It's Not Rape-Rape: Statutory Rape Classification Under the Armed Career Criminal Act

Norah M. Roth
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INTRODUCTION

In 1978, film director Roman Polanski plead guilty to unlawful sexual intercourse with a minor—a statutory rape crime.¹ The California statute under which Polanski was convicted makes it a felony for an adult to engage in sexual intercourse with a person under the age of eighteen.² Despite actress Whoopi Goldberg's infamous statement "it wasn't rape-rape,"³ the circumstances surrounding Polanski's conviction suggested a particularly heinous crime. Polanski's thirteen-year-old victim testified before a grand jury that Polanski gave her alcohol and drugs before engaging in vaginal and anal intercourse with her despite her protests.⁴ If Polanski's conviction were subsequently analyzed for sentence enhancement under the Armed Career Criminal Act (the “ACCA”), most courts would not consider it to be a violent felony. While it may seem to the casual onlooker that Polanski's specific violation of the

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² CAL. PENAL CODE § 261.5 (West 2011). In 1978 this statute applied only to adults engaging in sexual intercourse with female minors, but it was amended in 1993 to apply to both male and female victims. See id. The statute also provides for stricter sentencing when the crime is committed by an adult at least twenty-one years of age against a minor under the age of sixteen. Id.
⁴ See Lichtenstein, supra note 1.
California statute amounted to a violent crime, the same might not be true for all behaviors criminalized under that same statute.

The ACCA punishes repeat violent offenders convicted of being felons in possession of a firearm with a mandatory minimum fifteen-year sentence. This sentence enhancement is based on the defendant having three previous convictions for violent felonies. Federal courts are currently split over whether statutory rape should be considered a violent felony under the ACCA. The Second Circuit has answered this question in the affirmative. The Fourth, Seventh, and Ninth Circuits, however, have declined to classify statutory rape as a violent felony.

Several factors complicate classification of statutory rape under the ACCA. First, it is a strict liability crime, and the statutory age of consent varies from state to state. Additionally, the same statute can often be applied to a range of behaviors. For instance, a statute that simply criminalizes sexual intercourse with any person under the age of seventeen would apply equally to an eighteen-year-old's sexual relationship with his or her sixteen-year-old partner, and a thirty-year-old's sexual relationship with a twelve-year-old child.

This Note argues that because statutory rape laws can be applied to a range of behaviors, some violent and some not, judges should look to the age of the victim in determining whether a past conviction qualifies as a violent felony for the purpose of sentence enhancement under the ACCA. Part I of this Note examines the legislative history and purpose of the ACCA and discusses Supreme Court precedent regarding violent felony classification under the ACCA's residual clause. Part II provides background on the current circuit split regarding the classification of statutory rape as a violent felony under the ACCA. Part III analyzes the application of the ACCA's residual clause to the crime of statutory rape on the basis of Supreme Court jurisprudence, legislative purpose, and policy considerations, and it offers recommendations for a solution that will best suit the purposes of the ACCA. This Note suggests that judges should look beyond the fact of a statutory rape conviction

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6 Id.
to the ages of the victim and perpetrator for the basis of violent felony classification. This would allow for a determination more firmly grounded in the reality of the defendant’s crime.

I. THE HISTORY AND PURPOSE OF THE ARMED CAREER CRIMINAL ACT

A. Legislative History

The ACCA was passed in 1984 for the purpose of reducing crime by enhancing sentences for career criminals. The statute created a minimum fifteen-year sentence for criminals with at least three past convictions for violent felonies who are found guilty of the federal offense of being a felon in possession of a firearm. Congress was acting in response to studies that tended to show that a majority of crimes are perpetrated by a small number of habitual criminals. The statute was designed to incapacitate these habitual criminals by mandating lengthy sentences for repeat offenders who had proved to be “unrehabilitative.”

The ACCA originally applied only to offenders with past convictions for armed robbery and armed burglary. In 1986, however, it was amended to apply to those with past convictions for serious drug offenses and violent felonies as well. Thus, a much broader class of repeat offenders could be subjected to the sentence enhancement.

Violent felonies are defined in subsection (e)(2)(B) of the statute as:

[Any crime punishable by imprisonment for a term exceeding one year, or any act of juvenile delinquency involving the use or carrying of a firearm, knife, or destructive device that would be punishable by imprisonment for such term if committed by an adult, that—

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8 See 18 U.S.C. § 924(e)(1).
10 See 134 Cong. Rec. 15807.
11 See id.
(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.

The classification provision of crimes that “otherwise
involve[] conduct that presents a serious potential risk of
physical injury to another” is referred to as the statute’s
“residual clause.”

