach, focuses on a comparison between *elements* of the offenses, not the underlying *facts* of an offender’s case,¹⁰⁷ and (2) the *Taylor* approach, like the Texas approach, questions whether the elements of the statute of conviction sufficiently mirror the elements of the generic definition of the offense.¹⁰⁸ The *White* analysis excludes the *Taylor* focus on hypothetical imaginations of the least culpable conduct. However, more recent Texas decisions have implemented judicial imaginations required for an analysis to receive classification as a least culpable conduct inquiry.

101. See Tex. Penal Code § 12.42 (c)(2)(B)(v).

102. Tex. Penal Code § 12.42 (c)(2)(B)(v).

103. See *Prudholm v. State*, 333 S.W.3d 590, 592 n.9 (Tex. Crim. App. 2011).

104. See generally *White v. State*, 2003 WL 865351 (Tex. App. Mar. 6, 2003).

105. *Id.* at *3.

106. See *Prudholm*, 333 S.W.3d at 596–600.

107. Compare *White*, 2003 WL 865351 at *3, with *Taylor*, 495 U.S. at 600.

108. *Id.*

For example, in 2013, the Texas Court of Criminal Appeals in *Anderson v. State* reaffirmed *White's* explanation of the analysis required in foreign jurisdiction clause cases, and in many ways applied an analysis that more closely mirrors the *Taylor*-variety categorical approach. The *Anderson* court compared the elements in North Carolina's taking indecent liberties with children statute with the elements in Texas' "indecenty with a child" statute.¹⁰⁹ The *Anderson* court found North Carolina's taking indecent liberties with children statute to be insufficiently similar to Texas' indecenty with a child statute.¹¹⁰ The *Anderson* court's analysis focused on the different ranges of conduct punishable under either statute:

The crucial difference is that under the North Carolina statute, almost any conduct . . . may satisfy the "bad act" element of the offense For example, North Carolina defendants have been convicted of "Indecent Liberties" for kissing a minor's face, French kissing a minor, and hugging the legs of a minor. Such conduct would clearly be insufficient to meet the elements of our Texas "Indecency with a Child" statute While the elements of two offenses need not "parallel" one another to be "substantially similar," they must criminalize a similar "range of conduct." The North Carolina statute criminalizes a great range of conduct that is lawful in Texas [and is thus broader than the Texas statute].¹¹¹

The quote above exemplifies the *Anderson* court's use of the pure, *Taylor*-variety categorical approach¹¹² in a few distinct ways. First, the *Anderson* court illustrates its use of a *Taylor*-variety approach by explaining the following conduct—"kissing a minor's face, french kissing a minor, and hugging the legs of a minor"¹¹³—is less culpable than conduct punishable under the Texas statute.¹¹⁴ The conduct cited by the *Anderson* court arguably represents some of the least egregious conduct, or least culpable conduct,

109. *Anderson v. State*, 394 S.W.3d 531, 533, 539 (Tex. Crim. App. 2013).

110. *Id.* at 533.

111. *Anderson*, 394 S.W.3d at 538–539 (citations omitted).

112. However, it is essential under *Johnson* that Texas courts use some variation of a pure categorical analysis—not that Texas courts necessarily perfectly follow either the *Taylor*-variety categorical approach or the *James*-type categorical approach. See generally Koh, *supra* note 50, at 1168–69 (explaining any pure "categorical approach," when combined with an overly vague statute, can raise issues of vagueness under *Johnson*).

113. *Anderson*, 394 S.W.3d at 538–39.

114. *Id.* at 539.

punishable under the North Carolina statute.¹¹⁵ By emphasizing this conduct, the *Anderson* court demonstrates its use of the least culpable conduct piece of the *Taylor* analysis. The court continues to reinforce its use of a *Taylor*-variety approach by focusing on statutory elements, as opposed to the underlying facts,¹¹⁶ of the offender's conviction.¹¹⁷ But what is most demonstrative of *Anderson's* use of a least culpable conduct approach is the court's judicial imagining of what conduct would qualify under the Texas statute.

As with a *Taylor*-variety least culpable conduct categorical approach, the *Anderson* court considered conduct that would qualify offenders for conviction under North Carolina's statute, and then considered whether this conduct would qualify under the Texas statute.¹¹⁸ Notably, the *Anderson* court cites ranges of conduct historically punished under the North Carolina statute, but the *Anderson* court did not explain or include the factual scenarios underpinning the conduct.¹¹⁹ Rather, the *Anderson* court explained generally that "kissing a minors face, french kissing, and hugging the legs of a minor" constituted conduct that could not satisfy the Texas statute, "even if [the court imagined the conduct was] performed to 'arouse or gratify . . .

115. The North Carolina statute punishes offenders who "commit any lewd or lascivious act upon or with the body or any part or member of the body of any child of either sex under the age of 16 years." *Id.* at 537 n.27 (quoting N.C. Gen. Stat. § 14–202.1). The language in the statute, particularly the "lewd" and "lascivious" language, could be broadly construed to encompass markedly more egregious acts than the conduct cited by the *Anderson* court.

116. Texas courts addressing the use of facts in sentencing effectively allow only a "modified categorical approach." A full treatment of the modified categorical approach is not necessary for this Note, but is relevant only insofar as it reinforces Texas courts' use of a pure categorical approach as opposed to a circumstance-specific approach. The modified categorical approach allows a court to look at limited class documents "to determine which alternative element formed the basis of the defendant's prior conviction," but not to determine whether the factual crime falls within the generic definition of an offense. *Descamps v. United States*, 133 S. Ct. 2278, 2279 (2013). The modified categorical approach "is consistent with a strong elements-based categorical approach." Koh, *supra* note 50, at 1170 n.279. Texas courts have similarly applied a modified categorical approach in a limited number of cases, which merely reinforces the use of a pure categorical approach. *See Castle v. State*, 402 S.W.3d 895, 908 (Tex. App. 2013, *no pet.*) (the court used limited documents to determine the age of a victim in a statutory rape case. This demonstrates the modified categorical approach because the facts here were used to determine whether the offender was convicted for an alternative age element that was more broadly construed than what was required for the enhancing offense. The court noted "while generally we do not focus on the specific conduct alleged, but rather on the elements of the offense, 'sometimes, the specific conduct, as well as the elements, must be considered.'"); *Anderson*, 394 S.W.3d at 536 n.21 (citing *Texas Dep't of Public Safety v. Garcia*, 327 S.W.3d 898, 906–07 (Tex. App. 2010, *pet. denied*)).

