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Resolving the Post-Begay Maelstrom Statutory Rape as a Violent Felony Under the Armed Career Criminal Act

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RESOLVING THE POST-*BEGAY* MAELSTROM: STATUTORY RAPE AS A VIOLENT FELONY UNDER THE ARMED CAREER CRIMINAL ACT

SARENA M. HOLDER*

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I. INTRODUCTION

The Armed Career Criminal Act (“ACCA”),¹ enacted in 1984, mandates a minimum fifteen-year sentence² for defendants who unlawfully possess a firearm³ and who also have three prior convictions for violent felonies and/or serious drug offenses.⁴ Since its inception, the ACCA has presented a weighty problem: what constitutes a “violent” felony?⁵ A seemingly self-explanatory phrase, the language in the statute has nevertheless proven woefully inadequate in determining what crimes qualify for the enhanced sentencing required under the ACCA.⁶

The United States Supreme Court has made an effort to allay the confusion, most recently in its decision in *Begay v. United States*,⁷ requiring that violent felonies be purposefully violent or aggressive.⁸ This definition, however, along with the Court’s

¹ Armed Career Criminal Act (ACCA), 18 U.S.C. § 924(e) (2006).

² Although the prudence of mandatory minimum sentences are beyond the scope of this Note, there has been significant debate regarding the imposition of enhanced sentencing and mandatory minimums. *Compare Mandatory Minimum Sentencing Laws - The Issues: Hearing Before the Subcomm. on Crime, Terrorism, and Homeland Security of the H. Comm. on the Judiciary*, 110th Cong. (2007) (contending that eliminating mandatory minimum sentencing guidelines would result in sentences that are too lenient given the offense), and U.S. SENTENCING COMM’N, SPECIAL REPORT TO THE CONGRESS: MANDATORY MINIMUM PENALTIES IN THE FEDERAL CRIMINAL JUSTICE SYSTEM 13 (1991), available at http://www.ussc.gov/Legislative_and_Public_Affairs/Congressional_Testimony_and_Reports/Mandatory_Minimum_Penalties/199108_RtC_Mandatory_Minimum.htm (arguing that mandatory minimum sentences prevent crime because those who are incapacitated as a result of such sentences are unable to commit additional crimes while imprisoned, and that mandatory minimum sentences deter convicted and potential criminals from committing crime and that they ensure fairness in sentencing), with BARBARA S. VINCENT & PAUL J. HOFER, FED. JUDICIAL CTR., THE CONSEQUENCES OF MANDATORY MINIMUM PRISON TERMS: A SUMMARY OF RECENT FINDINGS 14 (1994), available at <http://ftp.resource.org/courts.gov/fjc/conmanmin.pdf> (“Mandatory minimums have had no observable effect on crime.”).

³ 18 U.S.C. § 924(g)(4) (2006).

⁴ 18 U.S.C. § 924(e)(1) (2006).

⁵ 18 U.S.C. § 924(e)(2)(B) (2006).

⁶ *See, e.g.*, *United States v. Shannon*, 110 F.3d 382, 387 (7th Cir. 1997) (upholding conviction for participating in sexual intercourse with thirteen-year-old female complainant as a crime of violence); *United States v. Dickerson*, 77 F.3d 774, 777 (4th Cir. 1996) (upholding conviction for felony attempted escape from custody as a crime of violence since it involves conduct that presents serious risk of physical injury to others); *United States v. Hascall*, 76 F.3d 902, 906 (8th Cir. 1996) (holding that burglaries of commercial properties qualify as predicate crimes of violence for sentence-enhancement purposes); *United States v. Rutherford*, 54 F.3d 370, 377 (7th Cir. 1995) (upholding conviction for vehicular assault while intoxicated as crime of violence); *United States v. Weekley*, 24 F.3d 1125, 1127 (9th Cir. 1994) (holding that trial court did not commit reversible error in refusing to count attempted burglary as predicate crime of violence); *United States v. Poff*, 926 F.2d 588, 593 (7th Cir. 1991) (holding that writing threatening letters to public officials is a crime of violence).

⁷ *Begay v. United States*, 553 U.S. 137 (2008).

⁸ *Id.* at 144.

holding in *Chambers v. United States*⁹—seemingly relying on the pre-*Begay* test of whether the predicate offense poses a “serious potential risk of physical injury to another”¹⁰—has further muddied the waters regarding strict liability crimes that lack the requisite *mens rea* for violence under *Begay*.¹¹ The crime colloquially referred to as “statutory rape” is one such crime, and the circuits are split on whether to regard it as a crime of violence.¹² This Note questions the reasoning of circuit courts that have disallowed statutory rape as a violent felony post-*Begay*, a stance that has generally been supported by the argument that, as a strict liability crime¹³ that is often “consensual,” a statutory rape cannot be uniformly typified as “purposeful” or “aggressive.”¹⁴

Rather than construing the acquiescence of a minor to intercourse as “consent” that negates the aggression required under *Begay*, the focus of the courts should instead be on the reason that the legislatures in all states have rendered sex with a minor a strict liability crime: a child lacks the ability to give any legally-cognizable consent.¹⁵ This well-settled rule of law should create a presumption that, if an adult knowingly engages in sexual intercourse with a minor below the age of consent, such intercourse is inevitably the result of a purposeful “aggression” against the child on the part of the offender. Such a presumption is implied by the nature of the crime itself and by the manner in which the states have drafted their statutory rape legislation. Adopting this rule would remedy the post-*Begay* confusion with regards to strict liability sex crimes that center on the inability of the victims to form consent.

⁹ *Chambers v. United States*, 555 U.S. 122 (2009).

¹⁰ *Id.* at 128.

¹¹ *See Begay*, 553 U.S. at 145.

¹² *See* Michael M. O’Hear, *Seventh Circuit Decides That Reckless Injury and Statutory Rape Are Not “Crimes of Violence,”* MARQ. UNIV. L. SCH. FACULTY BLOG (Jan. 27, 2010), <http://law.marquette.edu/facultyblog/2010/01/27/seventh-circuit-decides-that-reckless-injury-and-statutory-rape-are-not-crimes-of-violence/>.

¹³ Statutory rape laws historically prohibited sexual conduct between persons above and below a codified “age of consent.” Today, they are generally strict liability crimes, although some courts have allowed a mistake of age defense. *See, e.g.,* *People v. Hernandez*, 393 P.2d 673, 677 (Cal. 1964) (allowing mistake of age defense to statutory rape charge where defendant held “reasonable belief” that female complainant was above the age of consent). *See also* Catherine L. Carpenter, *On Statutory Rape, Strict Liability, and the Public Welfare Offense Model*, 53 AM. U. L. REV. 313 (2003); Jarrod Forster Reich, Note, *The Need for a Mistake of Age Defense in Child Rape Prosecutions*, 57 VAND. L. REV. 693 (2004).

¹⁴ *See* *United States v. McDonald*, 592 F.3d 808 (7th Cir. 2010); *see also* *United States v. Thornton*, 554 F.3d 443, 444 (4th Cir. 2009) (holding that a Virginia statute making it a felony to have non-forcible sexual contact with a child between the ages of thirteen and fifteen was not a violent felony post-*Begay*); *United States v. Christensen*, 559 F.3d 1092, 1095 (9th Cir. 2009) (noting that “because statutory rape may involve consensual sexual intercourse . . . it does not necessarily involve either ‘violent’ or ‘aggressive’ conduct”).

¹⁵ *See* *People v. Gonzales*, 561 N.Y.S.2d 358, 361 (N.Y. Sup. Ct. 1990) (“It has long been recognized that the state has the authority to regulate the sexual conduct of its minors by setting age limits to establish whether the individual is sufficiently mature to make intelligent and informed decisions and to consent to certain activities.”).

In furtherance of this view, Part II of this Note seeks to define statutory rape in light of how the elements differ by jurisdiction. Part III explores the legislative history of the ACCA's enhanced sentencing provisions and its definition of violent felonies for the purpose of enhanced sentencing, and compares this language to that of other federal sentencing guidelines. Part IV describes the United States Supreme Court rulings in *Begay v. United States* and *Chambers v. United States* and how these cases have contributed to the ongoing evolution of the definition of a "violent felony" or a "crime of violence." Part V examines statutory rape as a predicate violent felony and proposes a rule that would, in accordance with *Begay*, presume aggression in the absence of consent. Part VI considers the serious risks of physical harm to minors that may result from sexual activity with an adult offender, and why these risks should render statutory rape a predicate violent felony under the ACCA. Part VII concludes.

II. DEFINING STATUTORY RAPE: A CROSS-JURISDICTIONAL SURVEY

Modern statutory rape legislation has evolved from English common law property doctrines intended to preserve the interest of fathers in the chastity of their daughters.¹⁶ Today, statutory rape laws look to alleviate more contemporary concerns.¹⁷ In addition to the state's interest in protecting minors from sexual intercourse and predatory relationships,¹⁸ studies conducted in the late 1990s¹⁹ prompted lawmakers to utilize statutory rape legislation as a tool to assist in the prevention of teenage pregnancy and the resulting increased numbers of young welfare recipients.²⁰ These studies, indicating that half of all children born to

¹⁶ See generally SUSAN BROWNMILLER, *AGAINST OUR WILL* 17 (1975) (describing rape originating from property law regimes, where it was viewed as the theft of man's interest in his daughter's chastity).

