will directly support a more limited range of lower-court decisions. A habeas regime in which primarily fact-bound holdings constitute the "clearly established law" will increasingly resemble a fact lottery: if cases fit into particular fact sets, state courts will be heavily bound; if cases fall beyond those narrow areas, state courts will enjoy greater latitude to apply standards based on judges' intuitions. The regime of broader, more generalized governing law, conversely, has constrained this arbitrary element and ensured greater uniformity in the degree and extent of state court autonomy.

The *Musladin* Court's abridged standard of review thus may hold significant — though subtle — ramifications, both doctrinally and practically. Even if the more stringent AEDPA review standard signaled by the majority opinion does not materialize in later habeas cases, the Court injected unnecessary confusion into the § 2254(d)(1) inquiry. Indeed, § 2254(d)(1) was designed to simplify and streamline the tangled morass of habeas claims. Congress sought to "prevent 'retrials' on federal habeas"[80] and "restrict the power of the lower federal courts to overturn fully reviewed state court criminal convictions."[81] With these goals in sight, however, the *Musladin* Court advanced a stricter view of what constitutes "clearly established law" and simultaneously placed inordinate emphasis on that determination. Although *Musladin* merely rearticulated prior statements about "clearly established law" comprising "holdings, as opposed to . . . dicta," the Court's truncated implementation of the AEDPA review standard threatens the tenuous relationship between federal and state courts.

B. Armed Career Criminal Act

Definition of "Violent Felony." — The Armed Career Criminal Act of 1984[1] (ACCA) imposes a mandatory minimum sentence of fifteen years for federal firearm offenders who hold three prior convictions that qualify as "serious drug offense[s]" or "violent felon[ies]."[2] The Act defines violent felonies to include burglary, arson, extortion, felonies "involv[ing] use of explosives," and a residual category of felonies "otherwise involv[ing] conduct that presents a serious potential risk of physical injury to another."[3] Federal courts have interpreted the residual clause broadly, holding that the ACCA covers a panoply of fel-

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[80] *Id.* at 386.

[81] Musladin v. Lamarque, 427 F.3d 647, 647 (9th Cir. 2005) (Kleinfeld, J., dissenting from denial of rehearing en banc).

[1] Pub. L. No. 98-473, tit. II, ch. XVIII, 98 Stat. 2185, 2185 (codified as amended at 18 U.S.C. § 924(e) (2000 & Supp. IV 2004)).

[2] 18 U.S.C. § 924(e)(1).

[3] *Id.* § 924(e)(2)(B)(ii).

ony offenses including failure to report back to a halfway house,[4] "walkaway" escape from a prison honor camp,[5] driving while intoxicated,[6] and operating a dump truck without the owner's consent.[7] Last Term, a divided Court held in *James v. United States*[8] that attempted burglary as defined by Florida law constitutes a violent felony for the purposes of the ACCA enhancement.[9] Although heated disagreements surfaced among the majority and the dissenters over their approaches to statutory construction, none of the Justices gave adequate consideration to the rule of lenity, the application of which could have clarified the issues of institutional legitimacy and competence that should have entered into the interpretation of the Act.

In 2003, Alphonso James, Jr., pled guilty to a charge of being a felon in possession of a firearm in violation of 18 U.S.C. § 922(g).[10] At sentencing, the government argued that James's sentence should be enhanced pursuant to the ACCA in light of his three prior felony convictions under Florida state law: one for attempted burglary[11] and two for drug trafficking crimes.[12] James challenged these felony predicates, arguing that they did not constitute "serious drug offense[s]" or "violent felon[ies]" under the ACCA.[13] The district court ruled that James's attempted burglary conviction qualified as a violent felony, but held that one of his drug trafficking convictions did not count as a serious drug offense.[14] With the ACCA inapplicable, the district court sentenced James to seventy-one months in prison followed by thirty-six months of supervised release.[15] The government and James cross-appealed these rulings on qualifying felonies.

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4 United States v. Bryant, 310 F.3d 550, 554 (7th Cir. 2002).

5 United States v. Springfield, 196 F.3d 1180, 1185 (10th Cir. 1999).

6 *E.g.*, United States v. Begay, 470 F.3d 964, 970–72 (10th Cir. 2006), *cert. granted*, No. 06-11543, 2007 WL 1579420 (U.S. Sept. 25, 2007); United States v. McCall, 439 F.3d 967, 972 (8th Cir. 2006) (en banc).