117. *Anderson*, 394 S.W.3d at 536.

118. *Compare Anderson*, 394 S.W.3d at 538–39, with *Taylor v. United States*, 495 U.S. 575, 599–601, 602–603 (1990).

119. *Anderson*, 394 S.W.3d at 538–39.

sexual desire.”¹²⁰ This reinforces the notion that Texas courts were not applying the actual fact patterns from North Carolina cases to the Texas statute. Rather, the *Anderson* court hypothetically considered ranges of conduct that could qualify offenders for enhancement under North Carolina’s statute and then imagined whether these hypothetical scenarios would be punishable under the Texas statute.¹²¹

This hypothetical judicial imagining mirrors the type of analysis often used by courts applying the *Taylor*-variety categorical approach.¹²² More importantly, *Anderson*’s analysis, combined with recent case law relying on this analysis,¹²³ reinforces Texas’ requirement of a least culpable conduct categorical approach in sentencing enhancement under Texas Penal Code section 12.42.

Recall, however, that *Johnson* did not involve the least culpable conduct test; it dealt with the ordinary or typical commission approach that had been applied to the ACCA residual clause.¹²⁴ This may lead to the conclusion that *Johnson*’s holding is relevant only when courts use a *James*-type ordinary commission categorical approach. However, as scholar Jennifer Lee Koh explains, *Johnson*’s holding merely suggests that the *Taylor* least culpable conduct approach poses comparatively less vagueness danger than the ordinary commission *James* approach.¹²⁵ According to Koh, “[E]very time *Johnson* referenced the prohibition on consulting ‘real-world facts’ . . . it also emphasized the absence of ‘statutory elements’ in the analysis . . . [for example] in *James v. United States* . . . the Court highlighted ‘how speculative [and how detached from statutory elements] this enterprise

120. *Anderson*, 394 S.W.3d at 538–39.

121. *Id.* at 539.

122. See *Matter of Silva-Trevino*, 241 & N. Dec. 687, 688 (2008) (The court states that it must apply a *Taylor*-variety categorical approach. The courts analysis used judicially imagined hypothetical scenarios to determine whether the statute of conviction would qualify an offender for enhancement under the enhancing statute.)

123. The following cases use the same analysis adopted in *Anderson*. See generally *Wagner v. State*, 2009 WL 838187, at *15 (Tex. App. Nov. 18, 2009); *Prudholm v. State*, 274 S.W.3d 236 (Tex. App. 2008) *aff’d*, 333 S.W.3d 590 (Tex. Crim. App. 2011); *Outland v. State*, 389 S.W.3d 346 (2012); *Anderson v. State*, 394 S.W.3d 531, 535–37 (Tex. Crim. App. 2013); *Lott v. State*, 2016 WL 1298962 (Tex. App. Mar. 31, 2016), *reh’g overruled* (May 11, 2016), petition for discretionary review refused (Aug. 24, 2016).

124. See generally *Johnson v. United States*, 135 S. Ct. 2551 (2015).

125. See Koh, *supra* note 50, at 1168–69 (arguing “*Johnson*, as well the broader case law addressing the categorical approach, clarifies that the problem in *Johnson* lies with the peculiar variation of the categorical approach—the ‘ordinary case’ analysis—adopted by courts when interpreting the residual clause of the ACCA and similar provisions In other words, a categorical approach that relies strictly on statutory elements is less likely to run afoul of the vagueness doctrine.”).

has become.”¹²⁶ But while Koh recognizes the elements-based approach poses less vagueness danger than the *James* ordinary commission approach, she, and others,¹²⁷ ultimately argue that even a strict elements-based categorical approach is not exempt from vagueness challenges. Koh explains that “despite the overall workability of a strong ‘categorical approach,’ which minimizes fact-finding, statutes (and statutory constructions) exist such that the application of the ‘categorical approach’ may still result in indeterminacy. In those cases, courts should invoke the vagueness doctrine.”¹²⁸ Koh continues to highlight instances where an elements-based categorical approach may be suspect under *Johnson*:

[Koh’s] Article does not advocate applying vagueness to those statutes in which an elements-based categorical approach produces relatively uniform results . . . [but at times there are] statutes for which the categorical approach does not yield clarity or consistency in the courts Measuring consistency is . . . a potentially elusive process. But evaluating the degree to which lower courts are split on assessing . . . consequences of particular crimes may provide an initial data point for doing so. In cases where courts seem unable to achieve consensus over time . . . courts should consider whether the problem lies in the statute’s vagueness.¹²⁹

Koh explains that *Johnson*’s holding can extend to an elements-based categorical approach if that approach is applied to an overly ambiguous statute and if courts applying the approach to the statute are consistently unable to create a clear judicial standard.¹³⁰ Looking at how some courts apply the *Taylor*-variety least culpable conduct categorical approach not only justifies Koh’s interpretation of *Johnson*, but also provides an independent justification for applying *Johnson* to courts using a *Taylor* approach.

As Justice Scalia explains in *Johnson*, the vagueness problem arose in part due to judicial imaginings that were inevitable under an ordinary case

126. Koh, *supra* note 50, at 1169 (quoting *Johnson*, 135 S. Ct. at 2558).

127. See *Armed Career Criminal Act—Residual Clause—Johnson v. United States*, 129 HARV. L. REV. 301, 309–10 (2015) (“Justice Scalia . . . significantly revived and broadened the vagueness doctrine, indicating that where a statute was mostly vague, but perhaps clearly covered a core of conduct, it could still be violative of a defendant’s due process rights and therefore void.”).

128. See Koh, *supra* note 50, at 1133.

129. See Koh, *supra* note 50, at 1170–71 (citations omitted).

130. *Id.*

categorical approach.¹³¹ But judicial imaginings are not unique to the ordinary case categorical approach and are equally present in the least culpable conduct categorical approach. A prime example of judicial imagining in the least culpable conduct categorical approach is presented in *Matter of Silva-Trevino*.

