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Violent Crimes and Known Associates: The Residual Clause of the Armed Career Criminal Act

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Confusion reigns in federal courts over whether crimes qualify as “violent felonies” for purposes of the Armed Career Criminal Act (“ACCA”). The ACCA requires a fifteen-year minimum sentence for felons convicted of possessing a firearm who have three prior convictions for violent felonies. Many offenders receive the ACCA’s mandatory minimum sentence of fifteen years based on judges’ guesses that their prior crimes could be committed in a violent manner—instead of based on the statutory crimes for which they were actually convicted. Offenders who do not deserve a minimum sentence of fifteen years may receive it anyway.

*The courts’ application of the ACCA is also underinclusive. Although the ACCA defines “violent felony” to include all crimes “involving conduct that presents a serious potential risk of bodily injury to another,” a 2008 Supreme Court decision has drastically narrowed the so-called residual clause. *Begay v. United States* held that crimes fall under the residual clause only if they are “purposeful, violent, and aggressive” as a matter of law. This imprecise, extra-statutory formula has resulted in the exclusion of some seriously risky crimes of recklessness and negligence, and created tension with the nearly identical “crime of violence” definition in the career offender sentencing guideline.*

*This Article is the first to survey ACCA jurisprudence after *Begay* and the Court’s 2009 decision in *Chambers v. United States* and to detail the conflict between these decisions, the text of the ACCA, and the Court’s prior precedent. This Article offers lower courts a way to apply the ACCA’s residual clause with greater respect for the Sixth Amendment right to a jury trial, the statutory text, and precedent. First, courts should narrowly construe *Begay*’s requirement of “purposeful” conduct to exclude strict liability crimes from the residual clause but include crimes of negligence and recklessness. Second, courts should read *Begay*’s “aggressive” requirement as a rhetorical flourish without any meaningful distinction from its “violent” requirement. Third, despite *Begay*’s apparent invitation to do otherwise, courts should strictly follow the “categorical approach” as set forth in *Taylor v. United States*. The net result of these three steps would be a greater faithfulness to the text of the ACCA: courts applying the residual clause would include only those crimes whose elements require violent conduct while excluding those crimes whose elements do not require violence or any *mens rea*.*

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Violent Crimes and Known Associates: The Residual Clause of the Armed Career Criminal Act

DAVID C. HOLMAN*

I. INTRODUCTION

Involuntary manslaughter is not a violent felony. Possession of a dangerous weapon is inherently violent. Driving away from the police is necessarily aggressive. Welcome to the bizarre world of the Armed Career Criminal Act (“ACCA”),¹ brought about by a poorly drafted statute and a conflicting morass of Supreme Court and appellate case law. Essentially, the ACCA requires a fifteen-year minimum sentence for repeat offenders convicted of possessing a firearm who have three prior convictions for violent felonies.² In defining which crimes qualify as violent felonies, the ACCA includes any crime that “otherwise involves conduct that presents a serious potential risk of physical injury to another.”³ In *Begay v. United States*, the Supreme Court limited this residual clause to crimes that involve “purposeful, violent, and aggressive” conduct.⁴

The case of Melvin Spells illustrates the often whimsical application of the ACCA after *Begay*. When a police officer saw Spells driving without wearing his seatbelt, the officer turned on his lights to pull Spells over.⁵ Spells refused to pull over, earning him a state felony conviction for fleeing law enforcement.⁶ Years later, Spells faced federal sentencing for being a felon in possession of a firearm, among other crimes.⁷ A felon-in-possession conviction would normally carry a maximum sentence of ten

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¹ Anti-Drug Abuse Act of 1986, Pub. L. 99-570, §§ 1401–02, 100 Stat. 3207 (1986) (codified as amended at 18 U.S.C. § 924(e) (2006)). Congress first passed the ACCA in 1984, and amended it to its present form in 1986. For an in-depth review of the legislative history, see James G. Levine, Note, *The Armed Career Criminal Act and the U.S. Sentencing Guidelines: Moving Toward Consistency*, 46 HARV. J. ON LEGIS. 537, 545–48 (2009).

² 18 U.S.C. § 924(e)(1).

³ *Id.* § 924(e)(2)(B)(ii).

⁴ 553 U.S. 137, 144–45 (2008) (internal quotation marks omitted).

⁵ *United States v. Spells*, 537 F.3d 743, 745–46 (7th Cir. 2008).

⁶ *Id.*

⁷ *Id.* at 744.

years in prison.⁸ But the sentencing court found that Spells had three prior convictions for violent felonies, including his conviction for fleeing law enforcement, making him eligible for the ACCA's mandatory minimum sentence of fifteen years in prison.⁹ On appeal, the Seventh Circuit determined that Spells's conviction for fleeing law enforcement entailed purposeful, violent, and aggressive conduct as a matter of law, as required by *Begay*.¹⁰ The appellate court admitted that the statutory elements of the crime did not require violent or aggressive conduct for a conviction. Nonetheless, the court concluded that the crime is legally violent and aggressive because the offender's flight "calls the officer to give chase, and . . . dares the officer to needlessly endanger himself in pursuit."¹¹ This judicial reasoning made the difference of at least five years in prison for Melvin Spells. Similar reasoning has concluded that crimes such as the mere possession of a dangerous weapon and larceny are inherently violent, leaving circuits split over whether certain crimes are violent felonies.¹²

The battle over the application of the ACCA is fought over whether a defendant's three prior convictions fall within the meaning of "violent felony" or "serious drug offense," therefore triggering the ACCA. Under the text of the ACCA, a felony is violent if it fulfills any one of three conditions: (1) it "has as an element the use, attempted use, or threatened use of physical force against the person of another," (2) it "is burglary, arson, or extortion, [or] involves use of explosives," or (3) it "otherwise involves conduct that presents a serious potential risk of physical injury to another."¹³ This Article focuses on the contentious "otherwise" or "residual" clause—the ill-defined third option. At sentencing, federal prosecutors often take a broad view and argue that physically stealing from a person,¹⁴ criminal trespass to a dwelling,¹⁵ and fleeing law enforcement¹⁶ should all qualify as violent felonies under the residual clause. Defendants, of course, prefer a narrower construction. Despite frequent litigation, a standard definition of a "violent felony" has proven elusive.

⁸ 18 U.S.C. § 924(a)(2).

⁹ *Spells*, 537 F.3d at 745.

¹⁰ *Id.* at 751, 753–54.

¹¹ *Id.* ("An individual's purposeful decision to flee an officer in a vehicle when told to stop, reflects that if that same individual were in possession of a firearm and asked to stop by police, they would have a greater propensity to use that firearm in an effort to evade arrest.").

¹² See *infra* Part V.C (discussing circuits' analysis of sexual crimes against children) and V.D.2 (discussing circuits' analysis of fleeing law enforcement).

¹³ 18 U.S.C. § 924(e)(2)(B)(i)–(ii) (2006).

¹⁴ *United States v. Hennecke*, 590 F.3d 619, 622–23 (8th Cir. 2010) (addressing a Missouri conviction for physically stealing from another in violation of MO. REV. STAT. § 569.030, which requires proof of the use of force).

¹⁵ *United States v. Corner*, 588 F.3d 1130, 1132 (7th Cir. 2009) (addressing Wisconsin conviction for criminal trespass to a dwelling in violation of WIS. STAT. § 943.14).

¹⁶ *Spells*, 537 F.3d at 749–50 (addressing Indiana conviction for fleeing law enforcement in violation of IND. CODE § 35-44-3-3(a)).

The residual clause is problematic because lower federal courts are torn between the text of the ACCA, a complex analysis known as the “categorical approach,” and the Supreme Court’s recent decision in *Begay v. United States*, which requires that a prior conviction be “purposeful, violent, and aggressive” to fall under the residual clause.¹⁷ This Article is the first to survey the residual clause’s various problems after *Begay*, particularly the conflict between the text of the residual clause, the categorical approach, and *Begay*.¹⁸

Federal courts must reconcile two nearly contradictory strains of ACCA case law. The first strain has mandated a “categorical approach” in determining whether a particular crime constitutes a violent felony. Under the categorical approach, courts may examine only the fact of the prior conviction, the statutory elements of that offense, and, in rare cases, the charging documents, jury instructions, or plea agreements.¹⁹ In other words, the prior conviction must be a violent felony as a matter of law—not just a felony committed in a violent manner in that particular case.

For example, state statutes defining the crime of witness tampering may not require any violent act: to commit the crime, a person needs only to induce a witness to testify falsely or not testify.²⁰ The person convicted of witness tampering may have committed the crime in a violent way, like killing the witness in order to prevent his testimony. But that violence does not make the crime legally or categorically violent because the government never had to prove an element of violence to secure a conviction. Consequently, a conviction under one of these statutes, even where a witness had been killed, would not fall within the residual clause and, accordingly, the defendant would not be subject to heightened sentencing under the ACCA. The categorical approach restricts a sentencing court’s consideration of prior convictions to those elements actually proven to a jury beyond a reasonable doubt or admitted by the defendant, thereby protecting the defendant’s Sixth Amendment right to a jury trial.²¹

¹⁷ 553 U.S. 137, 144 (2008).

¹⁸ *Begay*’s interpretation of the ACCA has received no substantial coverage in legal journals except for brief case comments and reviews of the 2007–2008 Supreme Court Term. More generally, the most recent treatment of the ACCA is discussed in Levine, *supra* note 1, at 547 (assessing the ACCA’s implications). See also Krystle Lamprecht, Comment, *Formal, Categorical, But Incomplete: The Need for a New Standard in Evaluating Prior Convictions Under the Armed Career Criminal Act*, 98 J. CRIM. L. & CRIMINOLOGY 1407, 1409 (2008) (arguing for a uniform generic standard of the sentencing requirement without discussing *Begay*).

¹⁹ See *infra* Part III.A (explaining the categorical approach in greater detail).

²⁰ See, e.g., COLO. REV. STAT. ANN. § 18-8-707 (2009) (defining the crime of tampering with a witness or victim); KY. REV. STAT. ANN. § 524.050 (2006) (defining same); N.H. REV. STAT. § 641:5 (2007) (defining same). But see 18 U.S.C. §§ 1512(a)(1)–(2) (2006) (proscribing killing, using physical force or the threat of physical force, or attempted killing or use of force with intent to prevent, influence, or delay testimony).

²¹ See *infra* note 47 and accompanying text.

The second strain of case law limits the scope of the residual clause to crimes similar to the crimes enumerated in the preceding clause. According to *Begay*, the enumerated crimes “limit[] the crimes that [the residual clause] covers to crimes that are roughly similar, in kind as well as in degree of risk posed, to the examples themselves.”²² Crimes are similar in kind if they—like the enumerated crimes—“typically involve purposeful, violent, and aggressive conduct.”²³ Theoretically, *Begay* is perfectly compatible with the categorical approach. Courts simply determine whether the statutory elements of the prior offense of conviction require purposeful, violent, and aggressive conduct. But the practical application of *Begay* is different for two reasons.

First, *Begay* and its offspring contain language undermining the categorical approach. The Court suggested that lower courts should examine the “ordinary” or “typical” commission of the statutory offense. But how a crime is *typically* committed may vary from what the statutory elements actually require for conviction.²⁴ The example of Melvin Spells illustrates this conflict. The Seventh Circuit may have correctly concluded that the crime of fleeing law enforcement *typically* involves violence because the pursuing officer will often give chase, risking harm to himself and bystanders. But violent conduct is not *required* in order to convict under the statute. Mr. Spells may have been driving on a deserted street. Or Mr. Spells, while refusing to stop, may have never exceeded the speed limit and may have obeyed all traffic laws. Improbable? Perhaps. But *possible*. *Begay* introduced another subjective consideration that veers from the statute and the categorical approach: it instructed lower courts to consider whether the prior crime is one that indicates the criminal is likely to use a weapon to harm a victim in the future.²⁵ This consideration also creates tension with the categorical approach.

Second, some courts have resisted *Begay*’s newly fashioned requirement that violent felonies be purposeful, violent, and aggressive. Instead of *Begay*’s “purposeful, violent, and aggressive” requirement, some courts continue to apply the unglossed statutory requirement that the

²² *Begay*, 553 U.S. at 143; *see also* *James v. United States*, 550 U.S. 192, 203 (2007) (“The specific offenses enumerated in clause (ii) [of the ACCA] provide one baseline from which to measure whether other similar conduct ‘otherwise . . . presents a serious potential risk of physical injury.’” (quoting 18 U.S.C. § 924(e)(2)(B)(ii) (2006))).

²³ *Begay*, 553 U.S. at 144–45 (internal quotation marks omitted).

²⁴ For example, a person may have killed someone while engaging in some other non-violent criminal activity, but only been convicted of the latter crime because evidence of one element was lacking with respect to the former.

²⁵ *Begay*, 553 U.S. at 145 (“[Purposeful, violent, and aggressive] conduct is such that it makes more likely that an offender, later possessing a gun, will use that gun deliberately to harm a victim. Crimes committed in such a purposeful, violent, and aggressive manner are ‘potentially more dangerous when firearms are involved.’” (quoting *United States v. Begay*, 470 F.3d 964, 980 (2006) (McConnell, J., dissenting in part))).

prior crime pose a serious potential risk of physical injury.²⁶ Other courts use *Begay*'s "purposeful, violent, and aggressive" requirement, but apply it to the "typical" or "ordinary case" with reasoning at odds with the categorical approach.²⁷

This Article aims to help lower courts resolve the conflict between *Begay* and the categorical approach by identifying the major pitfalls in applying the ACCA after *Begay* and suggesting the ideal post-*Begay* application of the categorical approach. Part II examines the text of the ACCA and presents some basic principles in interpreting the residual clause. Part III explains Supreme Court precedent regarding the ACCA, focusing on *Taylor v. United States*,²⁸ *James v. United States*,²⁹ *Begay*, and, most recently, *Chambers v. United States*.³⁰ Part IV exhibits several of *Begay*'s various inherent problems. Part V sets out four chief difficulties in implementing *Begay*.

Finally, Part VI proposes an application of the ACCA that is more consistent with the statutory text and the categorical approach. First, courts should narrowly construe *Begay*'s mens rea holding and read it as excluding only strict liability crimes from the residual clause while including crimes of negligence and recklessness. Second, courts should read *Begay*'s "aggressive" requirement as a rhetorical flourish without any meaningful distinction from "violent." Third, despite *Begay*'s apparent invitation to do otherwise, courts should strictly follow the categorical approach and apply the residual clause to only those crimes with elements that require the underlying conduct be violent while excluding those crimes with elements that do not require violence or any mens rea.

II. THE TEXT OF THE ARMED CAREER CRIMINAL ACT

As stated above, the ACCA³¹ mandates a sentence of at least fifteen years in prison for felons convicted of possessing a firearm and who have at least three prior convictions for a violent felony, a serious drug offense, or both.³² For purposes of the ACCA, a "violent felony" is any crime

²⁶ See *infra* Part V.A.

²⁷ See *infra* Part IV.B.2.

²⁸ 495 U.S. 575 (1990).

²⁹ 550 U.S. 192 (2007).

³⁰ 129 S. Ct. 687 (2009).

³¹ Anti-Drug Abuse Act of 1986, Pub. L. 99-570, §§ 1401-02, 100 Stat. 3207 (1986) (codified as amended at 18 U.S.C. § 924(e) (2006)).

³² Section 924(e)(1) states:

In the case of a person who violates section 922(g) of this title and has three previous convictions by any court referred to in section 922(g)(1) of this title for a violent felony or a serious drug offense, or both, committed on occasions different from one another, such person shall be fined under this title and imprisoned not less than fifteen years

18 U.S.C. § 924(e)(1).

punishable by imprisonment for more than one year 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”³³

The first clause of the violent felony definition is relatively straightforward in its application. Either a crime contains one of those elements or it does not. For example, any kind of attempted or completed homicide or assault (excluding felony murder) has as an element the use or attempted use of force. The second clause is more difficult for two reasons. First, the ACCA does not define the enumerated crimes. While those crimes are familiar concepts in American law, states may define them differently.³⁴ Second, the residual or “otherwise” clause of clause (ii) is deceptive. At first blush, the residual clause seems sweeping—it includes any other crime that presents a serious potential risk of physical injury.³⁵ Statutory rules of construction, however, limit its scope. Where general words follow specific ones in a list, the canon of *ejusdem generis* suggests that “the general words are construed to embrace only objects similar in nature to those objects enumerated by the preceding specific words.”³⁶ Such is the case in the ACCA. The residual clause should therefore include only crimes that are “similar in nature” to burglary, arson, extortion, or crimes involving use of explosives.³⁷

³³ *Id.* § 924(e)(2)(B).

³⁴ The variety of state burglary statutes required the Supreme Court in *Taylor v. United States*, 495 U.S. 575, 598 (1990), to craft a generic definition of burglary. See *supra* notes 41–44 and accompanying text.

³⁵ This was the Government’s position in *Begay*.

³⁶ WILLIAM N. ESKRIDGE, JR. ET AL., LEGISLATION AND STATUTORY INTERPRETATION 253–54 (2000) (quoting 2A SUTHERLAND, STATUTES AND STATUTORY CONSTRUCTION § 47.17, at 188 (Norman Singer ed., 5th ed. 1992)). Despite some scholars’ criticism of canons in the mid-twentieth century, “a large and growing number of academics . . . now believe in the utility of canons of constructions . . . and . . . the newly faithful cover a broad philosophical spectrum” from Scalia to Sunstein. John F. Manning, *Legal Realism & The Canons’ Revival*, 5 GREEN BAG 2D 283, 284 (2002); see, e.g., *AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366, 407–08 (1999) (Thomas, J., concurring in part and dissenting in part) (arguing that *ejusdem generis* limits FCC’s authority under general provision, “[t]he Commission may prescribe such rules and regulations as may be necessary in the public interest to carry out the provisions of this chapter,” to interstate and foreign communications because the preceding section pertained “exclusively” to ‘interstate or foreign communication by wire or radio’” (citing 47 U.S.C. § 201(a))).

³⁷ *James v. United States*, 550 U.S. 192, 203 (2007) (“The specific offenses enumerated in clause (ii) provide one baseline from which to measure whether other similar conduct ‘otherwise . . . presents a serious potential risk of physical injury.’” (quoting 18 U.S.C. § 924(e)(2)(B)(ii))); see also *Begay v. United States*, 553 U.S. 137, 150–51 (2008) (Scalia, J., concurring) (“The Court is correct that the clause . . . signifies a similarity between the enumerated and unenumerated crimes.”); *James*, 550 U.S. at 218 (Scalia, J., dissenting) (“[T]he most natural reading of the statute is that committing one of the enumerated crimes (burglary, arson, extortion, or crimes involving explosives) is *one way* to commit a crime ‘involv[ing] conduct that presents a serious potential risk of physical injury to another’; and that *other ways* of committing a crime of that character similarly constitute ‘violent felon[ies].’”). But see *Begay*, 553 U.S. at 162 (Alito, J., dissenting) (“The statute does not say that these offenses must present at least as much risk as the enumerated offenses.”).

Finding similarities across those four crimes is a challenge. The Model Penal Code's definitions of burglary, arson, and extortion do not contain any common element besides specific intent.³⁸ The use of explosives, however, "may involve merely negligent or reckless conduct,"³⁹ a feature that eliminates the one commonality of the first three crimes. Although the enumerated crimes lack any common elements, they are all serious crimes with potential for violent consequences. Burglary could lead to a confrontation with the occupant or owner of the target structure. Also, because burglary requires "breaking and entering," it involves violence to property.⁴⁰ Arson may entail the destruction of a building and a great risk of harm to persons. Extortion may involve theft by the threat of violence. The use of explosives could harm persons or property, especially if used recklessly. Without any other obvious threads connecting the four enumerated crimes, courts have had to take an active role in clarifying the residual clause's ambiguity.

III. SUPREME COURT PRECEDENT REGARDING THE ACCA

The Supreme Court's ACCA jurisprudence addresses two main issues: (1) what information courts may consider in determining whether a crime is a violent felony, and (2) which crimes fall under the residual clause.