¹⁷ See discussion *infra* Part VI.A.; see also *United States v. Shannon* 110 F.3d 382 (7th Cir. 1997). Judge Posner asserts that:

A further complication, so far as characterizing the purpose behind a particular state's statutory-rape law is concerned, lies in the origins of these laws. Their original purpose was to protect the virginity of female minors in order, in turn, to protect their marriageability, viewed as a girl's or a woman's most precious asset and one gravely impaired by loss of virginity. . . . Only recently has the focus of governmental concern with teenage sex shifted to the protection of young girls from pregnancy, sexually transmitted diseases, possible psychological harms incident to early commencement of sexual activity, and possible adverse social and economic consequences of teenage pregnancy and births out of wedlock.

Id. at 387 (citations omitted).

¹⁸ See, e.g., 42 U.S.C. § 14016(b)(1) (1996) (requiring the United States Attorney General to implement a program establishing the links between statutory rape, teenage pregnancy, and predatory offenders); Martin Tolchin, *More States Trying to Curb Teen-Age Pregnancies*, N.Y. TIMES, June 17, 1990, at 24 (reporting two-thirds of states making efforts to reduce incidence of teenage pregnancies).

¹⁹ See Patricia Donovan, *Can Statutory Rape Laws Be Effective in Preventing Adolescent Pregnancy?*, 29 FAMILY PLANNING PERSPECTIVES (Jan./Feb. 1996), available at <http://www.guttmacher.org/pubs/journals/2903097.html>.

²⁰ *Id.*

underage mothers are fathered by adult men,²¹ have sounded the alarm for increased enforcement of statutory rape laws to protect young women from exploitation and abuse²² and to protect children from poverty and neglect.²³

Difficulties in defining what is colloquially referred to as “statutory rape,” however, are immediately apparent from a comparison of the various state statutes criminalizing sexual contact with a minor.²⁴ There is little agreement among the states as to what the age of consent is or should be.²⁵ Indeed, only twelve states have a single age of consent, generally between sixteen and eighteen years of age.²⁶ In all other jurisdictions, the age of consent is dependent upon age differences between the victim and perpetrator, the age of the victim, and the age of the defendant.²⁷ Even the name of the crime differs by jurisdiction, and states often distinguish between those crimes involving minors above or below certain ages, offenders inside or outside a certain range of difference in age from the victim, or involving different levels of sexual activity.²⁸ These inconsistencies render it nearly impossible to make sweeping assertions as to what constitutes a statutory rape.

What is true in every jurisdiction, however, is that adult sexual contact with a minor is prohibited by statute,²⁹ based on the well-settled rule of law that there exists an age under which an individual lacks the capacity to legally consent to sexual activity.³⁰ However, a distinction must be made between sexual activity involving minors who are of a socially-acceptable (albeit arbitrary) age to give assent, or “consent-in-fact”³¹ to sexual activity, and sexual activity involving minors below this age. This distinction is evident in the manner in which many states’ statutory rape

²¹ *Id.*

²² *Id.*

²³ *Id.*

²⁴ Sandra Norman-Eady, Christopher Reinhart & Peter Martino, *Statutory Rape Laws By State*, OLR RESEARCH REPORT (Apr. 14, 2003), available at <http://www.cga.ct.gov/2003/olrdata/jud/rpt/2003-r-0376.htm>.

²⁵ *Id.* A survey of state statutory rape laws shows that age differentials between defendants and complainants range from two to ten years.

²⁶ *Id.*

²⁷ *Id.*

²⁸ *Id.* Statutory language signifying sexual conduct includes “sexual intercourse,” “sexual conduct,” “sexual penetration,” “lewd and lascivious conduct,” “indecent liberties,” and “illicit connection.” See generally, RICHARD A. POSNER & KATHERINE B. SILBAUGH, *A GUIDE TO AMERICA’S SEX LAWS* 44 (1996).

²⁹ See Norman-Eady et al., *supra* note 24.

³⁰ See *United States v. McDonald*, 592 F.3d 808, 814 (7th Cir. 2010). There is much debate regarding adolescents’ aptitude for making mature choices regarding sex. For a critique of statutory rape laws and the proposition that some adolescents can make these choices in an informed manner, see Heidi Kitrosser, *Meaningful Consent: Toward a New Generation of Statutory Rape Laws*, 4 VA. J. SOC. POL’Y & L. 287 (1997).

³¹ See *United States v. Sarmiento-Funes*, 374 F.3d 336, 341 (5th Cir. 2004) (“[T]he sex at issue in statutory rape may be consensual as a matter of fact, even if the law disregards or countermands the victim’s decision.”).

laws are drafted, with penalties for adult/minor sexual intercourse increasing as the child's age decreases.³² This Note presumes that the victim is of sufficient age to give consent-in-fact to the sexual activity, and therefore the assertions herein are limited to victims in the general range of twelve to seventeen years of age.³³ Accordingly, statutory rape is to be understood as sexual activity that would be legal if not for the age of at least one of the parties.³⁴

III. THE ARMED CAREER CRIMINAL ACT AND THE ADVENT OF THE "VIOLENT FELONY"

A. Legislative History

Enacted by Congress in 1984³⁵ as a response to research indicating that a small number of recidivist offenders were responsible for a significant percentage of crimes,³⁶ the Armed Career Criminal Act mandated a minimum prison term of fifteen years for any person convicted of being a felon in possession of a firearm in violation of 18 U.S.C. § 922(g) if that person had three previous convictions for robbery or burglary.³⁷ The House Report quotes Senator Arlen Specter, the sponsor of the legislation, in his assertion that burglary was one of the "most damaging crimes to society" because it involves "invasion of [victims'] homes or workplaces, [and] violation of their privacy"³⁸

³² Norman-Eady et al., *supra* note 24.

³³ Twelve years of age is the lowest age, of all the states, below which sexual activity is considered first degree rape. For a detailed chart of ages of consent state-by-state, see *id.*

³⁴ *Id.*

³⁵ 130 CONG. REC. 28,096 (1984).

³⁶ H.R. REP. NO. 98-1073, at 1-2 (1984), reprinted in 1984 U.S.C.C.A.N. 3661, 3661-62; see also *Armed Career Criminal Act Amendments: Hearing Before the Subcomm. on Criminal Law of the S. Comm. on the Judiciary*, 99th Cong. 19 (1986) [hereinafter *ACCA Hearing*] (statement of Sen. Specter) ("I have long been convinced that if we could put 200,000 career criminals in jail in this country, we could reduce violent crime by 50 percent.")

³⁷ Both Senator Specter and Representative Wyden introduced bills in their respective Houses of Congress that would have omitted mention of burglaries or robberies from the original version of the ACCA, substituting the phrase "crime of violence," which was defined as "an offense that has as an element the use, attempted use, or threatened use of physical force against the person or property of another," or any felony that, "by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense." See H.R. 4639, 99th Cong. (1986). In response to the proposals by Specter and Wyden, Representatives Hughes and McCollum introduced a bill also eliminating burglaries and robberies as enumerated offenses, but defining the "violent felony" as any state or federal felony that has as an element the "use, attempted use, or threatened use of physical force against the person of another." H.R. 4768, 99th Cong. (1986).

³⁸ *Taylor v. United States*, 495 U.S. 575, 581 (1990) (emphasis added).

Due to the narrow scope of the original provision, the 1984 version of the ACCA failed to accomplish its purpose: incarcerating recidivist criminals.³⁹ In 1986, the Subcommittee on Crime heard testimony on whether to expand the predicate offenses of robbery and burglary to include serious drug offenses and other violent felonies in the provisions of the ACCA.⁴⁰ The subcommittee hearing sought to determine what, if any, additional felonies should be included in its definition of a “violent felony.” As the Court noted in *Taylor v. United States*,

Congress singled out burglary (as opposed to other frequently committed property crimes such as larceny and auto theft) for inclusion as a predicate offense . . . because of its inherent potential for harm to persons. . . . There never was any proposal to limit the predicate offense to some special subclass of burglaries that might be especially dangerous, such as those where the offender is armed, or the building is occupied, or the crime occurs at night.⁴¹

In its 1986 amended form, the ACCA added arson, extortion, and crimes involving explosives to the enumerated offenses of robbery and burglary, and defined violent felonies as those crimes “punishable for a prison term of more than one year that involve conduct that presents a serious risk of physical injury to another.”⁴² This amendment to the original language was the beginning of the debate and the myriad circuit splits surrounding how and what to define as a violent felony.

B. The “Crime of Violence” and the United States Sentencing Guidelines

The amended ACCA “violent felony” definition was later adopted by other federal sentence enhancement initiatives.⁴³ The United States Sentencing Commission, established by the Sentencing Reform Act of 1984,⁴⁴ was created specifically to provide “adequate deterrence to criminal conduct” and “protect the public from further crimes of the defendant.”⁴⁵ To do this, the Sentencing Commission established the United States Sentencing Guidelines (“USSG”) in order to “provide certainty and fairness in meeting the purposes of sentencing [and avoid] unwarranted sentencing disparities among defendants with similar records who have

³⁹ See, e.g., *ACCA Hearing supra* note 36, at 9 (testimony of Deputy Assistant Attorney General James Knapp) (reporting that as of 1986, only fourteen people had been imprisoned under the ACCA).

⁴⁰ H.R. REP. NO. 99-849 (1986).