Matter of Silva-Trevino analyzed whether Texas Penal Code section 21.11(a)(1) constituted a “crime involving moral turpitude” under a federal enhancing statute.¹³² The court explained that the analysis required a *Taylor*-variety least culpable conduct categorical approach.¹³³ Using this approach, the court provided the following analysis:

In contrast to statutory rape . . . which typically involves penetration or something similar, the sexual conduct encompassed by [the Texas Penal Code] . . . potentially involves much less intrusive contact. For example, a defendant in Texas has been convicted under the statute for touching the chest/breast of a 10-year-old boy This raises the possibility that a 20-year-old woman dancing suggestively with a youth just under the age of 17, who represents himself as older and can reasonably be believed to be such, could be liable under the statute if she acted on a desire to arouse herself or a spectator. This is so even if she touched the victim through his clothing. This does not strike us as the type of behavior which would be classified as involving moral turpitude under the Act.¹³⁴

The *Matter of Silva-Trevino* court’s analysis demonstrates the latitude afforded to judges—under even the least culpable conduct categorical approach—to subjectively imagine any range of conduct to justify a decision.¹³⁵ Ultimately, an analysis that fails to rely on the underlying case facts will inevitably produce imagined scenarios. And as *Johnson* held, combining an open-ended statute with a judicially imagined categorical analysis “produces more unpredictability and arbitrariness than the Due Process Clause tolerates.”¹³⁶ Texas Penal Code section 12.42 may be subject to a *Johnson* vagueness challenge for two reasons: (1) the least culpable conduct categorical approach requires the same type of judicially imagined

131. *Johnson v. United States*, 135 S. Ct. 2551, 2557–58 (2015).

132. *Matter of Silva-Trevino*, 24 I. & N. Dec. 687, 688 (2008) (citing §212(a)(2) of 8 U.S.C. §1182(a)(2) (2006)).

133. See generally *Matter of Silva-Trevino*, 24 I. & N. Dec. 687 (2008).

134. *Id.* at 692.

135. *Id.*

136. *Johnson*, 135 S. Ct. at 2558.

factual scenario questioned in *Johnson*, and (2) Texas Penal Code section 12.42 requires some type of least culpable conduct categorical approach.

B. Ambiguous Language in Texas Penal Code §12.42

Under *Johnson*, a law is vague if it applies a pure categorical approach to an ambiguously worded statute, and if there is a history of futile judicial efforts to clarify the statute's meaning.¹³⁷ Because Texas courts apply a categorical approach to an ambiguously worded clause in Texas Penal Code section 12.42, and because these courts have struggled unsuccessfully to give determinate meaning to the statute's ambiguous clause, the statute is unconstitutionally vague.

The term "substantially similar" has been defined in varying ways throughout Texas case law. The Texas Court of Appeals first attempted to define substantially similar in the 2008 case *Prudholm v. State*.¹³⁸ In *Prudholm*, the court analyzed whether "California[']s sexual battery offense addresses less offensive conduct [than] . . . the Texas sexual assault offense."¹³⁹ *Prudholm* held "the elements of another state's law [are] substantially similar to the elements of an offense listed in section 12.42(c)(2)(B)(i)-(iv) when the elements of the other [s]tate's law *parallel* the elements of a single Texas offense."¹⁴⁰ The court failed to explain how to interpret "parallel" and how the "parallel" language clarifies "substantially similar." As a result, the *Prudholm* court, on a successive appeal, revisited the issues presented in the district court.¹⁴¹ The *Prudholm* court struggled again to define "substantially similar," and also rejected the "parallel" test stating "we have found no legal authority for this 'parallel' test, and it seems of little assistance in applying the statute."¹⁴² The court replaced this test with the following:

[If] an element of the foreign offense can be proved by a fact that would be insufficient to prove the respective Texas element, the elements may still be substantially similar

"[S]ubstantial" means "to a large extent" while "similar" means "having a likeness or resemblance." Together with comparative words

137. See generally *Johnson v. United States*, 135 S. Ct. 2551 (2015).

138. See *Prudholm v. State*, 274 S.W.3d 236, 239-40 (Tex. App. 2008).

139. *Id.* at 241.

140. *Id.* at 239 (emphasis added).

141. *Prudholm v. State*, 333 S.W.3d 590, 593-96 (Tex. Crim. App. 2011).

142. *Id.* at 596.

like “similar,” “majority,” or “probability,” the combination with “substantial” or “substantially” means something significantly greater than the modified word, whereas with absolute words like “complete,” “certain,” or “all,” the combination with “substantially” means something only slightly less than the modified word (“similar”). Based on this common usage, we hold that the elements being compared pursuant to Penal Code Section 12.42(c)(2)(B)(v) must display a *high degree of likeness*, but *may be less than identical*.¹⁴³

The above description exemplifies the difficulty in defining “substantially similar,” and amplifies the ambiguity in the phrase. As will be discussed more fully in the next section, the appellate court’s description of “substantially similar,” and subsequent test for determining “substantial similarity,” have not reduced the confusion surrounding the phrase.¹⁴⁴ The difficulty in defining “substantially similar” is compounded by additional difficulty in measuring “similarity.”¹⁴⁵ The *Prudholm* court recognized this difficulty in defining as well as quantifying “substantial similarity,” stating the phrase still begs the “critical question of *the respect in which the elements must display a high degree of likeness . . . elements . . . could be substantially similar with respect to general characteristics such as terminology, function, and type of element, or with respect to specific characteristics such as the seriousness of violent or sexual aspects.*”¹⁴⁶ The apparent difficulty in measuring and defining “substantial similarity” raises an additional justification for finding Texas Penal Code section 12.42 unconstitutional under *Johnson*.

In *Johnson*, the Court held “[b]y combining indeterminacy about *how to measure the risk* posed by a crime with indeterminacy about *how much risk it takes* for the crime to qualify as a violent felony, the residual clause produces more unpredictability and arbitrariness than the Due Process Clause tolerates.”¹⁴⁷ This combines confusion in *measuring the risk* with a difficulty in defining *the quantum of risk* required to satisfy the statute’s definition.¹⁴⁸ The problems with “substantially similar” are analogous to the

143. *Prudholm*, 333 S.W.3d. at 594 (emphasis added).

144. *See Anderson v. State*, 394 S.W.3d 531, 535–37 (2013).

145. *Prudholm*, 333 S.W.3d at 594–95.

146. *Id.* at 594 (emphasis added).