A. *Taylor and James: The Categorical Approach Meets the Residual Clause*

The Supreme Court has mandated a "categorical approach" for determining whether a crime qualifies as a "violent felony" under the ACCA. *Taylor v. United States*⁴¹ addressed whether a Missouri conviction for second-degree burglary qualified as the "burglary" listed among the

³⁸ MODEL PENAL CODE § 220.1 ("A person is guilty of arson, a felony of the second degree, if he starts a fire or causes an explosion with the purpose of: (a) destroying a building or occupied structure of another; or (b) destroying or damaging any property, whether his own or another's, to collect insurance for such loss."); *id.* § 221.1 ("A person is guilty of burglary if he enters a building or occupied structure, or separately secured or occupied portion thereof, with purpose to commit a crime therein, unless the premises are at the time open to the public or the actor is licensed or privileged to enter."); *id.* § 223.4 ("A person is guilty of theft if he purposely obtains property of another by threatening to: (1) inflict bodily injury on anyone or commit any other criminal offense; or (2) accuse anyone of a criminal offense; or (3) expose any secret tending to subject any person to hatred, contempt or ridicule, or to impair his credit or business repute; or (4) take or withhold action as an official, or cause an official to take or withhold action; or (5) bring about or continue a strike, boycott or other collective unofficial action, if the property is not demanded or received for the benefit of the group in whose interest the actor purports to act; or (6) testify or provide information or withhold testimony or information with respect to another's legal claim or defense; or (7) inflict any other harm which would not benefit the actor.").

³⁹ *Begay*, 553 U.S. at 152 (Scalia, J., concurring).

⁴⁰ MODEL PENAL CODE § 221.1.

⁴¹ 495 U.S. 575 (1990).

ACCA's enumerated crimes.⁴² After establishing a generic definition of "burglary" for ACCA purposes,⁴³ *Taylor* specified how lower courts should determine if a state burglary offense qualifies as a "burglary" under the ACCA. The ACCA, the *Taylor* Court held, "generally requires the trial court to look only to the fact of conviction and the statutory definition of the prior offense."⁴⁴ The sentencing court may look beyond the fact of the conviction "in a narrow range of cases where a jury was actually required to find all the elements of generic burglary."⁴⁵ For example, a conviction based on a burglary statute that can be violated in multiple ways—such as either entering a vehicle or entering a building—is a violent felony only if the jury had to find that the defendant entered a building, thereby meeting the Court's generic burglary definition.⁴⁶ In other words, the categorical approach restricts a sentencing court's fact-finding to the existence of a prior conviction and its statutory elements. When necessary, the court may use charging documents to examine which part of a disjunctive statute the defendant violated, but not *how* she violated it. That secondary step, where permitted, is restricted to the "indictment or information and jury instructions"⁴⁷ In the case of a guilty plea, because no trial occurred, the sentencing court may examine "the terms of a plea agreement or transcript of colloquy between the judge and defendant in which the factual basis for the plea was confirmed by the defendant"⁴⁸

Consider the burglary example above. If the fact of conviction does not reveal whether the defendant entered a building or entered a vehicle, then the sentencing court may review the charging documents, or any plea agreement or colloquy. If those documents show that he was charged with entering a building, then the categorical approach allows the court to find that he committed burglary under the ACCA. If, however, those documents do not clarify which subsection the defendant violated, the sentencing court may go no further. The crime cannot constitute a predicate crime for purposes of the ACCA.⁴⁹

⁴² *Id.* at 577–79.

⁴³ *Id.* at 592–93 (defining burglary generically as "independent of the labels employed by the various States' criminal codes"); *see also id.* at 598 ("Although the exact formulations vary, the generic, contemporary meaning of burglary contains at least the following elements: an unlawful or unprivileged entry into, or remaining in, a building or other structure, with intent to commit a crime."). The Court has not yet generically defined the other enumerated crimes.

⁴⁴ *Id.* at 602.

⁴⁵ *Id.*

⁴⁶ *Id.*

⁴⁷ *Id.*

⁴⁸ *Shepard v. United States*, 544 U.S. 13, 26 (2005).

⁴⁹ The Supreme Court has repeatedly affirmed the restriction on judicial fact-finding for sentencing purposes since *Taylor*. *See James v. United States*, 550 U.S. 192, 202 (2007) ("[W]e consider whether the *elements of the offense* are of the type that would justify its inclusion within the residual provision, without inquiring into the specific conduct of this particular offender."); *Apprendi v. New Jersey*, 530 U.S. 466, 491–92 (2000) (striking down a mandatory sentencing enhancement as unconstitutional in violation of the Sixth Amendment). Because fact-finding by judges, instead of

The categorical approach's relative simplicity does not appear to have survived its application to the residual clause. In *James v. United States*, the Court addressed whether a Florida conviction for attempted burglary qualifies as a violent felony.⁵⁰ Although attempted burglary did not meet *Taylor*'s generic definition of burglary for the ACCA, the Court held that it could still constitute a violent felony under the residual clause.⁵¹ In so holding, however, the Court confused the analysis in two ways. First, it proposed a broader reading of the residual clause than the canon of *ejusdem generis* may allow. It acknowledged that the scope of the residual clause was limited by the preceding enumerated crimes:

The specific offenses enumerated in clause (ii) provide one baseline from which to measure whether other similar conduct "otherwise . . . presents a serious potential risk of

juries, increased defendants' sentences, the sentencing scheme at issue in *Apprendi* violated the right to trial by jury. *Id.* The right to a jury trial includes the right to have a jury of one's peers find each fact necessary to the conviction and sentence. Indeed, *Apprendi* offered this guidance: "Other than the fact of prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." *Id.* at 490. The Supreme Court extended *Apprendi*'s key holding to state sentencing guidelines in *Blakely v. Washington*, 542 U.S. 296, 301 (2004), and federal Sentencing Guidelines in *United States v. Booker*, 543 U.S. 220, 230–32 (2005), and has affirmed it in *Rita v. United States*, 551 U.S. 338 (2007), and *Gall v. United States*, 552 U.S. 38 (2007). For the argument that the Sentencing Guidelines violate the Sixth Amendment, see generally David C. Holman, Note, *Death by a Thousand Cases: After Booker, Rita, and Gall, the Guidelines Still Violate the Sixth Amendment*, 50 WM. & MARY L. REV. 267, 271 (2008).

Just as judges cannot rely on facts not found by a jury to increase a mandatory sentence under *Apprendi* and *Booker*, they cannot do so to determine whether a prior conviction is a violent felony. *Apprendi* and the categorical approach require judges to use only the fact of the prior conviction and the specific elements found by a jury or admitted by the defendant. Whether a prior conviction is a "violent felony" is a legal question that would not ordinarily implicate the Sixth Amendment jury trial right. That inquiry remains a legal question so long as the judge considers only the law. But if the judge deviates from the categorical approach and considers aspects of the crime not found by the jury, not admitted by the defendant, or which do not constitute elements of the crime, then that veers into factual questions and implicates the Sixth Amendment.

Shepard acknowledged *Apprendi*'s limitation on ACCA fact-finding, distinguishing judicial fact-finding of a prior conviction for generic burglary "made on the authority of *Almendarez-Torres v. United States*, 523 U.S. 224 (1998)" from fact-finding of a prior conviction for a non-generic burglary. *Shepard*, 544 U.S. at 25. A court determining whether a non-generic crime of burglary qualifies as ACCA burglary will need to resort to the jury instructions or other charging documents. *Id.* This fact-finding

is too far removed from the conclusive significance of a prior judicial record, and too much like the findings subject to *Jones* [*v. United States*, 526 U.S. 227 (1999)] and *Apprendi*, to say that *Almendarez-Torres* clearly authorizes a judge to resolve the dispute. The rule of reading statutes to avoid serious risks of unconstitutionality, therefore counsels us to limit the scope of judicial factfinding on the disputed generic character of a prior plea, just as *Taylor* constrained judicial findings about the generic implication of a jury's verdict.

Id. at 25–26 (internal citation omitted). The Court has acknowledged and limited the danger of judicial fact-finding that violates the Sixth Amendment. In light of *Apprendi* and its progeny, the Court could not forsake the categorical approach in favor of judicial fact-finding regarding the actual conduct underlying a prior conviction.

⁵⁰ 550 U.S. 192, 195 (2007).

⁵¹ *Id.* at 211–12.

physical injury.” In this case, we can ask whether the risk posed by attempted burglary is comparable to that posed by its closest analog among the enumerated offenses—here, completed burglary.⁵²

Later, however, the Court stated that crimes falling under the residual clause must pose a risk *comparable*, but not necessarily *equal*, to the risk posed by the enumerated crimes.⁵³ The Court then appeared to open the floodgates to *all* crimes that pose a serious risk, and not just those similar to the enumerated crimes: “As long as an offense is of a type that, by its nature, presents a serious potential risk of injury to another, it satisfies the requirements of [the] residual provision.”⁵⁴ As Justice Scalia argued in his dissent, this “almost entirely ad hoc” approach is hardly a model of clear guidance.⁵⁵

Second, *James* muddled the categorical approach, despite its firm restatement of the *Taylor/Shepard* language early in the opinion, by instructing courts for the first time to look beyond the elements of the statutory offense and consider the “ordinary” commission of the offense. “We do not view [the categorical] approach as requiring that every conceivable factual offense covered by a statute must necessarily present a serious potential risk of injury before the offense can be deemed a violent felony.”⁵⁶ In other words, the statutory elements control, not the facts of the crime. Someone *could* peacefully commit a crime, the elements of which require a serious potential risk of injury, simply by avoiding the injury. For example, reckless driving, or even arson, presents a serious potential risk of injury to others, but one can commit it without actually injuring anyone. A hypothetically peaceful commission of the crime should not exclude it from the residual clause. Nonetheless, the Court restated this framework in a troubling fashion: “[T]he 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.”⁵⁷

This instruction presents two problems. First, a sentencing court has few tools to determine reliably the “ordinary” commission of a crime. Without better guidance, courts have tried several approaches, including

⁵² *Id.* at 203.

⁵³ *Id.* at 209 (arguing that crimes falling under the residual clause need not present “as much risk as the least dangerous enumerated offense” and “[w]hile it may be reasonable to infer that the risks presented by the enumerated offenses involve a risk of this magnitude, it does not follow that an offense that presents a lesser risk necessarily fails to qualify”).

⁵⁴ *Id.*

⁵⁵ *Id.* at 215 (Scalia, J., dissenting) (“That gets this case off our docket, sure enough. But it utterly fails to do what this Court is supposed to do: provide guidance concrete enough to ensure that the ACCA residual provision will be applied with an acceptable degree of consistency . . .”). Justices Stevens and Ginsburg joined Justice Scalia’s dissent.

⁵⁶ *Id.* at 208 (majority opinion).

⁵⁷ *Id.* (emphasis added).

the use of statistics, applying their “intuitive belief”⁵⁸ to hypothesize how the crime is usually committed, and imagining how the crime could be committed in the exceptional case.⁵⁹ Second, the emphasis on the “ordinary case” threatens to usurp the supposed primacy of the statutory elements. Of course, these fears could be overblown. One Seventh Circuit panel has construed *James*’s “ordinary case” language consistently with the categorical approach.⁶⁰ Nonetheless, as another Seventh Circuit panel demonstrated,⁶¹ *James* provided the temptation for lower courts to consider more than the mere fact of conviction, the elements of the crime, and the charging documents.

B. *Begay v. United States*

Begay v. United States was the Court’s next opportunity to refine its approach to the residual clause. While *Begay* provided more guidance than *James* did, the opinion raised more questions than it answered. The *Begay* Court considered whether three New Mexico convictions for driving under the influence were violent felonies under the ACCA.⁶² Returning to a limited construction of the residual clause, the Court held that the enumerated crimes limit “the crimes that clause (ii) covers to crimes that are roughly similar, in kind as well as in degree of risk posed, to the examples themselves.”⁶³ This language moves away from *James*’s potentially broad construction of the residual clause, but it still requires lower courts to wander through comparisons between the enumerated crimes and countless state crimes.

Most significantly, *Begay* held that driving under the influence is not a violent felony.⁶⁴ The Court reached this conclusion through its explication of the “similar[] in kind” requirement: the enumerated crimes in clause (ii) of the ACCA “all typically involve purposeful, ‘violent,’ and ‘aggressive’ conduct.”⁶⁵ DUI statutes, on the other hand, “typically do not insist on purposeful, violent, and aggressive conduct; rather, they are, or are most

⁵⁸ *Chambers v. United States*, 129 S. Ct. 687, 692 (2009).

⁵⁹ See *infra* Part V.D.2.

⁶⁰ *United States v. Woods*, 576 F.3d 400, 404 (7th Cir. 2009) (“As we understand it, this means that a crime must be categorized as one of violence even if, through some freak chance, the conduct did not turn out to be violent in an unusual case.”).

⁶¹ See *infra* text accompanying notes 202–10 (discussing *United States v. Dismuke*, 593 F.3d 582 (7th Cir. 2010)).

⁶² *Begay v. United States*, 553 U.S. 137, 139–40 (2008). In New Mexico, a DUI becomes a felony (punishable by imprisonment for more than one year) after the third offense. *Begay* had a dozen DUI convictions. *Id.* at 140.

⁶³ *Id.* at 143.

⁶⁴ *Id.* at 148 (“[A] prior record of DUI, a strict liability crime, differs from a prior record of violent and aggressive crimes committed intentionally such as arson, burglary, extortion, or crimes involving the use of explosives. The latter are associated with a likelihood of future violent, aggressive, and purposeful ‘armed career criminal’ behavior in a way that the former are not.”).

⁶⁵ *Id.* at 144–45.

nearly comparable to, crimes that impose strict liability”⁶⁶ *Begay*’s implicit requirement that crimes falling under the residual clause must typically involve purposeful, violent, and aggressive conduct became, for lower courts, its key holding.⁶⁷ The *Begay* Court anchored this new requirement in its understanding of the underlying purpose of the ACCA: the prevention of future armed crimes. “As suggested by its title, the Armed Career Criminal Act focuses upon the special danger created when a particular type of offender—a violent criminal or drug trafficker—possesses a gun.”⁶⁸ Purposeful, violent, and aggressive conduct, the Court said, “is such that it makes more likely that an offender, later possessing a gun, will use that gun deliberately to harm a victim. Crimes committed in such a purposeful, violent, and aggressive manner are ‘potentially more dangerous when firearms are involved.’”⁶⁹ In holding that a DUI did not qualify as a violent crime, the Court noted that a prior conviction of DUI is not “associated with a likelihood of future violent, aggressive, and purposeful ‘armed career criminal’ behavior.”⁷⁰ *Begay*’s two different considerations, “purposeful, violent, and aggressive,” and the ACCA’s concern with a violent felon possessing a firearm, have led lower courts to results at odds with the categorical approach, as this Article later demonstrates.⁷¹

C. Chambers Continues “Purposeful, Violent, and Aggressive”

The Supreme Court’s most recent opinion regarding the residual clause of the ACCA, *Chambers v. United States*,⁷² further confused matters. *Chambers* applied *Begay*’s “purposeful, violent, and aggressive” test to an Illinois conviction for failure to report to a penal institution.⁷³ The Court rejected the Seventh Circuit’s holding that failure to report poses a “serious potential risk of physical injury to another” thereby falling under the residual clause.⁷⁴ The Court’s application of *Begay*’s chief test was unremarkable: “Conceptually speaking, the crime amounts to a form of inaction, a far cry from the ‘purposeful, violent, and aggressive conduct’ potentially at issue when an offender uses explosives against property,

⁶⁶ *Id.* at 145.

⁶⁷ See *id.* at 144–45 (“The listed crimes all typically involve purposeful, ‘violent,’ and ‘aggressive’ conduct.”).

⁶⁸ *Id.* at 146.

⁶⁹ *Id.* at 144–45 (quoting *United States v. Begay*, 470 F.3d 964, 980 (2006)).

⁷⁰ *Id.* at 148.

⁷¹ See *infra* Part IV for a discussion of *Begay*’s inherent problems.

⁷² 129 S. Ct. 687 (2009) (reversing *United States v. Chambers*, 473 F.3d 724 (7th Cir. 2007)). Although the Supreme Court issued another ACCA decision in 2010, *Johnson v. United States* analyzed a prior conviction under clause (i) of the ACCA and did not discuss the residual clause, *Begay*, or *Chambers*. *Johnson v. United States*, 130 S. Ct. 1265, 1269 (2010).

⁷³ 720 ILL. COMP. STAT. 5/31-6(a) (West. Supp. 2008).

⁷⁴ *Chambers*, 129 S. Ct. at 691.

commits arson, burgles a dwelling or residence, or engages in certain forms of extortion.”⁷⁵ The “purposeful, violent, and aggressive” standard seems to exclude failure to report on its face: the elements of the crime include a mens rea of “knowingly,” which may equate to “purposeful,” but they do not suggest violence or aggression.⁷⁶

But *Chambers* continued its analysis beyond the simple application of the “purposeful, violent, and aggressive” standard to the elements of failure to report. The Seventh Circuit had reluctantly followed circuit precedent and based its holding on the “conjecture as to the possible danger”⁷⁷ posed by criminals who fail to report.⁷⁸ Rather than adhering to a strict categorical approach that asks only whether the elements of the crime necessarily involve violent behavior, the Seventh Circuit sought to determine whether failure to report is statistically likely to be committed in a violent manner. *Begay*’s concern with the danger posed by the armed offender encouraged the Seventh Circuit’s inquiry and the Supreme Court in *Chambers* reaffirmed that concern: “The question is whether such an offender is significantly more likely than others to attack, or physically to resist, an apprehender, thereby producing a ‘serious potential risk of physical injury.’”⁷⁹ The Supreme Court then cited a Sentencing Commission report that surveyed two years of federal sentences involving failure to report and found that none involved violence.⁸⁰ The Court used the study to confirm “the intuitive belief that failure to report does not involve a serious potential risk of physical injury.”⁸¹ This statistical inquiry drew upon *Begay*’s understanding of the ACCA’s animating purpose. While *Begay* had emphasized the “purposeful, violent, and aggressive” test, *Chambers* seemed to emphasize a statistical inquiry into

⁷⁵ *Id.* at 692.

⁷⁶ 720 ILL. COMP. STAT. 5/31-6(a) (“A person convicted of a felony . . . who knowingly fails to report to a penal institution or to report for periodic imprisonment at any time or knowingly fails to return from furlough or from work and day release or who knowingly fails to abide by the terms of home confinement is guilty of a Class 3 felony.”); *Chambers*, 129 S. Ct. at 691–92 (applying the purposeful, violent, and aggressive conduct test to the crime of failing to report to a penal institution).

⁷⁷ *United States v. Chambers*, 473 F.3d 724, 726 (7th Cir. 2007).

⁷⁸ The Seventh Circuit’s *Chambers* panel, led by Judge Posner, adhered to circuit precedent and “overwhelming support in the decisions of the other circuits.” *Chambers*, 473 F.3d at 726. But it did not do so without protest:

We shall adhere to the precedents for now. But it is an embarrassment to the law when judges base decisions of consequence on conjectures, in this case a conjecture as to the possible danger of physical injury posed by criminals who fail to show up to begin serving their sentences or fail to return from furloughs or to halfway houses.

Id.

⁷⁹ *Chambers*, 129 S. Ct. at 692 (quoting 18 U.S.C. § 924(e)(2)(B)(ii) (2006)).

⁸⁰ The Seventh Circuit in *Chambers* had urged the U.S. Sentencing Commission to study the frequency of violence in escapes and failures to report. *Chambers*, 473 F.3d at 727. By the time the Supreme Court decided *Chambers*, the Sentencing Commission had obliged. *See infra* notes 240–45 and accompanying text.

⁸¹ *Chambers*, 129 S. Ct. at 692.

whether the predicate felony increased the likelihood that the offender would engage in armed felonies in the future. After *Chambers*, it is unclear which test has primacy.