7 United States v. Johnson, 417 F.3d 990, 997 (8th Cir. 2005).

8 127 S. Ct. 1586 (2007).

9 *Id.* at 1590.

10 United States v. James, 430 F.3d 1150, 1152 (11th Cir. 2005).

11 At the time of James's conviction, Florida law defined burglary of a dwelling as "entering or remaining in a structure or a conveyance with the intent to commit an offense therein, unless the premises are at the time open to the public or the defendant is licensed or invited to enter or remain." FLA. STAT. § 810.02(1) (1993). Moreover, Florida law defined a dwelling to encompass the curtilage of the building or conveyance in question. *Id.* § 810.011(2). Florida's criminal attempt statute provided that "[a] person who attempts to commit an offense prohibited by law and in such attempt does any act toward the commission of such offense, but fails in the perpetration or is intercepted or prevented in the execution thereof, commits the offense of criminal attempt." *Id.* § 777.04(1).

12 *James*, 127 S. Ct. at 1590.

13 *James*, 430 F.3d at 1152.

14 *See id.* at 1153.

15 *Id.* at 1152.

The Eleventh Circuit reversed with respect to James's drug trafficking conviction and affirmed with respect to his attempted burglary conviction.[16] Writing for a unanimous panel, Judge Wilson rejected James's argument that attempted burglary posed a mere "risk of a risk" insufficient to qualify under the ACCA's definition of a violent crime,[17] finding instead that attempts to commit felonies do present "serious potential risk of physical injury to another."[18] The Eleventh Circuit vacated James's sentence and remanded to the district court with instructions to sentence James in accordance with the ACCA's mandatory minimum.[19]

The Supreme Court granted certiorari and affirmed.[20] Writing for the Court, Justice Alito[21] first dismissed James's contention that attempt offenses are excluded from the residual provision by negative implication due to their express inclusion in another definitional clause of the ACCA.[22] Justice Alito instead found that Congress intended the residual provision to be a catchall clause encompassing a wide range of offenses.[23] He also rejected James's argument that because the enumerated violent felonies are all completed offenses, felonies in the residual category must also be completed offenses. Instead, he found that direct and indirect risks of bodily injury are the essence of what unites the enumerated felonies.[24]

Justice Alito next sought to determine whether the risk involved in attempted burglary was "comparable" to that pertaining to the enumerated felonies.[25] He began by analyzing Florida's burglary statute under the "categorical approach," as defined by *Taylor v. United States*.[26] This approach focuses on the offense's elements as defined by statute, not on the specific conduct of the offender.[27] After finding

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[16] *Id.* at 1155–57.

[17] *Id.* at 1157 (internal quotation mark omitted).

[18] *Id.*

[19] *Id.*

[20] The grant of certiorari was limited to the question of whether James's attempted burglary was an ACCA predicate felony. *See* James v. United States, 126 S. Ct. 2860 (2006) (mem.).

[21] Justice Alito was joined by Chief Justice Roberts and Justices Kennedy, Souter, and Breyer.

[22] *James*, 127 S. Ct. at 1591–92 (citing 18 U.S.C. § 924(e)(2)(B)(i) (2000 & Supp. IV 2004) (defining as predicate violent felonies those felonies "ha[ving] as an element the use, *attempted use*, or threatened use of physical force against the person of another" (emphasis added))). Both parties agreed that attempted burglary did not qualify as a predicate felony under this clause. *Id.* at 1591.

[23] *Id.* at 1592.

[24] *Id.* at 1592–93. Justice Alito also countered James's arguments relating to legislative history, noting that although Congress had initially rejected language that would have specifically included attempt offenses as predicate felonies, it later amended the ACCA to expand the range of predicate offenses. *Id.*

[25] *See id.* at 1594.

[26] 495 U.S. 575 (1990).