B. Supreme Court Jurisprudence on Classification Under the
Armed Career Criminal Act’s Residual Clause

1. Taylor v. United States and the Categorical Approach

Application of the ACCA’s residual clause generally involves
what is known as a “categorical approach.” Under this approach,
courts look only to the statutory elements of a crime to determine
whether that crime should be classified as a violent felony for
sentence enhancement purposes. A narrow exception to the
categorical approach, the “modified categorical approach,” is
applied in circumstances where both violent and nonviolent
behaviors can be described under the same criminal statute.
While still narrow, the range of circumstances to which the
modified approach is applied has been expanded over the last two
decades. This subsection introduces the original development of
the categorical and modified categorical approaches. Changes to
these approaches are discussed further in the sections below
covering recent Supreme Court decisions on classification under
the ACCA.

The categorical approach was first described by the Supreme
Court in Taylor v. United States. Taylor held that “the only
plausible interpretation of [the ACCA] is that . . . it generally
requires the trial court to look only to the fact of conviction and
the statutory definition of the prior offense.” The Court also
provided that this categorical approach could be modified to
“permit the sentencing court to go beyond the mere fact of

14 Id.
16 See, e.g., United States v. McDonald, 592 F.3d 808, 810 (7th Cir. 2010).
17 495 U.S. at 602.
18 Id.
conviction in a narrow range of cases.”19 Taylor identified the circumstances subject to this modification as those in which “a jury was actually required to find all the elements” of a qualifying offense.20 The Court went on to provide the example of conviction under a burglary statute that included burglary of a building or of a vehicle.21 The Court explained that if a jury would be required to find burglary of a building to convict the defendant, burglary of a building would be the crime analyzed under the ACCA, as opposed to burglary of a building or vehicle.22

The scope of the modified categorical approach has since been expanded. In Shepard v. United States, the Court held that the modified approach could be applied to guilty plea and bench trial convictions, as well as to jury convictions.23 In these cases, the Court held that courts could examine the “bench-trial judge’s formal rulings of law and findings of fact,” or “the statement of factual basis for the charge.”24

2. James v. United States

In the 2007 case James v. United States, the Supreme Court held that attempted burglary under a Florida statute was a predicate offense for ACCA sentence enhancement.25 The James court made two important contributions to the analytic framework for identifying which crimes are covered by the ACCA’s residual clause. First, James clarified the categorical approach for classification under the residual clause. Second, James interpreted the amount of risk that needs to be presented by crimes falling under the residual clause.26 It is also worth noting that, in this case, the Supreme Court looked to the United States Sentencing Commission for guidance on classifying attempted crimes as violent felonies.27

19 Id.
20 Id.
21 See id.
22 See id.
24 Id. at 20.
26 Id. at 207–08.
27 Id. at 206.
In *James*, the Supreme Court clarified *Taylor*’s categorical approach to classification under the residual clause. *Taylor*’s categorical approach required that courts look to the statutory elements of a crime, rather than the particular facts surrounding the perpetration of the crime, in order to determine whether it fell under the residual clause of the ACCA.28 The *James* court clarified that the appropriate question under the categorical approach is not whether *all* instances of the crime presented a serious risk of injury; rather, the appropriate inquiry is whether the crime presents such a risk in the "ordinary case."29 In other words, *James* instructed that a crime falls under the residual cause when a typical perpetration of the crime presents a serious potential risk of injury to another person. For example, the *James* court explained that while an attempted burglary could potentially be perpetrated without creating a risk of injury to anyone, the typical commission of the crime would create such a risk.30 The Court pointed out that a person convicted of attempted burglary is likely to have been caught in the act, and that such a confrontation presents a serious risk that someone will be injured.31 Thus, the Court concluded that attempted burglary should be classified as a violent felony under the ACCA.

Additionally, *James*’s analysis seems to have decreased the amount of risk needed for a crime to qualify as a violent felony under the ACCA. The Court rejected the argument that in order to fall under the residual clause a crime must present "at least as much risk as the least risky of the [statute’s] enumerated offenses."32 While the Court acknowledged that the crime in question—attempted burglary—presents essentially the same risk as the enumerated offense of burglary, its analysis indicates that a crime that did not present the same risk would not automatically fall outside the provision of the residual clause.33 The Court noted that requiring a crime to involve "at least as much risk" as the enumerated offenses would "greatly reduce[ ]

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29 James, 550 U.S. at 208 (emphasis added).
30 See id.
31 See id. at 203–04.
33 James, 550 U.S. at 209–11.
the reach of [the] ACCA." The Court also pointed out that such a requirement would not aid courts in determining whether offenses not listed in the ACCA qualify as violent felonies under its residual clause.\(^\text{35}\)