⁴¹ *Taylor*, 495 U.S. at 588.

⁴² Career Criminal Amendments Act of 1986, Pub. L. No. 99-570, 100 Stat. 3207-39 (1986).

⁴³ See U.S. SENTENCING GUIDELINES MANUAL § 4B1.2(a) (2007). The federal “crime of violence” definition has also been used in statutes with civil remedies for victims of violent crimes. See, e.g., Violence Against Women Act of 1994, 42 U.S.C. § 13981(d)(2) (1994).

⁴⁴ See Comprehensive Crime Control Act (CCCA) of 1984, Pub. L. No. 98-473, 98 Stat. 2017 (1984) (creating the United States Sentencing Commission).

⁴⁵ 18 U.S.C. § 3553(a)(2)(B) (1993); 18 U.S.C. § 3553(a)(2)(C) (1993).

been found guilty of similar criminal conduct.”⁴⁶ Under the USSG, career offenders receive enhanced sentences based in part on their criminal history.⁴⁷

Following the 1986 amending of the ACCA, the Sentencing Commission likewise amended the USSG to encompass the new violent felony definition as part of a determination of career offender status.⁴⁸ Known under the USSG as “crimes of violence,” the Commission correctly predicted that the new Guidelines definition would be more readily embraced by Congress and federal sentencing judges because it tracked the congressionally-approved language of 18 U.S.C. 924(e).⁴⁹ Given these parallels in language, courts have recognized that any interpretation of a “crime of violence” under the USSG is persuasive when interpreting whether a crime is a “violent felony” under the ACCA, and vice versa.⁵⁰

C. *Categorical Approach*

In approaching the question of whether an offense is a violent felony under the ACCA, courts have traditionally used one of three approaches: the categorical approach,⁵¹ the modified categorical approach,⁵² and the fact-based approach,⁵³ each

⁴⁶ United States Sentencing Guidelines (USSG), 28 U.S.C. § 991(b)(1)(B) (1993).

⁴⁷ U.S. SENTENCING GUIDELINES MANUAL § 4B1.1(a) (2007) (“A defendant is a career offender if (1) the defendant was at least eighteen years old at the time the defendant committed the instant offense of conviction; (2) the instant offense of conviction is a felony that is either a crime of violence or a controlled substance offense; and (3) the defendant has at least two prior felony convictions of either a crime of violence or a controlled substance offense.”).

⁴⁸ The Guidelines originally took their definition of the “crime of violence” from an amendment to the Comprehensive Crime Control Act. *See* 18 U.S.C. 16 (1994) (defining “crime of violence” as either “an offense that has as an element the use, attempted use, or threatened use of physical force against the person or property of another” or “any . . . offense that is a felony and that, by its nature, involves a substantial risk that physical force against the person or property . . . may be used in the course of committing the offense”).

⁴⁹ *See* U.S. SENTENCING COMM’N, CAREER OFFENDER WORK GROUP REPORT 24 (1987) (“The [work] group’s general feeling is that because the penalties imposed by this guideline are so severe, linking the definitions of predicate crimes to those already approved, defined and joined together by Congress for the heavy sanction of 924(e) would facilitate both the acceptance of the guideline and its proper application.”).

⁵⁰ *See* United States v. Winter, 22 F.3d 15, 18 n.3 (1st Cir. 1994).

⁵¹ Under this approach, the court does not delve into the specific conduct of the defendant, but looks only to the minimum conduct necessary for a conviction under the relevant statute. *See, e.g.*, United States v. Bauer, 990 F.2d 373, 375 (8th Cir. 1993) (finding that statutory rape is a crime of violence under the categorical approach).

⁵² Under the modified categorical approach, the sentencing court will examine the facts relating to the underlying conviction contained in the charging papers, the indictment, or information to determine whether an offense involves conduct that presents a “serious potential risk of physical injury to another.” *See, e.g.*, United States v. Shannon, 110 F.3d 382, 389 (7th Cir. 1997) (finding that sexual intercourse with a thirteen-year-old was a crime of violence using the modified categorical approach).

⁵³ Under the fact-based approach, courts examine any and all facts surrounding prior convictions rather than limiting their inquiries to any specific documents. A court may review the record of the prior proceeding or hold evidentiary hearings to determine whether the

of which has strengths, weaknesses, and varying degrees of support.⁵⁴ Use of the categorical approach—which requires that the sentencing court look only to the fact of conviction in determining whether an offense is a predicate violent felony for enhanced sentencing—has been mandated by the Court in the seminal case on violent felony determinations: *Taylor v. United States*.⁵⁵ *Taylor* does, however, allow for the use of a modified categorical approach in the narrow range of cases where the statutory definition of the offense is ambiguous or so broad in scope that it encompasses both violent felonies and other crimes that would not qualify as a predicate felony under the statute.⁵⁶ In such cases, the court may consider extrinsic evidence, but such evidence is limited to “the terms of the charging document, the terms of a plea agreement . . . or to some comparable judicial record of this information”⁵⁷ in order to determine that the crime is a violent felony as defined by the ACCA.

The *Taylor* exception to strict use of the categorical approach is particularly relevant to statutory rape statutes. Often, charges brought under such statutes hinge on the age of the victim or the perpetrator—information not readily gleaned from the statutory definition of the offense—or simultaneously criminalize actual sexual contact with a minor (*i.e.* intercourse) and “victimless” sexual conduct such as possession of child pornography.⁵⁸ This broad scope sometimes requires that courts utilize a modified categorical approach in determining whether statutory rape is a predicate violent felony for enhanced sentencing,⁵⁹ without sacrificing the equity of the categorical approach.

IV. RECONCILING *BEGAY V. UNITED STATES* AND *CHAMBERS V. UNITED STATES*

A. Deconstructing *Begay v. United States*

After a night of heavy drinking in September 2004, Larry Begay accosted his aunt and sister with a rifle, demanded money, and threatened to shoot if they failed to comply. When informed that they had no money, Mr. Begay repeatedly pulled the

previous conviction was a crime of violence that would constitute a predicate felony for enhanced sentencing. *See, e.g., United States v. Flores*, 875 F.2d 1110, 1114 (5th Cir. 1989) (Allowing the use of an interview-based reliance on a pre-sentence report to determine whether the defendant’s burglary convictions were for burglaries of a “dwelling”).

⁵⁴ *See* Susan Fleischmann, Comment, *Toward a Fact-Based Analysis of Statutory Rape Under the United States Sentencing Guidelines*, 1998 U. CHI. LEGAL F. 425, 429 (1998) (positing that the fact-based approach is the sole way of allowing the courts to consider the facts of a case in totality prior to making a determination that a predicate offense is a crime of violence).

⁵⁵ *Taylor v. United States*, 495 U.S. 575 (1990).

⁵⁶ *Id.* at 602. (“This categorical approach, however, may permit the sentencing court to go beyond the mere fact of conviction in a narrow range of cases where a jury was actually required to find all the elements of generic burglary.”)

⁵⁷ *United States v. France*, 394 F. App’x 246, 248 (6th Cir. 2010) (quoting *United States v. Barte*, 529 F.3d 357, 358 (6th Cir. 2008)).

⁵⁸ *United States v. Daye*, 571 F.3d 225, 235 (2d Cir. 2009).

⁵⁹ *See, e.g., United States v. Shannon*, 110 F.3d 382, 387 (7th Cir. 1997).

trigger of the unloaded gun.⁶⁰ After his arrest, Begay admitted being an eight-time felon, having been convicted twelve times of driving under the influence (“DUI”),⁶¹ a crime that, under New Mexico law, becomes a felony the fourth (and each subsequent) time an individual commits it.⁶² Following his guilty plea for unlawful possession of a firearm, the sentencing judge determined that Begay’s prior DUI convictions were for crimes “punishable by imprisonment for a term exceeding one year,” and involved “conduct that present[ed] a serious potential risk of physical injury to another.”⁶³ Accordingly, Begay was sentenced under the ACCA’s enhanced sentencing provisions requiring a mandatory minimum prison term of fifteen years.⁶⁴ On appeal, Begay argued that driving under the influence was not a crime of violence under the ACCA.⁶⁵ The Tenth Circuit Court of Appeals disagreed.⁶⁶

Upon granting certiorari, the *Begay* Court, in an entirely new interpretation of the “otherwise” clause of the ACCA,⁶⁷ determined that to qualify as a violent felony, the offense must “typically involve purposeful, violent, and aggressive conduct,”⁶⁸ as do the enumerated offenses that precede the “otherwise” clause.⁶⁹ Additionally, the Court held that to qualify as a predicate violent felony, an offense must be “roughly similar, *in kind* as well as in degree of risk posed, to the [statutory] examples” of burglary, arson, extortion, and offenses involving the use of explosives.⁷⁰ Using this standard, the Court found that DUI, a strict liability crime requiring no culpable *mens rea*, could not constitute a predicate felony offense under the ACCA because it did not typically involve “purposeful” conduct of the kind associated with robbery, burglary, or drug offenses.⁷¹

B. *Where Does Chambers v. United States Fit?*

Less than a year post-*Begay*, the Supreme Court heard oral arguments in *Chambers v. United States*⁷² on the question of whether failure to report, as distinct from felony escape, is a violent felony for purposes of the ACCA’s enhanced

⁶⁰ *Begay v. United States*, 553 U.S. 137, 140 (2008).