[27] *See id.* at 600–01.

that Florida's attempt statute requires some "overt act" directed toward entry,[28] he identified the nearest analog of attempted burglary among the enumerated felonies: completed burglary.[29] He then evaluated the risks of those two felonies and concluded that both crimes involved the "same kind" of risk — namely, the possibility of a confrontation between the burglar and a third party.[30] As additional support for this conclusion, Justice Alito cited the weight of the courts of appeals — at least with respect to their holdings on burglary attempts that had gone beyond merely "casing the joint" — and the U.S. Sentencing Commission's interpretation of an analogous career offender enhancement with a corresponding "crime of violence" predicate.[31] Keying in on the ACCA's use of "*potential* risk" in combination with the categorical approach, Justice Alito emphasized that the relevant degree of risk need be present only in ordinary instances of the felony, not in "every conceivable factual offense covered by [the] statute."[32]

In concluding the Court's opinion, Justice Alito dismissed Justice Scalia's alternative approach as failing to provide the lower courts the guidance it purported to offer because of the paucity of empirical evidence on the actual risk of violence posed by various offenses.[33] Finally, he rejected an argument that the Florida statute's inclusion of curtilage took the offense out of the residual clause as well as a claim that determining predicate felonies under the ACCA involves judicial factfinding in violation of the *Apprendi v. New Jersey*[34] line of Sixth Amendment cases.[35]

Justice Scalia dissented.[36] His opening salvo criticized the majority for its "almost entirely ad hoc" approach and its consequence of providing inadequate guidance for lower courts.[37] In particular, he faulted Justice Alito's method of identifying the closest analogous enumerated offense as inadequate to dispose of the set of cases in which the predicate felony bears little relation to the enumerated crimes (for example, a drunk driving conviction).[38]

Raising the specter of holding the ACCA void for vagueness, Justice Scalia offered an alternative method for determining whether a

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[28] *James*, 127 S. Ct. at 1594 (citing Jones v. State, 608 So. 2d 797, 799 (Fla. 1992)).

[29] *See id.*

[30] *Id.* at 1595.

[31] *Id.* at 1595–96 & nn.3–4; *see also* U.S. SENTENCING GUIDELINES MANUAL § 4B1.2 & cmt. n.1 (2006).

[32] *James*, 127 S. Ct. at 1597 (emphasis added).

[33] *Id.* at 1598.

[34] 530 U.S. 466 (2000).

[35] *James*, 127 S. Ct. at 1599–1600.

[36] Justice Scalia was joined by Justices Stevens and Ginsburg.

[37] *James*, 127 S. Ct. at 1601 (Scalia, J., dissenting).

[38] *Id.*

felony falls under the ACCA's residual clause that he promised would provide clearer parameters for applying the Act. He interpreted the word "otherwise" at the beginning of the residual clause to justify the application of *ejusdem generis* to read the clause as requiring a degree of risk of harm similar to that presented by the enumerated felonies.[39] He then applied the rule of lenity to arrive at the narrowest plausible reading of the required nexus between the degree of risk of the felony in question and that of the enumerated felonies, framing the inquiry as whether attempted burglary poses *at least* as much risk of physical harm to another as the *least dangerous* of the enumerated crimes.[40] After settling on burglary as the least-dangerous enumerated crime,[41] he relied on hypothetical burglary scenarios to find that attempted burglary as a category poses less risk of injury than completed burglary does.[42]

Justice Scalia concluded his opinion by touting its superiority over the majority's "puny solution" and "decision-averse" approach, which he characterized as leaving multiple issues relating to the ACCA's application unresolved.[43] He decried the "shoddy draftsmanship" of Congress in crafting the ACCA and presented four options facing a reviewing court: a blanket application of the ACCA to almost all predicate offenses, an unpredictable case-by-case method of application at the whim of the judge, a coherent and stable approach of applying the Act to a defined subset of felonies, or holding the statute void for vagueness.[44] He described his opinion as providing the third option, lambasted the majority for choosing the second, and closed with characteristic fervor by excoriating Congress for passing "an unintelligible criminal statute" and faulting the Court for allowing the Act "to survive uncorrected, unguided, and unexplained."[45]

Justice Thomas filed a separate dissent. Referencing his concurrence in *Shepard v. United States*,[46] he argued that the ACCA requires

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[39] *See id.* at 1602–03.

[40] *See id.* at 1603.