Finally, it is useful to note that the James Court looked to the United States Sentencing Commission (the "Commission") for support in classifying attempted burglary as a violent felony. The Court remarked upon the similarities between the definitions of the Commission's Sentencing Guidelines' "crime of violence" and the ACCA's "violent felony."\(^\text{36}\) It then commented on the Commission's determination that "‘crime[s] of violence' for the purpose of the Guidelines enhancement ‘include the offenses of aiding and abetting, conspiring, and attempting to commit such offenses.'"\(^\text{37}\) In looking to the Commission for support, the Court acknowledged that while it was not bound by the Commission's conclusion, the Commission "is better able than any individual court to make an informed judgment about the relation between a particular offense and the likelihood of accompanying violence."\(^\text{38}\)

3. **Begay v. United States**

   In 2008, the Supreme Court again refined the framework for classification under the residual clause in *Begay v. United States*.\(^\text{39}\) The Begay court determined whether driving under the influence (DUI), which becomes a felony under New Mexico law after the third conviction, could be classified as a violent felony under the ACCA's residual clause.\(^\text{40}\)

   Most significantly, the Begay court narrowed the scope of the residual clause, seeming to contradict its stated fear of "reduc[ing] the reach of [the] ACCA."\(^\text{41}\) The Begay court declined to classify the New Mexico DUI convictions law as violent felonies, reasoning that DUI was too dissimilar from the

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\(^{34}\) Id. at 209–10.

\(^{35}\) Id. at 210.

\(^{36}\) See id. at 206 (internal quotation marks omitted).

\(^{37}\) Id. (alteration in original) (quoting U.S. SENTENCING GUIDELINES MANUAL § 4B1.2 cmt. 1 (2006)).

\(^{38}\) Id. at 206–07 (quoting United States v. Doe, 960 F.2d 221, 225 (1st Cir. 1992)) (internal quotation marks omitted).


\(^{40}\) Id. at 140.

\(^{41}\) *James*, 550 U.S. at 209–10.
enumerated offenses in the statute to fall under the residual clause. The New Mexico statute made it a crime to "drive a vehicle . . . under the influence of intoxicating liquor." This misdemeanor becomes a felony after three previous convictions under the same statute.

The Court held that a crime must be similar in kind as well as in degree of risk posed to the enumerated offenses in order to be classified as a violent felony. In so holding, the Court relied on three characteristics common to the enumerated offenses and lacking from DUI: "purposeful, violent, and aggressive conduct." The Begay court interpreted the residual clause as an attempt to identify and punish career criminals "who might deliberately point the gun and pull the trigger." In this respect, the court reasoned that "[c]rimes committed in . . . a purposeful, violent, and aggressive manner are potentially more dangerous when firearms are involved." Finally, the Court concluded that crimes, such as DUI, that are not "committed intentionally" are not predictive of future "armed career criminal behavior."

4. Chambers v. United States

The Supreme Court's most recent return to violent felony classification under the residual clause occurred in the 2009 case of Chambers v. United States. In Chambers, the Court determined that the Illinois crime of failure to report for confinement should not be classified as a violent felony under the ACCA. The Court also revisited the categorical approach, expanding the modified version of the approach where different behaviors falling under the same criminal statute are treated as

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42 Begay, 553 U.S. at 148.
43 Id. at 141 (quoting N.M. STAT. ANN. § 66-8-102(A) (2010)) (internal quotation marks omitted).
44 See id. at 140 (citing N.M. STAT. ANN. § 66-8-102(G)–(J)).
45 Id. at 143.
46 Id. at 144–45 (quoting United States v. Begay, 470 F.3d 964, 980 (10th Cir. 2006) (McConnell, J., dissenting in part)) (internal quotation marks omitted).
47 Id. at 146.
48 Id. at 145 (quoting Begay, 470 F.3d at 980 (McConnell, J., dissenting in part)) (internal quotation marks omitted).
49 Id. at 148 (internal quotation marks omitted).
51 Felony failure to report occurs when "[a] person convicted of a felony . . . knowingly fails to report to a penal institution or to report for periodic imprisonment." 720 ILL. COMP. STAT. ANN. 5/31-6(a) (West 2009).
52 Chambers, 555 U.S. at 123.
separate crimes. The Chambers court expanded on Begay's "purposeful, violent, and aggressive" analysis by also applying a statistical analysis of the likelihood that the crime in question would be accompanied by violence.

Chambers's main impact on interpretation of the residual clause is its reworking of the categorical approach to classification of violent felonies. The modified categorical approach allows courts to look "beyond the mere fact of conviction in a narrow range of cases." The Chambers court applied the modified approach to separate behaviors described in an Illinois escape and failure to report statute. In its analysis the Court broke the statutory section into seven "phrases," and then sorted these phrases into "at least two separate crimes." In this way the Court was able to separate failure to report from other types of escape described in the same statutory section.