⁶¹ *Id.*

⁶² *Id.*

⁶³ *Id.* at 155-56.

⁶⁴ *Id.* at 155.

⁶⁵ *Id.* at 140.

⁶⁶ *Id.*

⁶⁷ 18 U.S.C. § 924(e)(2)(B)(ii) (2006) (known as the “otherwise” or “residual” clause of the ACCA).

⁶⁸ *Begay*, 553 U.S. at 158 (Alito, J., dissenting).

⁶⁹ *Id.* at 144; *see also* 18 U.S.C. § 924(e)(2)(B)(ii) (2006).

⁷⁰ *Begay*, 553 U.S. at 143 (emphasis added).

⁷¹ *Id.* at 145.

⁷² *Chambers v. United States*, 555 U.S. 122 (2009).

sentencing provisions.⁷³ Having pled guilty to being a felon in possession of a firearm, Deondery Chambers was sentenced to roughly fifteen and a half years in prison under the ACCA.⁷⁴ On appeal, Chambers argued that his prior conviction for escape was not a predicate violent felony.⁷⁵ The Seventh Circuit affirmed the sentence, although Judge Posner noted that, for purposes of enhanced sentencing under the ACCA, a clear distinction should be made between a violent escape and a peaceful failure to report.⁷⁶

The Supreme Court made just such a distinction in *Chambers v. United States*, holding that a failure to report is not a violent felony under the ACCA.⁷⁷ Seven months after *Begay*, the Court concluded that failure to report did not reach the level required for enhanced sentencing because it does not involve conduct that is purposeful, violent, and aggressive,⁷⁸ a finding in line with its narrow construction of the “otherwise” clause in *Begay*.⁷⁹ However, the inquiry did not end there. Instead, the Court then focused its attention on whether a failure to report “involves conduct that presents a serious potential risk of physical injury to another.”⁸⁰ Concluding that failure to report did not involve such risk and thus was not within the purview of the ACCA, the Court appeared to rely on the pre-*Begay* standard of evaluating the “otherwise” clause in terms of risk of injury rather than similarity *in kind* with the enumerated offenses.⁸¹ Additionally, the Court seemed to relegate the *Begay* requirements to a passing observation, noting that “[c]onceptually speaking, [failure to report] amounts to a form of inaction, a far cry from . . . ‘purposeful, violent, and aggressive conduct.’”⁸² This apparent departure from *Begay* further confused the inquiry regarding what offenses qualify as violent felonies and what standard should be used to make such a determination.

C. Resolving the Uncertainty

In his *Begay* dissent, Justice Alito (joined by Justices Souter and Thomas) took to task the “purposeful,” “violent,” and “aggressive” standards established by the majority as wholly inconsistent with the language of the statute.⁸³ Citing the Webster’s Dictionary definition of “otherwise”—“in a different manner”⁸⁴—Alito

⁷³ *Id.* at 122.

⁷⁴ *Id.* at 124.

⁷⁵ *United States v. Chambers*, 473 F.3d 724, 725 (7th Cir. 2007).

⁷⁶ *Id.* at 727.

⁷⁷ *Chambers*, 555 U.S. at 130 (2009).

⁷⁸ *Id.* at 128.

⁷⁹ *Begay v. United States*, 553 U.S. 137, 144 (2008).

⁸⁰ *Chambers*, 555 U.S. at 122 (2009).

⁸¹ Violent felonies must be “roughly similar, *in kind* as well as in degree of risk posed, to the [statutory] examples” of burglary, arson, extortion, and offenses involving use of explosives. *Begay*, 553 U.S. at 143 (emphasis added).

⁸² *Chambers*, 555 U.S. at 128 (2009).

⁸³ *Begay*, 553 U.S. at 155 (Alito, J., dissenting).

⁸⁴ *Id.* at 159.

asserted that any similarities between a crime that presents a “serious potential risk of physical injury to another” and the named statutory offenses of burglary, arson, and extortion need not be in kind, but must merely, “in a different manner,” pose a serious risk of physical injury.⁸⁵ Any other requirements (*i.e.* that the crime be purposeful, violent, or aggressive) would amount to adding new language to the statute, a practice that is to be resisted by the Court.⁸⁶ In yet another interpretation of the “otherwise” clause, Justice Scalia in his *Begay* concurrence suggested a test that would center on the question of “risk.”⁸⁷ Dismissing the majority decision as a “regrettable continuation of a piecemeal, suspenseful, Scrabble-like approach to the interpretation of this statute,”⁸⁸ Justice Scalia came to the same conclusion regarding the *Begay* test as did Alito, Souter and Thomas: that the “purposeful” “violent” and “aggressive” test bears no resemblance to the plain language of the statute or, by extension, the intent of Congress.⁸⁹

Justice Alito, joined by Justice Thomas, reiterated the concerns he voiced in his *Begay* concurrence in his concurrence in *Chambers*.⁹⁰ While commending the efforts of his colleagues to develop a workable test of the “otherwise” clause while retaining the categorical approach adopted in *Taylor*,⁹¹ Alito nonetheless stressed the apparent impossibility of consistent application of the “otherwise” clause.⁹² Citing the circuit splits that have resulted from an attempt to balance the “otherwise” clause with the categorical approach⁹³ and noting that these splits could “occupy this Court

⁸⁵ *Id.*

⁸⁶ *Id.*

⁸⁷ *Id.* at 150 (Scalia, J., concurring) (“There is simply no basis (other than the necessity of resolving the present case) for holding that the enumerated and unenumerated crimes must be similar in respects *other than the degree of risk that they pose.*”) (emphasis in original).

⁸⁸ *Id.*

⁸⁹ *Id.* at 152.

⁹⁰ *Chambers v. United States*, 555 U.S. 122, 131 (2009) (Alito, J., concurring).

⁹¹ *Id.* at 131-32.

⁹² *Id.* at 132.

⁹³ *Id.* at 133 n.2. There has been little consistency in the application of the “otherwise” clause using the categorical approach. Justice Alito notes the myriad circuit splits that have resulted from attempts to reconcile the two:

[T]he lower courts have split over whether it is a “violent felony” under ACCA’s residual clause to commit rape, *compare* *United States v. Sawyers*, 409 F.3d 732 (6th Cir. 2005) (statutory rape not categorically violent), *with* *United States v. Williams*, 120 F.3d 575 (5th Cir. 1997) (inducement of minor to commit sodomy violent), *and* *United States v. Thomas*, 231 F. App’x. 765 (9th Cir. 2007) (all rape violent); retaliate against a government officer, *compare* *United States v. Montgomery*, 402 F.3d 482 (5th Cir. 2005) (not violent), *with* *Sawyers*, *supra* (violent); attempt or conspire to commit burglary, *compare* *United States v. Fell*, 511 F.3d 1035 (10th Cir. 2007) (even after *James v. United States*, 550 U.S. 192 (2007)), and even where statute requires an overt act, conspiracy to commit burglary not violent), *with* *United States v. Moore*, 108 F.3d 878 (8th Cir. 1997) (attempted burglary violent if statute requires proof of overt act); carry a concealed weapon, *compare* *United States v. Whitfield*, 907 F.2d 798 (8th Cir.

for years.”⁹⁴ Justice Alito concluded that each new application seems to lead the Court further away from the plain language of the statute, and suggests that Congress revisit the ACCA and “formulate a specific list of expressly defined crimes”⁹⁵ that would qualify as predicate violent offenses under the ACCA.

Notwithstanding these critiques, it is possible to reconcile *Chambers* and *Begay*. While *Chambers* appears to rely on the pre-*Begay* standard of “serious risk of physical harm” as the test of a violent felony—seemingly a departure from the purposeful, violent, and aggressive test outlined in *Begay*—*Chambers* in fact merely clarifies that the test of a violent felony is twofold. In other words, a predicate violent felony is one that is purposeful, violent, and aggressive (or similar *in kind* to the enumerated offenses) and one that involves conduct that poses a serious risk of physical harm to another (or similar in *degree of risk posed* to the enumerated offenses). However, as evidenced by the concurring and dissenting opinions in *Begay* and *Chambers*, the subsequent case law and resulting circuit splits, clarity on what crimes fall within the Court’s definition of a violent felony remains elusive.

V. STATUTORY RAPE: SIMILAR “IN KIND” TO THE ENUMERATED OFFENSES

The central proposition asserted by the *Begay* Court is that there exists a unifying thread amongst the enumerated offenses of the ACCA, and that this common factor is the purposeful, violent, and aggressive conduct involved. However, there are further commonalities. Burglary, as Senator Specter alluded, involves an intrusion upon the sanctity of our private space—our homes.⁹⁶ Arson and the use of explosives carry the potential for loss of life and long-term financial devastation. Extortion may begin as a rather innocuous crime and quickly escalate to a violent endeavor. While on first blush statutory rape bears little resemblance to these crimes, it indeed shares these crucial linking traits. Sexual intercourse between an adult and a minor, like burglary and robbery, carries with it the invasion of the victim’s most personal space and human dignity.⁹⁷ Sexual conduct even between consenting adults may result in a deadly sexually transmitted disease or pregnancy.⁹⁸

1990) (not violent), *with* United States v. Hall, 77 F.3d 398 (11th Cir. 1996) (violent); and possess a sawed-off shotgun as a felon, *compare* United States v. Amos, 501 F.3d 524 (6th Cir. 2007) (not violent), *with* United States v. Bishop, 453 F.3d 30 (1st Cir. 2006) (violent). *Compare also* United States v. Sanchez-Garcia, 501 F.3d 1208 (10th Cir. 2007) (unauthorized use of a motor vehicle not a “violent felony” under 18 U.S.C. § 16(b), which closely resembles ACCA’s residual clause), *with* United States v. Reliford, 471 F.3d 913 (8th Cir. 2006) (automobile tampering violent under ACCA’s residual clause), *and* United States v. Galvan-Rodriguez, 169 F.3d 217 (5th Cir. 1999) (*per curiam*) (unauthorized use of a motor vehicle a “violent felony” under § 16(b)).