Chambers mentioned the categorical approach only once, in terms of assessing the correct part of the disjunctive failure to report statute. That nod toward the categorical approach is a sliver of what had been rote doctrine only four years ago—that sentencing courts must stick to the fact of the conviction and charging documents and not consider the facts underlying the offense. Not merely a complex formula promulgated by the Supreme Court, the categorical approach protects offenders’ Sixth Amendment jury trial right by ensuring that their punishment is based on crimes that they actually committed. After *Begay* and *Chambers*, circuit courts may justifiably wonder if the categorical approach is dead, and which part of Supreme Court precedent to use in applying the residual clause of the ACCA. As Justice Alito observed, “each new application of the residual clause seems to lead us further and further away from the statutory text.”⁸²

IV. THE PROBLEMS INHERENT IN *BEGAY*

Begay—and later, *Chambers*—provided lower courts with two inquiries to determine whether a crime qualifies as a violent felony under the ACCA’s residual clause. First, the crime must be similar in kind, as well as degree of risk posed, to the enumerated crimes of burglary, arson, extortion, and use of explosives.⁸³ “Similar in kind” means, according to *Begay*, that the crime must involve “purposeful, violent, and aggressive” conduct.⁸⁴ Second, *Begay* and *Chambers* suggest that the crime must be of the kind that makes the offender more likely to use a gun in future crimes to harm a victim.⁸⁵ This Article refers to this second consideration as the “likely shooter” requirement. This section examines the difficulties with understanding “purposeful, violent, and aggressive” as well as the requirement that the violent felony evince an increased likelihood that the offender might deliberately use a gun to harm a victim.

A. The Nebulous “Purposeful, Violent, and Aggressive” Test

Requiring that residual clause crimes be “purposeful, violent, and aggressive” presents two problems. The first is *Begay*’s failure to define

⁸² *Id.* at 695 (Alito, J., concurring).

⁸³ See *supra* note 63 and accompanying text.

⁸⁴ See *supra* note 67 and accompanying text.

⁸⁵ See *supra* notes 67–70 and accompanying text.

“purposeful,” “violent,” or “aggressive.”⁸⁶ This omission

creates problems of classification. It may be easy to tell when a person’s *conduct* was violent and aggressive, but whether a crime of conviction entails such conduct can be tricky, because it is necessary to think through the many varieties of behavior within a law’s domain. States did not write their statutes with *Begay* in mind.⁸⁷

While “violent” and “purposeful” are terms used with some frequency in state and federal statutes, “aggressive” has no commonly used legal definition.⁸⁸ Aside from aggressive driving statutes, which delineate very specific driving actions that make driving legally “aggressive,”⁸⁹ no other state statutes appear to define “aggressive.” Nonetheless, some statutes still employ “aggressive” without defining it.⁹⁰ Given the varying definitions of “aggressive,” one could conclude, as the Seventh and Tenth Circuits have, that it is synonymous with “violent.”⁹¹ But why would the Supreme Court add a gratuitous requirement to its *Begay* holding? Lower courts may assume that the Court carefully chooses its words. If “aggressive” has any meaning different from “violent,” however, it is unclear what additional elements a crime must require in order to be a violent felony.

The word “purposeful” is used in some state statutes but often without

⁸⁶ *United States v. Herrick*, 545 F.3d 53, 58 (1st Cir. 2008) (“Perhaps because it is common sense that a DUI is not violent or aggressive in an ordinary sense, the Supreme Court did not define those terms or explain in other than conclusory terms why a DUI was not violent or aggressive.”).

⁸⁷ *United States v. Woods*, 576 F.3d 400, 413 (7th Cir. 2009) (Easterbrook, J., dissenting).

⁸⁸ *Begay v. United States*, 553 U.S. 137, 160 (2008) (Alito, J., dissenting) (“The concept of ‘aggressive’ crimes is vague . . .”).

⁸⁹ *See, e.g.*, IND. CODE ANN. § 9-21-8-55(b) (LexisNexis 2009) (defining “aggressive driving” as committing at least three specific acts, including “[f]ollowing a vehicle too closely,” “[u]nsafe operation of a vehicle,” and “[u]nsafe stopping or slowing,” among others).

⁹⁰ *See, e.g.*, D.C. CODE § 22-2301 (LexisNexis 2001) (defining “aggressive manner” for the purposes of a panhandling statute as certain specific actions); 720 ILL. COMP. STAT. 5/12A-5(a) (2010) (discussing a finding of the General Assembly that “minors who play video games are more likely to . . . [e]xhibit violent, asocial, or aggressive behavior”); KAN. STAT. ANN. § 38-2347(e) (2009) (including the question of “whether the alleged offense was committed in an aggressive, violent, premeditated or willful manner” among factors to consider when determining whether a juvenile should be tried as an adult); LA. REV. STAT. ANN. § 14:102.18 (2004) (providing that law enforcement may seize a dog which kills or harms a human “when unprovoked, in an aggressive manner”); N.D. CENT. CODE ANN. § 12.1-20-02(5) (2009) (defining “sexual contact” as certain forms of contact “for the purpose of arousing or satisfying sexual or aggressive desires”).

⁹¹ *United States v. Dismuke*, 593 F.3d 582, 594 (7th Cir. 2010) (concluding that “the ‘violent and aggressive’ limitation requires only that a residual-clause predicate crime be characterized by aggressive conduct with a similar potential for violence and therefore injury as the enumerated offenses”); *United States v. Zuniga*, 553 F.3d 1330, 1335 (10th Cir. 2009) (“We consider it unlikely that any conduct properly characterized as ‘violent’ could not also be characterized as ‘aggressive.’”). *But see Herrick*, 545 F.3d at 59 (“Although [vehicular homicide] is no doubt violent, as a typical vehicular homicide involves the death of a victim resulting from a forceful collision, it is not necessarily aggressive, a term that dovetails with purposeful because it involves a degree of intent.”).

definition.⁹² The Model Penal Code (“MPC”) lists “purposely” as one of four types of culpability, along with “knowingly,” “recklessly,” and “negligently.”⁹³ According to the MPC:

A person acts purposely with respect to a material element of an offense when: (i) if the element involves the nature of his conduct or a result thereof, it is his conscious object to engage in conduct of that nature or to cause such a result; and (ii) if the element involves the attendant circumstances, he is aware of the existence of such circumstances or he believes or hopes that they exist.⁹⁴

While a minority of states have criminal statutes requiring “purposeful” conduct, all fifty states and the District of Columbia use a form of “intentional” as a criminal mens rea.⁹⁵ It is unclear how the terms

⁹² Eleven states and the District of Columbia appear to use “purposely” or a derivative as criminal mens rea. This figure is approximate given the search methodology: a search of Westlaw’s state statutes database (STAT-ALL) for “ti(crim!) & (purposeful purposely “with the purpose” “with purpose”).” See ARK. CODE ANN. § 5-28-103(b)(1), (b)(1)(2) (2006) (“purposely”), *id.* § 5-37-208(b)(1) (“with the purpose to”); D.C. CODE ANN. § 22-2101 (2001) (“purposely”); KY. REV. STAT. ANN. § 506.120(1) (West 2009) (“with the purpose to”); MICH. COMP. LAWS § 445.111c(c) (2006) (“with the purpose of”); MO. REV. STAT. § 565.225.1(3) (2010) (“purposely”); MONT. CODE ANN. § 23-5-161 (2009) (“purposely”); N.H. REV. STAT. ANN. § 626:8(IV) (2007) (“purposely”); N.J. STAT. ANN. § 2C:5-1(a)(1), (a)(3) (2005) (“purposely”); N.C. GEN. STAT. ANN. § 14-221.1 (2009) (“with the purpose of”); OHIO REV. CODE ANN. § 2909.07(A)(2), (A)(5) (West 2010) (“[w]ith purpose to”); VT. STAT. ANN. tit. 9, § 5508(a)(3) (2006) (“purposely”).

⁹³ MODEL PENAL CODE § 2.02(2)(a).

⁹⁴ *Id.*

⁹⁵ All fifty states and the District of Columbia appear to use “intentionally” or a derivative as criminal mens rea. See ALA. CODE § 13A-2-2(1) (2005) (“intentionally”); ALASKA STAT. § 11.46.320 (2008) (“with intent to”); ARIZ. REV. STAT. ANN. § 13-105(10)(a) (2006) (“intentionally”); ARK. CODE ANN. § 27-14-2207(a) (2008) (“with intent”); CAL. PENAL CODE § 141(a), (b) (2010) (“intentionally”); COLO. REV. STAT. ANN. § 18-3-102 (2000) (“with the intent to”); CONN. GEN. STAT. ANN. § 53a-56 (2007) (“intentionally”); DEL. CODE ANN. tit. 11, § 253 (2007) (“intentionally”); D.C. CODE § 7-627(d) (2008) (“with the intent to”); FLA. STAT. § 934.43(1)(a)–(b) (2006) (“with intent to”); GA. CODE ANN. § 16-2-20(b)(2)–(3), (b)(4) (2003) (“intentionally”); HAW. REV. STAT. § 705-500(1)(a)–(b), (2) (1993) (“intentionally”); IDAHO CODE ANN. § 18-7011(2) (2006) (“intentionally”); 720 ILL. COMP. STAT. ANN. § 5/12-19(d)(1) (2002) (“intentionally”); IND. CODE § 35-42-2-2(b), (d) (2009) (“intentionally”); IOWA CODE § 716.1 (2003) (“intentionally”); KAN. STAT. ANN. § 21-3419(a)(1) (2009) (“with intent to”); KY. REV. STAT. ANN. § 508.100(1) (West 2006) (“intentionally”); LA. REV. STAT. ANN. § 14:67.12(A) (2010) (“with the intent to”); ME. REV. STAT. ANN. tit. 17-A, § 57(3)(A) (2006) (“with the intent”); MD. CODE ANN., CRIMINAL LAW § 8-801(b) (LexisNexis 2002) (“with intent to”); MASS. GEN. LAWS ch. 268, § 13D(a) (2008) (“with intent to”); MICH. COMP. LAWS § 750.110a(2)–(3), (4)(a) (2003) (“with intent to”); MINN. STAT. § 609.855(1)–(2) (2009) (“intentionally”); MISS. CODE ANN. § 97-44-19(1) (2006) (“intentionally”); MO. REV. STAT. § 565.225.1(2) (1999) (“with the intent to”); MONT. CODE ANN. § 45-9-103(1)–(3) (2008) (“with intent to”); NEB. REV. STAT. § 28-519(1)–(5) (2008) (“intentionally”); NEV. REV. STAT. § 704.800(1) (2009) (“with the intent to”); N.H. REV. STAT. ANN. § 159:23(I)–(II) (2002) (“with intent to”); N.J. STAT. ANN. § 2C:21-25(b)(1) (West 2005) (“with the intent to”); N.M. STAT. § 30-9-12(A) (2004) (“intentional”); N.Y. PENAL LAW § 145.05 (2010) (“with intent to”); N.C. GEN. STAT. § 14-34.8(b) (2002) (“intentionally”); N.D. CENT. CODE § 12.1-06-01(1) (1997) (“intentionally”); OHIO REV. CODE ANN. § 2909.07(A)(6) (West 2010) (“with intent to”); OKLA. STAT. tit. 21, § 856.1 (2002) (“intentionally”); OR. REV. STAT. § 161.155(2) (2010) (“with intent to”); 18 PA. CONS. STAT. ANN. § 907(a)–(b) (2010) (“with intent to”); R.I. GEN. LAWS § 11-8-5 (2002) (“with intent to”); S.C. CODE

differ, if at all. Perhaps there is no difference between the two—the words are arguably interchangeable, as some state legislatures and courts seem to assume.⁹⁶ But if the Court meant to require specific intent, why did it not use the term “intentional”? The choice is especially mystifying given that “intentional” is more commonly used in statutes and case law. This confusion complicates the application of *Begay*.

The second problem is determining whether the “purposeful, violent, and aggressive” standard applies to the requisite elements of a crime or the typical commission of a crime. The *Begay* Court first introduced the phrase by stating that the enumerated crimes “all *typically* involve purposeful, violent, and aggressive conduct.”⁹⁷ In this phrasing, the word “typically” modifies “involve,” which refers to the enumerated crimes. This suggests that courts are to determine whether residual clause crimes *typically* involve purposeful, violent, and aggressive conduct. That language invites examination into the usual method of committing the crime. Such an approach creates tension with the categorical approach, which considers only what the statutory elements *require* rather than the typical method of violating the statute. The Court next used the phrase in a slightly different way: “[S]tatutes that forbid driving under the influence . . . typically do not insist on purposeful, violent, and aggressive conduct.”⁹⁸ In this formulation, “typically” modifies “insist,” which refers to the various state statutes. This formulation suggests that crimes are only purposeful, violent, and aggressive if the state statute *requires* purposeful, violent, and aggressive conduct. That second formulation more closely tracks the strict categorical approach set forth in *Taylor* and *Shepard*.⁹⁹ An example better demonstrates the difference between these two approaches. Auto theft statutes typically do not *insist* on, or require, violent and

ANN. § 16-3-656 (2009) (“with intent to”); S.D. CODIFIED LAWS § 22-4A-1 (2006) (“with the intent to”); TENN. CODE ANN. § 39-14-406(d)(1)(A)–(B), (e)(1) (2006) (“with the intent to”); TEX. PENAL CODE ANN. § 19.01(a) (West 2003) (“intentionally”); UTAH CODE ANN. § 76-5-201(1)(a) (West 2008) (“intentionally”); VT. STAT. ANN. tit. 13, § 12 (2009) (“with intent to”); VA. CODE ANN. § 18.2-308.2:3(I), (J), (M) (2009) (“intentionally”); WASH. REV. CODE ANN. § 9A.28.020(1) (2009) (“with intent to”); W. VA. CODE ANN. § 29-22-12 (2008) (“with intent to”); WIS. STAT. ANN. § 943.012 (2005) (“intentionally”); WYO. STAT. ANN. § 6-1-301(a)(ii) (2009) (“intentionally”).

⁹⁶ See, e.g., ARK. CODE ANN. § 5-1-102(17) (2008) (“‘Purposely’ or an equivalent term such as ‘purpose’, ‘with purpose’, ‘intentional’, ‘intentionally’, ‘intended’, or ‘with intent to’ means the same as ‘purposely’ as defined in § 5-2-202.”); *id.* § 5-2-202(1) (using “purposely” instead of “intentionally” for the most culpable kind of mens rea); KAN. STAT. ANN. § 21-3201(b) (2009) (“Intentional conduct is conduct that is purposeful and willful and not accidental.”); N.M. STAT. ANN. § 58-13C-508(F) (2004) (“‘[W]illfully’ means purposely or intentionally”); D.E. v. State, 904 So. 2d 558, 561 (Fla. App. 2005) (“‘Willful’ means ‘intentional, knowing, and purposeful’”); *In re Jerry R.*, 35 Cal. Rptr. 2d 155, 160 (Cal. App. 4th. 1994) (“The Legislature’s use of the term ‘willfully’ means that the prohibited conduct must be performed purposefully or intentionally.”).

⁹⁷ *Begay v. United States*, 553 U.S. 137, 144–45 (2008) (emphasis added) (internal quotations marks omitted).

⁹⁸ *Id.* at 145 (emphasis added).

⁹⁹ For a discussion of the categorical approach in *Taylor* and *Shepard*, see *supra* text accompanying notes 41–49.

aggressive conduct. Rather, a few states require only: (1) knowingly or intentionally, (2) exerting, (3) unauthorized control, (4) over another person's vehicle, (5) with intent to deprive.¹⁰⁰ Therefore, under the second formulation, these crimes are not violent felonies. However, under the first "typically" formulation, one might plausibly argue that auto theft in fact often involves violent and aggressive conduct. Judge Steven Colloton of the Eighth Circuit has argued that what begins as auto theft tends to turn into a dangerous high-speed chase when the police are called and therefore is "typically" violent and aggressive.¹⁰¹

Even assuming, however, that *Begay*'s second formulation is the correct one, that formulation may still sit uneasily with the categorical approach. If state statutes must "typically insist" on purposeful, violent, and aggressive conduct, perhaps only a plurality or majority of state statutes defining a particular crime must require those elements. Rather than looking to see whether the specific state statute at issue requires purposeful, violent, and aggressive conduct, lower courts could survey all state statutes defining the crime and craft a generic definition of the crime, as the *Taylor* Court did. The categorical approach, then, would apply to the typical, generic formulation of the crime. For example, one may be convicted under a state auto theft statute which requires violent and aggressive conduct as elements in order to convict. But because the vast majority of state auto theft statutes do not typically require violent and aggressive behavior, such a crime may not qualify as "purposeful, violent, and aggressive" under *Begay*'s rough formulation. The imprecision of "purposeful, violent, and aggressive" sends lower courts mixed signals, at best, leading them to varying results.

B. *The Rootless "Likely Shooter"*

Even once courts decide which formulation of "purposeful, violent, and aggressive" to adopt, they are not out of the woods yet. The ACCA imposes a fifteen-year mandatory minimum sentence on felons convicted of possessing a gun who have three prior convictions for violent felonies, serious drug offenses, or both. *Begay* and *Chambers* suggested, for the first time, that a prior crime qualifies as a violent felony only if it is the type of crime that makes it more likely that the criminal will use or possess a weapon in future crimes.¹⁰² Specifically, the Court explained that it was

¹⁰⁰ E.g., ALASKA STAT. ANN. § 11.46.360(a) (2008); ARIZ. REV. STAT. § 13-1802(A), (G) (2010); IND. CODE ANN. § 35-43-4-2.5(b) (2009).

¹⁰¹ *United States v. Williams*, 546 F.3d 961, 963 (8th Cir. 2008) (Colloton, J., dissenting from denial of rehearing en banc).

¹⁰² See *Chambers v. United States*, 129 S. Ct. 687, 689 (2009) (questioning "whether . . . such an offender is significantly more likely than others to attack or resist an apprehender, thereby producing a serious risk of physical injury"); *Begay*, 553 U.S. at 146.

especially concerned with violent felonies that “show an increased likelihood that the offender is the kind of person who might deliberately point the gun and pull the trigger.”¹⁰³ To the Court, the title of the Armed Career Criminal Act means that the ACCA focuses upon “the special danger created when a particular type of offender—a violent criminal or drug trafficker—possesses a gun.”¹⁰⁴ As support, the Court cited Judge McConnell’s dissent from the Tenth Circuit’s *Begay* decision,¹⁰⁵ in which he wrote, “the legislative history, both originally and in the amendments relevant to this case, makes clear that the title—the ‘Armed Career Criminal Act’—was not merely decorative.”¹⁰⁶

1. *The Judicial and Legislative History of the “Likely Shooter”*

Contrary to the *Begay* Court’s claims, the “likely shooter” inquiry is a judicial creation without any root in the ACCA or its legislative history. The ACCA’s title says nothing about whether courts should categorize a particular crime as a violent felony. Although a statute’s title is a valid source for statutory interpretation,¹⁰⁷ the title of the ACCA is itself ambiguous as to when the criminal is armed. Under the most natural reading, the title implies that the Act is concerned with career criminals, who are currently armed by virtue of the instant felon-in-possession conviction. Neither the Act’s title nor its text imply that the three previous violent felonies should be of the type that make the instant felon-in-possession charge—or any other weapon-toting crime—more likely. A close examination of the legislative history reveals no suggestion that Congress was primarily concerned with prior violent felonies that create an increased risk of future armed crime.¹⁰⁸ While the three prior felonies may

¹⁰³ *Begay*, 553 U.S. at 146.

¹⁰⁴ *Id.* at 152; *see also id.* at 147 (stating that certain crimes with mens rea of negligence or recklessness are “far removed . . . from the deliberate kind of behavior associated with the violent criminal use of firearms”).

¹⁰⁵ *Id.* at 145 (citing *United States v. Begay*, 470 F.3d 964, 981 n.3 (10th Cir. 2006) (McConnell, J., dissenting)).

¹⁰⁶ *Begay*, 470 F.3d at 981 n.3 (McConnell, J., dissenting) (citing H.R. REP. NO. 98-1159 (1984), *as reprinted in* 1984 U.S.C.C.A.N. 3710).