The Chambers court went on to analyze failure to report under the Begay standard of "purposeful, violent, and aggressive conduct." The Court initiated its analysis with a simple application of Begay, stating, "the crime amounts to a form of inaction, a far cry from ... purposeful, violent, and aggressive conduct .... [A]n individual who fails to report would seem unlikely, not likely, to call attention to his whereabouts by simultaneously engaging in additional violent and unlawful conduct." From there, however, the Court turned to a statistical analysis of the risk of violence associated with the crime. The Court based its analysis on a Commission report on escape crimes that "included calculation of the likelihood that violence would accompany commission ... or the offender's later apprehension." Based on this report, the Court concluded that failure to report presented "only a small risk of physical violence," and fell outside the scope of the ACCA.

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53 Id. at 126–27.
54 Id. at 128–29 (internal quotation marks omitted).
55 Chambers, 550 U.S. at 126–27.
56 Id.
57 Id.
58 Id. at 128–29 (internal quotation marks omitted).
59 Id. at 128 (internal quotation marks omitted).
60 Id. at 129.
61 Id. at 130.
62 Id. at 130.
II. THE CIRCUIT SPLIT OVER CLASSIFICATION OF STATUTORY RAPE AS A VIOLENT FELONY

The Supreme Court has not yet ruled on the classification of statutory rape as a violent felony for ACCA sentence enhancing purposes. In this vacuum, circuit courts remain divided over whether or not this crime qualifies as a predicate offense.

A. The Second Circuit

In United States v. Daye the Second Circuit of the United States Court of Appeals held that a Vermont statutory rape crime fell under the ACCA’s residual clause for classification as a violent felony.\(^{63}\) In its decision, the Daye court first pointed out that the crime would clearly constitute a violent felony pre-Begay,\(^{64}\) before proceeding to its Begay analysis.\(^{65}\)

Daye determined that a conviction under a Vermont statute for sexual assault of a minor was a “violent felony” conviction for the purposes of ACCA sentence enhancement.\(^{66}\) The Vermont statute in question forbade “sexual act[s] with another person” where the other person is “under the age of sixteen.”\(^{67}\)

As a preliminary matter, it is worth noting that the trial court in Daye applied a modified categorical approach to Daye’s sexual assault convictions.\(^{68}\) The District Court looked to the facts of Daye’s convictions and concluded that they qualified as violent felonies based on the particular ages of his victims.\(^{69}\) This approach has been followed by district courts classifying statutory rape convictions as violent crimes under other federal sentence enhancing statutes.\(^{70}\) Following the Supreme Court’s

\(^{63}\) 571 F.3d 225, 234 (2d Cir. 2009).
\(^{64}\) Id. at 230–32.
\(^{65}\) Id. at 232.
\(^{66}\) Id. at 237.
\(^{67}\) Id. at 229–30 (quoting VT. STAT. ANN. tit. 13, § 3252(c) (1986) (since amended)). This statute also included exceptions where the parties were married and the sexual acts were consensual. Id. Its amended version further exempts consensual acts between a person nineteen years of age or younger and a minor who is at least fifteen years of age. VT. STAT. ANN. tit. 13, § 3252(c)(2) (West 2011).
\(^{68}\) Daye, 571 F.3d at 228.
\(^{69}\) Id. Daye’s three past convictions for sexual assault under the Vermont statute involved children ranging from age six to age twelve. Id. at 227.
\(^{70}\) See, e.g., United States v. Sawyers, 409 F.3d 732, 742 (6th Cir. 2005) (applying a modified categorical approach to a Tennessee statutory rape law that applied to sixteen and seventeen year old victims); United States v. Sacko, 247 F.3d 21, 22–23 (1st Cir. 2001) (allowing a sentencing court to look to charging documents
expansive application of the modified approach in *Chambers*, it seems even more likely that a modified approach is suitable for statutory rape classification. While not explicitly condemning the District Court's approach—examining the actual ages of the victims—the Second Circuit declined to go beyond a strict categorical approach “look[ing] only to the fact of conviction and the statutory definition of the prior offense.”

Before reaching its conclusion, the Circuit Court first determined that Daye's conviction for sexual assault of a minor would have qualified as a violent felony pre-*Begay*. The court noted that a pre-*Begay* analysis would have turned simply on whether the crime in question posed a risk of physical injury similar to that posed by the statute's enumerated crimes. The court pointed out that the minor victims in statutory rape cases are generally “smaller, weaker, and less experienced” as well as more “susceptible to...the coercive power” of the adult perpetrator. The court therefore concluded that the risk of physical injury in such crimes is “serious and foreseeable.” In response to the argument that the crime only presents such a risk of injury with particularly young victims, the court countered that the Vermont statute in question only applies to victims fifteen years of age and younger. The court further noted that young teens may not be fully developed, thus facing a risk of injury from the act of intercourse itself. Finally, the court pointed out that the risk of injury to victims who are “legally unable to consent” because of their physical or emotional immaturity is not limited to risk stemming directly from the sexual act. The risk involved also encompasses “a substantial

or jury instructions to determine the age of a Rhode Island statutory rape victim); United States v. Thomas, 159 F.3d 296, 298-99 (7th Cir. 1998) (supporting a modified categorical approach that allowed consideration the victim's age under an Illinois statutory rape law).