147. *Johnson*, 135 S. Ct. at 2558 (emphasis added).

148. *Johnson*, 135 S. Ct. at 2558 (emphasis added).

issues identified with the ACCA residual clause.¹⁴⁹ Namely, the “substantially similar” clause raises confusion regarding the *method of defining substantial similarity*,¹⁵⁰ and the *degree of similarity* required to qualify as “substantially similar.”¹⁵¹ Thus, the foreign jurisdiction clause presents the same combination of ambiguities present in the ACCA residual clause struck down in *Johnson*.

Notwithstanding the difficulties in defining and measuring “substantial similarity,” the *Prudholm* court explained in a footnote, “[w]e do not find the phrase ‘substantially similar’ to be ambiguous, and thus need not resort to extratextual factors [in interpreting the statute].”¹⁵² And yet the court appeared to “measure” “substantially similar” using factors not appearing in the statute, stating “[w]e further hold that the elements must be substantially similar with respect to the individual or public interests protected and the impact of the elements on the seriousness of the offenses.”¹⁵³ Whether or not these factors would be considered “extratextual,” the difficulty in defining “substantially similar” is irresistibly analogous to the difficulty in defining the “serious potential risk” phrase of the ACCA residual clause.¹⁵⁴ Thus, under the first test provided in *Johnson*, the foreign jurisdiction clause of the Texas habitual offender statute should be struck down as void for vagueness because it combines a categorical analysis with an ambiguous liability standard, thereby “produc[ing] more unpredictability and arbitrariness than the Due Process Clause tolerates.”¹⁵⁵

C. The Texas Courts’ Inability to Establish a Clear and Consistent Standard for Applying Texas Penal Code §12.42

The *Johnson* Court set forth a separate consideration for finding a statute impermissibly vague—inability to establish a clear and consistent standard for analyzing crimes under the residual clause.¹⁵⁶ In fact, Texas courts have repeatedly failed to establish a clear standard for the foreign jurisdiction clause of Texas’ habitual offender statute.

149. Compare the analysis of “substantially similar” in *Prudholm*, 333 S.W.3d at 594–95, with the analysis of the residual clause in *Johnson*, 135 S. Ct. at 2581. (Alito, J., dissenting).

150. Compare *Prudholm*, 333 S.W.3d at 594–95, with *Johnson*, 135 S. Ct. at 2581 (Alito, J., dissenting).

151. *Id.*

152. *Prudholm*, 333 S.W.3d at 595 n.21.

153. *Id.* at 595.

154. Compare *Prudholm*, 333 S.W.3d at 594–95, with *Johnson*, 135 S. Ct. at 2581. (Alito, J., dissenting).

155. *Johnson*, 135 S. Ct. at 2557–58 (citations omitted).

156. *Id.* at 2560.

As previously explained, in the 2003 case *White v. State*, the court defined the inquiry under the foreign jurisdiction clause as revolving around the elements rather than the facts of the underlying case.¹⁵⁷ The court had no choice; the statutory text explicitly uses the term “elements.”¹⁵⁸ While *White* is undoubtedly correct, so far as it goes, it still fails to establish any kind of clarity or predictability in applying “substantially similar” when it comes to particular convictions. Nor does it stipulate which factors may and may not be considered when determining “substantial similarity.”¹⁵⁹ Later Texas appellate opinions cite *Ex Parte White*, in which the Texas Court of Criminal Appeals reexamined the facts of *White* in an effort to illustrate the lack of transparency in judicial analysis of the “substantially similar” language.¹⁶⁰ As a result, following *White* and *Ex Parte White*, the *Prudholm* court in 2008 established a “parallel” test to help clarify “substantially similar.”¹⁶¹ Yet the application of the “parallel” test failed to generate a more transparent and robust analysis.¹⁶²

For example, in *Wagner v. State*, the court concluded that an Ohio “corruption of a minor” statute was “substantially similar” to the Texas statute for “sexual assault.”¹⁶³ The court compared the elements of the Texas statute to the Ohio statute.¹⁶⁴ The Texas sexual assault statute explains that a person is guilty if the “person intentionally or knowingly ‘causes the penetration of the anus or sexual organ of a child by any means.’”¹⁶⁵ The Ohio statute states: “[I]n sexual conduct with another, who is not the spouse of the offender, when the offender knows other such person is thirteen years of age or older but less than sixteen years of age, or the offender is reckless in that regard.”¹⁶⁶ The *Wagner* court then referred to *Prudholm* and stated, “providing that ‘substantially similar’ elements of different statutes will ‘parallel’ each other We conclude the elements of the Ohio offense for which appellant was convicted are substantially similar to the elements of an

157. *White v. State*, 2003 WL 865351, at *3 (Tex. App. Mar. 6, 2003).

158. See Tex. Penal Code § 12.42(c)(2)(B)(v) (2017).

159. See *Prudholm*, 333 S.W.3d at 593–94 (emphasizing *White* and *Ex Parte White*’s inability to provide a clear test for applying the “substantially similar” language, and outlining a test for defining “substantial similarity”).

160. *Id.*

161. *Prudholm v. State*, 274 S.W.3d 236, 239 (Tex. App. 2008).

162. *Prudholm*, 333 S.W.3d at 596.

163. *Wagner v. State*, Nos. 14–07–00906–CR, 14–07–00907–CR, 2009 WL 838187, at *15 (Tex. App. Mar. 31, 2009).

164. *Id.*

165. *Id.* (quoting Tex. Penal Code Ann. § 22.011(a)(2)(A) (2009)).