Id.

⁹⁴ *Id.* at 133.

⁹⁵ *Id.* at 134.

⁹⁶ Taylor v. United States, 495 U.S. 575, 581 (1990).

⁹⁷ For the parallels between robbery and its similarities to sexual activity, see Susan Estrich, *Rape*, 95 YALE L.J. 1087, 1152 (1986).

⁹⁸ See discussion *infra* Part VI.

Further, given the age, maturity, and possible size and strength disparities between victim and perpetrator, a genuine concern exists that any sexual conduct between adults and minors, regardless of the assent of the victim, can quickly escalate to an aggressive or forceful encounter.

A. Addressing the “Purposefully” Requirement

As Justices Scalia and Alito have noted, requiring that predicate violent felonies be purposeful, violent, and aggressive runs afoul of the statutory language.⁹⁹ However, even accepting this portion of the test, statutory rape should qualify as a crime of violence for purposes of enhanced sentencing under the ACCA because it involves not only aggressive conduct, but also a degree of purpose on the part of the perpetrator. Since *Begay*,¹⁰⁰ courts in several jurisdictions have shown reluctance to find that strict liability crimes such as statutory rape possess the requisite intent to qualify as a crime of violence.¹⁰¹ The reason for this reluctance is clear: *Begay* itself concerned the strict liability crime of driving under the influence and specifically rejected the notion that a strict liability crime lacking any purposeful *mens rea* is a violent felony.¹⁰² It is the nature of the crimes themselves, however, that renders the two strict liability offenses distinct from one other, and these differences are crucial to our understanding of the ramifications of the *Begay* “purposefully” requirement on statutory rape versus driving under the influence. Where statutory rape laws generally require, at a minimum, *intentional* sexual conduct with an individual legally unable to consent,¹⁰³ driving under the influence is a crime of recklessness or negligence.¹⁰⁴

Of course, one might argue that the act of having sex is intentional, as is the act of driving, and that mistake as to the age of a sexual partner is similar to the negligence involved in drunk driving.¹⁰⁵ Where these two strict liability crimes diverge is that drunk driving may or may not result in an imposition on the person or property of another and is often “victimless” in that, frequently, no one is physically or financially injured by the negligent or reckless intoxicated driver.¹⁰⁶ Adult-minor sexual activity should be distinguished from the strict liability crime of driving under the influence because, unlike DUI, sexual intercourse always involves the interplay

⁹⁹ See discussion *infra* Part VI; *Begay v. United States*, 553 U.S. 137, 159 (2008) (Alito, J., dissenting).

¹⁰⁰ *Begay*, 553 U.S. at 137.

¹⁰¹ See, e.g., *United States v. McDonald*, 592 F.3d 808, 814 (7th Cir. 2010); *United States v. Thornton*, 554 F.3d 443, 444 (4th Cir. 2009); *United States v. Christensen*, 559 F.3d 1092, 1093 (9th Cir. 2009).

¹⁰² *Begay*, 553 U.S. at 145-46.

¹⁰³ Norman-Eady et al., *supra* note 24.

¹⁰⁴ *United States v. Rooks*, 556 F.3d 1145, 1151 (10th Cir. 2009).

¹⁰⁵ For a discussion of mistake-of-age defenses, see generally *People v. Hernandez*, 393 P.2d 673 (Cal. 1964).

¹⁰⁶ See, e.g., Morbidity & Mortality Weekly Report, *Vital Signs: Alcohol Impaired Driving Among Adults - United States, 2010*, CTR. DISEASE CONTROL (Oct. 4, 2011), <http://www.cdc.gov/mmwr/preview/mmwrhtml/mm6039a4.htm> (“An average drunk driver has driven drunk 80 times before first arrest.”)

between one's personal autonomy and that of another. This is the case even where the act is between consenting adults, but the psychological, physiological, and emotional impact is far greater in adult-minor sexual relations.¹⁰⁷

Further, statutory rape is proscribed by the statutes of all fifty states because it is recognized that children lack the emotional and/or physical maturity to consent to sexual activity and all that flows from it. Conversely, the adult perpetrator is expected to have the ability to appreciate the ramifications, risks, and rewards of sexual contact as well as to conduct due diligence as to the age of his or her partner. For these reasons, if an adult intentionally engages in a sex act with someone unable to give legally-cognizable consent—regardless of any mistake as to the age of the victim—it is the adult who bears the sole criminal and civil liability for the encounter. Completion of a sex act with an individual who is, in fact, below the age of consent therefore can be legitimately construed as affirmative conduct by the defendant.¹⁰⁸ As the Second Circuit found in *Daye*, a post-*Begay* case, completion of such an act is sufficient to satisfy *Begay's* requirement that the crime be one of purpose, even absent any culpable *mens rea* required by the statute itself.¹⁰⁹

B. Rape Statutes as a Benchmark: Defining Force and Violence

Spurred by the feminist theory era of the 1970's,¹¹⁰ the societal view of rape has evolved from the "crime of passion" to the crime of violence and aggression.¹¹¹ The characterization of rape as a violent crime is evidenced by the move of state legislatures toward shifting the statutory definitions of rape closer to those of assault and battery.¹¹² In fact, many states have changed their very terminology, classifying

¹⁰⁷ See discussion *infra* Part VI.

¹⁰⁸ *United States v. Daye*, 571 F.3d 225, 234 (2d Cir. 2009).

¹⁰⁹ *Id.*

¹¹⁰ Susan Brownmiller pioneered the theory of rape as a crime of violence, describing it as "a societal problem resulting from a distorted masculine philosophy of aggression," and "not a crime of lust but of violence and power." BROWNMILLER, *supra* note 16, at 400; see also CATHERINE MACKINNON, FEMINISM UNMODIFIED 85 (1987) ("Rape is a crime of violence, not sexuality"); Estrich, *supra* note 97, at 1089-92 ("rape . . . celebrates male aggressiveness").

¹¹¹ See *supra* note 109 and accompanying text. The trend toward defining rape as a violent crime is outlined in the Violence Against Women Act of 1994, Pub. L. No. 103-322, 108 Stat. 1796. See MAJORITY STAFF SENATE JUDICIARY COMM., 103d CONG., THE RESPONSE TO RAPE: DETOURS ON THE ROAD TO EQUAL JUSTICE (1993) (quoting Senator Joe Biden: "[T]here are . . . crimes—namely rape and family violence—that disproportionately burden women.").

¹¹² Using assault and battery statutes as a guide, almost all state rape statutes have now been amended to: 1) establish and emphasize force as an element of the crime; and 2) eliminate the requirement that the victim have resisted the assault. See, e.g., MICH. COMP. LAWS ANN. §§ 750.520a, 750.520b (West 1991) (categorizing sexual intercourse as a first-degree felony if achieved by the use or threat of physical force).

rape as “sexual assault”¹¹³ and emphasizing the defendant’s use of force as an element of the offense.¹¹⁴

Black’s Law Dictionary defines “force” as “[p]ower, violence, or pressure directed against a person or thing.”¹¹⁵ On the other hand, “power” is defined as “[d]ominance, control, or influence.”¹¹⁶ Considering “force” and “power” as legal terms of art, it becomes clear that a sex offense can be forcible absent any physical force. This is so because the law requires only compulsion (or “pressure”) to find force, and that compulsion can be accomplished through an exertion of power wholly devoid of any physical violence.¹¹⁷ The disparity in power, influence, and physical stature that exists in many adult-minor sexual relationships can easily foster an atmosphere in which forceful, violent, or aggressive behavior will be utilized to ensure compliance. This is so because a child has little recourse in deterring a “stronger, more mature” adult from using such force.¹¹⁸ These disparities are directly in line with the legally-accepted definition of force as the exertion of undue power.

Despite the increasing societal conception of rapes as crimes of violence, a victim’s consent to sexual conduct continues to be the primary factor in determining whether the conduct was rape. In cases involving “date rape,” or “acquaintance rape,” where the type and level of force used may be unclear,¹¹⁹ modern courts have recognized that it is the lack of consent to sexual activity that renders an act “violent.”¹²⁰ In such cases, where the only force deemed necessary to meet the statute’s force requirement is that necessary to accomplish the sexual act, the crucial question is whether or not there was consent.¹²¹ Nowhere is this reliance on the presence or absence of consent more relevant than when determining whether statutory rape should qualify as a predicate violent felony for enhanced sentencing.

¹¹³ See, e.g., 720 ILL. COMP. STAT. ANN. 5/12-12 (West 1997); N.J. STAT. ANN. § 2C:14-2 (West 1995) (defining the crime of “sexual assault”).

¹¹⁴ See *supra* note 113 and accompanying text.; see also 720 ILL. COMP. STAT. ANN. 5/12-13 (West 1993) (“The accused commits criminal sexual assault if he or she: (1) commits an act of sexual penetration by the use of force or threat of force . . .”).