[41] *See id.* at 1607. Justice Scalia arrived at this conclusion by first winnowing down the list of candidate crimes to burglary and extortion and then comparing those two crimes in detail. *See id.* at 1603–06. To define burglary for ACCA purposes, Justice Scalia looked to *Taylor*'s holding on the elements of generic burglary. *See id.* at 1604 (citing Taylor v. United States, 495 U.S. 575, 599 (1990)). In defining extortion, he applied *Taylor*'s categorical approach along with traditional canons of statutory interpretation to settle on a definition considerably narrower than the Model Penal Code's expansive language. *See id.* at 1604–06 (defining extortion as "the obtaining of something of value from another, with his consent, induced by the wrongful use or threatened use of force against the person or property of another"); *cf.* MODEL PENAL CODE § 223.4 (1962).

[42] *James*, 127 S. Ct. at 1607 (Scalia, J., dissenting).

[43] *Id.* at 1608.

[44] *Id.* at 1609.

[45] *Id.* at 1609–10.

[46] 125 S. Ct. 1254 (2005).

judges to engage in factfinding regarding prior convictions in violation of defendants' Sixth Amendment right to a jury determination of factual questions that could result in an enhanced maximum sentence.[47]

James is certainly important to felons in possession of firearms whose criminal records include convictions of attempted robbery, and the decision may presage the expansion of ACCA predicates to other attempt offenses. Yet regardless of the number of convicts it will sweep into the Act's ambit, *James* is significant on another level: it exemplifies the quandary that far-reaching and vague federal criminal statutes present to judges. For all the divisions that surfaced from the Justices' embrace of their respective favored methodologies of statutory interpretation, the Court was united in expressing discomfort with the nebulous residual provision of the ACCA.[48] Although the various *James* opinions plowed ahead without directly engaging with this institutional awkwardness, a more thorough consideration of the rule of lenity's potential application to the question presented — whether attempted burglary qualifies as an ACCA predicate — could have brought these concerns to the fore and perhaps led to a more effective resolution of the Act's ambiguities.

The rule of lenity garnered short shrift in the *James* opinions[49] and has taken a beating in recent academic commentary,[50] but the rule's conventional justifications counsel for its application to the residual

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[47] *James*, 127 S. Ct. at 1610 (Thomas, J., dissenting) (citing *Shepard*, 125 S. Ct. at 1263–64 (Thomas, J., concurring in part and concurring in the judgment)). The majority dismissed this argument by characterizing the task of determining whether attempted burglary qualifies as an ACCA predicate felony as "statutory interpretation, not judicial factfinding." *Id.* at 1600 (majority opinion).

[48] *Compare id.* at 1598 n.6 (majority opinion) (acknowledging that the ACCA "requires judges to make sometimes difficult evaluations of the risks posed by different offenses"), *with id.* at 1609 (Scalia, J., dissenting) (characterizing the ACCA as a statute "insusceptible of an interpretation that enables principled, predictable application").

[49] Although the issue was briefed, *see* Brief of Petitioner at 39–40, *James*, 127 S. Ct. 1586 (No. 05-9264), 2006 WL 2415460, Justice Scalia mentioned the rule only in the context of the narrow issue of defining the nexus between the risk posed by the enumerated felonies and the risk required for an unenumerated felony to fall under the residual clause. *See James*, 127 S. Ct. at 1603 (Scalia, J., dissenting). The possibility of applying the rule to the ACCA has not escaped the notice of some judges on the courts of appeals, *see, e.g.*, United States v. Begay, 470 F.3d 964, 985 (10th Cir. 2006) (McConnell, J., dissenting in part), *cert. granted*, No. 06-11543, 2007 WL 1579420 (U.S. Sept. 25, 2007); United States v. McCall, 439 F.3d 967, 983 (8th Cir. 2006) (en banc) (Lay, J., dissenting), or commentators, *see* A Few Quick Reactions to *James*, Sentencing Law and Policy, http://sentencing.typepad.com/sentencing_law_and_policy/2007/04/a_few_quick_rea.html (Apr. 18, 2007, 12:05 PM).