*Daye*, 571 F.3d at 229 (quoting Taylor v. United States, 495 U.S. 575, 602 (1990)) (internal quotation marks omitted). Whether the Circuit Court was influenced by the facts of Daye's convictions is a possibility that should not be ignored, but cannot be proved or disproved.

*Id.* at 230 (citing James v. United States, 550 U.S. 192, 203 (2007)).

*Id.* at 231 (quoting United States v. Cadieux, 500 F.3d 37, 45 (1st Cir. 2007)).

*Id.*

This argument is based on the fact that the statute includes “consensual” contact even where the victim cannot legally give consent.

*Id.*

*Id.* at 232.
likelihood that the adult may employ force to coerce the child's accession.” Consequently, the court held that the crime involved a “serious potential risk” of injury.

Following its determination that the crime involved a risk of injury comparable to the statute's enumerated offenses, the court proceeded to undertake a Begay-based analysis. In engaging in its Begay analysis, the court first turned to precedent set by Chery v. Ashcroft for guidance, which classified statutory rape as a “crime of violence” under 18 U.S.C. § 16(b). Citing Chery, the court noted that a sexual act with a minor, unlike drunk driving, involves “affirmative conduct.” Daye stated that statutory rape “creates a risk, not generally present during the commission of a drunk driving offense, that the perpetrator will intentionally use force.” Next, the court addressed the issue of mens rea. Begay requires that a crime involve “purposeful” conduct, thus bringing into question whether a strict liability crime such as statutory rape can qualify as a violent felony. Daye acknowledged the strict liability nature of the crime, but pointed out that despite this, it also involves “deliberate and affirmative conduct—namely, an intentional sexual act” and therefore satisfies the “purposeful” requirement of Begay. Finally, the

79 Id.
80 Id.
81 See id.
82 347 F.3d 404, 408–09 (2d Cir. 2003). Chery held that a conviction under a Connecticut statute prohibiting sexual intercourse with a person between the ages of thirteen and sixteen was a crime of violence. Id. The statute also provided that the perpetrator must be more than three years older than the victim. See CONN. GEN. STAT. ANN. § 53a-71 (West 2011). In an interesting parallel, the Chery court distinguished that case from Dalton v. Ashcroft, 257 F.3d 200, 205–08 (2d. Cir. 2001), in which it held DUI not to be a crime of violence under 18 U.S.C. § 16(b). See Daye, 571 F.3d at 233. The ruling in Dalton was adopted by the Supreme Court in Leocal v. Ashcroft, using similar reasoning to that found in Begay. See 543 U.S. 1, 10–11 (2004) (noting that DUI requires mere negligent misconduct, while crimes of violence require a higher mens rea). In fact, Begay cites directly to Leocal in its reasoning. See Begay v. United States, 553 U.S. 137, 143, 145–46 (2008).
83 See Daye, 571 F.3d at 233. The court admits that precedent involving classification under 18 U.S.C. § 16(b) is not controlling, but finds Chery's analysis persuasive as applicable to the ACCA's residual clause nonetheless. See id. at 233 n.9.
84 Id. at 233.
85 See Begay, 553 U.S. at 144.
86 Daye, 571 F.3d at 234. The court again turned to precedent to establish the affirmative nature of statutory rape as opposed to DUI, remarking that "engaging in sexual intercourse with a minor... is a crime of violence as it 'involves affirmative conduct' in the form of 'the deliberate touching of [the child's] intimate parts.' This
court turned to the “violent” and “aggressive” requirements of \textit{Begay}. Reiterating its “substantial risk” arguments, the court held that the use of force that is likely in statutory rape cases “establishes that the perpetrator will commonly act in a . . . violent[] and aggressive manner.” The court ultimately held that statutory rape is at least as “intentionally aggressive and violent” as the enumerated crime of burglary, and that it therefore must be classified as a violent felony under the ACCA’s residual clause.

\textbf{B. The Fourth, Seventh, and Ninth Circuits}

The Fourth, Seventh, and Ninth Circuits of the United States Court of Appeals have each held statutory rape crimes not to be violent felonies under the ACCA. The most recent case supporting this holding was \textit{United States v. McDonald}. \textsuperscript{90} \textit{McDonald}’s reasoning is representative of arguments made by the circuits against the residual clause covering the crime of statutory rape.