¹¹⁵ BLACK’S LAW DICTIONARY 673 (8th ed. 1999).

¹¹⁶ *Id.* at 1207.

¹¹⁷ *United States v. Chacon*, 533 F.3d 250, 257 (4th Cir. 2008); see also *United States v. Romero-Hernandez*, 505 F.3d 1082, 1088 (10th Cir. 2007).

¹¹⁸ See *United States v. Daye*, 571 F.3d 225, 232 (2nd Cir. 2009).

¹¹⁹ See, e.g., *Commonwealth v. Berkowitz*, 609 A.2d 1338, 1340 (Pa. Super. Ct. 1992) (“[He] put me down on the bed. It was kind of like—he didn’t throw me on the bed. It’s hard to explain. It was kind of like a push but no. . . . It wasn’t slow like a romantic kind of thing, but it wasn’t a fast shove either. It was kind of in the middle.”).

¹²⁰ See, e.g., *State ex rel. M.T.S.*, 609 A.2d 1266 (N.J. 1992). The court found that engaging in intercourse with the sleeping victim constituted sexual assault, even though the defendant stopped when the victim awoke and requested he do so.

¹²¹ *Id.* at 1277-78.

C. Should Consent-in-Fact Be a Factor?

Even prior to *Begay*, some district courts were reluctant to construe statutory rape as a “violent” felony, because unlike “pure” rape and sexual assault statutes, statutory rape laws generally do not have the use of force as an element.¹²² However, pre-*Begay* courts in several circuits recognized that the inability of a minor to give any legally-cognizable consent to sex meant that even sexual conduct under the guise of assent by the victim was necessarily forcible.¹²³ As the district court noted in *United States v. Wilcox*, “any purported consent is invalid. And if you take consent out of the statutory rape, or take consent out of sexual intercourse, then what you end up with is a crime of violence.”¹²⁴

This is the rational rule. Because minors cannot give consent, statutory rapes are arguably on equal footing with rapes involving the use or threat of physical force—the perpetrator continues with the act although they have not received any legally-recognized consent.¹²⁵ This concept has been applied to the definition of crimes of violence under the U.S. Sentencing Guidelines Manual, which expressly defines a crime of violence, in relevant part, as including “forcible sex offenses (including where consent to the conduct is not given or *is not legally valid*, such as where consent to the conduct is involuntary, incompetent, or coerced)”¹²⁶ and “statutory rape.”¹²⁷ Statutory rape is included among the enumerated offenses alongside forcible sex offenses because, if a minor is incapable of consent, the crime necessarily involves a sexual act performed “against” a child.¹²⁸

It stands to reason that consent-in-fact should not be considered in a determination of whether a crime is a violent felony under the ACCA. In a statutory

¹²² See, e.g., *United States v. Wilcox*, 150 F. App’x 458, 461 (6th Cir. 2005) (quoting *United States v. Perez-Velasquez*, 67 F. App’x 890, 892 (6th Cir. 2003)).

¹²³ *Perez-Velasquez*, 67 F. App’x at 892.

¹²⁴ *Wilcox*, 150 F. App’x at 461.

¹²⁵ Pre-*Begay*, at least two circuits made a distinction between a sexual offense that results from force and a sexual offense that is committed in the absence of consent. See, e.g., *United States v. Beltran-Munguia*, 489 F.3d 1042, 1051 (9th Cir. 2007) (ruling that “forcible sex offense” requires use of force that is violent in nature); *United States v. Gomez-Gomez*, 493 F.3d 562, 567 (5th Cir. 2007) (concluding that an act against the will of the victim is not a forcible sex offense unless there is also force or threat of force); *United States v. Sarmiento-Funes*, 374 F.3d 336, 344-45 (5th Cir. 2004) (nonconsensual intercourse is not “forcible”). But see, e.g., *United States v. Bolanos-Hernandez*, 492 F.3d 1140, 1146 (9th Cir. 2007) (concluding that requiring a forcible sex offense “to contain the same level of force required to qualify a crime under the catch-all provision would . . . render[] the enumeration superfluous”); *United States v. Romero-Hernandez*, 505 F.3d 1082, 1089 (10th Cir. 2007) (addressing whether nonconsensual sexual contact constitutes a forcible sex offense and concluding that “[w]hen an offense involves sexual contact with another person, it is necessarily forcible when that person does not consent”); *United States v. Remoi*, 404 F.3d 789, 796 (3d Cir. 2005) (holding that a forcible sexual offense may be committed without the employment of physical force).

¹²⁶ U.S. SENTENCING GUIDELINES MANUAL § 2L1.2 cmt. n.1(B)(iii) (2010) (emphasis added).

¹²⁷ *Id.*

¹²⁸ *United States v. Chavarriya-Mejia*, 367 F.3d 1249, 1251 (2004).

rape case, there exists no legally-cognizable distinction between legal consent and consent-in-fact. Finding such a distinction would fly in the face of the intent behind every statutory rape statute—the accepted socio-legal principle that minors below the age of consent *may not consent*.¹²⁹ As Judge Torruella aptly noted in *Aguiar v. Gonzales*, “we would be saying that persons under the age of sixteen cannot consent, except when they do consent.”¹³⁰

If our courts operate under the legal assumptions that; (1) legally invalid consent is indistinguishable from non-consent; (2) in a statutory rape, there exists no legally recognized *consent* even if the minor *assented* to the sexual activity; (3) force is the exertion of undue power or pressure; and (4) non-consent constitutes force, then, taken to its logical conclusion, a statutory rape will invariably involve the use of force as it is understood by our legal system, even if that force is only that “exertion of undue power” needed to accomplish the sex act.¹³¹

VI. SIMILAR IN “DEGREE OF RISK POSED” TO THE ENUMERATED OFFENSES: SERIOUS RISK OF PHYSICAL HARM

A. *What is the Harm?*

The infringement on personal autonomy inherent to any sexual conduct is exacerbated in cases of statutory rape, and, where it concerns minors of insufficient age to cope with the psychological ramifications of sexual intercourse, presents serious risks of harm to the psyche of that minor. Teenaged girls are arguably incapable of making informed decisions regarding sexual activity,¹³² and are certainly particularly susceptible to abuse and exploitation. Notwithstanding the dire psychological harms that may result from adult-minor sexual activity, however, the “otherwise” clause of the ACCA is satisfied only where there exists a risk of physical harm similar to that posed by those offenses enumerated in the statute.

¹²⁹ Concerns exist that construing statutory rape as a violent felony under the ACCA could sweep in consensual sexual activity between teenagers if there is no required age gap in the statute. *See United States v. Cadieux*, 500 F.3d 37, 46 (1st Cir. 2007). Conceivably, those situations would not present a serious risk of potential injury. However, most states have created exemptions to “Romeo and Juliet” charges of statutory rape in situations where both partners are below the age of consent and several have moved away from strict construction of the age of consent, increasingly passing legislation mandating either an age gap of between two and six years between the perpetrator and the defendant, or that the defendant be of a minimum age—generally twenty-one to twenty-six years old. *See ASAPH GLOSSER ET AL., THE LEWIN GROUP, STATUTORY RAPE: A GUIDE TO STATE LAWS AND REPORTING REQUIREMENTS* (2004), available at <http://www.4parents.gov/sexrisky/statutoryrapelaws.pdf>. Finally, many enhanced sentencing statutes have as an element the requirement that the defendant have reached the age of 18 at the time of their conviction for each violent felony. *See, e.g., U.S. SENTENCING GUIDELINES MANUAL* § 4B1.1(a) (2007). (“A defendant is a career offender if (1) the defendant was at least eighteen years old at the time the defendant committed the instant offense of conviction. . . .”).

¹³⁰ *Aguiar v. Gonzales*, 438 F.3d 86, 90 (1st Cir. 2006).

¹³¹ *See, e.g., Florida v. Sedia*, 614 So. 2d 533, 535 (Fla. Dist. Ct. App. 1993).

¹³² *See Kitrosser, supra* note 30, at 289. (“It is far too simplistic to suggest that adolescent girls are incapable of making consensual sexual choices in all instances.”).

Pre-*Begay*, the key question addressed by the courts in determining whether a statutory rape conviction was a crime of violence rested squarely with the “otherwise” clause of the ACCA, which provides that a crime that “otherwise involves conduct that presents a serious potential risk of physical injury to another” qualifies that crime as a predicate violent felony for purposes of enhanced sentencing.¹³³ Using only that standard, most courts were willing to find that statutory rape posed such a risk to minors, either because they “inherently involve physical force against the children,”¹³⁴ present a “substantial risk that physical force will be used to ensure a child’s compliance,”¹³⁵ because the “smaller, weaker” victim is likely to be injured in the course of sexual activity,¹³⁶ or because sexual intercourse naturally exposes the minor to possible transmission of “social or venereal diseases.”¹³⁷ These concerns—that minors can be injured by the sex act itself and that they are subject to increased risks of pregnancy and transmission of sexually transmitted disease—are central to the question of whether a serious risk of physical harm exists when an adult enters into a sexual relationship with a minor. If these risks are serious in a manner similar to the risks involved in a typical instance of the enumerated offenses—robbery, burglary, extortion, or the use of explosives—statutory rape should fall under the umbrella of those crimes that will qualify as predicate violent felonies for purposes of the enhanced sentencing mandated by the ACCA.