[50] *See, e.g.*, Dan M. Kahan, *Lenity and Federal Common Law Crimes*, 1994 SUP. CT. REV. 345, 396 ("Lenity should be abolished."); Zachary Price, *The Rule of Lenity as a Rule of Structure*, 72 FORDHAM L. REV. 885, 886 (2004) (describing the rule as having "fallen out of favor"). *See generally* Note, *The New Rule of Lenity*, 119 HARV. L. REV. 2420, 2421–28 (2006) (surveying the "modern critique" of the rule).

clause of the ACCA at some point in the interpretive process.[51] The rule — a common version of which states that "an ambiguous criminal statute is to be construed in favor of the accused"[52] — has traditionally been grounded in due process concerns of fair notice to the defendant.[53] Indeed, it was this rationale of "fair warning" that prompted Justice Scalia's limited application of the rule.[54] To be sure, it is not entirely intuitive why notice should be of concern in the sentencing context, where it is given that the defendant engaged in culpable conduct and where the question of statutory interpretation affects only the degree of punishment; application of lenity in *James* probably cannot be founded on the fiction that a recidivistic burglar will rush to the statute books to ascertain his probable penalty before engaging in his next heist. Nonetheless, there are strong due process reasons for applying the rule of lenity when construing sentencing statutes.[55] For one, the fact that the defendant has already been found guilty does not mean he forfeits his entitlement to process at sentencing, as the myriad procedural requirements of federal sentencing indicate.[56] More gener-

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[51] Much of the judicial debate over the rule of lenity has turned on where in the interpretive hierarchy the rule should fall. The Court has recently indicated that it will apply the rule only after exhausting all other interpretive aids, *see* Smith v. United States, 508 U.S. 223, 240 (1993), or in cases of "grievous ambiguity," Chapman v. United States, 500 U.S. 453, 463 (1991) (quoting Huddleston v. United States, 415 U.S. 814, 831 (1974)) (internal quotation mark omitted). In concurring and dissenting opinions, Justice Scalia has urged for application at an earlier stage, at least before resort to legislative history, *see* United States v. R.L.C., 503 U.S. 291, 307–08 (1992) (Scalia, J., concurring in part and concurring in the judgment), or upon a preliminary finding of textual ambiguity, *see Smith*, 508 U.S. at 246 (Scalia, J., dissenting).

[52] Staples v. United States, 511 U.S. 600, 619 n.17 (1994).

[53] *See, e.g.*, McBoyle v. United States, 283 U.S. 25, 27 (1931) (Holmes, J.) ("Although it is not likely that a criminal will carefully consider the text of the law before he murders or steals, it is reasonable that a fair warning should be given to the world in language that the common world will understand, of what the law intends to do if a certain line is passed. To make the warning fair, so far as possible the line should be clear."); *see also* William N. Eskridge, Jr., *Public Values in Statutory Interpretation*, 137 U. PA. L. REV. 1007, 1029 (1989) ("The rule of lenity rests upon the due process value that government should not punish people who have no reasonable notice that their activities are criminally culpable . . . .").

[54] *See James*, 127 S. Ct. at 1603 (Scalia, J., dissenting) (quoting United States v. Bass, 404 U.S. 336, 348 (1971)) (internal quotation marks omitted).

[55] The Supreme Court's precedents recognize that the rule of lenity can apply to statutes that specify the length of a sentence as well as to statutes that determine whether conduct is criminally culpable in the first place. *See, e.g.*, Albernaz v. United States, 450 U.S. 333, 342 (1981) ("[W]e [have] recognized that the rule of lenity is a principle of statutory construction which applies not only to interpretations of the substantive ambit of criminal prohibitions, but also to the penalties they impose."). *But see* Phillip M. Spector, *The Sentencing Rule of Lenity*, 33 U. TOL. L. REV. 511, 512 (2002) (aiming to establish the "theoretical bankruptcy of applying the rule of lenity to sentencing statutes").