166. *Id.* (quoting Ohio Rev. Code Ann. § 2907.04 (2007)).

offense listed.”¹⁶⁷ The *Wagner* court’s analysis ended here without any explanation of why the court found the two statutes’ elements parallel. The consistent lack of analysis generated from the “parallel” test propelled the *Prudholm* court in 2011 to revisit the “substantially similar” analysis.¹⁶⁸

Prudholm provided both a definition of “substantially similar” and a metric for measuring “substantial similarity.”¹⁶⁹ The court departed from the “parallel” test and held that, to satisfy the “substantially similar” requirement, “the elements being compared pursuant to Texas Penal Code Section 12.42(c)(2)(B)(v) must display a high degree of likeness, but may be less than identical.”¹⁷⁰ The court then stated that the metric for determining “high degree of likeness” would require “the elements . . . [to] be substantially similar with respect to the individual or public interests protected and the impact of the elements on the seriousness of the offenses.”¹⁷¹ Applying this new test to the case before it, the court compared the elements of Texas’s “aggravated kidnapping” to California’s “sexual battery” statute,¹⁷² holding that the two statutes were not “substantially similar.”¹⁷³ The court first noted “the difference between the sexual elements of the offenses,” finding “sexual battery contains a conduct element requiring the touching of an intimate part, whereas aggravated kidnapping contains a specific intent element requiring the intent to commit a non-consensual sex act.”¹⁷⁴ However, and more importantly in the court’s view, were the differences in the “restraint” elements in the respective statutes:

[S]exual battery requires only an “unlawful restraint,” . . . interpreted as the control of a person’s liberty, against his will, by words, acts or authority of the perpetrator aimed at depriving the person’s liberty. . . aggravated kidnapping requires an “abduction,” which is an “unlawful restraint”—a substantial interference with the person’s liberty, by moving the person from one place to another or by confining the person—committed with the specific intent to prevent the victim’s liberation by secreting or holding him in a place where he is not likely to be found or using or threatening to use deadly force. The additional,

167. *Wagner v. State*, Nos. 14–07–00906–CR, 14–07–00907–CR, 2009 WL 838187, at *15.

168. *Prudholm v. State*, 333 S.W.3d 590, 595 (Tex. Crim. App. 2011).

169. *Prudholm*, 333 S.W.3d at 594–95.

170. *Id.* at 594.

171. *Id.* at 595.

172. *Id.* at 596–99.

173. *Id.* at 599.

174. *Prudholm v. State*, 333 S.W.3d 590, 599 (Tex. Crim. App. 2011).

substantive specific—intent component of “abduction” suggests that the restraint elements do not display a high degree of likeness.¹⁷⁵

The first passage contains the initial inquiry, namely, strict comparison of the elements. The court explicated its second test by discussing the “individual or public” interests protected by the two laws.¹⁷⁶ The court found that the individual liberty interests of the laws differed.¹⁷⁷ “The California ‘unlawful restraint’ element protects individuals’ liberty interests, while the Texas ‘abduction’ element goes beyond protecting liberty interests to protect against the considerable risk of death or serious bodily injury involved in an abduction.”¹⁷⁸ Building on these liberty interests, the court analyzed the third prong of its newly established test, “the impact of the elements on the seriousness of the offense.”¹⁷⁹ There it held that “the difference between the restraint elements causes a great difference in the seriousness of the offenses, as demonstrated by the punishments available.”¹⁸⁰ The court held the disparity in severity of punishment weighed in favor of holding these statutes “unsubstantially similar.”¹⁸¹ The court relied specifically on the fact that “sexual battery exposes a defendant to a maximum sentence of four years, whereas aggravated kidnapping exposes a defendant to a maximum sentence of life or ninety-nine years.”¹⁸² Although the *Prudholm* court delivered a stronger and more transparent analysis than previous courts, the test it established still lacked sufficient predictability.

This lack of clarity was reflected in a 2012 case, *Outland v. State*. Although the court in *Outland* identified all the elements in each statutory offense and also cited the appellant’s and state’s arguments with respect to these elements,¹⁸³ the *Outland* court’s analysis failed to compare, or adequately devote consideration to,¹⁸⁴ the first prong of the *Prudholm* test, which requires comparison of the bare text of the elements in the statute.¹⁸⁵ The *Outland* court cites each parties’ arguments with respect to the first

175. *Prudholm*, 333 S.W.3d at 599 (citations omitted).

176. *Id.*

177. *Id.* at 599–600.

178. *Id.* 599.

179. *Id.* at 595.

180. *Prudholm*, 333 S.W.3d at 595.

181. *Id.* at 599–600.

182. *Id.*

183. *Outland v. State*, 389 S.W.3d 346, 348–49 (Tex. Crim. App. 2012).

184. *Outland*, 389 S.W.3d at 348–49.

185. *Id.* at 348–49.

prong of the *Prudholm* test, but the court provides no individual analysis of the first *Prudholm* prong.¹⁸⁶ Rather, the court states “we agree with the State,” but proceeds to explain only its agreement with the analysis of “individual and private interests protected” as well as the “seriousness of the offense” analysis provided in the state’s brief.¹⁸⁷ It thus remains unclear whether the *Outland* court agrees with the state’s analysis of the first prong of *Prudholm*’s test. More importantly, *Outland*’s lack of analysis with respect to the textual elements either misconstrues *Prudholm*’s test or presents a new test entirely—either of which still fails to establish a clear and consistent standard.

In addition to the potential confusion regarding the emphasis on statutory elements, the *Prudholm* court found that the statutes in question lacked similarity under all three tests leaving the issue unresolved.¹⁸⁸ This leaves courts, and individuals alike, to wonder which of these factors is most important. Because of this ambiguity, the court in *Anderson v. State* was forced to devote significant time to reexplaining and reshaping the *Prudholm* test.¹⁸⁹

In *Anderson*, the court clarified the *Prudholm* test on a few key grounds. First, the court explained that the inquiry was not in fact a weighing of three independent factors, but rather a two-part test.¹⁹⁰ After redefining the structure of the test, the court explained that the first inquiry should focus on the “high degree of likeness” between the textual elements.¹⁹¹ The *Anderson* court also took lengths to emphasize that “high degree of likeness” could not be found when an out-of-state statute proscribed conduct more broadly than a Texas statute, or when an out-of-state statute proscribed less severe conduct than a Texas statute.¹⁹² The lengths the *Anderson* court took to describe the “high degree of likeness” inquiry arguably indicates continued confusion over how to define and apply the first prong of the test. Following the explanation of the first prong, the court then stated that the second prong of the *Prudholm* test included a “two-step analysis.”¹⁹³ This required the individual or public interests in statutes be similar, “and [mandated] the

186. *Outland*, 389 S.W.3d at 349.

187. *Id.*

188. *Prudholm*, 333 S.W.3d at 599–600.

189. See *Castle v. State*, 402 S.W.3d 895, 901 (Tex. App. 2013) (“In *Anderson v. State* . . . the Texas Court of Criminal Appeals recently re-addressed the process—first outlined by the court in *Prudholm*—for determining if an out-of-state sexual offense contains “substantially similar” elements to a listed Texas sexual offense.”).