¹⁰⁷ *See, e.g., Castillo v. United States*, 530 U.S. 120, 125 (2000) (considering the title of 18 U.S.C. § 924 to determine whether “machinegun” was an element of a new crime or a statutory enhancement). *But see INS v. St. Cyr*, 533 U.S. 289, 308 (2001) (“[A] title alone is not controlling.”); *Pa. Dep’t of Corrs. v. Yeskey*, 524 U.S. 206, 212 (1998) (“[T]he title of a statute . . . cannot limit the plain meaning of the text. For interpretive purposes, [it is] of use only when [it] shed[s] light on some ambiguous word or phrase.” (quoting *Bhd. of R.R. Trainmen v. Balt. & Ohio R. Co.*, 331 U.S. 519, 528–29 (1947))).

¹⁰⁸ The ACCA’s legislative history suggests that it was meant to be a pure three-strikes recidivist statute for felons convicted of possession of a firearm. The legislative history reveals only one clear purpose for the “armed” aspect of the ACCA: the trigger for federal authority. Without the connection to a conviction for felon in possession, federal courts could not constitutionally punish state crimes because “purely local activities [are] beyond the reach of federal power.” *Gonzales v. Raich*, 545 U.S. 1, 9 (2005) (citing *United States v. Morrison*, 529 U.S. 598, 612–13 (2000)); *see also United States v. Lopez*, 514 U.S. 549, 567 (1995) (stating that “[t]he possession of a gun in a local school zone is in no

increase the likelihood that the offender will commit yet another crime, only the instant gun-possession conviction, not the three prior felonies, makes it likely that the offender will use a gun in a future crime.

The *Begay* Court seemed to acknowledge its extra-textual, policy-driven approach: “Were we to read the statute without this distinction, its 15-year mandatory minimum sentence would apply to a host of crimes which, though dangerous, are not typically committed by those whom one normally labels ‘armed career criminals.’”¹⁰⁹ In other words, the “likely shooter” requirement is not drawn from the text of the statute, but was created by the Court to avoid what it regards as undesirable outcomes, such as including DUIs as violent felonies. Unfortunately, this attempt to determine the ACCA’s policy rationale has only further complicated interpretation of the residual clause.

2. The “Likely Shooter” Conflicts with the Categorical Approach

Not only is the “likely shooter” requirement absent from the title, text, and legislative history of the ACCA, but it also fits poorly with the categorical approach. This examination, whether the prior felony entails conduct that makes it more likely that the criminal will deliberately use a gun in future crimes, necessarily casts a wider net than the categorical approach. If a sentencing court were limited to examining the elements of the previous crime, the likelihood of future armed crime would be an irrelevant question. The court could consider whether the elements of the predicate crime require purposeful, violent, and aggressive conduct without engaging in the “likely shooter” inquiry. Further, the “likely shooter” inquiry unmoors the court from both the text of the ACCA and the

sense an economic activity that might, through repetition elsewhere, substantially affect any sort of interstate commerce” and is therefore beyond the reach of federal power).

Senator Specter’s testimony in favor of the 1986 House bill is telling on this point: “The armed career criminal bill for the first time brings the Federal Government into the fight against street crime by making it a Federal offense for career criminals to possess a firearm.” *Armed Career Criminal Legislation: Hearing on H.R. 4639 and H.R. 4768 Before the Subcomm. on Crime of the H. Comm. on the Judiciary*, 99th Cong. 43 (1986) (statement of Sen. Specter). The criminal must first commit the three predicate violent felonies, qualifying as a career criminal. The subsequent possession of the firearm then “brings the Federal Government into the fight.” *Id.* Neither the 1984 ACCA nor the 1986 ACCA were concerned with the criminal who possessed the firearm during the predicate crime. The firearm component of the law is present only because it opens the door to federal authority under the Commerce Clause. See 18 U.S.C. § 922(g) (2006) (“It shall be unlawful for any person—who has been convicted in any court of, a crime punishable by imprisonment for a term exceeding one year; . . . to ship or transport in interstate or foreign commerce, or possess in or affecting commerce, any firearm or ammunition; or to receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce.”); see also Levine, *supra* note 1, at 547 (2009) (“[T]he desire to incapacitate career criminals seems to have been the principal motivation for the ACCA. In fact, it appears that the only reason that the minimum fifteen-year sentence is mandated for illegally possessing firearms is that imposing the sentence on all career criminals regardless of whether they were convicted of violating a federal law (such as by illegally possessing a gun) was not a politically feasible option due to the aforementioned federalism concerns.”).

¹⁰⁹ *Begay*, 553 U.S. at 146.

“purposeful, violent, and aggressive” test for points unknown. Exacerbating this problem is the lack of a standard to measure the likelihood—how likely is likely enough? As this Article discusses below, lower courts struggle with those very questions.

By holding that a DUI does not constitute a violent felony under the ACCA, the Supreme Court in *Begay* reached an arguably just result. But *Begay*’s ad hoc approach spells trouble for any court trying to understand its reasoning, and even more trouble for a court trying to follow *Begay* while remaining faithful to the Supreme Court’s categorical approach and the text of the ACCA itself.

V. ISSUES IN *BEGAY* IMPLEMENTATION

If *Begay* is problematic on its face, in practice it is downright ugly. This section discusses four main problems with lower courts’ implementation of *Begay*. First, by requiring that violent felonies be “purposeful” as well as violent and aggressive, *Begay* appeared to require specific intent for residual clause crimes. Therefore, crimes with a mens rea of negligence or recklessness cannot qualify as violent felonies even if those crimes present a serious potential risk of bodily injury. After *Begay*, lower courts have obligingly excluded reckless and negligent crimes from the residual clause. This has led to seemingly absurd results such as a holding that negligent vehicular homicide is not a “violent felony.”¹¹⁰ Second, *Begay* has caused a division between the formerly compatible ACCA and career offender guideline. Because the statutory definitions of “violent felony” in the ACCA and “crime of violence” in the career offender guideline are almost identical, federal courts interchangeably apply the jurisprudence interpreting the two provisions.¹¹¹ *Begay* has called this compatibility into serious doubt. Third, the combination of the categorical approach and *Begay*’s requirement that a prior crime be “purposeful, violent, and aggressive” excludes sex crimes against children that pose a serious potential risk of bodily injury. Fourth, lower courts have accepted the Supreme Court’s invitation to deviate from the categorical approach and search for the “ordinary case” and the “likely shooter” using little more than their imaginations, intuitions, and varied use of statistics.¹¹²

A. *Specific Intent Is Underinclusive*

Begay’s requirement that predicate violent felonies be “purposeful” has led circuit courts to exclude crimes that appear to fall squarely within the

¹¹⁰ *United States v. Herrick*, 545 F.3d 53, 59 (1st Cir. 2008).

¹¹¹ See *infra* note 141.

¹¹² See *supra* Part IV.B.

residual clause. Recall that the residual clause of the ACCA includes any prior felonies involving “a serious potential risk of physical injury to another.”¹¹³ *Begay* held that a DUI is not a violent felony because, among other reasons, DUI statutes “are most nearly comparable to[] crimes that impose strict liability”¹¹⁴ and “the conduct for which the drunk driver is convicted need not be purposeful or deliberate.”¹¹⁵ Clearly, *Begay* means that strict liability crimes like DUI cannot qualify as violent felonies under the residual clause.

But what about crimes requiring a mens rea of recklessness or negligence? By holding that prior crimes must be “purposeful” to fall under the residual clause, the Court strongly suggested that negligent or reckless criminal offenses can never qualify. “Purposeful” conduct typically equates to intentional conduct.¹¹⁶ As examples of crimes that “are not typically committed by those whom one normally labels ‘armed career criminals’” and therefore should not qualify as violent felonies, *Begay* offered several state and federal crimes with a mens rea of negligence or recklessness.¹¹⁷ The selected crimes are a curious list of low-hanging fruit. Instead of listing crimes of recklessness or negligence that might pose tougher questions—that is, crimes better characterized as violent felonies like involuntary manslaughter or reckless endangerment—the Court chose environmental or consumer crimes that *indirectly* pose a risk of bodily injury. These crimes poorly demonstrate the effects of the new, post-*Begay* ACCA; they would not constitute violent felonies even under the plain language of the ACCA because they do not pose the same or even comparable risk of potential injury as the enumerated crimes. Its poor choice of illustrative crimes aside, the Court strongly implied that crimes of negligence or recklessness cannot be violent felonies.

Many courts of appeals have expressly said what *Begay* only implied: violent felonies under the residual clause must require specific intent. The Seventh Circuit has stated that “crimes with a mens rea of negligence or recklessness do not trigger the enhanced penalties mandated by the ACCA.”¹¹⁸ Another circuit court’s survey of post-*Begay* cases from other

¹¹³ 18 U.S.C. § 924(e)(2)(b)(ii) (2006).

¹¹⁴ *Begay v. United States*, 553 U.S. 137, 145 (2008).

¹¹⁵ *Id.*

¹¹⁶ See *supra* notes 92–96 and accompanying text.

¹¹⁷ *Begay*, 553 U.S. at 146–47 (“See, e.g., ARK. CODE ANN. § 8-4-103(a)(2)(A)(ii) (2007) (reckless polluters); 33 U.S.C. § 1319(c)(1) (2006) (individuals who negligently introduce pollutants into the sewer system); 18 U.S.C. § 1365(a) (2006) (individuals who recklessly tamper with consumer products); § 1115 (seamen whose inattention to duty causes serious accidents).”).

¹¹⁸ *United States v. Smith*, 544 F.3d 781, 786 (7th Cir. 2008); see also *United States v. Lee*, 612 F.3d 170, 196 (3d Cir. 2010); *United States v. Baker*, 559 F.3d 443, 453 (6th Cir. 2009) (“Although it is hardly debatable that the elements of felony reckless endangerment in Tennessee present a serious potential risk of physical injury to another, . . . the offense does not clearly involve the type of ‘purposeful, violent, and aggressive’ conduct as burglary, arson, extortion, or the use of explosives Rather, on its face the statute criminalizes only reckless conduct.” (internal citations omitted) (internal

circuits concluded, “These decisions make clear that when a statute does not *require* deliberate or purposeful conduct, a conviction under such a statute will not be considered a violent felony under the [residual clause of the] ACCA”¹¹⁹

This new requirement excludes crimes of negligence or recklessness that involve “a serious potential risk of bodily injury.”¹²⁰ Since *Begay*, appellate courts have overturned their own precedents holding that certain dangerous crimes—involuntary manslaughter,¹²¹ negligent vehicular homicide,¹²² and reckless endangerment¹²³—are violent felonies under the ACCA or crimes of violence under the career offender guideline.¹²⁴

Judges of the Seventh Circuit recently clashed over whether involuntary manslaughter should be classified as a crime of violence.¹²⁵ In *United States v. Woods*, Woods pled guilty to involuntary manslaughter for dropping and shaking his five-week-old infant son, causing his death.¹²⁶ The Illinois involuntary manslaughter statute criminalizes reckless acts that result in an unintentional killing without lawful justification.¹²⁷ Acknowledging that involuntary manslaughter requires only a mens rea of recklessness, the Government argued that the intent to commit the act, even while only “reckless as to the *consequences* of that act,” was sufficient to bring a crime of recklessness under the residual clause after

quotation marks omitted)); *United States v. Gray*, 535 F.3d 128, 131–32 (2d Cir. 2008) (“*Begay* places a strong emphasis on intentional—purposeful—conduct as a prerequisite for a crime to be considered similar in kind to the listed crimes.”).

¹¹⁹ *United States v. Roseboro*, 551 F.3d 226, 241–42 (4th Cir. 2009) (analyzing *United States v. Herrick*, 545 F.3d 53, 54–55 (1st Cir. 2008)); *Gray*, 535 F.3d at 131–32; *United States v. Archer*, 531 F.3d 1347, 1348–52 (11th Cir. 2008)). *Roseboro* incorrectly cites *Herrick* for this proposition. *Herrick* held that vehicular homicide’s requisite intent fell below “other crimes that the *Begay* majority listed as crimes that do not fall under the residual clause.” *Herrick*, 545 F.3d at 59. More importantly, *Herrick* expressly avoided deciding “whether crimes with a recklessness mens rea could ever come within the residual clause.” *Id.* at 60.

¹²⁰ 18 U.S.C. § 924(e)(2)(b)(ii) (2006).

¹²¹ *United States v. Woods*, 576 F.3d 400, 411–12 (7th Cir. 2009) (stating that an Illinois conviction for involuntary manslaughter is not a crime of violence).

¹²² *Herrick*, 545 F.3d at 59.

¹²³ *United States v. Bishop*, No. 08-1950, 2009 WL 2503646, at *1 (7th Cir. Aug. 17, 2009) (stating that a Wisconsin conviction for second-degree reckless endangerment is not a crime of violence); *Baker*, 559 F.3d at 453; *Gray*, 535 F.3d at 132.

¹²⁴ Some of these decisions actually decided whether the crime was a “crime of violence” under U.S. SENTENCING GUIDELINES MANUAL § 4B1.2 (2009). The definition of “crime of violence” in the “career offender” guideline is nearly identical to the ACCA, so circuits use ACCA precedent for section 4B1.2 and vice-versa. For a list of circuit decisions treating the two provisions interchangeably, see *infra* note 141.

¹²⁵ *Woods*, 576 F.3d at 401, 407. The Seventh Circuit treats “violent felony” under the ACCA “interchangeably” with “crime of violence” under U.S. SENTENCING GUIDELINES MANUAL § 4B1.2. *Woods*, 576 F.3d at 404.

¹²⁶ *Woods*, 576 F.3d at 401–02.

¹²⁷ *Id.* at 410 (“A person who *unintentionally* kills an individual without lawful justification commits involuntary manslaughter if his acts *whether lawful or unlawful* which cause the death are such as are likely to cause death or great bodily harm to some individual, and he performs them *recklessly*.” (quoting 720 ILL. COMP. STAT. ANN. 5/9-3(a))).

Begay.¹²⁸ That creatively expansive take on *Begay*'s "purposeful" requirement would make all crimes of recklessness crimes of violence because "[e]very crime of recklessness necessarily requires a purposeful, volitional act that sets in motion the later outcome."¹²⁹ For example, under this reasoning, shooting into a crowded room would be purposeful because one intends to pull the trigger, even though the shooter was only reckless as to the consequences of the act. Rejecting that argument as inconsistent with *Begay*, the court held that crimes of recklessness cannot fall within the scope of the residual clause and that an Illinois conviction for involuntary manslaughter is not a crime of violence.¹³⁰

Woods's holding met strong resistance from other Seventh Circuit judges. Because the unanimous *Woods* panel disagreed with another panel's application of the categorical approach, the Seventh Circuit resolved the dispute by circulating the opinions to the entire court instead of an en banc hearing.¹³¹ The majority of the Seventh Circuit agreed with the *Woods* panel, but Judge Easterbrook dissented, joined by Judges Posner and Tindler.¹³² The dissenters argued that all homicides are instinctively purposeful, violent, and aggressive: "How can homicide *not* be an intentional, violent, and aggressive act?"¹³³ The Illinois involuntary manslaughter law's requirement of an intentional *act* is sufficiently purposeful, the dissenters argued, to make it a crime of violence under *Begay*. "The possibility that Woods did not intend to drop the child need not detain us; the state statute requires some knowing conduct, a standard satisfied by the [intentional] shaking if not the dropping."¹³⁴ The criminal recklessness involved in the Illinois involuntary manslaughter statute "is a *form* of intent," Judge Easterbrook continued, "and I think it likely that the Justices will deem it sufficient for recidivism enhancements too."¹³⁵ After chipping away at the long-standing distinction between intentional and reckless, Judge Easterbrook revealed his ultimate purpose—to void *Begay*'s "purposeful" requirement. "I grant that recklessness is not universally equivalent to intent; statutory context matters. But in the main a violent or aggressive crime that produces injury or death should meet the *Begay* standard, even if the actor recklessly ignored the risks to others."¹³⁶

¹²⁸ *Id.* at 410.

¹²⁹ *Id.* at 411.

¹³⁰ *Id.* at 412–13.

¹³¹ *Id.* at 407.

¹³² *Id.* at 413 (Easterbrook, J., dissenting).

¹³³ *Id.* at 414.

¹³⁴ *Id.* at 416.

¹³⁵ *Id.* The Second Circuit has held that one affirmative act fulfills *Begay*'s "purposeful" requirement. Although sexual assault of a child is a strict liability crime under Vermont law, it "involves deliberate and affirmative conduct—namely, an intentional sexual act with a person who is, in fact, under the age of consent—sufficient to satisfy *Begay*'s observation that violent felonies . . . typically involve 'purposeful' conduct." *United States v. Daye*, 571 F.3d 225, 234 (2d Cir. 2009).

¹³⁶ *Woods*, 576 F.3d at 417 (Easterbrook, J., dissenting).

By this formulation, a crime need not be purposeful to be a crime of violence, and it can be either violent *or* aggressive, so long as it is physically harmful. Judge Easterbrook's test is compatible with the text of the residual clause—which includes all crimes that pose a serious potential risk of physical injury—but he failed to reconcile it with the language of *Begay*.

Among the circuits that have considered whether the post-*Begay* residual clause requires intentional conduct, only the First Circuit has avoided holding that it requires intentional conduct.¹³⁷ Instead of categorically excluding all crimes of recklessness and negligence, the First Circuit compared the crime to the other crimes discussed in *Begay* to determine whether negligent vehicular homicide constitutes a crime of violence. Negligent vehicular homicide requires more culpability than DUI, the court reasoned, but less culpability than the negligent and reckless environmental crimes that *Begay* listed as lacking the requisite intent for a violent felony.¹³⁸ Thus, the court concluded that negligent vehicular homicide is not a crime of violence.

A wild imagination is not necessary to hypothesize other, very dangerous crimes that directly threaten others' lives and require only negligence or recklessness. Felony murder is one example.¹³⁹ Even though *Begay* did not actually hold that only specific intent crimes may constitute violent felonies, its dicta has effected that outcome in the lower courts.

B. Conflict with the Career Offender Sentencing Guideline

Begay's statement that only "purposeful, violent, and aggressive" crimes qualify as violent felonies technically applies only to the ACCA. However, that holding creates tension with the commentary interpreting a "crime of violence" under the career offender sentencing guideline.

Textually, the two provisions are nearly identical. The only substantial difference between their texts is that the "crime of violence" definition in the guideline includes "burglary of a dwelling" as an enumerated crime, whereas the "violent felony" definition of the ACCA includes mere "burglary."¹⁴⁰ The career offender guideline, like the ACCA, has a

¹³⁷ *United States v. Herrick*, 545 F.3d 53, 60 (1st Cir. 2008) (avoiding the decision of "whether crimes with a recklessness mens rea could ever come within the residual clause").

¹³⁸ *Id.* at 59 ("Although vehicular homicide's mens rea of criminal negligence under this statute surpasses that of the DUI at issue in *Begay* . . . it is below that of other crimes that the *Begay* majority listed as crimes that do not fall under the residual clause.").

¹³⁹ See, e.g., DEL. CODE ANN. tit. 11, § 636(a)(2) (2007) ("A person is guilty of murder in the first degree when . . . [w]hile engaged in the commission of, or attempt to commit, or flight after committing or attempting to commit any felony, the person recklessly causes the death of another person.").

¹⁴⁰ Compare U.S. SENTENCING GUIDELINES MANUAL § 4B1.2(a) (2009), which states:

The term 'crime of violence' means any offense under federal or state law, punishable by imprisonment for a term exceeding one year, that—(1) has as an

residual clause that includes any crime involving “conduct that presents a serious potential risk of physical injury to another.” Because the two provisions are so similar, all circuits have treated the case law regarding “violent felony” and “crime of violence” as fungible both before¹⁴¹ and after¹⁴² *Begay*.

Although the texts of the provisions are so similar, the commentary to the “crime of violence” definition adds a host of crimes to those enumerated in the guideline itself. The guideline commentary lists murder, manslaughter, kidnapping, aggravated assault, forcible sex offenses, robbery, extortionate extension of credit, and unlawfully possessing certain prohibited firearms as crimes of violence, even though they are not

element the use, attempted use, or threatened use of physical force against the person of another, or (2) is burglary of a dwelling, arson, or extortion, involves use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another.

with 18 U.S.C. § 924(e)(2)(B) (2006), which states:

[T]he term ‘violent felony’ means any crime punishable by imprisonment for a term exceeding one year . . . 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.