[56] *See, e.g.*, FED. R. CRIM. P. 32 (establishing sentencing procedures, including requirements of notice to defendant, opportunity to object to the presentence report, and allocution right); *see also* Rita v. United States, 127 S. Ct. 2456, 2469 (2007) (emphasizing that the current federal sentencing regime is a "reasoned process").

ally, the rule of lenity is founded on the due process notion that only clearly stated laws can justify significant deprivations of liberty.[57]

The second classical rationale for the rule more directly involves separation of powers concerns: according to this argument, the rule prevents legislatures from punting their crime-defining function to the courts.[58] Professor Dan Kahan has reframed this traditional justification as a sort of nondelegation doctrine and observed that delegations of crime-defining powers to the judiciary are legion.[59] At first blush, this nondelegation principle may appear to have little bite in the realm of sentencing, where the Court has upheld a massive delegation to the Sentencing Commission (formally located in the judicial branch) and where judges have traditionally exercised much discretion.[60] But the fact that such a delegation is constitutionally permissible does not mean that it is appropriate in the context of construing the ACCA's residual clause, especially because Congress has not given the courts a clear mandate to generate a common law of ACCA predicate offenses.[61] A more robust discussion of lenity in *James* would have focused the Court on the important question of which institution was in the best position to determine which classes of offenders should be subject to the ACCA's severe sentencing provisions.

A powerful and related institutional argument for applying the rule of lenity in *James* has to do with Professor Einer Elhauge's characterization of lenity as an example of a "preference-eliciting statutory de-

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[57] Even though this due process concern may not be cognizable if presented as a direct constitutional claim, it is nonetheless a "public value" that should inform statutory interpretation. *See* Eskridge, *supra* note 53, at 1028–29 (describing lenity as a canon "most susceptible to a public values reading"); Cass R. Sunstein, *Nondelegation Canons*, 67 U. CHI. L. REV. 315, 332 (2000) (arguing that the rule of lenity is "inspired by a due process constraint" that is "rooted in a constitutional principle"); *cf.* Apprendi v. New Jersey, 530 U.S. 466, 476–77 (2000) (identifying due process foundations of the Court's recent sentencing jurisprudence).

[58] *See, e.g.*, *Bass*, 404 U.S. at 348 ("This policy embodies 'the instinctive distastes against men languishing in prison unless the lawmaker has clearly said they should.'" (quoting HENRY J. FRIENDLY, *Mr. Justice Frankfurter and the Reading of Statutes*, *in* BENCHMARKS 196, 209 (1967))); United States v. Hudson & Goodwin, 11 U.S. (7 Cranch) 32, 32–34 (1812) (establishing that the federal judiciary cannot create a common law of crimes of its own accord); Kahan, *supra* note 50, at 350 (finding the mission of lenity to be "to enforce legislative supremacy in criminal law").

[59] *See* Kahan, *supra* note 50, at 347.

[60] For this argument, see Spector, *supra* note 55, at 548–49. *See also* Mistretta v. United States, 488 U.S. 361, 412 (1989) (holding that creation of the Sentencing Commission did not violate the nondelegation principle or separation of powers).

[61] This is not to say that such an implied delegation would be impossible. But, as Justice Scalia's dissent suggested, the presence of the word "otherwise" in the residual clause may doom any argument that Congress made an intelligible delegation to the judiciary. Justice Scalia offered a telling analogy: "The phrase 'shades of red,' standing alone, does not generate confusion or unpredictability; but the phrase 'fire-engine red, light pink, maroon, *navy blue*, or colors that otherwise involve shades of red' assuredly does so." *James*, 127 S. Ct. at 1610 n.7 (Scalia, J., dissenting).

fault rule."[62] Professor Elhauge has defined these rules as employing canons of interpretation that differ from likely legislative preferences in order to encourage the legislature to clarify its intent.[63] He finds the use of such rules is more likely to be justified when the default rule will burden some politically influential group with ready access to the legislative process so that the judicial intervention can easily prompt legislative correction.[64] Thus, the rule of lenity serves the function of erring on the side of construing a penal statute too narrowly, a situation that can easily be remedied by legislative correction, rather than construing such a statute too broadly, a result that a legislature would be unlikely to amend.[65] As applied to *James*, a preference-eliciting rule would involve a narrow interpretation of the ACCA by the Court, which would then educe a congressional amendment specifying attempted burglary (or attempt offenses in general) as predicate felonies if and only if such a preference was legislatively enactable.[66]

The preference-eliciting justification for the rule of lenity is somewhat at odds with process theory justifications, which emphasize that legislatures systematically underrepresent the interests of people accused of committing crimes.[67] Process theorists would likely object to a preference-eliciting rule that would provoke the legislature to express its normatively unattractive inclinations. As an initial matter, however, the process theory rationale appears to be weak as applied to

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[62] Einer Elhauge, *Preference-Eliciting Statutory Default Rules*, 102 COLUM. L. REV. 2162, 2192–93 (2002).