190. *Anderson v. State*, 394 S.W.3d 531, 535–37 (Tex. Crim. App. 2013).

191. *Anderson*, 394 S.W.3d at 535.

192. *Id.* at 536.

193. *Anderson*, 394 S.W.3d at 535.

impact of the elements on the seriousness of the offenses”¹⁹⁴ be similar.¹⁹⁵ Hence, the *Anderson* court established not only a new framework for the *Prudholm* test, but also affirmed that both factors of the second prong need to be satisfied to enhance a defendant’s sentence.

The court then defined “individual or public interest,” which the *Prudholm* court did not do, by stating “similarity” exists “if there is a ‘similar danger to society’ that the statute is trying to prevent.”¹⁹⁶ Next, the court defined similarity between the “impact[s] on the seriousness of the offenses,” which *Prudholm* also failed to do, by stating “the court must then determine if the class, degree, and punishment range of the two offenses are substantially similar.”¹⁹⁷ Finally, the *Anderson* court clarified the *Prudholm* test by deciding that “[N]o single factor in the analysis is dispositive, so a court must weigh all factors before making a determination. That determination must be made with sensitivity because the defendant is subject to an automatic life sentence.”¹⁹⁸ The *Anderson* court’s restructuring and redefining of the *Prudholm* test, as well as the *Anderson* court’s inclusion of a final consideration—“sensitivity” during judgment—reinforces the sense of confusion in the *Prudholm* test.

The persistent lack of clarity is arguably present in a more recent case that has applied the *Anderson* revision of the *Prudholm* test. In 2016, a Texas appellate court’s decision in *Lott v. State* addressed the question of whether a Colorado “sexual assault” statute was “substantially similar” to a Texas “indecenty with a child” statute.¹⁹⁹ The court in *Lott* applied *Anderson*’s revised *Prudholm* test.²⁰⁰ However, the *Lott* court strayed from this test when it held the two statutes “substantially similar” even though “the Colorado statute prohibits a wider range of touching with respect to adult victims than the Texas statute, [and] also includes specifically prohibited touching of child victims.”²⁰¹ Holding these two statutes “substantially similar” under this rationale directly contradicts the *Anderson* court’s contemplation of the test, because as *Anderson* explains:

194. The court in *Anderson* italicizes the “and” in this section of the *Prudholm* court’s analysis.

195. *Anderson*, 394 S.W.3d at 536 (quoting *Prudholm v. State*, 333 S.W.3d 590, 595 (Tex. Crim. App. 2011)).

196. *Anderson*, 394 S.W.3d at 536.

197. *Id.*

198. *Id.* at 537.

199. *Lott*, 2016 WL 1298962, at *5 (Tex. App. Mar. 31, 2009).

200. *Id.* at *6 (Tex. App. Mar. 31, 2009).

201. *Id.* at *6–*8.

The out-of-state offense cannot be *markedly broader* than or distinct from the Texas prohibited conduct. For instance, in *Prudholm*, the California offense prohibited “touching” of an “intimate part,” whereas the Texas offense proscribed the “penetration or contact” of a person’s “anus” or “sexual organ.” We held that the two statutes “encompass[ed] a markedly different range of conduct,” and “[w]hile the elements . . . may be similar in a general sense, they do not display the high degree of likeness required to be substantially similar.” There are many more “intimate parts” covered under the California statute than the specific subset of “intimate parts”—the “anus” and “sexual organ”—listed in the Texas statute.²⁰²

Looking directly at the statutes involved in *Lott*, two aspects make the statutes dissimilar. First, the Colorado statute specifically proscribes “sexual contact, intrusion or penetration,” whereas the Texas statute refers only to “touching.”²⁰³ This indicates that the conduct listed in the Colorado statute “encompass[es] a markedly different range of conduct” than the Texas statute.²⁰⁴ Second, the Colorado statute proscribes different “intimate parts” under the term “sexual conduct” than the Texas statute.²⁰⁵ The court in *Lott* specifically identifies “external genitalia or the perineum or the anus or the buttocks or the pubes or the breast of any person” whereas the Texas statute limits “intimate parts” to the “anus, breast, or any part of the genitals.”²⁰⁶ Again, this raises issues broached in *Prudholm*, where the court held two statutes insufficiently similar when the only difference in “‘intimate parts’ covered under the California statute” was areas like the “buttocks.”²⁰⁷ Moreover, the application of the *Prudholm* test in *Lott* appears, if not incorrect, at the very least confusing, given the degree of difference in the “conduct” and range of “intimate parts” proscribed under the Colorado statute.

It is also worth noting that, much like the statistical analyses Justice Scalia found lacking in *Sykes* and *Chambers*, here the “interests protected” by any given statute may not be defined in the statute, adding more confusion to the *Prudholm* test later re-worked in *Anderson*.²⁰⁸ For example, in *Castle*

202. *Anderson v. State*, 394 S.W.3d 531,536 (Tex. Crim. App. 2013) (citations omitted).

203. *Lott*, WL 1298962, at *6–*8.

204. *Id.*

205. *Id.*

206. *Id.*

207. Compare *Lott*, WL 1298962, at *6–*8 with *Prudholm v. State*, 333 S.W.3d 590, 596–99 (Tex. Crim. App. 2011)).

208. Compare *Johnson v. United States*, 135 S. Ct. 2551, 2559 (2015) with *Castle v. State*, 402 S.W.3d 895, 905 (Tex. App. 2013).

v. State, the court adopted the *Anderson* court's reshaping of the *Prudholm* test, and, with respect to the "private or public interest protected" factor, stated the following:

Although the Louisiana sexual battery statute *appears* to be designed to protect from more than merely "offensive contact"—its "touching" prohibition is directed at body parts considered to be "sexual" (anus and genitals)—it *appears* the Louisiana legislature intended more broadly to guard against "sexual" touching that could involve external contact rather than the severe trauma of rape addressed by the Texas sexual assault statute.²⁰⁹

As the "appears" language in the cited text suggests, the statute in question does not specifically identify an individual or public interest to protect. At best, a judge must guess at the legislature's intent, which seems to mirror the type of arbitrary and inconsistency dangers identified by Justice Scalia in his reference to *Sykes* and *Chambers*.²¹⁰ The inherent dangers of the current test, taken with the continued changes and overall inability to establish a clear and consistent standard, reinforce the invalidity of the foreign jurisdiction clause of the Texas habitual offender statute.