¹⁴¹ *United States v. Upton*, 512 F.3d 394, 404 (7th Cir. 2008) (stating that a prior decision qualifying crime as a “crime of violence” foreclosed argument that crime was not a “violent felony”); *United States v. Holloway*, 499 F.3d 114, 118 (1st Cir. 2007) (noting that the court will look to cases dealing with “crime of violence” and “violent felony” to interpret the other); *United States v. Taylor*, 489 F.3d 1112, 1113 (11th Cir. 2007) (noting previous holdings that “crime of violence” cases “provide important guidance in determining what is a ‘violent felony’ under the ACCA”), *vacated on other grounds sub nom. Taylor v. United States*, 129 S. Ct. 990 (2009); *United States v. Spudich*, 443 F.3d 986, 987 (8th Cir. 2006) (stating that the “same analysis” applies to “crime of violence” and “violent felony”); *United States v. Ladwig*, 432 F.3d 1001, 1005 n.9 (9th Cir. 2005) (stating that the court “may consult cases construing [‘crime of violence’] when considering whether a crime is a ‘violent felony’ under the ACCA”); *United States v. Serna*, 309 F.3d 859, 864 (5th Cir. 2002) (concluding that “violent felony” case law from another circuit is “persuasive authority” to determine whether a similar crime qualifies as a “crime of violence”); *United States v. Johnson*, 246 F.3d 330, 333 n.5 (4th Cir. 2001) (providing that “violent felony” reasoning “is relevant to determining the meaning of ‘crime of violence’”); *United States v. Zamora*, 222 F.3d 756, 764 (10th Cir. 2000) (using “violent felony” case to find that similar crime constituted a “crime of violence”); *United States v. Houston*, 187 F.3d 593, 594–95 (6th Cir. 1999) (holding that “it would be logically inconsistent” for a crime to qualify as a “crime of violence” and not as a “violent felony”); *Royce v. Hahn*, 151 F.3d 116, 120 (3d Cir. 1998) (stating that “crime of violence” and “violent felony” “should be read consistently with each other”); *United States v. Hill*, 131 F.3d 1056, 1062 n.6 (D.C. Cir. 1997) (stating that “violent felony” cases are “controlling” when interpreting “crime of violence”), *overruled in part by In re Sealed Case*, 548 F.3d 1085 (D.C. Cir. 2008); *United States v. Palmer*, 68 F.3d 52, 55 (2d Cir. 1995) (stating that ACCA precedent is “highly germane authority” for interpreting “crime of violence”).

¹⁴² *United States v. Terrell*, 593 F.3d 1084, 1087 n.1 (9th Cir. 2010); *United States v. Harris*, 586 F.3d 1283, 1285 (11th Cir. 2009); *Toledo v. United States*, 581 F.3d 678, 680 n.2 (8th Cir. 2009); *United States v. Hopkins*, 577 F.3d 507, 511 (3d Cir. 2009); *United States v. Charles*, 576 F.3d 1060, 1068 n.2 (10th Cir. 2009); *United States v. Baker*, 559 F.3d 443, 452–53 (6th Cir. 2009); *United States v. Mohr*, 554 F.3d 604, 609 n.4 (5th Cir. 2009); *United States v. Seay*, 553 F.3d 732, 738 (4th Cir. 2009); *In re Sealed Case*, 548 F.3d 1085, 1089 (D.C. Cir. 2008); *United States v. Herrick*, 545 F.3d 53, 58 (1st Cir. 2008); *United States v. Billups*, 536 F.3d 574, 579 (7th Cir. 2008); *United States v. Gray*, 535 F.3d 128, 130 (2d Cir. 2008).

enumerated in the guideline.¹⁴³ Most importantly, the commentary lists manslaughter as a crime of violence without specifying whether it is referring to voluntary or involuntary manslaughter.¹⁴⁴ Nor does the commentary specify whether manslaughter qualifies as a crime of violence because it requires the use of force (under subsection (1) of the guideline) or because it falls under the residual clause of the guideline. Given the rather broad reach of the ACCA's residual clause, all the additional crimes in the guideline commentary could also plausibly fall under the text of the residual clause—that is, before *Begay* and its apparent holding that only “purposeful” crimes constitute violent felonies under the ACCA.

By interpreting the ACCA to include only purposeful crimes, the Supreme Court in *Begay* introduced a potential rift between the ACCA and the career offender guideline. After all, the guideline commentary clearly states that manslaughter is a crime of violence, even though manslaughter need not be purposeful. Courts attempting to wrestle with this budding conflict have taken a variety of approaches.

Courts assume that *Begay* applies with equal force to the career offender guideline in spite of the fact that *Begay* only dealt explicitly with the ACCA.¹⁴⁵ These courts cite their own precedent stating that the two provisions should be interpreted identically and ignore or explain away the inclusion of manslaughter in the guideline commentary. Circuits applying *Begay* to the career offender guideline exclude crimes of negligence or recklessness that previously qualified as crimes of violence. The Wisconsin crime of negligent vehicular homicide “fits neatly” as a crime of violence within the residual clause because it presents a serious potential risk of physical injury to another.¹⁴⁶ It fit so neatly that the First Circuit unequivocally declared: “There is no possible formulation of the Wisconsin motor vehicle homicide statute that would criminalize conduct that would not constitute a [crime of violence] under the formal categorical approach to [the] Guidelines.”¹⁴⁷ Nonetheless, because the crime does not fulfill *Begay*'s purposeful requirement, the court concluded that it cannot qualify as a crime of violence.¹⁴⁸ The same goes for the New York crime of reckless endangerment.¹⁴⁹ Only one appellate decision since *Begay* has

¹⁴³ U.S. SENTENCING GUIDELINES MANUAL § 4B1.2 cmt. n.1 (2009) (listing murder, manslaughter, kidnapping, aggravated assault, forcible sex offenses, robbery, arson, extortion, extortionate extension of credit, burglary of a dwelling, and the unlawful possession of a firearm described in 26 U.S.C. § 5845(a)). The comment also includes “the offenses of aiding and abetting, conspiring, and attempting to commit” crimes of violence. *Id.*

¹⁴⁴ *Id.*

¹⁴⁵ See *supra* note 142 and accompanying text.

¹⁴⁶ *Herrick*, 545 F.3d at 57.

¹⁴⁷ *Id.*

¹⁴⁸ *Id.* at 60.

¹⁴⁹ *United States v. Gray*, 535 F.3d 128, 132 (2d Cir. 2008).

recognized and respected the definitions' differences.¹⁵⁰

As discussed in the previous section, the Seventh Circuit in *United States v. Woods* held that an Illinois conviction for involuntary manslaughter did not constitute a crime of violence because it is not purposeful.¹⁵¹ Treating the ACCA and the career offender guideline "interchangeably,"¹⁵² the *Woods* court relied entirely on *Begay* without one mention of the "crime of violence" commentary. Of course, ACCA case law should strongly influence the application of the career offender guideline, especially where the two do not conflict. But *Woods* needed to address the apparent conflict between the two: "manslaughter" appears to include both involuntary and voluntary manslaughter. The Guidelines commentary cannot be ignored. As the "equivalent of legislative rules adopted by federal agencies," they bind federal courts unless plainly erroneous or inconsistent with the Guidelines.¹⁵³ The Seventh Circuit chose *Begay*, which applies only indirectly to the career offender guideline, over the guideline's commentary, which has "controlling weight."¹⁵⁴

The involuntary manslaughter problem calls into doubt the circuits' application of ACCA case law to the career offender guideline. If "manslaughter" in the crime of violence commentary includes involuntary manslaughter, then *Begay*'s purposeful requirement must not apply to that crime. And if involuntary manslaughter is exempted from *Begay*'s requirement, then perhaps *Begay* should not apply to the career offender guideline at all. Several factors point in that direction. First, the *Begay* Court never expressly extended its holding to the residual clause of the career offender guideline. Second, *Begay*'s "likely shooter" inquiry, loosely derived from the title of the ACCA, does not apply to the career offender guideline.¹⁵⁵ Third, the apparent inclusion of involuntary manslaughter in the guideline commentary suggests that crimes of violence include crimes of recklessness. Including such crimes, as long as they pose a serious potential risk of physical injury, is perfectly compatible with the text of the career offender guideline. Therefore, the commentary's inclusion of crimes of recklessness should enjoy controlling weight. Judge Colloton has added another reason why courts should not interchangeably treat the two provisions—they were "adopted by different bodies at

¹⁵⁰ *United States v. Martinez*, 602 F.3d 1166, 1172–75 (10th Cir. 2010) (holding that an Arizona conviction for attempted second-degree burglary qualifies as a crime of violence but not a violent felony because the guideline commentary expressly includes inchoate offenses).

¹⁵¹ 576 F.3d 400, 413 (7th Cir. 2009).

¹⁵² *Id.* at 404.

¹⁵³ *Stinson v. United States*, 508 U.S. 36, 45 (1993).

¹⁵⁴ *Id.*

¹⁵⁵ *United States v. Templeton*, 543 F.3d 378, 380 (7th Cir. 2008) (noting that the career offender guideline "does not single out armed criminals," and so "[p]erhaps *Begay* has broken the link between § 924(e) and § 4B1.2").

different times.”¹⁵⁶ Lastly, the advisory nature of the Guidelines after *Booker* makes the onerous crime-of-violence determination less necessary. Even if a sentencing judge determines that a particular prior conviction is not a crime of violence, the judge still has the discretion to issue a greater sentence.¹⁵⁷ In that light, “elaborate rules . . . that the district judge may elect to bypass in the end” look foolish.¹⁵⁸ Until the significant differences between the career offender guideline and *Begay* are reconciled, courts’ application of *Begay* to the guideline is unnecessary and unfaithful to the guideline commentary.

C. “Violent” May Exclude Sex Crimes Against Children

Another unintended consequence of *Begay* is that sex crimes against children no longer fall under the residual clause in many circuits. Before *Begay*, circuit courts repeatedly concluded that sex crimes against minors, such as sexual assault, statutory rape, and interstate trafficking with the intent that the minor engage in prostitution, pose a serious potential risk of physical injury to another. This idea enjoyed such wide acceptance among the circuits that the Tenth Circuit stated unequivocally in 1998: “Every published appellate decision which has considered applying the ‘otherwise’ clause in the context of sexual offenses involving minors has found a ‘serious potential risk of physical injury’ to the minors under U.S.S.G. § 4B1.2(1)(ii) and has held that the offenses at issue are ‘crimes of violence.’”¹⁵⁹ Courts held that the residual clause even encompassed convictions where the defendant never actually physically injured the minor or where the defendant obtained actual consent—because such

¹⁵⁶ *United States v. Williams*, 546 F.3d 961, 962 n.1 (8th Cir. 2008) (Colloton, J., dissenting from denial of rehearing en banc) (“[T]he statute and the guideline were adopted by different bodies at different times, . . . the texts of the provisions are not identical, and . . . the Sentencing Commission has added authoritative commentary to § 4B1.2, which does not apply to § 924(e).” (citing U.S. SENTENCING GUIDELINES MANUAL § 4B1.4, cmt. n.1 (2009))); *United States v. Begay*, 470 F.3d 964, 969–70 (10th Cir. 2006); *United States v. Bell*, 445 F.3d 1086, 1090 (8th Cir. 2006); *United States v. Guerra*, 962 F.2d 484, 487 (5th Cir. 1992); *United States v. Parson*, 955 F.2d 858, 870–72 & n.17 (3d Cir. 1992); see also *United States v. Martinez*, 602 F.3d 1166, 1173 (10th Cir. 2010) (“[T]he definitions are not identical. The Sentencing Commission was not bound to use for its purposes the ACCA definition of *violent felony*. Indeed, it chose to use a different term—*crime of violence*, rather than *violent felony*.”).

¹⁵⁷ *Woods*, 576 F.3d at 417 (Easterbrook, J., dissenting).

¹⁵⁸ *Id.* at 418. Nonetheless, district judges must faithfully determine and consider the appropriate guideline sentence before deciding to exercise discretion and vary from the guideline’s range. See *Gall v. United States*, 552 U.S. 38, 50 (2007) (noting that a judge “must make an individualized assessment based on the facts presented. If he decides that an outside-Guidelines sentence is warranted, he must consider the extent of the deviation and ensure that the justification is sufficiently compelling to support the degree of the variance.”); Holman, *supra* note 49, at 286 (“[A] sentence is procedurally reasonable if the judge considered the appropriate factors, correctly calculated the advisory Guidelines range, and adequately stated his reasons.”).

¹⁵⁹ *United States v. Coronado-Cervantes*, 154 F.3d 1242, 1244 (10th Cir. 1998).

conduct poses a serious *potential* risk of physical injury.¹⁶⁰ Courts reasoned that sexual contact between adults and children creates high risks of force, physical injury, sexually transmitted diseases, and pregnancy.¹⁶¹

Begay has changed some circuits' treatment of sex crimes against children. *Begay* held that prior felonies fall within the scope of the residual clause only if the statutes of conviction require violent and aggressive conduct.¹⁶² Some sex crimes against minors—particularly statutory rape—do not require violence or aggression, even though they clearly pose a serious *potential* risk of physical injury under the plain language of the residual clause. Reconsidering their prior precedent after *Begay*, the Fourth and Ninth Circuits have held that statutory rape is not a violent felony¹⁶³: “[B]ecause statutory rape may involve consensual sexual intercourse, it does not necessarily involve either ‘violent’ or ‘aggressive’ conduct.”¹⁶⁴ Similarly, the Sixth Circuit has held that a state conviction for sexual assault is not a violent felony because the law, which prohibits nine types of sexual conduct including some consensual encounters, “can result in convictions for crimes that, while involving purposeful behavior, do not involve aggressive and violent behavior.”¹⁶⁵ The Seventh and Eleventh Circuits have also revisited their prior precedent after *Begay* and held that state convictions for statutory rape fall outside the residual clause because

¹⁶⁰ After *Begay*, the Tenth Circuit held that a state conviction for knowingly taking immodest, immoral, or indecent liberties with a minor did not constitute a crime of violence. *United States v. Dennis*, 551 F.3d 986, 991 (10th Cir. 2008). The crime, “which requires a jury assessment based on the totality of the circumstances and common sense as to whether it has been violated, [does not] necessarily involve[] conduct that presents a serious potential risk of physical injury to another.” *Id.* at 990.

¹⁶¹ See *United States v. Austin*, 426 F.3d 1266, 1273 (10th Cir. 2005) (including pregnancy, venereal disease, and physical injury among the risks in child sexual abuse cases); *United States v. Asberry*, 394 F.3d 712, 717 (9th Cir. 2005) (noting STDs and “physical risks of pregnancy” as risks from statutory rape). Notably, however, these courts did not substantiate these risks with any statistical data. Research seems to support the high risk of pregnancy: sixty-nine percent of unmarried adolescent girls with partners more than six years older become pregnant, 3.7 times the pregnancy rate for the same population with partners no more than two years older. Denise A. Hines & David Finkelhor, *Statutory Sex Crime Relationships Between Juveniles and Adults: A Review of Social Scientific Research*, 12 AGGRESSION & VIOLENT BEHAVIOR 300, 303 (2007). Further, adolescent girls with older partners are more likely to contract an STD. *Id.* at 307. Nonetheless, “these studies are correlational,” which is to say that the girls’ risky behavior may precede their sexual relationships with older men. *Id.* Hines and Finkelhor did not mention high risks of force or physical injury. Still, another study reports: “Seventy-four percent of women who had intercourse before age 14 and 60% of those who had sex before age 15 report having had a forced sexual experience.” Patricia Donovan, *Can Statutory Rape Laws Be Effective in Preventing Adolescent Pregnancy?*, 29 FAMILY PLANNING PERSPECTIVES 30, 30 (1996). Although these figures are not broken down by the age of the sexual partner, they still show greater incidence of forced sex among young girls.

¹⁶² *Begay v. United States*, 553 U.S. 137, 144–45 (2008).

¹⁶³ *United States v. Christensen*, 559 F.3d 1092, 1095 (9th Cir. 2009); *United States v. Thornton*, 554 F.3d 443, 449 (4th Cir. 2009).

¹⁶⁴ *Christensen*, 559 F.3d at 1095 (internal citation omitted).

¹⁶⁵ *United States v. Wynn*, 579 F.3d 567, 574 (6th Cir. 2009); see also OHIO REV. CODE § 2907.03 (West 2010) (requiring no elements of aggressive or violent behavior to be found guilty of sexual battery, a felony of the third degree).

the crimes are strict liability offenses.¹⁶⁶

While faithful to the categorical approach and *Begay*, these results seem contrary to the text of the ACCA. The ACCA's residual clause plainly includes sexual assault as a violent felony, because non-consensual sexual contact has a serious potential risk of physical injury.¹⁶⁷ Similarly, sexual contact with a minor in the form of statutory rape carries grave risks of harm, given the high frequency of violence, pregnancy, and STDs, as well as the underage victim's diminished capacity for informed consent and legal inability to consent. *Begay* creates an end-run around the plain language of the statute and allows possibly dangerous sexual predators to avoid a longer prison sentence.¹⁶⁸

Other courts have relied on *Begay*'s "typically" language to circumvent the categorical approach and conclude that sex crimes against children constitute violent felonies and crimes of violence.¹⁶⁹ *Begay*'s "typically" language—along with *James*'s emphasis on the "ordinary" case—has allowed courts to expand the inquiry beyond the statutory elements of the offense and consider how the crime is typically committed. The Second Circuit took this route in *United States v. Daye*, explaining, "*Begay* does not require that *every* instance of a particular crime involve purposeful, violent, and aggressive conduct."¹⁷⁰ Sexual assault of a child is violent and aggressive, the *Daye* court said, because "crimes involving sexual contact between adults and children create a substantial likelihood of forceful, violent, and aggressive behavior on the part of the perpetrator because a child has essentially no ability to deter an adult from using such

¹⁶⁶ *United States v. Harris*, 608 F.3d 1222, 1230, 1232–33 (11th Cir. 2010) (holding that Florida conviction for sexual battery of a child under sixteen is not a violent felony under the residual clause because it is not categorically "purposeful," despite "presenting a serious potential risk of physical injury"); *United States v. McDonald*, 592 F.3d 808, 813–15 (7th Cir. 2010) (stating that Wisconsin conviction for sexual assault of a child is not a crime of violence after *Begay* because it is a strict liability offense).

¹⁶⁷ *United States v. Riley*, 183 F.3d 1155, 1159 (9th Cir. 1999) (reasoning that simple rape "could result in physical injury to the victim," "is nonetheless a crime against the bodily integrity of the victim," and "also subjects the victim to the physical risks associated with sexually transmitted diseases and pregnancy"). The Ninth Circuit has maintained post-*Begay* that rape is still a crime of violence, even though the Arizona sexual assault statute does not require force or coercion. *United States v. Terrell*, 593 F.3d 1084, 1089–91 (9th Cir. 2010).

¹⁶⁸ Of course, *Begay* may also correct the residual clause's overbreadth by excluding non-dangerous offenders and saving them from an unnecessarily lengthy sentence. The author thanks Michael O'Hear for this observation. See Shani Fregia, *Statutory Rape: A Crime of Violence for Purposes of Immigrant Deportation?*, 2007 U. CHI. LEGAL F. 539, 555 (2007) ("[T]reating all statutory rape offenses in this manner ignores the meaningful variations that exist between cases.").

¹⁶⁹ See, e.g., *United States v. Patterson*, 576 F.3d 431, 434 (7th Cir. 2009) (discussing a federal conviction for transporting a minor in interstate commerce with intent that the minor engage in prostitution); *United States v. Daye*, 571 F.3d 225, 227 (2d Cir. 2009) (discussing a Vermont conviction for sexual abuse of a child); *United States v. Wilson*, 568 F.3d 670, 671 (8th Cir. 2009) (discussing a Missouri conviction for child abuse).