[63] *See id.* at 2165.

[64] The interest group criterion fulfills the second of Professor Elhauge's three conditions for when preference-eliciting default rules should be applied to construe an unclear statute: (1) courts are sufficiently uncertain what the legislature would have preferred; (2) the preference-eliciting default rule is more likely to provoke legislative correction (ex ante or ex post) than the default rule that better matches likely legislative preferences; and (3) where the correction is not ex ante, any interim costs from not employing the statutory default rule the legislature would more likely prefer are not unduly large or uncorrectable. *Id.* at 2179–80.

[65] *See id.* at 2194 ("[T]he rule of lenity forces the legislature to define just how anti-criminal they wish to be, and how far to go with the interest in punishing crime when it runs up against other societal interests.").

[66] *Cf.* John Calvin Jeffries, Jr., *Legality, Vagueness, and the Construction of Penal Statutes*, 71 VA. L. REV. 189, 220–23 (1985) (urging judges interpreting vague penal statutes to opt for a resolution that makes the law more certain rather than one that perpetuates ambiguity). The same result could be reached by casting the rule of lenity as a clear statement rule. *See, e.g.*, William N. Eskridge, Jr. & Philip P. Frickey, *Quasi-Constitutional Law: Clear Statement Rules as Constitutional Lawmaking*, 45 VAND. L. REV. 593, 597 (1992) (praising clear statement rules for their potential to "forc[e] the political process to pay attention to the constitutional values at stake"); *cf.* Frank H. Easterbrook, *Statutes' Domains*, 50 U. CHI. L. REV. 533, 544 (1983) ("[U]nless [a] statute plainly hands courts the power to create and revise a form of common law, the domain of the statute should be restricted to cases anticipated by its framers and expressly resolved in the legislative process.").

[67] *See, e.g.*, William N. Eskridge, Jr., *Overriding Supreme Court Statutory Interpretation Decisions*, 101 YALE L.J. 331, 413 (1991).

James; this case involved the class of burglars, hardly the sort of discrete and insular minority that is indisputably worthy of special judicial protection.[68] Moreover, even those who believe that criminal defendants are poorly served by the legislative process may favor a preference-eliciting rule because they believe there is less of a need for representation reinforcement the second time around, perhaps because the criminal statute in question will become more publicly salient. Beyond making it more likely that criminal statutes will match legislative preferences, a preference-eliciting application of the rule would help ensure that the breadth of the ACCA is transparent and accountable to voters, especially given that the political incentives of Congress may create a divergence from majoritarian preferences regarding mandatory minimums.[69]

A preference-eliciting application of lenity in *James* would have been especially salutary given the empirical nature of the statutory ambiguity in question. As the Justices and other judges construing the ACCA have recognized,[70] a comparison of the degree of potential risk between the enumerated felonies and a candidate for the residual clause is not something that one can easily intuit.[71] Nevertheless, both the majority opinion and Justice Scalia's dissent relied on little more than armchair speculations to rank the relative danger of a generic attempted burglary.[72] A narrow construction of the residual clause

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[68] *Cf.* Laurence H. Tribe, *The Puzzling Persistence of Process-Based Constitutional Theories*, 89 YALE L.J. 1063, 1075 (1980) (presenting burglars as a clear example of a group not deserving treatment as a "suspect class" despite being subject to public opprobrium).

[69] *See* Price, *supra* note 50, at 911–12 (arguing that the rule of lenity should be understood as a rule promoting democratic accountability); *cf.* Rachel E. Barkow, *Federalism and the Politics of Sentencing*, 105 COLUM. L. REV. 1276, 1278–85 (2005) (describing aspects of the political process of sentencing that lead to "'get-tough' rhetoric and ever harsher sentences").

[70] *See James*, 127 S. Ct. at 1608 (Scalia, J., dissenting); *see also* United States v. Chambers, 473 F.3d 724, 726–27 (7th Cir. 2007) (Posner, J.) (lamenting that "it is an embarrassment to the law when judges base decisions of consequence on conjectures" and calling for the Sentencing Commission, Congress, or some other institution to undertake a study of the comparative frequency of violence for possible ACCA predicate offenses).