IV. Possible Remedies

Three distinct changes to Texas' foreign jurisdiction clause could remedy the vagueness issues. The first option is to eliminate the foreign jurisdiction clause entirely and prevent enhancement for out of state offenses. However, in the event that courts or legislatures wish to maintain a foreign jurisdiction clause, rather than strike the clause, the court could abandon the categorical approach in favor of a circumstance-specific approach. This problem could similarly be eliminated by crafting a clearer statute and by applying a factual inquiry as opposed to a categorical approach. Further, even if the courts still applied a categorical analysis, the statute could still avoid a *Johnson* problem if the "substantially similar" language was clarified. The following sections will explain these three remedies.

209. *Castle*, 402 S.W.3d at 905 (emphasis added).

210. *Compare Johnson*, 135 S. Ct. at 2559 with *Castle*, 402 S.W.3d at 905.

A. Adoption of a Circumstance Specific Approach

In the *Johnson* dissent, Justice Alito made an impassioned argument for abandoning the categorical approach as opposed to striking down the residual clause of the ACCA.²¹¹ Justice Alito argued:

The Court . . . admits that, “[a]s a general matter, we do not doubt the constitutionality of laws that call for the application of a qualitative standard such as “substantial risk” to real-world conduct.” Its complaint is that the residual clause ‘requires application of the ‘serious potential risk’ standard to an *idealized ordinary case of the crime*.’ Thus, according to the Court, ACCA’s residual clause is unconstitutionally vague because its standard must be applied to “an idealized ordinary case of the crime” and not, like the vast majority of the laws in the Solicitor General’s appendix, to “real-world conduct.”²¹²

Even if a statute contains ambiguity, the problem may be resolved through application of unambiguous facts, and, as Justice Alito pointed out, even the majority opinion “all but concedes that the residual clause would be constitutional if it applied to ‘real-world conduct.’”²¹³ Justice Alito bolstered his argument by invoking the constitutional canon of a presumption against finding statutes unconstitutional.²¹⁴ Yet the central holding of *Johnson* provides a more straightforward justification for moving to a factual analysis.²¹⁵ Factual analysis does not raise the hypothetical “judicial imaginings” dangers condemned in *Johnson*.²¹⁶ Although it is beyond the scope of this Note, it is not at all clear that moving to a factual analysis would trigger a jury trial right, as “it is questionable whether the Sixth Amendment creates a right to a jury trial in this situation.”²¹⁷ Still, given the manifest difficulty in essentially retrying old convictions from other states, the Texas courts and legislature should consider alternative remedies before abandoning the “categorical approach.” Another potentially fruitful ground for discovering such alternative remedies is to see how other states enhance foreign jurisdiction convictions.

211. *Johnson*, 135 S. Ct. at 2577 (Alito, J., dissenting).

212. *Id.* (citations omitted).

213. *Id.* at 2578.

214. *Id.*

215. *Id.* at 2557–58.

216. *Johnson v. United States*, 135 S. Ct. 2551, 2557–58 (2015).

217. *Id.* at 2580–81 (citing *Almendarez-Torres v. United States*, 523 U.S. 224 (1998)).

B. A Clear State Statute with a Factual Inquiry

California courts have avoided the *Johnson* problem by using the following approach. First, the California courts do not apply a pure categorical approach but instead allow consideration of the facts of conviction during the enhancement stage.²¹⁸ Second, California courts require direct overlap between the out-of-state statute and the enhancing statute.²¹⁹ This avoids the *Johnson* problem because the language of the statute is more transparent and less open-ended than Texas' foreign jurisdiction clause, requiring exact overlap on "all of the elements of a particular . . . felony"²²⁰ as opposed to allowing some unspecifiable amount of deviation across statutes, as in the Texas habitual offender statute.²²¹ Adopting California's statute and analysis could cure the vagueness problem in Texas' habitual offender statute. To mirror the California law, Texas courts and legislatures would need to: (1) abandon the pure categorical approach" and opt for a "circumstance-specific approach," and (2) strike the offending "substantially similar" language in favor of language that requires "equivalence" between elements. Making both of these changes would not only mirror the California approach, but would

218. The following California cases reinforce California's use of a circumstance-specific approach as opposed to a pure categorical approach. See *People v. Riel*, 22 Cal. 4th 1153, 1204–05 (2000) ("prosecution may go behind the least adjudicated elements of prior felony, and submit evidence of prior crime as it was actually committed, in order to prove that it would have been a felony in California, and thus may support enhancement."); *People v. Rodriguez*, 17 Cal. 4th 253, 261–62 (1998) ("the prosecution [is] entitled to go beyond the least adjudicated elements of the . . . conviction and use the entire record to prove that defendant had in fact personally inflicted great bodily injury (§ 1192.7, subd. (c)(8)) or personally used a dangerous or deadly weapon (§ 1192.7, subd. (c)(23))."); *In re Jones*, 27 Cal. App. 4th 1032, 1047–48 (1994) (quoting *People v. Myers*, 5 Cal. 4th 1193, 1201 (1993)) ("[T]he trier of fact must be permitted to go beyond the least adjudicated elements of the offense, to implement the purpose of the electorate in incorporating paragraphs (18) and (24) of section 1192.7 into section 667 (a), 'and to consider, if not precluded by the rules of evidence or other statutory limitation, evidence found within the entire record of the foreign conviction.'"); *People v. Guerrero*, 44 Cal. 3d 343, 355 (1988) ("To allow the trier of fact to look to the entire record of the conviction is certainly reasonable: it promotes the efficient administration of justice and, specifically, furthers the evident intent of the people in establishing an enhancement for [a subdivision] that refers to conduct, not a specific crime.").

219. See Cal Penal Code § 667.71 (2006) ("A prior conviction in another jurisdiction for an offense that, if committed in California . . . shall constitute a prior conviction of a particular serious and/or violent felony if the prior conviction in the other jurisdiction is for an offense that includes all of the elements of a particular violent felony."); see also *Prudholm v. State*, 333 S.W.3d 590, 592 (Tex. Crim. App. 2011). ("Many states significantly enhance punishment for offenders who have been previously convicted of . . . [California courts enhance out of state convictions if] (iii) the elements of the foreign offense are the same as the elements of an enumerated offense.").