¹⁷⁰ *Daye*, 571 F.3d at 234; see also *Wilson*, 568 F.3d at 674 ("[O]ur inquiry under the residual clause is focused on whether violent and aggressive conduct is *typically* involved.").

force to coerce the child into a sexual act.”¹⁷¹ The Eighth Circuit surveyed reported Missouri court cases regarding convictions for child abuse and found that each one “clearly involves violent and aggressive conduct.”¹⁷² Therefore, the court concluded that child abuse qualified as a violent felony even though the statute did not require violent or aggressive conduct, but only a consensual sexual act with a person under the age of sixteen.¹⁷³ These cases supplant the requirement that a crime be *necessarily* violent and aggressive with the requirement that a crime be violent and aggressive in its “typical” or likely commission.¹⁷⁴ Although these circuits pay lip service to the categorical approach, this method of examining the likely commission of a crime contradicts the categorical approach. As discussed earlier, this problem did not originate with the circuit courts; rather, *Begay*’s imprecise instructions created the confusion.

Courts are often caught between a rock and a hard place in applying *Begay* to certain prior crimes. Some courts apply the categorical approach to determine whether the prior crime required purposeful, violent, and aggressive conduct. This approach remains faithful to the categorical approach but often produces unsatisfying results—such as concluding that sexual assault of a minor is not a crime of violence. Other courts take advantage of *Begay*’s “typically” language to circumvent the categorical approach and reach the more satisfying result—which appears more in line with the ACCA’s statutory text. These courts must ignore Supreme Court precedent mandating the categorical approach, or assume that *Begay* somehow abrogated it with respect to the residual clause of the ACCA.

D. *The Search for the “Ordinary Case” Abandons the Categorical Approach*

1. *Growing Tension Between James/Begay/Chambers and Taylor/Shepard*

Lower federal courts now grapple with two nearly contradictory instructions from the Supreme Court. On the one hand is the categorical approach as set forth in *Taylor* and *Shepard*. According to the categorical approach, a sentencing court may examine only the fact of the conviction and the elements of the statutory offense to determine whether a crime is a “violent felony” for purposes of the ACCA’s residual clause.¹⁷⁵ In a few cases, the defendant may be charged under a statute with disjunctive elements and the jury is “actually required to find all the elements” of the

¹⁷¹ *Daye*, 571 F.3d at 234.

¹⁷² *Wilson*, 568 F.3d at 674.

¹⁷³ *Daye*, 571 F.3d at 229 (quoting VT. STAT. ANN. tit. 13, § 3252(3)).

¹⁷⁴ See *Patterson*, 576 F.3d at 442 (holding that transporting a minor in interstate commerce with intent that the minor engage in prostitution is violent because it creates a “significant risk of violence”).

¹⁷⁵ See *supra* notes 45–47 and accompanying text.

crime, including one of the disjunctive elements, in order to convict.¹⁷⁶ Only in those rare situations may the court look to the charging documents, jury instructions, or any plea agreement or colloquy to learn under which part of the statute the defendant was convicted.¹⁷⁷ Besides those narrow exceptions, which examine only established facts and admissions actually necessary for the conviction, the categorical approach forbids courts from examining any other facts underlying the offense.

On the other hand, *James*, *Begay*, and *Chambers* progressively eroded the categorical approach and encouraged sentencing courts to determine whether someone *could* have committed the crime violently. Although *James* echoed previous categorical approach instructions,¹⁷⁸ it claimed that 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.”¹⁷⁹ As this Article has discussed, inquiring into the “ordinary case” likely means looking beyond the elements of the offense and charging documents. *Begay* provided two further hints that lower courts should hypothesize violent means of committing crimes. First, it held that crimes fall under the ACCA’s residual clause if they “typically” involve purposeful, violent, and aggressive conduct, inviting courts to hypothesize the typical commission of the crime.¹⁸⁰ Second, it held that a crime is a violent felony under the residual clause only if the offender is a likely shooter¹⁸¹—“the kind of person who might deliberately point the gun and pull the trigger.”¹⁸² The likely shooter inquiry encourages yet another examination of facts beyond the elements of the offense.¹⁸³

Presumably set free from the categorical approach, circuit courts now frequently ask whether a particular crime is typically committed violently, or involves purposeful, violent, and aggressive conduct, in “the ordinary case.” This inquiry takes three slightly different but overlapping forms, which this Article terms the imaginary ordinary crime exercise, the smell test, and the statistical perspective.

2. The Great Search for the “Ordinary Case”

a. The Imaginary Ordinary Crime

In order to determine whether a crime is violent and aggressive in the

¹⁷⁶ *Taylor v. United States*, 495 U.S. 575, 602 (1990).

¹⁷⁷ See *supra* note 46–48 and accompanying text for a discussion of restrictions on the court’s fact-finding.

¹⁷⁸ See *supra* notes 51–57.

¹⁷⁹ *James v. United States*, 550 U.S. 192, 208 (2007) (emphasis added). See *supra* notes 56–57 and accompanying text for a discussion of the “ordinary case” in *James*.

¹⁸⁰ See *supra* notes 65–69 and accompanying text.

¹⁸¹ See *supra* note 69–70 and accompanying text.

¹⁸² *Begay v. United States*, 553 U.S. 137, 146 (2008).

¹⁸³ For a discussion of the Supreme Court’s precedent regarding the ACCA, see *supra* Part III.B.

“ordinary case,” courts often employ their collective imaginations to hypothesize how a crime might play out. In *United States v. Billups*, the Seventh Circuit applied *Begay* to the career offender guideline and the defendant’s argument that false imprisonment is not a crime of violence because it can be committed in a non-violent way.¹⁸⁴ In Wisconsin, one may be convicted of false imprisonment for imprisoning another without his consent.¹⁸⁵ But imprisonment “without consent” may be effected in one of four ways under the statute: by overcoming the non-consenting victim, by fear through the use or threat of imminent use of physical violence, purporting to act under legal authority, or by reason of the victim’s ignorance or mistake of fact or law.¹⁸⁶ The first two scenarios clearly involve some violence or threat of violence.¹⁸⁷ But the court found that the latter two scenarios, in which the perpetrator’s trickery prevents consent, have sufficient potential for violence because “the victim *may* discover” the trickery and resist.¹⁸⁸ The court acknowledged that the fourth method of false imprisonment, by reason of the victim’s ignorance or mistake of fact or law, could be committed without the risk of violence where a child victim avoids any physical confrontation.¹⁸⁹ Nonetheless, “that there exists a single possible way, among many, to commit the offense without posing a serious risk of injury to another does not mean that, in the *ordinary case*, the offense does not present such a risk.”¹⁹⁰ The *Billups* court took the “ordinary case” route to the exclusion of the categorical approach: instead of only examining the elements of the offense, which arguably do not require *violent* conduct, the court imagined how the offense might play out.¹⁹¹

In *United States v. Spells*, another Seventh Circuit panel imagined the ordinary crime. The *Spells* court addressed whether an Indiana conviction for resisting law enforcement constitutes a “violent felony” under the ACCA.¹⁹² Under the Indiana statute, one may resist law enforcement by one of three means: by forcibly resisting a law enforcement officer, by forcibly resisting service of a process or order from a court, or by fleeing a law enforcement officer.¹⁹³

Spells defied the categorical approach in two ways. First, *Spells* initially decided whether one of the disjunctive provisions, fleeing law

¹⁸⁴ 536 F.3d 574, 580 (7th Cir. 2008).

¹⁸⁵ *Id.* at 577 (citing WIS. STAT. § 940.30).

¹⁸⁶ *Id.* at 579 (citing WIS. STAT. § 939.22(48)).

¹⁸⁷ *Id.* at 581.

¹⁸⁸ *Id.* (emphasis added).

¹⁸⁹ *Id.*

¹⁹⁰ *Id.* at 582 (emphasis added).

¹⁹¹ *Id.* at 580–83. The court also applied *Begay* in passing, finding that “false imprisonment always involves purposeful behavior and typically involves aggressive, violent behavior.” *Id.* at 583.

¹⁹² *United States v. Spells*, 537 F.3d 743, 746 (7th Cir. 2008).

¹⁹³ *Id.* at 749 (quoting IND. CODE § 35-44-3-3(a)).

enforcement, is a crime of violence.¹⁹⁴ But both the categorical approach¹⁹⁵ and Seventh Circuit precedent¹⁹⁶ require courts initially to determine under which disjunctive provision of the statute the defendant was convicted. *Spells* unnecessarily reached the merits, because it should have remanded the case to the district court. Second, in holding that fleeing an officer qualifies as a violent felony,¹⁹⁷ *Spells*'s application of *Begay*'s "purposeful, violent, and aggressive" test did not stick to the statutory elements of the prior conviction. This crime is purposeful because the statute requires that one "knowingly or intentionally" flee an officer.¹⁹⁸ Fleeing an officer in a vehicle, the court reasoned, is "inherently aggressive, *despite Indiana law's absence of a requirement that the conduct endanger others.*"¹⁹⁹ This is so, the court said, because the officer will likely give chase thereby endangering himself and others on the road.²⁰⁰ Further, using *Begay*'s "likely shooter" inquiry, the court hypothesized that one fleeing the police may have a firearm, and that such a person "would have a greater propensity to use that firearm in an effort to evade arrest."²⁰¹ Based only on these hypotheticals and considerations well beyond the elements of the offense, *Spells* held that the crime of fleeing law enforcement qualifies as a violent felony.²⁰²

¹⁹⁴ *Id.* at 750 ("Spells claims that the district court failed to properly determine which subsection of this statute he was convicted under. Whether such a procedural violation occurred is only of significance if certain Class D felony violations of Indiana's Resisting Law Enforcement offense would not constitute a 'violent felony.'"). Whether fleeing law enforcement is a crime of violence was not actually the issue before the court until it determined that *Spells* was convicted under that clause of the resisting law enforcement statute. *Id.*

¹⁹⁵ See *supra* notes 41–49 and accompanying text.

¹⁹⁶ *Spells*, 537 F.3d at 749 (stating that the court may consult the charging document, plea agreement or colloquy or "some comparable judicial record of this information . . . '[o]nly where the statutory elements and the content of the charging document do not resolve whether the crime of conviction constitutes a [violent felony]'" (quoting *United States v. Newbern*, 479 F.3d 506, 508 (7th Cir. 2007))).

¹⁹⁷ *Id.* at 752.

¹⁹⁸ *Id.*

¹⁹⁹ *Id.* (emphasis added). The Indiana statute contemplates but does not require that the offender use a vehicle. See also IND. CODE 35-44-3-3(a)(3) (2009) (stating that a person who knowingly or intentionally resists law enforcement when he or she "flees from a law enforcement officer after the officer has, by visible or audible means, including operation of the law enforcement officer's siren or emergency lights, identified himself or herself and ordered the person to stop").

²⁰⁰ *Id.*

²⁰¹ *Id.* *Spells* also cited Department of Justice statistics for this proposition. See *infra* V.D.2.c.

²⁰² Three other circuits have concluded that fleeing law enforcement is a violent felony. Citing *Spells* for the notion that fleeing law enforcement invites chase, the Tenth Circuit in *United States v. West* held in conclusory fashion, "[t]here is little doubt that knowingly flaunting the order of a police officer is aggressive conduct." 550 F.3d 952, 969 (10th Cir. 2008); see also *United States v. Wise*, 597 F.3d 1141, 1145 (10th Cir. 2010) (reaffirming *West* and holding that Utah crime of failing to stop at the command of a police officer was a crime of violence). As for *Begay*'s violence requirement, the crime "will typically lead to a confrontation with the officer being disobeyed," and the likelihood of a chase increases "the likelihood of serious harm to the officers involved as well as any bystanders that by happenstance get in the way . . ." *Id.* at 970. The Fifth and Sixth Circuits echoed *Spells*'s and *West*'s reasoning: the crime is aggressive because it is a "clear challenge to the officer's authority and typically initiates pursuit." *United States v. Harrimon*, 568 F.3d 531, 535 (5th Cir. 2009) (citing *Spells*, 537 F.3d

A recent Seventh Circuit panel has reinforced *Spells*'s hypothetical approach, despite acknowledging that decision's faults. In *United States v. Dismuke*, the court held that a Wisconsin conviction for vehicular fleeing qualifies as a violent felony.²⁰³ The court could have simply affirmed the sentence based on *Spells* because the Indiana crime addressed a sufficiently similar crime. But in light of more recent case law and *Spells*'s failure to "address whether fleeing is 'violent' in the way required by *Begay*," *Dismuke* considered the issue anew.²⁰⁴ First, the court set out its version of the categorical approach. The *Begay* test does not apply only to the elements of the crime, the court reasoned, but rather to the "generic crime as ordinarily committed" or, to repeat *James*'s formulation, "the conduct encompassed by the statutory elements of the crime, in the ordinary or typical case."²⁰⁵ Second, the statutory elements of the crime must require a "purposeful" mens rea. The violent and aggressive requirements, however, are more flexible, requiring "only that a residual-clause predicate crime be characterized by aggressive conduct with a similar potential for violence and therefore injury as the enumerated offenses, not that it must 'insist on' or require a violent act."²⁰⁶ With this reasoning, *Dismuke* whittled the *Begay* test down to one indispensable element (a purposeful mens rea), effectively eliminated the violent element, and obscured the aggressive element.

Against these permissive versions of the categorical approach and *Begay*, the Wisconsin conviction for vehicular fleeing easily qualified as a violent felony. *Dismuke* uncritically adopted the reasoning of *Spells* and its progeny, the Tenth Circuit's *West* decision, the Fifth Circuit's *Harrimon* decision, and the Sixth Circuit's *United States v. LaCasse*²⁰⁷ decision, that the crime "in the ordinary case" likely leads to a chase.²⁰⁸ The court briefly distinguished the contrary holding of the Eleventh Circuit²⁰⁹ on the basis that the Wisconsin statute requires accelerated speed or extinguishing vehicle lights.²¹⁰ Although the Minnesota statute at issue in *United States*

at 752); see also *United States v. Young*, 580 F.3d 373, 377 (6th Cir. 2009). It is violent because the police officer must typically overcome the criminal's use of force and the criminal will typically attempt to flee by any means necessary. *Young*, 580 F.3d at 378; *Harrimon*, 568 F.3d at 535.

²⁰³ 593 F.3d 582, 596 (7th Cir. 2010). Although the Wisconsin vehicular fleeing statute is divisible, the court determined from the criminal complaint that Dismuke was convicted of "increas[ing] the speed of the operator's vehicle or extinguish[ing] the lights of the vehicle in an attempt to elude or flee" in violation of WIS. STAT. § 346.04(3) (2010). *Dismuke*, 593 F.3d at 590.

²⁰⁴ *Dismuke*, 593 F.3d at 593. "Wisconsin's fleeing offense is narrower than Indiana's, so it is tempting to simply accept the government's argument and rely on *Spells* as subsuming the question presented here. But in light of an analytical omission we have noted in *Spells* and intervening developments in the caselaw, we think the issue calls for independent consideration." *Id.* at 592.

²⁰⁵ *Id.* at 594. This phrasing comes directly from *James*. See *supra* note 57.

²⁰⁶ *Dismuke*, 593 F.3d at 594.

²⁰⁷ 567 F.3d 763 (6th Cir. 2009).

²⁰⁸ *Id.* at 591 n.3, 595.

²⁰⁹ *United States v. Tyler*, 580 F.3d 722 (8th Cir. 2009).

²¹⁰ *Dismuke*, 593 F.3d at 591 n.3.

v. *Tyler* contained those same requirements,²¹¹ *Dismuke* avoided engaging the Eighth Circuit's reasoning that the crime could not be a violent felony because its elements do not require a confrontation, chase or violent and aggressive conduct.²¹² *Dismuke*'s resolution of *Spells*'s analytical omission is not satisfactory. Despite an impressive windup that diluted the categorical approach and *Begay*, the final analysis did not make a more convincing case that vehicular fleeing is categorically a violent felony. Instead, the court's logic mirrored *Spells* and other circuits' repetition of *Spells*'s reasoning. Ultimately, felons facing sentencing in the Seventh Circuit for illegally possessing a firearm could still receive a minimum of fifteen years of imprisonment based on the judicial guess that vehicular fleeing is violent.²¹³

Certainly, there is nothing grossly unreasonable about these courts' educated guesses as to how a crime typically plays out. However, the scenarios depend entirely on the judges' imaginations, not what is necessary under the statute to commit the crime. In order to be convicted of fleeing a law enforcement officer, the criminal need only disobey a police officer's order to stop. In some states, a conviction requires even less. Minnesota's fleeing statute, for example, "criminalizes conduct that is neither violent nor aggressive, such as merely 'extinguish[ing] motor vehicle headlights or taillights.'"²¹⁴ Turning off headlights is not necessarily violent or aggressive except in a world unconnected to the statute of the prior conviction. Although the Eighth Circuit held that a Minnesota fleeing conviction is not a crime of violence, the Seventh or Tenth Circuits could imagine that the mine run of such fleeing convictions are violent and aggressive, just as those courts did in *Spells* and *West*.²¹⁵ At *Begay*'s invitation, circuit courts enter this imaginary world apparently in order to avoid the unsatisfying results required by the categorical approach.

A recent Eighth Circuit opinion exemplifies the constitutional problems with the imaginary approach. In *United States v. Williams*, the Eighth Circuit held that Missouri convictions for auto theft without consent and auto tampering are not crimes of violence under the career offender

²¹¹ See *infra* text accompanying note 214.

²¹² *Dismuke*, 593 F.3d at 591 n.3, 596.

²¹³ The Supreme Court has granted certiorari in *United States v. Sykes*, another Seventh Circuit case affirming *Spells* and *Dismuke*, for the October 2010 Term. 598 F.3d 334, 338 (7th Cir. 2010), *cert. granted*, 2010 WL 2345244 (U.S. Sept. 28, 2010) (No. 09-11311).

²¹⁴ *Tyler*, 580 F.3d at 725 (quoting MINN. STAT. § 609.487 subd. 1 (2009)). *Tyler* held that a Minnesota conviction for fleeing a police officer is not a crime of violence. *Tyler*, 580 F.3d at 726. But see *United States v. Malloy*, Nos. 09-2618, 09-2619, 2010 WL 3061922, at *9–11 (8th Cir. Aug. 6, 2010) (distinguishing the Iowa crime of eluding a pursuing law enforcement officer from the Minnesota crime of fleeing a police officer at issue in *Tyler* and holding that the Iowa crime is violent and aggressive because it requires one to exceed the speed limit by more than twenty-five m.p.h.).

²¹⁵ See *supra* note 202 and accompanying text.

guideline.²¹⁶ Auto theft without consent requires only the act of taking another's vehicle with the purpose to deprive,²¹⁷ and tampering "may be committed by merely receiving, possessing, selling, altering, or defacing an automobile."²¹⁸ Overruling pre-*Begay* circuit precedent, the panel concluded that these types of auto theft did not qualify as crimes of violence because auto theft without consent does not demonstrate a "proclivity for violence and aggression" similar to auto theft by force, and auto theft by tampering "includes a range of conduct that is neither violent nor aggressive."²¹⁹ In a dissent from the denial of a petition for rehearing en banc, Judge Colloton chastised the panel for unduly overruling pre-*Begay* circuit precedent on the issue.²²⁰ Quoting pre-*Begay* case law, Colloton argued that auto theft without consent is violent not because of its statutory elements, but because of the "likelihood of confrontation."²²¹

Once the thief drives away with the vehicle, he is unlawfully in possession of a potentially deadly or dangerous weapon Under the stress and urgency which will naturally attend his situation, the thief will likely drive recklessly and turn any pursuit into a high-speed chase with the potential for serious harm to police or innocent bystanders.²²²

This imaginary commission of auto theft is several leaps from what the Missouri statute actually requires. Judge Colloton's argument had persuasive value before *Begay* because auto theft arguably presents a serious potential risk of physical injury. But before or after *Begay*, the hypothetical crime has never been within the ambit of the categorical approach. The elements of auto theft do not require dangerous behavior, much less violent and aggressive behavior. The prosecutor in the prior case did not have to prove violent and aggressive conduct to obtain a conviction. The defendant accordingly lacked the opportunity to test the government's evidence and offer his own in defense. A jury of the defendant's peers did not weigh the evidence and find that the offender acted with violence or aggression, as would be required by the Sixth Amendment if violence and aggression were elements of the statutory offense. When judges impose their own, imaginary version of events, they rob defendants not only of the protection of the categorical approach but

²¹⁶ *United States v. Williams*, 537 F.3d 969, 974–76 (8th Cir. 2008).