[71] In a revealing exchange at oral argument, Justice Breyer half-heartedly attempted a delegation of this empirical interpretive question to the legal academy:

> JUSTICE BREYER: Why doesn't anybody — you know, count. It sounds to me if you're wondering about whether there's a specific serious risk of harm, you could find out. . . . We have all these law professors who like statistics. Now they like law [and] economics and everything. So why don't they go out there and count, and then we'd actually know, instead of sitting here and trying to figure out something I know nothing about . . . .
>
> JUSTICE GINSBURG: We're not going to be able to do that in time to decide this case.
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> . . . .
>
> JUSTICE SCALIA: It would also keep the professors from other mischief.

Transcript of Oral Argument at 12–13, *James*, 127 S. Ct. 1586 (No. 05-9264), *available at* http://www.supremecourtus.gov/oral_arguments/argument_transcripts/05-9264.pdf.

[72] *See James*, 127 S. Ct. at 1595, 1599; *id.* at 1607 (Scalia, J., dissenting).

would put the onus on Congress to undertake or commission the empirical studies necessary for more accurate conclusions about the risk of harm posed by attempted burglary.

The competing methods of statutory interpretation at work in the *James* opinions evinced now-familiar tensions among the Justices of the Roberts court. Most obvious was the rift between the minimalists and their less restrained counterparts — whereas the former camp, represented by Justice Alito's majority opinion, left undecided every ambiguity in the ACCA that was unnecessary to the resolution of the case, Justice Scalia repeatedly emphasized the need to provide clear guidance to lower courts.[73] But although Justice Scalia's *James* dissent burnishes his somewhat improbable record as a champion of criminal defendants' constitutional rights,[74] he missed an opportunity to sustain his advocacy for lenity in construing criminal statutes.[75] Had he and the other Justices analyzed the case with more attention to lenity, they might have reached a more institutionally competent, empirically sound, and democratically accountable result.

C. Civil Rights Act, Title VII

Statute of Limitations. — For over four decades, workers subjected to unequal pay for discriminatory reasons have turned to Title VII of the Civil Rights Act of 1964,[1] a statute enacted with the "primary objective" of "bring[ing] employment discrimination to an end."[2] They have had to contend, however, with the application of section 703, the Act's limitations period, to claims based on continuing violations[3] — "arguably the most muddled area in all of employment discrimination

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[73] The Court is set to provide further guidance next Term. *See* Begay v. United States, No. 06-11543, 2007 WL 1579420 (U.S. Sept. 25, 2007) (granting certiorari on the question of whether felony drunk driving is an ACCA predicate).

[74] *See* Stephanos Bibas, *Originalism and Formalism in Criminal Procedure: The Triumph of Justice Scalia, the Unlikely Friend of Criminal Defendants?*, 94 GEO. L.J. 183, 184 (2005).

[75] *See* Sarah Newland, Note, *The Mercy of Scalia: Statutory Construction and the Rule of Lenity*, 29 HARV. C.R.-C.L. L. REV. 197, 198 (1994). Perhaps Justice Scalia's desire to counter the minimalism of the majority opinion led him to invoke the broad vagueness doctrine (which, if applied, would have invalidated the ACCA's residual clause in its entirety) where he might otherwise have considered a more tailored application of lenity. *Cf.* United States v. Lanier, 520 U.S. 259, 266 (1997) (describing lenity as a circumscribed version of the vagueness doctrine).

[1] 42 U.S.C. §§ 2000e to 2000e-17 (2000). Female plaintiffs have utilized the Equal Pay Act of 1963, 29 U.S.C. § 206(d) (2000), as well.

[2] Ford Motor Co. v. EEOC, 458 U.S. 219, 228 (1982).

[3] *See* 42 U.S.C. § 2000e-5(e)(1) ("A charge under this section shall be filed within one hundred and eighty days after the alleged unlawful employment practice occurred . . . ."). The limitations period is 300 days if the plaintiff previously instituted proceedings in a state that has an agency dedicated to processing employment discrimination claims. *See id.*; *see also* Roy L. Brooks, *A Roadmap Through Title VII's Procedural and Remedial Labyrinth*, 24 SW. U. L. REV. 511, 513–14 (1995).