In \textit{McDonald}, the Seventh Circuit held that a conviction under section two of Wisconsin’s Sexual Assault of a Child statute did not qualify as a violent felony. \textsuperscript{91} Section two of the statute prohibits sexual contact or intercourse with a person under the age of sixteen. \textsuperscript{92} McDonald was convicted under this statute for engaging in sexual intercourse with a fifteen-year-old type of conduct creates a risk, not generally present during the commission of a drunk driving offense, that the perpetrator will intentionally use force.” \textit{Id.} at 233 (alteration in original) (citation omitted) (quoting Dos Santos v. Gonzales, 440 F.3d 81, 85 (2d Cir. 2006)).

\textsuperscript{87} See \textit{id.} at 234.

\textsuperscript{88} \textit{Id.}

\textsuperscript{89} \textit{Id.} The court also muses that the typical instance of statutory rape is likely more “violent and aggressive” than the typical instance of burglary, citing a 1985 case in which the Supreme Court looked at statistical evidence indicating that burglaries were rarely violent. \textit{Id.} (citing Tennessee v. Garner, 471 U.S. 1, 21–22 (1985)).

\textsuperscript{90} 592 F.3d 808 (7th Cir. 2010).

\textsuperscript{91} See \textit{id.} at 815. The court was analyzing the applicability of McDonald’s past conviction to sentence enhancement under U.S. SENTENCING GUIDELINES MANUAL § 2K2.1(a)(2). See \textit{id.} at 809. Before beginning its analysis, the Seventh Circuit of the United States Court of Appeals pointed out that § 2K2.1(a) is virtually identical to the ACCA’s “violent felony” definition. \textit{Id.} at 810. Furthermore, the Seventh Circuit had previously held that the two statutes should be “interpreted in the same way.” \textit{Id.} For this reason, it is unnecessary to further address the fact that \textit{McDonald} did not actually involve classification under the ACCA.

\textsuperscript{92} WIS. STAT. ANN. § 948.02(2) (West 2011).
girl. In its analysis, the court first discussed pre-Begay precedent, and then determined that, under the categorical approach, the age of the victim in McDonald's specific crime was irrelevant. Following this determination, the court found that the categorical crime did not involve "purposeful, violent, and aggressive" behavior, as required by Begay.

McDonald's reasoning is preceded by a discussion of United States v. Shannon, in which the Seventh Circuit held that a conviction for statutory rape, under the same Wisconsin statute in question in McDonald, did qualify as a crime of violence. In this pre-Begay case, the court declined to hold that all convictions under the statute qualified as crimes of violence, but that the specific violation did qualify as such, due to the particularly young age of the victim. The McDonald court identified two immediate issues with applying Shannon's holding to McDonald: 1) the victim in McDonald was fifteen—the oldest age covered by the statute—so, holding that McDonald's conviction was a crime of violence would effectively make every conviction under the statute a crime of violence, and 2) the modified categorical approach that was applied in Shannon would be inappropriate in the post-Begay environment. The court viewed the statute as indivisible with respect to the age of the victim, stating that "[it] does not enumerate multiple categories of the offense, some of which may be crimes of violence and others not."
Following its discussion of Shannon, the court moved into its Begay analysis. The court first addressed Begay's "purposeful" requirement. The court reasoned that because statutory rape is a strict liability crime, it could not be purposeful in the sense required by Begay. The court stated that Begay, through its "purposeful" requirement, "removed strict-liability crimes from the reach of the residual clause of the ACCA's definition of violent felony." Next, the court evaluated the requirement that the crime involve "violent and aggressive" conduct. Here, the court noted the circuit split on the issue, and remarked that it would be "difficult to conclude that the offense is typically violent and aggressive." Though the court expressed doubt that statutory rape could "qualify as categorically 'violent and aggressive,'" it relied on its determination that the "purposeful" requirement was not met, and declined to make a further determination as to the "violent and aggressive" requirement.

Other courts have found that statutory rape does not involve violent and aggressive conduct; the primary arguments are that the conduct may be consensual and "constructive force" implied by inability to legally consent is not equivalent to "violent" or "aggressive" conduct.