1. Physical Injury from the Sex Act

In many jurisdictions, it is well-settled that most “indecent sexual contact crimes perpetrated by adults against children categorically present a serious potential risk of physical injury.”¹³⁸ However, some courts have found that consensual sex with a minor creates a serious potential risk of injury only where there exists some aggravating factor, such as the minor being less than thirteen or fourteen years of age.¹³⁹ It is certainly true that the likelihood of physical injury from sexual activity increases as the child’s age decreases.¹⁴⁰ Aside from the physical considerations, a younger child is likely to have “poorer judgment, less knowledge about sex, and less

¹³³ 18 U.S.C. § 924(e)(2)(B)(ii) (2006).

¹³⁴ *United States v. Chavarriya-Mejia*, 367 F.3d 1249, 1251 (2004).

¹³⁵ *United States v. Searcy*, 418 F.3d 1193, 1197 (11th Cir. 2005) (quoting *United States v. Munro*, 394 F.3d 865, 871 (10th Cir. 2005)).

¹³⁶ *United States v. Cadieux*, 500 F.3d 37, 46 (quoting *United States v. Sherwood*, 156 F.3d 219, 221 (1st Cir. 1998)).

¹³⁷ *United States v. Williams*, 529 F.3d 1, 5 (1st Cir. 2008).

¹³⁸ *Cadieux*, 500 F.3d at 45.

¹³⁹ *United States v. Bartee*, 529 F.3d 357 (6th Cir. 2008). The existence of a familial relationship between the defendant and the complainant may also be an aggravating factor. See *United States v. Campbell*, 256 F.3d 381, 396 (6th Cir. 2001) (finding that a conviction for sexual contact with a minor was a crime of violence because “[a]lthough the crime can occur through mere consented touching . . . there is a real possibility that physical force may be used in making sexual contact, particularly when the victim is a minor between 13 and 16 and within the strictures of familiarity and proximity bred by kinship”).

¹⁴⁰ *United States v. Champion*, 248 F.3d 502, 506 (6th Cir. 2001).

money,”¹⁴¹ rendering them much less likely to use or insist that their adult partner use appropriate measures to prevent pregnancy and disease.¹⁴² As legislatures increasingly move towards age-gap restrictions¹⁴³ and decreased ages of consent,¹⁴⁴ it will become more likely that the children covered by statutory rape laws are those most susceptible to physical injury.

It is clear, however, that statutory rape presents serious risks of physical harm even to older teens, and courts should not limit these risks to the direct physical consequences of adult-minor intercourse. Statutory rape laws seek to protect those who are incapable of consenting to sex because of physical or emotional immaturity,¹⁴⁵ and, in the case of young teens, the physical ramifications of sex with an adult may be great even where consent-in-fact exists.¹⁴⁶ Physical and other injury is a foreseeable risk even in the course of ordinary sexual encounters between consenting adults. Intercourse between an adult and an older teen, while perhaps less likely to result in physical injury resulting from the sex act itself, may still expose the victim to the risk of pregnancy, sexually transmitted disease, or emotional

¹⁴¹ *Id.*

¹⁴² *Id.*

¹⁴³ Noy S. Davis & Jennifer Twombly, *State Legislators' Handbook for Statutory Rape Issues*, (Feb. 2000), available at <http://www.ojp.usdoj.gov/ovc/publications/infores/statutoryrape/handbook/issu.html>.

¹⁴⁴ *Id.*

¹⁴⁵ See Michelle Oberman, *Turning Girls Into Women: Re-Evaluating Modern Statutory Rape Law*, 8 DEPAUL J. HEALTH CARE L. 109, 112 (2004) (“Although it is conceivable that a teenage girl might ‘consent’ to sexual intercourse in some circumstances, the seemingly facile conclusion that so long as she consents, any act of intercourse with her is freely chosen and, therefore, legally permissible is troubling.”). Oberman argues that meaningful consent can be an elusive concept in relation to teenaged girls:

The stories girls tell about the “consensual” sex in which they engage reflect a poignant subtext of hope and pain. Girls express longing for emotional attachment, romance, and respect. At the same time, they suffer enormous insecurity and diminished self-image. . . . Girls negotiate access to the fulfillment of these emotional needs by way of sex. A girl who wants males to find her attractive . . . might reasonably consent to sex with a popular boy. . . . Even if they defy legal categorization, construing these sexual encounters as anything but scary, painful, shaming, and/or unpleasurable for the minor girls involved requires people to strain their imaginations.

Id. at 164-65. Other sociologists question whether teens are comfortable refusing sexual advances by either adult or minor partners. See, e.g., SUSAN MOORE & DOREEN ROSENTHAL, *SEXUALITY IN ADOLESCENCE* 99 (1993) (citing a study showing that 40% of adolescents felt unable or uncertain about their ability to refuse a partner’s sexual advances).

¹⁴⁶ *United States v. Daye*, 571 F.3d 225, 231 (2d Cir. 2009) (citing *United States v. Sacko*, 247 F.3d 21, 23-24 (1st Cir. 2001)) (summarizing studies indicating that up to a third of fourteen-year-old girls are not fully developed physically, and as a result of this physical immaturity face a real risk of physical injury from sexual intercourse).

or psychological injury.¹⁴⁷ The latter three concerns even hold true regardless of the gender of the minor victim.¹⁴⁸ It stands to reason that in adult-minor sexual activity, the risk of injury is both serious and foreseeable. Indeed, courts have rejected the argument that the risks of STD transmission and pregnancy associated with statutory rape “‘depend upon a speculative chain of events unrelated’” to the age of the minor victim or the adult perpetrator.¹⁴⁹ Accordingly, the myriad risks inherent to sexual activity—risks imposed on minors unable to consent to accepting those risks—should be considered when determining whether a typical instance of statutory rape will involve a serious risk of physical injury and thus fall within the *Begay-Chambers* conception of the otherwise clause.

2. Sexually Transmitted Disease, Pregnancy, and Poverty

While incidents of transmission of sexually transmitted diseases (“STDs”) in teenage boys have continued to decline, the numbers of similarly-aged girls infected with STDs has exponentially.¹⁵⁰ In 2008, teenaged girls aged fifteen to nineteen accounted for the largest number of the one and a half million reported cases of Chlamydia and gonorrhea in the United States.¹⁵¹ As a result of their partially-developed immune systems and immature physiology, young girls are particularly susceptible to STDs from intercourse.¹⁵² In fact, a single act of unprotected intercourse results in a 1% risk of acquiring HIV, a 30% risk of getting genital herpes, and a 50% chance of contracting gonorrhea.¹⁵³ Further, it is estimated that

¹⁴⁷ See *United States v. Thornton*, 554 F.3d 443, 449 (4th Cir. 2009) (finding that carnal knowledge of a child was not a predicate violent felony in light of *Begay*, but noting that even non-forcible adult-minor sexual activity can present grave physical risks to minors).

¹⁴⁸ See Alice Susan Andre-Clark, Note, *Whither Statutory Rape Laws: Of Michael M., The Fourteenth Amendment, and Protecting Women from Sexual Aggression*, 65 S. CAL. L. REV. 1933, 1959 (1992). Legislatures and courts have traditionally conceived of statutory rape as a gender-specific crime. See, e.g., *Michael M. v. Super. Ct. of Sonoma Cnty.*, 450 U.S. 464, 474 (1981) (upholding California’s gender-specific statutory rape law on the basis of substantial state interest in preventing teenage pregnancy); N.Y. PENAL LAW § 130.20 (1998) (“A person is guilty of sexual misconduct when . . . being a male, he engages in sexual intercourse with a female without her consent.”). However, the laws of most states are now gender-neutral. See, e.g., HAW. REV. STAT. § 707-730 (2011) (“A person commits the offense of sexual assault in the first degree if . . . [t]he person knowingly engages in sexual penetration with another person who is less than fourteen years old.”).

¹⁴⁹ *Thornton*, 554 F.3d at 446.

¹⁵⁰ Sharon G. Elstein & Noy S. Davis, *Sexual Relationships Between Adult Males and Young Teen Girls: Exploring the Legal and Social Responses*, ABA CTR. ON CHILDREN & THE LAW (Oct. 1997), available at http://new.abanet.org/child/PublicDocuments/statutory_rape.pdf.

¹⁵¹ *Teen Girls at Higher Risk of STDs: Report*, U.S. NEWS & WORLD REPORT, Nov. 16, 2009, available at <http://health.usnews.com/health-news/family-health/sexual-and-reproductive-health/articles/2009/11/16/teen-girls-at-higher-risk-for-stds-report>.

¹⁵² Brenda Zurita, *Girls Beware: Protect Your Transformation Zone*, CONCERNED WOMEN FOR AM., <http://www.cwfa.org/articledisplay.asp?id=12368&department=BLI&categoryid=family>.