²¹⁷ MO. REV. STAT. § 570.030 (West 1999).

²¹⁸ *Williams*, 537 F.3d at 974.

²¹⁹ *Id.*

²²⁰ *United States v. Williams*, 546 F.3d 961, 961 (8th Cir. 2008) (Colloton, J., dissenting from denial of rehearing en banc).

²²¹ *Williams*, 546 F.3d at 963.

²²² *Id.*

more importantly their basic constitutional rights.

b. The Smell Test

Rather than engage in these imaginary gymnastics to arrive at the ordinary commission of a crime, some appellate courts utilize a “smell” test, much like Justice Potter Stewart’s pornography standard.²²³ In *United States v. Zuniga*, the Tenth Circuit held that a Texas conviction for possession of a deadly weapon in a penal institution qualified as a violent felony.²²⁴ Before *Begay*, a court could certainly find that possessing a deadly weapon in prison presents a serious potential risk of physical injury, as the Tenth Circuit had.²²⁵ But *Begay* forced the Tenth Circuit to consider whether the “purposeful” requirement, under the categorical approach, bars a crime requiring mens rea of “intentionally, knowingly, or recklessly.”²²⁶ Because one could “recklessly” possess a deadly weapon under the statute, a strict application of the categorical approach would require a sentencing court to find that such a crime was not a violent felony. The *Zuniga* court did not strictly apply the categorical approach. The statute need not require purposeful conduct, *Zuniga* held, citing *Begay*’s “typically” language: “It is reasonable to surmise that those who possess deadly weapons in a penal institution typically intend to possess them.”²²⁷ Based on that conclusory reasoning, the Tenth Circuit held that the offense is purposeful.²²⁸ Notably, the Tenth Circuit had an alternate—and far more intellectually satisfying—justification for this conclusion. Despite the statute’s recitation of the word “recklessly,” Texas courts have interpreted the statute as requiring purposeful possession.²²⁹ The court could have rested its outcome on the judicial construction of the Texas statute, but it unnecessarily relied on a legally questionable assumption. Adopting *Zuniga*’s reasoning, two other circuits have assumed that possession of a dangerous weapon is necessarily purposeful.²³⁰

²²³ *Jacobellis v. Ohio*, 378 U.S. 184, 197 (1964) (Stewart, J., concurring) (“I know it when I see it . . .”).

²²⁴ *United States v. Zuniga*, 553 F.3d 1330, 1337 (10th Cir. 2009).

²²⁵ *Id.* at 1333 (citing *United States v. Romero*, 122 F.3d 1334, 1341 (10th Cir. 1997)).

²²⁶ *Id.*

²²⁷ *Id.* at 1334 (emphasis added).

²²⁸ *Id.* at 1334–35.

²²⁹ *Id.*

²³⁰ In *United States v. Polk*, the Third Circuit considered whether a federal conviction for possession of a prohibited object designed to be used as a weapon is a crime of violence. 577 F.3d 515, 520 (3d Cir. 2009). *Polk* assumed that the strict liability crime was purposeful “in that we may assume one who possesses a shank intends that possession . . .” *Id.* at 519 (emphasis added). Nonetheless, *Polk* expressly broke from *Zuniga* and held that the crime is not a crime of violence because “it cannot properly be characterized as conduct that is itself aggressive or violent, as only the potential exists for aggressive or violent conduct.” *Id.*

The Eighth Circuit followed and expanded *Zuniga* beyond the prison context to an Arkansas conviction for possession of a sawed-off shotgun. *United States v. Vincent*, 575 F.3d 820, 827 (8th Cir. 2009). First, citing *Zuniga*, *Vincent* held that “[p]ossession of a dangerous weapon that has no

The Eleventh Circuit used only judicial intuition in *United States v. Harrison* to determine that a Florida conviction for willfully fleeing a police officer is not a violent felony.²³¹ The offense requires only that a person willfully flee or attempt to elude a law enforcement officer driving a marked patrol vehicle with sirens and lights activated.²³² Based on the Supreme Court's direction to determine the "ordinary case,"²³³ *Harrison* said that the court must ascertain how the crime is "ordinarily committed."²³⁴ Any commission of the offense must be purposeful, given the statute's mens rea of "willfully."²³⁵ Addressing *Begay*'s violence prong, the court supposed that the disobedience of fleeing "does not always translate into a serious potential risk of physical injury."²³⁶ Nor does the crime pass *Begay*'s "likely shooter" test. If the statute criminalized "driving away recklessly without regard for the safety of others," the court said, "[s]uch callousness and indifference to the lives of others [would] smack more of the kind of person that might 'deliberately point the gun and pull the trigger.'"²³⁷ In contrast, willfully fleeing "suggests an unwillingness to engage in violent conduct . . . [T]hat kind of person is not, in our mind, *cut from the same cloth* as burglars, arsonists, extortionists, or those that criminally detonate explosives."²³⁸ By using terms of analysis such as "smack" and "cut from the same cloth," the court in *Harrison* appeared to base its holding on its gut feeling about the crime. Of the three inquiries, the "smell" test is the most detached from the categorical approach—a subjective, judicial sense of the crime showing little regard for the elements of the offense.

c. The Judge as Statistician

Applying a third approach to identify the "ordinary case," some courts have used statistics, adding the patina of objectivity to an essentially

lawful purpose creates a serious potential risk of physical injury to others." *Id.* at 825 (citing *Zuniga*, 553 F.3d at 1334). *Vincent*'s paltry analysis of "purposeful, violent, and aggressive" was based entirely on *Zuniga*. "The *Zuniga* court reasoned that a statute reaching intentional, knowing, or reckless conduct could still fall within the 'otherwise' clause of § 924(e) because violations of such statutes 'typically' involve purposeful conduct." *Id.* at 827 (citing *Zuniga*, 553 F.3d at 1334–35). Like the possession of a sawed-off shotgun, the *Vincent* court said, the possession of a weapon in prison "is violent and aggressive because it 'creates the possibility—even the likelihood—of a future violent confrontation.'" *Id.* (quoting *Zuniga*, 553 F.3d at 1335). *Vincent* offered no support for the holding that possession of a sawed-off shotgun is necessarily purposeful, violent, and aggressive, other than *Zuniga*'s surmise and its conclusory statement that possession of "a weapon with no lawful purpose . . . is purposeful, violent, and aggressive conduct." *Id.*

²³¹ *United States v. Harrison*, 558 F.3d 1280, 1301 (11th Cir. 2009).

²³² FLA. STAT. § 316.1935(2) (2006).

²³³ *Harrison*, 558 F.3d at 1284–85 (quoting *Chambers v. United States*, 129 S. Ct. 687, 690 (2009); *Begay v. United States*, 553 U.S. 137, 141 (2008)).

²³⁴ *Harrison*, 558 F.3d at 1285.

²³⁵ *Id.* at 1293.

²³⁶ *Id.* at 1294.

²³⁷ *Id.* at 1295 (emphasis added) (quoting *Begay*, 553 U.S. at 146).

²³⁸ *Id.* at 1295–96 (emphasis added).

subjective exercise. Admittedly, as the *James* Court observed, “serious potential risk” is an “inherently probabilistic concept.”²³⁹ But because many judges are amateur statisticians, they are likely to misapply statistics. The most basic problem with this use of statistics, though, is that no one knows what to measure. Even if used accurately, the chosen metric for the “ordinary case” shifts from judge to judge. Both the Supreme Court and the circuit courts have demonstrated the dangers of the statistical approach.

The Supreme Court’s use of “conclusive” statistics in *Chambers* was approximate at best.²⁴⁰ To determine whether those who commit the crime of failure to report to a penal institution are likely shooters, *Chambers* utilized a Sentencing Commission report detailing the frequency of a criminal’s violence while escaping or failing to report to a penal institution.²⁴¹ The Sentencing Commission had drafted the report at the suggestion of the Seventh Circuit panel in *Chambers*.²⁴² Analyzing the previous two years, the Commission identified federal cases in which the defendant received the sentencing guideline enhancement for “Escape, Instigating or Assisting Escape.”²⁴³ After identifying 414 such cases, the Commission then examined whether the escape was committed with force or a dangerous weapon or whether the escape caused anyone injury.²⁴⁴ Such a measurement, of course, excludes any violent offenders who benefited from prosecutorial discretion or were convicted in state court. Nonetheless, because none of the catalogued “failure to report” offenses in the previous two years involved violence, *Chambers* concluded that the crime did not constitute a “violent felony.”²⁴⁵

Following this statistical approach, the law categorizes crimes as violent felonies depending on how most criminals actually commit them. If the use of violence in commission of a particular crime significantly increased over a two-year period, the law categorizing that crime could change just as quickly. This approach and its small sample size create more problems. Courts could never rely on past precedent but would have to reassess continually whether a crime had become—or ceased to be—a violent felony, depending on how felons in recent years had chosen to commit that particular crime. Constant statistical reassessment would raise questions regarding the standard of review. Now, courts review the

²³⁹ *James v. United States*, 550 U.S. 192, 207 (2007).

²⁴⁰ *Chambers v. United States*, 129 S. Ct. 687, 692 (2009).

²⁴¹ *Id.* (“The question is whether such an offender is significantly more likely than others to attack, or physically to resist, an apprehender, thereby producing a ‘serious potential risk of physical injury.’” (quoting 18 U.S.C. § 924(e)(2)(B)(ii) (2006))).

²⁴² *Chambers*, 473 F.3d at 727.

²⁴³ *Chambers*, 129 S. Ct. 687, 692 (2009) (citing U.S. SENTENCING GUIDELINES MANUAL § 2P1.1).

²⁴⁴ U.S. SENTENCING COMM’N, REPORT ON FEDERAL ESCAPE OFFENSES IN FISCAL YEARS 2006 AND 2007, 6 (2008), available at http://www.ussc.gov/general/escape_FY0607_final.pdf.

²⁴⁵ *Chambers*, 129 S. Ct. at 692–93.

determination of whether a crime constitutes a violent felony under the ACCA de novo, as a matter of law. But to the extent that statistics form the factual basis for the legal conclusion, appellate courts might owe some deference to the district court's statistical findings. On the other hand, many months could pass between sentencing and appellate review, enough time for new and different statistics to develop. If the violent felony determination is legal, perhaps the appellate courts should consider those new statistics de novo. The mixed legal/factual nature of and the constant developments surrounding any statistical analysis may complicate an already onerous task. A sample size larger than the two-year period analyzed in *Chambers* would likely stabilize the statistics of particular crimes and alleviate many of these burdens.

The Seventh Circuit has demonstrated a particular affinity for the statistical approach. Its decision in *Spells*²⁴⁶ used—or rather, misused—statistics to conclude that one who flees law enforcement is a likely shooter. The court employed Department of Justice statistics showing that one in four “inmates convicted for brandishing or displaying a firearm[] had used the gun in this manner . . . to get away.”²⁴⁷ Somehow, *Spells* completely inverted that statistic, claiming that the statistic indicated the offender's increased “propensity to use that firearm in an effort to evade arrest.”²⁴⁸ The statistic refers to the number of criminals convicted of brandishing a firearm who had used that firearm to “get away” from law enforcement in one way or another. It says *nothing* about the frequency of criminals convicted of fleeing law enforcement who brandished a firearm. *Spells* misconstrued the statistic another way: *Begay* asked whether the prior offense is violent, not necessarily whether the prior offense involved a firearm. The presence of one does not necessarily lead to the presence of another. Still, that distorted evidence supported the court's conclusion that the crime is a violent felony.²⁴⁹

Another post-*Begay* decision from the Seventh Circuit, *United States v. Templeton*, strongly favored the use of statistics in discerning whether a crime is a crime of violence under the career offender guideline.²⁵⁰ Before applying *Begay*, the court examined the risk of physical injury in Wisconsin convictions for escape and failure to report.²⁵¹ The defendant

²⁴⁶ *United States v. Spells*, 537 F.3d 743 (7th Cir. 2008).

²⁴⁷ *Id.* at 752 (internal quotations marks omitted).

²⁴⁸ *Id.*

²⁴⁹ *Id.* at 752–53 (“This link between using a vehicle to flee an officer, and that same individual's likelihood of using a gun when fleeing in the future, distinguishes this crime from those listed by the Court in *Begay* as being ‘dangerous,’ but not reflective of someone ‘whom one normally labels [an] armed career criminal[.]’” (alteration in *Spells*) (quoting *Begay v. United States*, 553 U.S. 137, 146 (2008))).

²⁵⁰ 543 F.3d 378, 381 (7th Cir. 2008) (“[W]hen a statute inquires into risk, data trump judicial guesses.”).

²⁵¹ *Id.* at 381–82.

presented statistics showing that these crimes entailed violence only eleven percent to fifteen percent of the time.²⁵² That figure was based on the indictments of those convicted of failure to report and escape and whether they were also “charged under one of four statutes punishing some form of resisting arrest”²⁵³ The more relevant question, for purposes of the categorical approach, is whether the defendants were also *convicted* of resisting arrest. *Templeton* acknowledged that an indictment alleging “forceful resistance to arrest does not establish that violence occurred.”²⁵⁴ Nonetheless, an eleven percent to fifteen percent incidence of injury is “serious,” the court said, relying on precedent that even “a 2% incidence of injury from a crime renders the risk ‘serious.’”²⁵⁵ More reliable statistics, however, showed that violence occurred during escapes between 2.7% and eight percent of the time.²⁵⁶ Even that low frequency, the court said, is a “sufficient risk of injury” for escape to count as a crime of violence.²⁵⁷

Once the court established the risk of violence, a necessary but not sufficient condition of a violent felony, it applied *Begay*.²⁵⁸ Both escape and failure to report are purposeful and *could* be committed in violent or nonviolent ways, though neither crime *requires* violence or aggression. Failure to report is certainly not a violent felony, the court quickly held,²⁵⁹ but escape *may* be.²⁶⁰ The difference between the court’s treatments of the two crimes, it appears, is the slight statistical likelihood of violence of escape, even though the court did not present any comparable statistics on failure to report. Because of that small likelihood, the court remanded so that the district court could “determine in what way the defendant committed the offense.”²⁶¹

Templeton exemplified the pitfalls of the statistical approach, even where judges use statistics accurately. Goalposts move, depending on the court or the judge. How violent is violent? For some judges on the

²⁵² *Id.* at 381.

²⁵³ *Id.*

²⁵⁴ *Id.* at 382.

²⁵⁵ *Id.* at 381.

²⁵⁶ *Id.*

²⁵⁷ *Id.*

²⁵⁸ *Id.* at 382.

²⁵⁹ *Id.* at 383 (“A walkaway is not a crime of violence under *Begay*. Nor is a simple failure to report to custody . . .”).

²⁶⁰ *Id.* at 382 (“Escapes that entail violence . . . involve purposeful, violent, and aggressive conduct.” (internal quotations marks omitted)).

²⁶¹ *Id.* at 384. The statistical approach has its detractors. Another Seventh Circuit panel, in *United States v. Hart*, 578 F.3d 674 (7th Cir. 2009), doubted that statistics can help determine whether a crime is necessarily violent. The *Hart* court held that a conviction for the federal crime of escape is not a crime of violence because “one can commit escape under the federal statute without putting oneself, or anyone else, in harm’s way.” *Id.* at 681. *Chambers* did not establish that “there is some statistical cutoff separating violent from non-violent crimes” *Id.* Rather, the statistics in *Chambers* merely “elucidate the difficulties inherent in attempting to ascribe a single violent or non-violent ‘nature’ to crimes committed under such a broadly applicable statute.” *Id.*

Seventh Circuit, a two percent incidence of violence during the commission of a particular crime demonstrates that the crime is legally violent. The placement of that line seems arbitrary. If an incidence as low as two percent is violent, then perhaps any likelihood greater than zero will qualify the crime as legally violent. Courts may use statistics to confirm “intuitive” beliefs that a crime is violent or not.²⁶² As Judge Alex Kozinski recently wrote, there is no basis in the law for determining whether “most of the cases” involve dangerous conduct: “Don’t even think about how a court is supposed to figure out whether a statute is applied in a certain way ‘most of the time.’ (A statistical analysis of the state reporter? A survey? Expert evidence? Google? Gut instinct?)”²⁶³

Without any standards, the statistical approach is a dressed-up version of the imaginary ordinary crime approach and the smell test. Ultimately, they are all subjective inquiries that guesstimate the violence of crimes whose elements do not require violent conduct. These methods clearly conflict with the categorical approach. Further, under this method, the ACCA and its definition of “violent felony” lack independent meaning—they change according to criminals’ behavior from one year to the next. And the law varies even more widely depending on a court’s chosen metric. Such a capricious method of statutory interpretation cannot adequately place offenders on notice of which actions trigger the ACCA and its fifteen-year minimum sentence or the career offender guideline and its sixteen-level sentencing enhancement.

VI. RECONCILING THE CATEGORICAL APPROACH, *BEGAY*, AND THE TEXT OF THE ACCA

Lower courts interpreting the ACCA’s residual clause face a difficult task: reconciling the statutory text, the categorical approach, and *Begay*’s requirement that the crimes be “typically” purposeful, violent, and aggressive. This Article has presented three major problems with the post-*Begay* application of the residual clause. First, *James* and *Begay* supplied the tools to deviate from the categorical approach. *James*’s “ordinary case” language, *Begay*’s invitation to examine how an offense is “typically” committed, and *Begay*’s likely shooter consideration create room for courts to look beyond the statutory elements of the prior conviction. Second, *Begay* created the temptation to deviate from the categorical approach. If courts strictly apply the categorical approach and *Begay*’s “purposeful, violent, and aggressive” requirement, they are forced

²⁶² *Chambers v. United States*, 129 S. Ct. 687, 692 (2009) (“The upshot is that the study strongly supports the intuitive belief that failure to report does not involve a serious potential risk of physical injury.”).

²⁶³ *United States v. Mayer*, 560 F.3d 948, 952 (9th Cir. 2009) (Kozinski, J., dissenting from denial of rehearing en banc).

to exclude crimes involving conduct that clearly presents a serious potential risk of physical injury. The “purposeful” requirement seems to exclude some seriously risky crimes of negligence and recklessness, and creates tension with the career offender sentencing guideline. The “violent” requirement excludes many sex crimes against children. Lower courts are placed in the unenviable position of holding that seriously risky crimes are not violent felonies. Third, some lower courts are using the supplied tools to deviate from the categorical approach or to ignore some or all of *Begay*’s key holding.

The status quo is untenable. Given wide latitude by *Begay*’s ambiguous instructions, some lower courts actively circumvent the categorical approach to avoid a strict application of *Begay*’s “purposeful, violent, and aggressive” test and include crimes that clearly present a serious risk of physical injury. These courts need a new framework that includes more of these crimes while faithfully applying *Begay* and the categorical approach.

A new framework that addresses most of *Begay*’s problems is available. An examination of the alternative paths separates the better practices from the poor practices. After *Begay*, lower courts can choose from a few different combinations of the categorical approach and *Begay*’s “purposeful, violent, and aggressive” requirement. A court could apply the “purposeful, violent, and aggressive” test to the statutory elements of the prior convictions strictly following the categorical approach. By ignoring the “ordinary case,” this path excludes some crimes that should plainly qualify under the text of the residual clause, like negligent vehicular homicide in *United States v. Gray*²⁶⁴ and sexual assault in *United States v. Wynn*.²⁶⁵ The other options dilute either the categorical approach or the “purposeful, violent, and aggressive” requirement. One option is to apply the “purposeful, violent, and aggressive” requirement to the “typical” or “ordinary case,” effectively ignoring the categorical approach. This path includes more crimes that should qualify under the text of the residual clause, like fleeing law enforcement in *United States v. West*.²⁶⁶ The third option is to apply a diluted “purposeful, violent, and aggressive” requirement (by ignoring some elements or disregarding it altogether) while strictly following the categorical approach. Judge Easterbrook’s dissent in *Woods* exemplifies this option, which would also include more crimes that qualify under the text of the residual clause.²⁶⁷

²⁶⁴ 535 F.3d 128 (2d Cir. 2008).

²⁶⁵ 579 F.3d 567 (6th Cir. 2009). For a discussion of the residual clause and crimes of sexual assault, see *supra* Part V.C.