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101 See McDonald, 592 F.3d at 814.
102 Id.
103 See id. The court acknowledged that the act of the crime is indeed purposeful, but reasoned that because there is no requirement that the perpetrator have any intent as to the age of the victim—"the statutory element that makes the[her] conduct illegal"—any "purpose" involved is not of the kind required by Begay. Id.
104 Id.
105 Id. at 814–15.
106 Id.
107 See id. ("[B]ecause the offense is not categorically 'purposeful' in the sense required by Begay, we need not decide whether it is also categorically 'violent and aggressive.' As a strict-liability offense, a conviction under § 948.02(2) does not qualify as a crime of violence after Begay.").
108 See United States v. Christensen, 559 F.3d 1092, 1095 (9th Cir. 2009) ("[B]ecause statutory rape may involve consensual sexual intercourse, it does not necessarily involve either 'violent' or 'aggressive' conduct." (citations omitted)). This argument is unpersuasive given that Begay requires that we look to the typical commission of the crime, not that every commission of the crime involve violent and aggressive conduct.
109 See United States v. Thornton, 554 F.3d 443, 448 (4th Cir. 2009). It is worth noting that the Virginia statute under which Thornton was convicted of statutory rape specifically applies to non-forceable sexual acts. See VA. CODE ANN. § 18.2-63 (West 2011).
unpersuasive given that Begay requires evaluation based on the typical commission of the crime, not that every commission of the crime involve violent and aggressive conduct.\textsuperscript{110}

\section*{III. Analysis}

Given the confused state of the law surrounding application of the ACCA's residual clause, and the wide variation in ages of consent in statutory rape laws from state to state, it is no wonder that there is no consensus among the circuits on the classification of statutory rape. It is also apparent that strict application of the law as it has evolved may not always serve the purposes of the ACCA. This Part will analyze the classification of statutory rape as a violent felony under the ACCA by applying existing precedent. It will illustrate how the categorical approach to violent felony classification will lead to conflicting classifications of the same criminal behaviors because of the differences between state statutory rape crimes. Next, it will address how applying a modified categorical approach to statutory rape convictions would best serve the purposes of the ACCA. Finally, this Part will address the policy interests surrounding the classification of statutory rape as a violent felony and argue that allowing judges to look to the age of statutory rape victims in applying the ACCA will protect the policy interests of both victims and offenders.

\textbf{A. Categorically Applying Begay to the Uncategorized Crime of Statutory Rape}

The four circuit cases in which Begay has been applied to statutory rape crimes are illustrative of the problems involved in reaching a unified categorical classification of the crime under the ACCA. First, the categorical approach itself is in a confused state following the Supreme Court's most recent residual clause decisions. Furthermore, the immense variation between statutory rape laws makes it likely that states will reach inconsistent results in classifying identical criminal behaviors. This inconsistency could be avoided by allowing judges to look to the age of the statutory rape victim in determining whether or not the conviction should be classified as a violent felony.

1. Defining the Typical Commission of the Crime

The categorical approach requires that a violent felony analysis be applied to the crime as it is ordinarily committed. After Chambers v. United States, it appears that in applying the categorical approach, the first question is how the particular crime committed by the defendant should be characterized within its statute. If the statutory crime in question could be interpreted to involve multiple types of behavior, the modified categorical approach is applied, and the particular act of the defendant must be placed into a categorical group of behavior contained within the statute. This behavioral group must then be analyzed to determine whether it qualifies as a violent felony under the ACCA.

In determining how statutory rape convictions should be categorized, it is important to address the variety in state laws regarding such crimes. Statutory rape is generally characterized by sexual intercourse with a person under the age of consent. State statutes differ in two main regards: ages of consent and age gap provisions. Age of consent refers to the age below which a child is considered unable to consent to sexual contact by the governing statute. In 1999, ages of consent in the fifty states ranged from fourteen to eighteen. Age gap provisions safeguard young people who engage in sexual relationships with partners relatively close to their own ages. These provisions work by decriminalizing sexual activity with a person under the

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112 See, e.g., Begay, 553 U.S. at 141 (“In determining whether this crime is a violent felony . . . we examine it in terms of how the law defines the offense . . . .”).
113 See Chambers v. United States, 555 U.S. 122, 126 (2009) (“This categorical approach requires courts to choose the right category. And sometimes the choice is not obvious. The nature of the behavior that likely underlies a statutory phrase matters in this respect.”).
114 See id. at 126–27. (dissecting the statute in question by organizing it into three groups of separate types of behaviors). If this sounds confusing, it is because it is. No court has attempted to use this approach to break non-segregated statutory rape crimes into behavior groups based on the ages of the victims.
115 See id. at 127.
117 See, e.g., id. at 23–24 (showing a breakdown of statutory ages of consent and age gap provisions of state laws).
age of consent where the age difference between the parties involved is less than a defined number of years. In 1999, statutory age gaps varied from two to six years and had been adopted by forty-two of the fifty states.\textsuperscript{118}

Further distinctions between state statutory rape laws occur on two other main points. First, some state laws apply only to nonforcible, or purportedly consensual, contact,\textsuperscript{119} while others—the majority, in fact—do not distinguish on the basis of force.\textsuperscript{120} Second, some state statutes are organized to create separate graduated crimes based on the age of the victim,\textsuperscript{121} while others apply simply to every person below a certain age.\textsuperscript{122}