¹⁵³ Elstein & Davis, *supra* note 150, at 3.

seven out of ten teen girls become infected with sexually transmitted diseases as a result of sexual relations with men over twenty,¹⁵⁴ and an alarming 90% of all HIV cases acquired from heterosexual intercourse before age eighteen are in females.¹⁵⁵ These shocking statistics suggest that teenaged girls acquire nearly all STD and HIV infections from sexual relationships with older men.¹⁵⁶ The susceptibility of young girls to the transmission of sexually transmitted disease as a result of intimate relations with adult men constitutes not only a serious public health issue that should encourage the courts and the legislature to increase the protections afforded to teenaged girls against statutory rape, but is also clear evidence that physical harm often results from adult-minor sexual relationships because minors, teen girls in particular, are physically and physiologically at risk from sexual encounters.¹⁵⁷

Teenage pregnancy also puts teen girls at serious risk of harm and is another public health issue that can be addressed through the more vigorous application of enhanced sentencing schemes as they relate to statutory rape. In 2009, more than 400,000 girls between the ages of fifteen to nineteen gave birth.¹⁵⁸ Due to their physical immaturity, these teen mothers are at a considerably higher risk of complications from pregnancy, including pre-term labor, pre-eclampsia, low birth weight, failure to thrive, and miscarriage.¹⁵⁹ To society at large, teenaged pregnancy has long been a concern due to its statistical connection to poverty and welfare, high drop-out rates, and crime.¹⁶⁰ That stringent enforcement of statutory rape laws may alleviate these problems is evidenced by troubling statistics indicating that half of the fathers of babies born to mothers between the ages of fifteen and seventeen are twenty years old or older.¹⁶¹ Further, nearly twenty percent of the fathers of babies born to teen mothers are six or more years older than the teen mom, and, in general, the younger a mother, the greater the age difference between her and her partner.¹⁶²

Finally, because teen mothers impregnated by older men are also disproportionately likely to be abandoned by the fathers shortly after conception or

¹⁵⁴ *Id.*

¹⁵⁵ *Id.*

¹⁵⁶ *Id.*

¹⁵⁷ See *United States v. Shannon*, 110 F.3d 382, 387 (7th Cir. 1997) (“A 13 year old is unlikely to have a full appreciation of the disease . . . risks of intercourse, an accurate knowledge of . . . disease-preventive measures, and the maturity to make a rational comparison of the costs and benefits of premarital intercourse.”).

¹⁵⁸ *Sexual Risk Behavior: HIV, STD, & Teen Pregnancy Prevention*, CTRS. FOR DISEASE CONTROL & PREVENTION, (July 12, 2011) <http://www.cdc.gov/HealthyYouth/sexualbehaviors/>.

¹⁵⁹ TEENAGE PREGNANCY AND REPRODUCTIVE HEALTH 80-82 (Philip Baker et al., eds. 2007).

¹⁶⁰ See generally, KRISTIN LUKER, DUBIOUS CONCEPTIONS: THE POLITICS OF TEENAGE PREGNANCY (1996) (discussing the ramifications for the individual and society from teenage pregnancy); CHARLES MURRAY, LOSING GROUND: AMERICAN SOCIAL POLICY, 1950-1980, 124-34 (1984) (describing through statistical analysis the social impact of teenage motherhood).

¹⁶¹ See David J. Landry & Jacqueline Dorroch Forrest, *How Old Are U.S. Fathers?*, 27 FAM. PLAN. PERSP. 159, 160 (1995).

¹⁶² See *id.* at 161.

birth, the result is an increased reliance by teenaged mothers on welfare or other social programs.¹⁶³ Young women aged seventeen and under who give birth outside of marriage are more likely to go on public assistance and to spend more years on welfare once enrolled.¹⁶⁴ Between 1985 and 1990, teenage parenthood was estimated to have cost the taxpaying public one hundred and twenty million through the usage of such programs as food stamps, Medicaid, and Aid to Families with Dependent Children.¹⁶⁵ Children of teenaged parents also tend to have lower cognitive scores, lower educational aspirations, and a greater likelihood of becoming teenage parents themselves.¹⁶⁶

Of course, enhanced sentencing for statutory rape only partially addresses these very real and pervasive issues. However, classifying statutory rape as a violent felony is one vehicle that can be used to deter adult predators and protect young girls not only from abuse and exploitation, but also from the very real public health issues of the transmission of sexually transmitted disease, teenage pregnancy, and the reliance on welfare and other public services that are often the end result of such predatory relationships. If statutory rape is considered a violent felony under the ACCA, this trend toward fathering children with minor women only to abandon those children to poverty could be mitigated.

B. "Risk" Versus "Actual" Harm

As the court points out in *United States v. Rodriguez*, our concern should not be with the existence of any actual harm caused during the commission of a violent felony, but rather with the *risk* that physical harm will occur.¹⁶⁷ As Justice Scalia adeptly noted in his *Begay* concurrence, the crux of a determination into whether a crime should be one of violence under the "otherwise" clause should rest with the correlation between the degree of risk posed between the crime in consideration and the enumerated offenses.¹⁶⁸ While there must be a similarity between statutory rape and burglary, arson, extortion, and the use of explosives, this similarity need *only* be in the degree of risk posed. Statutory rape meets this test. A typical instance of sexual intercourse carries a significantly higher risk that injury will occur than does a typical instance of extortion or burglary.¹⁶⁹ Indeed, many burglaries or robberies, the enumerated offenses in the statute, can be accomplished without any actual harm and in a manner that is not violent or aggressive. Burglary remains a crime of violence, however, due to the risk of physical force, even if "in the particular case the defendant's conduct [did] not create a risk that force will be used—*i.e.* entering through a wide-open door when no one is inside."¹⁷⁰ This is an important distinction,

¹⁶³ Elstein & Davis, *supra* note 150, at 3.

¹⁶⁴ Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. No. 104-193, § 101(8)(A), 110 Stat. 2105, 2111 (1996).

¹⁶⁵ Pub. L. No. 104-193, § 101(9)(G), 110 Stat. 2105, 2112 (1996).

¹⁶⁶ TEENAGE PREGNANCY AND REPRODUCTIVE HEALTH, *supra* note 159, at 80-82.

¹⁶⁷ *United States v. Rodriguez*, 979 F.2d 138, 141 (8th Cir. 1992) ("It matters not one whit whether the risk ultimately causes actual harm.").

¹⁶⁸ *Begay v. United States*, 553 U.S. 137, 150 (2008) (Scalia, J., concurring).

¹⁶⁹ See discussion *supra* Part VI.A.

¹⁷⁰ *Chery v. Ashcroft*, 347 F.3d 404, 408 (2d Cir. 2003).

as the requirements under *Begay* are that the crime typically be of the type that involves purposeful, violent, and aggressive conduct.¹⁷¹ Where it involves a sexual relationship between an adult and a minor, this risk is nearly always present. As the court stated in *United States v. Velazquez-Overa*:

We think it obvious that such crimes typically occur in close quarters, and are generally perpetrated by an adult upon a victim who is not only smaller, weaker, and less experienced, but is also generally susceptible to acceding the coercive power of adult authority figures. A child has very few, if any, resources to deter the use of physical force. . . . In such circumstances, there is a significant likelihood that physical force may be used to perpetrate the crime.¹⁷²

If any given commission of the crime may result in a serious potential risk of physical injury, that crime should be considered a violent felony under 18 U.S.C. Section 924(e) (2006), and this requirement is indeed met in cases of statutory rape.

VII. CONCLUSION

The Supreme Court's ruling in *Begay v. United States* has served not to resolve, but to exacerbate the confusion regarding what offenses should be considered violent felonies under the ACCA. While, according to *Begay*, crimes must be purposeful, violent, and aggressive, even these terms can be impossible to decipher as they relate to any given criminal statute. Statutory rape is one strict liability crime that, generally accepted as a per se crime of violence pre-*Begay*, is now regarded in several circuits as a strict-liability offense that cannot be deemed a violent felony post-*Begay*. If allowed to continue, this trend will greatly reduce the protections against recidivist offenders afforded to minors by enhanced sentencing provisions. However, statutory rape does meet the *Begay* test. The intentional sex act at issue should be sufficient for the conduct to be defined as "purposeful," and the aggression required under *Begay* is satisfied by the legal definition of "force" as non-consent, and the lack of legally-cognizable consent present in a statutory rape.

Further, statutory rape presents a risk of physical injury equal to that of the enumerated offenses of the ACCA. The risks of physical injury from sexual intercourse, transmission of sexually transmitted disease, and pregnancy are documented and very real. Even if every instance of statutory rape does not result in such harms, a typical instance of sexual intercourse between an adult and a minor will always carry such risks, and it is this risk that courts should be concerned with. Coupling these risks with the affirmative act on the part of the perpetrator and the lack of legally-cognizable consent raising a presumption of force, the appropriate rule as it relates to statutory rape as a predicate felony becomes clear: It is a violent crime that satisfies both the ACCA and the Court's findings in *Begay* and *Chambers*.

As Justice Scalia has stressed, it is incumbent upon the legislature to clarify the offenses that it intended to be included in the ACCA. However, in the absence of

¹⁷¹ *Begay*, 553 U.S. at 144-45.

¹⁷² *United States v. Velazquez-Overa*, 100 F.3d 418, 422 (5th Cir. 1996). The court went on to note that it had previously held that burglary is also a per se "crime of violence" under 2L1.2: "If burglary, with its tendency to cause alarm and to provoke physical confrontation, is considered a violent crime . . . then surely the same is true of the far greater intrusion that occurs when a child is sexually molested." *Id.*

Congress taking such steps, we must begin to view statutory rape in light of the substantive crime from which it gets its name—rape. In the absence of any consent recognized by law, sexual intercourse with a minor should be considered a forcible crime of violence that will trigger the enhanced sentencing provisions of the ACCA.