220. Cal. Penal Code § 667.71.

221. Tex. Penal Code § 12.42 (c)(2)(B)(v) (2017).

also eliminate a *Johnson* problem.²²² Alternatively, Texas courts could continue to apply a categorical approach if the courts adopted a more clearly worded foreign jurisdiction clause.

C. Adoption of New York's Foreign Jurisdiction Clause

New York's foreign jurisdiction clause provides an example of a clear statute that simultaneously requires application of a pure "categorical approach."²²³ Like California, New York allows foreign offenses to qualify for sentencing enhancement if the out-of-state conviction "includes all of the essential elements of [the qualifying New York] felony."²²⁴ Courts have interpreted "all of the essential elements" language to mean "equivalence" or "exactness" between the elements.²²⁵ In this way, the New York statute provides less room for ambiguity and interpretation than Texas' habitual offender statute, because the window for interpreting "exactness" is narrower than the broad spectrum available in "substantially similar." While New York's foreign jurisdiction clause differs substantially from the Texas statute, New York courts apply a statutory analysis that is analogous to the analysis applied by Texas courts.²²⁶

New York courts have defined "[the] inquiry [under New York Penal Law section 70.04] as limited to a comparison of the crimes' elements as they are respectively defined in the out-of-state and New York penal statutes."²²⁷ Courts comparing out-of-state offenses and New York offenses "may not consider the factual allegations in the underlying indictments, 'as it is immaterial that the crime actually committed in the foreign jurisdiction

222. See generally *Johnson v. United States*, 135 S. Ct. 2551 (2015) (holding only the pure categorical approach applied to an ambiguously worded statute violates the Due Process Clause).

223. See *Prudholm*, 333 S.W.3d at 592 n.9 (defining the New York statute, stating New York requires "the elements of the foreign offense are the same as the elements of an enumerated offense.").

224. N.Y. Pen. Law § 70.04(b) (1999).

225. Compare *Saracina v. Artus*, 2010 WL 3529352, at *5 (W.D.N.Y. Mar. 31, 2010), report and recommendation adopted, WL 3529339 (W.D.N.Y. Sept. 8, 2010), *aff'd*, 452 Fed. Appx. 44 (2d Cir. 2011) (quoting *People v. Gonzalez*, 61 N.Y.2d 586, 589 (1984)) ("under New York law, a foreign or out-of-state conviction can [qualify] . . . only if the foreign conviction includes 'elements are equivalent to those of a New York felony.'") with *Prudholm*, 333 S.W.3d at 592 n.9 (defining the New York statute, stating New York requires "the elements of the foreign offense are the same as the elements of an enumerated offense.").

226. Compare *Prudholm*, 333 S.W.3d at 599 with *Saracina*, WL 3529352, at *5.

227. *People v. Muniz*, 74 N.Y.2d 464, 467–68 (1989).

may be the equivalent of a felony in New York.”²²⁸ As previously explained, Texas courts also apply the same type of categorical approach²²⁹ applied by New York courts, meaning Texas courts could adopt the “equivalence” language in New York’s statute to avoid the risk of ambiguity and open-endedness at issue in Texas Penal Code section 12.42.

Conclusion

In 2015, the Supreme Court in *Johnson* held a federal three-strike law enhancement scheme constitutionally void for vagueness.²³⁰ The Court found the residual clause of the ACCA unconstitutional on two independent grounds.²³¹ First, the Court held the intersection of a pure categorical approach with an ambiguously worded statute violated notice provisions of the Due Process Clause.²³² In addition, the Court identified an inability to create a clear and consistent standard of application as a second independent ground for holding the residual clause unconstitutional.²³³ Although the Court’s holding specifically applied to a federal sentencing enhancement scheme, the holding is undoubtedly applicable to states through the Fourteenth Amendment’s incorporation of the Fifth Amendment Due Process Clause.²³⁴

The holding in *Johnson* squarely applies to the “substantially similar” language of the foreign jurisdiction clause of Texas’ habitual offender statute. *Johnson* applies equally here because Texas courts apply a pure “categorical approach,”²³⁵ and because the “substantially similar” language has rendered the foreign jurisdiction clause ambiguous and confusing to courts applying the law. In addition, Texas courts have a history of applying the foreign jurisdiction clause inconsistently and unclearly. Accordingly, the foreign jurisdiction clause fails under *Johnson*’s second independent vagueness holding.

228. *People v. White*, 2014 WL 4436400, at *2 (Sup. Ct. 2014), *aff’d*, 48 N.Y.S.3d 584 (N.Y. App. Div. 2017) (quoting *People v. Ramos*, 19 N.Y.3d 417, 419 (2012), and *People v. Olah*, 300 N.Y. 96, 98–99 (1949)).

229. *See Prudholm*, 333 S.W.3d at 593–95, 599.

230. *Johnson v. U.S.*, 135 S. Ct. 2551, 2558 (2015).

231. *Id.* at 2557.

232. *Id.*

233. *Id.* at 2558.

234. *See generally* *Hurtado v. People of the State of Cal.*, 110 U.S. 516, 534–35 (1884).

235. *See* *People v. White*, 2014 WL 4436400, at *3 (Sup. Ct. 2014), *White v. State of Tex.*, 2003 WL 865351, at *3 (Tex. App. 2003), *and Prudholm v. State*, 333 S.W.3d 590, 596–99 (Tex. Crim. App. 2011).

If Texas courts find the Texas habitual offender law vague under *Johnson*, the Texas courts and/or legislature will have to innovate to remedy the constitutional infirmity. The legislature could abandon the statute entirely. Alternatively, the courts may save the statute by abandoning the pure categorical approach in favor of a fact-specific approach.²³⁶ Finally, the legislature could adopt the foreign jurisdiction enhancement scheme of another state, such as California,²³⁷ or New York.²³⁸ Each of these options would cure the vagueness problem by providing substantially more notice to offenders victimized by the statute.

236. *Johnson*, 135 S. Ct. at 2577 (Alito, J., dissenting).

237. See Cal. Penal Code § 667.71 (2006).

238. N.Y. Pen. Law §70.04(b) (1999).