²⁶⁶ 550 F.3d 952 (10th Cir. 2008); see also *supra* note 202 and accompanying text (discussing appellate courts’ treatment of the crime of fleeing law enforcement under the residual clause).

²⁶⁷ See *supra* notes 132–36 and accompanying text for a discussion of Judge Easterbrook’s dissent in *Woods*.

A fourth option, exemplified by the Seventh Circuit's decision in *United States v. Dismuke*,²⁶⁸ deserves an especially close look. As discussed above, *Dismuke* held that a Wisconsin conviction for vehicular fleeing is a violent felony, based on *Spells* and its progeny from other circuits.²⁶⁹ Leading up to that basic holding, though, the court laid out a framework that diluted both the categorical approach and *Begay*'s test by relying on the Supreme Court's "typically" and "ordinary case" language. Not "every conceivable violation of the statute [of the offense must] meet the *Begay* test."²⁷⁰ Instead, the court examined "the conduct encompassed by the statutory elements of the crime, in the ordinary or typical case"²⁷¹ By this rendering of the categorical approach, *Begay* applies to the ordinary commission of the crime as the court imagines it.

Turning to the impact of *Begay*, *Dismuke* minimized the "purposeful, violent, and aggressive" requirement more than any other appellate court to date. First, the court emphasized *Begay*'s holding that a residual clause crime must present a risk of injury similar in kind and degree to the enumerated crimes.²⁷² Second, *Dismuke* treated "purposeful" as a hard-and-fast element of *Begay*'s test, but regarded "violent and aggressive" as much more flexible. The court argued that residual clause crimes must have a mens rea of "purposeful" or "intentional" conduct because all of the enumerated crimes are purposeful.²⁷³ But that statement is not accurate: "crimes involving the use of explosives" may not require any mens rea, as Justice Scalia pointed out in his *Begay* concurrence.²⁷⁴ *Begay*'s "violent and aggressive" requirement, though, is less demanding in the eyes of the *Dismuke* court because the enumerated crimes do not "invariably involve acts of violence."²⁷⁵ Rather, "violent and aggressive" is merely "a descriptive phrase," characterizing the crimes' common "aggressive conduct that carries the genuine potential for violence."²⁷⁶ Therefore, "the 'violent and aggressive' limitation requires only that a residual-clause predicate crime be characterized by aggressive conduct with a similar potential for violence."²⁷⁷ In the aggregate, these dilutions of *Begay* require only purposeful mens rea and that the statutory elements of the crime be "encompassed" by aggressive conduct with a potential for violence similar to that of the enumerated crimes.

Although *Dismuke* thoroughly analyzed *Begay* in light of the ACCA's

²⁶⁸ *United States v. Dismuke*, 593 F.3d 582 (7th Cir. 2010).

²⁶⁹ *Id.* at 596.

²⁷⁰ *Id.* at 594.

²⁷¹ *Id.* (emphasis added).

²⁷² *Id.* at 591–92.

²⁷³ *Id.* at 592.

²⁷⁴ *Begay v. United States*, 553 U.S. 137, 158 (2008) (Scalia, J., concurring).

²⁷⁵ *Dismuke*, 593 F.3d at 594.

²⁷⁶ *Id.*

²⁷⁷ *Id.*

text, its approach still suffers from a glaring inconsistency with Supreme Court precedent: it plainly examines information beyond “the fact of conviction and the statutory definition of the prior offense.”²⁷⁸ With each careful step, *Dismuke* narrowed *Begay* to require only a “purposeful” mens rea. The remainder of *Begay*’s test, “violent and aggressive,” is so weakened that a court can effectively ignore “violent” and focus on the presence of what it deems to be “aggressive” conduct, even though the government never had to prove such an element to convict. Admittedly, the *Dismuke* court had to pick through the Supreme Court’s conflicting signals and choose a reasonable path. And the court largely succeeded. Vehicular fleeing seems like a violent felony according to the text of the residual clause, and the “typically” and “ordinary case” language from *Begay* and *James* support a diluted categorical approach.

But the categorical approach is the one aspect of ACCA jurisprudence that should not yield, given its grounding in the Sixth Amendment right to a jury trial,²⁷⁹ even if that means excluding some extremely risky crimes. All four of the outlined paths carry the same disadvantage: minimizing or disregarding an aspect of the Supreme Court’s ACCA precedent. The question is which solution both faithfully adheres to precedent, and includes as many crimes as possible that qualify as violent felonies under the plain text of the residual clause (crimes involving conduct that presents a serious risk of potential injury to another). Such a solution must give the categorical approach priority over other strains of the Supreme Court’s ACCA precedent. The categorical approach has major drawbacks. Its complex steps can easily trip up a court examining the statutory elements of a conviction, especially when the statute contains disjunctive elements, and its inflexibility may not accommodate statutes not written with the ACCA or *Begay*’s three-part test in mind.²⁸⁰ But basic principles of fairness and the Sixth Amendment right to a jury trial mandate that sentencing courts consider only the legal elements and admissions of the prior conviction, not hypothetical visions of that crime. Given the significant ambiguity still surrounding the residual clause even after a series of Supreme Court decisions and scores of appellate decisions, the

²⁷⁸ *Id.* at 589 (quoting *Shepard v. United States*, 544 U.S. 13, 17 (2005)).

²⁷⁹ See *supra* note 49 and accompanying text for a discussion of the categorical approach and the ACCA.

²⁸⁰ A strict categorical approach would also minimize the courts’ time spent analyzing crimes: either the crime’s statutory elements contain the necessarily elements or not. The “ordinary case” approach, in contrast, tends to require much more thought and labor; however, some courts simply state that the crime increases the likelihood of a confrontation without any further analysis. See *United States v. Patillar*, 595 F.3d 1138, 1140 (10th Cir. 2010) (claiming that the conduct underlying the crime of larceny from the person “is violent and aggressive because it creates a significant risk of confrontation between thief and victim”).

law should err on the side of lenity to the defendant.²⁸¹ Therefore, when forced to choose between the categorical approach and *Begay*, courts should strictly follow the categorical approach and, if necessary, minimize aspects of *Begay*.

With these principles in mind, courts should disregard the ACCA precedent most at odds with the categorical approach: *Begay*'s "typically" language and *James*'s "ordinary case." Defining the scope of the residual clause by comparison to the enumerated crimes, *Begay* argued that the enumerated crimes all "typically involve" purposeful, violent, and aggressive conduct. Elsewhere, *Begay* excluded a DUI as a violent felony because "statutes that forbid driving under the influence . . . typically do not insist on purposeful, violent, and aggressive conduct." As explained above, the typical or ordinary commission of a crime is simply beyond the scope of the statutory elements required to convict a person for a crime.

The "likely shooter" consideration from *Begay* should suffer the same fate. *Begay*'s claim that purposeful, violent, and aggressive conduct "is such that it makes more likely that an offender, later possessing a gun, will use that gun deliberately to harm a victim" merely illustrated its central test. Contrary to the Court's claim, the consideration is a judicial innovation rather than rooted in the statute's title or text.²⁸² *Begay*'s outcome did not turn on DUI's incompatibility with that consideration. Therefore, courts should regard the "likely shooter" as descriptive dicta, which they are free to disregard in future cases. Further, the consideration invites an imaginative application of the residual clause: could the court imagine an auto thief or a shoplifter using a gun to harm a victim in a later crime? That question is likewise unrelated to the statutory elements of which the defendant was actually convicted.

With the categorical approach as the lodestar, the only way to include more crimes that qualify as violent felonies under the plain text of the residual clause is to disregard the non-binding aspects of *Begay*'s "purposeful, violent, and aggressive" test. The apparent mandate that residual clause crimes require "purposeful" conduct is the weakest and most problematic part of *Begay*'s three-part test. *Begay* applied its test to a strict liability crime, a New Mexico DUI conviction. *Begay* only implied that crimes of recklessness and negligence cannot qualify as residual clause crimes without actually addressing any such crimes. Therefore, the only rationale actually necessary to *Begay*'s result is that strict liability crimes

²⁸¹ "Where it is reasonably avoidable, such indeterminateness is unacceptable in the context of criminal sanctions. The rule of lenity, grounded in part on the need to give 'fair warning' of what is encompassed by a criminal statute, demands that we give this text the more narrow reading of which it is susceptible." *James v. United States*, 550 U.S. 192, 219 (2007) (Scalia, J., dissenting) (quoting *U.S. v. Bass*, 404 U.S. 336, 348 (1971)).

²⁸² See *supra* Part III.B.

are not violent felonies under the residual clause.²⁸³ Since *Begay*, the Court has not had the occasion to extend the “purposeful, violent, and aggressive” test to crimes of recklessness and negligence. Therefore, language purporting to require intentional conduct should be considered dicta.²⁸⁴ Nothing in the text of the ACCA provides any reason to limit the residual clause to intentional crimes. Moreover, if the residual clause is defined by the characteristics of the preceding enumerated crimes, it is notable that one of those crimes, use of explosives, “may involve merely negligent or reckless conduct.”²⁸⁵ Furthermore, by including all crimes that pose a “serious potential risk of injury,” the residual clause plainly includes seriously dangerous crimes of negligence or recklessness.

As discussed above, Judge Easterbrook has offered another way to reconcile the categorical approach and *Begay*’s apparent “purposeful” requirement.²⁸⁶ In *Woods*, Judge Easterbrook argued that intent as to a requisite act, instead of the natural consequences of the act, is sufficiently purposeful to qualify as a violent felony under *Begay*. This argument’s greatest attraction is that it avoids ignoring a fairly clear direction (the “purposeful” requirement) from the Supreme Court. Nonetheless, it may be too clever by half. A mens rea of “purposely” usually requires that the offender intended a certain nature of conduct or the natural consequences of the act.²⁸⁷ The Indiana involuntary manslaughter statute at issue in *Woods* clearly did not qualify under the common concept of a purposeful mens rea. The statute’s mens rea pertains only to the *unintentional* killing.²⁸⁸ Because the Indiana involuntary manslaughter statute obviously required reckless, not purposeful, conduct, Judge Easterbrook’s argument requires a unique definition of mens rea for the ACCA and the career offender guideline and another definition of mens rea for the rest of criminal law. Such a maneuver, while helpful to this present problem,

²⁸³ See *supra* Part IV.A for a discussion of the “purposeful, violent, and aggressive” test.

²⁸⁴ See *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 66–67 (1996) (“We adhere . . . not to mere *obiter dicta*, but rather to the well-established rationale upon which the Court based the results of its earlier decisions. When an opinion issues for the Court, it is not only the result but also those portions of the opinion necessary to that result by which we are bound.”).

²⁸⁵ *Begay v. United States*, 553 U.S. 137, 152 (2008) (Scalia, J., concurring).

²⁸⁶ See *supra* notes 132–36 and accompanying text for a discussion of Judge Easterbrook’s dissent in *Woods*.

²⁸⁷ MODEL PENAL CODE § 2.02(a) (“A person acts purposely with respect to a material element of an offense when: (i) if the element involves the nature of his conduct or a result thereof, it is his conscious object to engage in conduct of that nature or to cause such a result; and (ii) if the element involves the attendant circumstances, he is aware of the existence of such circumstances or he believes or hopes that they exist.”); see also Cynthia V. Ward, *Punishing Children in the Criminal Law*, 82 NOTRE DAME L. REV. 429, 456 (2006) (“[T]he mens rea of conscious purpose requires that the defendant understand *and intend* the probable consequences of his actions.”).

²⁸⁸ 720 ILL. COMP. STAT. ANN. 5/9-3(a) (2010) (“A person who *unintentionally* kills an individual without lawful justification commits involuntary manslaughter if his acts *whether lawful or unlawful* which cause the death are such as are likely to cause death or great bodily harm to some individual, and he performs them *recklessly*” (emphasis added)).

turns the statute on its head and casts doubt on all statutes utilizing the common language of mens rea.

Reading *Begay* as still including crimes of negligence or recklessness would give effect to the text of the ACCA and common sense rather than non-binding dicta. Crimes like involuntary manslaughter, reckless endangerment, and negligent vehicular homicide would again qualify as violent felonies under the residual clause. This interpretation would also resolve most of the tension between the ACCA and the career offender guideline. If crimes of violence are not limited to purposeful crimes, then courts can give the guideline's commentary its due and controlling weight.

Begay's requirements that a residual clause crime be categorically violent and aggressive are not so easily neglected. The two requirements may have constituted dicta at the time of *Begay* because they were not necessary to the outcome of the case. The Court could have disposed of the case based only on the strict liability of the New Mexico DUI statute. But if the requirements were dicta after *Begay*, *Chambers* eliminated that possibility. *Chambers* held that a prior Illinois conviction for failure to report did not qualify as a violent felony under the residual clause.²⁸⁹ The statute at issue in *Chambers* required knowing conduct,²⁹⁰ so the Court could not dispose of the case on the same grounds as in *Begay*. Rather, the crime failed to qualify for lack of violent conduct: "[A]n individual who fails to report would seem unlikely . . . to call attention to his whereabouts by simultaneously engaging in additional violent and unlawful conduct."²⁹¹ Though the Court's discussion of likelihoods did not exemplify the categorical approach, *Chambers* certainly turned on the lack of violent conduct. After *Chambers*, only crimes that require violent conduct may qualify as violent felonies.

The impact of *Begay*'s "aggressive" requirement is still unclear. *Chambers* addressed the lack of aggressive conduct in the crime of failure to report just once in the opinion: "The behavior that likely underlies a failure to report would seem less likely to involve a risk of physical harm than the less passive, more aggressive behavior underlying an escape from custody."²⁹² Although this comparison between failure to report and escape from custody may be correct as an "intuitive belief,"²⁹³ the Illinois statute does not actually *require* aggressive conduct for either crime. Neither *Begay* nor *Chambers* distinguished the aggressive requirement

²⁸⁹ *Chambers v. United States*, 129 S. Ct. 687, 693 (2009).

²⁹⁰ See 720 ILL. COMP. STAT. 5/31-6(a) (2010) ("A person convicted of a felony . . . who *knowingly* fails to report to a penal institution or to report for periodic imprisonment at any time or *knowingly* fails to return from furlough or from work and day release or who *knowingly* fails to abide by the terms of home confinement is guilty of a Class 3 felony." (emphasis added)).

²⁹¹ *Chambers*, 129 S. Ct. at 692.

²⁹² *Id.* at 691.

²⁹³ *Id.* at 692.

from the violent requirement. Perhaps “aggressive” was a mere rhetorical flourish, not significantly different from “violent.” Without further direction or any common criminal law definition for “aggressive,” courts may safely assume that crimes that require violent conduct also satisfy *Begay*’s “aggressive” requirement.²⁹⁴

Of *Begay*’s “violent and aggressive” requirements, only “violent” is essential to crimes falling under the residual clause of the ACCA. While this narrow reading of *Begay* includes many more crimes that pose a serious potential risk of physical injury, it carries two major disadvantages. First, if the residual clause includes only crimes with a statutory element of violence, such a reading arguably renders the residual clause superfluous because clause (i) of the “violent felony” definition already encompasses elements involving the use or threat of force. Nonetheless, the residual clause is still broader than clause (i) because it also includes the “risk” of violence. Second, this framework still excludes many sex crimes against children that do not require violent conduct even though the text of the residual clause arguably includes sex crimes against children.²⁹⁵ But both of these disadvantages spring from *Begay*, rather than this framework. *Begay* has effectively superceded the statutory text, requiring violence instead of only the serious risk of violence. Lower courts should not consider hypothetical conduct outside the statutory elements of the prior conviction, even if this reading creates a statutory redundancy and fails to include many crimes that pose a serious potential risk of bodily injury. The hands of lower courts are tied until the Supreme Court reconsiders or recasts *Begay*, or Congress amends the ACCA.

Courts should limit the residual clause inquiry to the fact of the conviction and the elements of the offense. From that information, the court should determine whether the statute requires conduct that presents a serious potential risk of physical injury: violent conduct that is committed negligently, recklessly, or intentionally. If the statute of conviction is disjunctive, the court should examine the indictment, other charging documents, or any plea agreement or colloquy “‘only to determine which part of the statute the defendant violated.’”²⁹⁶ If neither the statute nor the charging documents indicate that the elements of the defendant’s crime of conviction required violence, then the court should not include the offense as a violent felony. The court should limit its inquiry to these facts and documents. It should not investigate the defendant’s uncharged conduct or speculate on the possibility that she could violently commit the crime.

²⁹⁴ See *supra* notes 88–91 and accompanying text for a detailed discussion of the “aggressive” requirement.

²⁹⁵ See *supra* Part IV.C for a discussion of the “violent” requirement excluding sex crimes against children.

²⁹⁶ *United States v. Smith*, 544 F.3d 781, 786 (7th Cir. 2008) (quoting *United States v. Howell*, 531 F.3d 621, 622–23 (8th Cir. 2008)).

Imagine that the federal sentencing court had applied this approach to the case of Melvin Spells and his prior conviction for fleeing law enforcement. A person can violate the Indiana statute in a number of ways. Mr. Spells was convicted of the Class D felony version, which required that he used a vehicle to commit the offense or committed it in a dangerous manner.²⁹⁷ The sentencing court should have initially determined under which subsection he was convicted, using the indictment, other charging documents, or any plea agreement or colloquy, instead of the probable cause affidavit.²⁹⁸ If those documents did not clarify which crime the defendant committed, the categorical approach inquiry would normally end and the crime could not qualify as a violent felony.²⁹⁹ But if the documents showed that Mr. Spells was convicted of using a vehicle to resist law enforcement, it would then decide whether that crime is categorically violent—whether the statutory elements included violence and a mens rea of at least negligence. The statute requires at least knowing or intentional conduct, so *Begay*'s prohibition of strict liability crimes does not disqualify it. But the statute does not require violent conduct, so it should not have qualified as a violent felony under the residual clause.

The hypothetical treatment of Mr. Spells's case demonstrates both the costs and benefits of this Article's proposal. The costs are mostly policy-based. The complex categorical approach burdens and confuses courts. The crime of resisting law enforcement in a vehicle *seems* like it "presents a serious potential risk of bodily injury."³⁰⁰ But these costs are worth bearing in light of the chief benefit: punishing a defendant based only on facts that the government actually had to prove beyond a reasonable doubt to secure a conviction, rather than based on the court's imagination.

²⁹⁷ United States v. Spells, 537 F.3d 743, 745–46 (7th Cir. 2008). The offense of fleeing law enforcement is a

Class D felony if: (A) . . . the person uses a vehicle to commit the offense; or (B) . . . the person draws or uses a deadly weapon, inflicts bodily injury on or otherwise causes bodily injury to another person, or operates a vehicle in a manner that creates a substantial risk of bodily injury to another person.

Id. at 749–50 (quoting IND. CODE § 35-44-3-3(b)).

²⁹⁸ See *id.* at 748–50 (listing the procedures a court must follow in determining whether a crime constitutes a violent felony).

²⁹⁹ The Seventh Circuit incorrectly skipped this step. The sentencing court procedurally erred by consulting the probable cause affidavit to determine whether Mr. Spells used a vehicle to flee law enforcement. *Id.* at 745–46, 750. "Whether such a procedural violation occurred is only of significance if certain Class D felony violations of Indiana's Resisting Law Enforcement offense would not constitute a 'violent felony.'" *Id.* at 750. The court went on to decide whether using a vehicle to flee law enforcement is a violent felony, even though it was not clear whether Mr. Spells committed that crime. *Id.*

³⁰⁰ *Id.* at 748 (citing 18 U.S.C. § 924(e)(2)(B) (2006)).

VII. CONCLUSION

Consistency, fairness to the defendant, faithfulness to the text of the ACCA, and adherence to Supreme Court precedent all point toward the strict categorical approach and reading *Begay* as requiring that the residual clause crimes include statutory elements of “violence.” Congress and the Supreme Court bear the most responsibility for the confusion surrounding the residual clause of the ACCA. Congress should clarify the scope of the residual clause. The Supreme Court should refine its approach with more precise opinions that hew closely to the text of the ACCA and prior precedent. Until they act, however, lower courts have the tools to discharge their responsibilities to the Constitution, the law, and judicial precedent.