Given these differences, it is easy to see how two separate statutory rape laws would be analyzed differently under the categorical approach. For instance, statutes that grade offenses based on the age of the victim would be subjected to a modified categorical approach.\textsuperscript{123} It is also possible that convictions based on statutes that do not graduate crimes on the basis of age may get pigeonholed with a particular classification based on the facts of the first conviction evaluated under the ACCA.\textsuperscript{124} After Chambers, however, it could be argued that all statutory rape laws should be subjected to a modified categorical approach on the basis of age, by reading the statutes as governing several distinct types of behavior.\textsuperscript{125} The trial court in Daye applied this approach, looking to the age of the victims to determine whether Daye's statutory rape convictions should be classified as crimes of violence.\textsuperscript{126} Courts have applied a similar approach to classification of statutory rape under sentence-enhancing

\textsuperscript{118} See, e.g., id.
\textsuperscript{119} See, e.g., VA. CODE ANN. § 18.2-63 (West 2011).
\textsuperscript{120} See, e.g., VT. STAT. ANN. tit. 13, § 3252(3) (West 2011); WIS. STAT. ANN. § 948.02(2) (West 2011).
\textsuperscript{121} See, e.g., MO. ANN. STAT. § 566.032 (West 2011) (criminalizing sexual intercourse with a person under the age of fourteen, with a provision increasing sentencing for engaging in sexual intercourse with a person under the age of twelve).
\textsuperscript{122} See, e.g., R.I. GEN. LAWS ANN. § 11-37-6 (West 2010); S.C. CODE ANN. § 16-3-655 (2010).
\textsuperscript{123} See supra notes 19–22 and accompanying text.
\textsuperscript{124} While the categorical approach requires judges to only look to the fact of conviction, it seems logical to assume that they may be swayed to fit a square peg into a round hole if particularly moved by the facts of past convictions.
\textsuperscript{125} See generally Chambers v. United States, 555 U.S. 122, 125–27 (2009).
\textsuperscript{126} United States v. Daye, 571 F.3d 225, 228 (2d Cir. 2009).
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statutes other than the ACCA.\textsuperscript{127} The most basic of statutory rape laws would not be likely to attract a modified categorical approach because, at least superficially, they describe one type of behavior—sexual contact with a person under the age of consent. Barring application of the modified categorical approach, the typical instance of the crime would generally involve sexual activity, whether forcible or not, with a person under the age of consent, with no consideration given as to the specific age of the victim.

2. Applying \textit{Begay} to the Typical Instance of the Crime

The various differences between statutory rape laws make it unlikely that \textit{Begay} could be applied uniformly across the United States to convictions with identical underlying behavior. Statutes that indicate ages of consent on the lower end of the spectrum are more likely to be classified as violent felonies than those with ages of consent on the upper end of the spectrum.\textsuperscript{128} Additionally, statutes that have an absence of force as an element of the crime will be less likely to be classified as violent felonies.\textsuperscript{129} Following the Supreme Court's example in \textit{Chambers}, however, by evaluating a statistical analysis that describes the various circumstances surrounding its perpetration,\textsuperscript{130} a more accurate picture can be obtained of how the typical instance of the crime is committed.

In 2005, The Office of Juvenile Justice and Delinquency Prevention published a statistical analysis of statutory rape incidents.\textsuperscript{131} The data shows that the majority of victims were

\textsuperscript{127} See, e.g., United States v. Sawyers, 409 F.3d 732, 742 (6th Cir. 2005) (applying a modified categorical approach to a Tennessee statutory rape law that applied to sixteen- and seventeen-year-old victims); United States v. Sacko, 247 F.3d 21, 23 (1st Cir. 2001) (allowing a sentencing court to look to charging documents or jury instructions to determine the age of a Rhode Island statutory rape victim); United States v. Thomas, 159 F.3d 296, 298–300 (7th Cir. 1998) (supporting a modified categorical approach that allowed consideration of the victim's age under an Illinois statutory rape law).

\textsuperscript{128} Cf. United States v. McDonald, 592 F.3d 808, 813–15 (7th Cir. 2010) (discussing precedent that held the statutory rape of thirteen-year-old victim to qualify as a crime of violence but declining to similarly qualify the same crime as committed against a fourteen- or fifteen-year-old victim).

\textsuperscript{129} Cf. United States v. Thornton, 554 F.3d 443, 446–49 (4th Cir. 2009).


\textsuperscript{131} Karyl Troup-Leasure & Howard N. Snyder, \textit{Statutory Rape Known to Law Enforcement}, JUV. JUST. BULL., Aug. 2005, at 1. The analysis is based on the FBI's
either fourteen or fifteen years old, with perpetrators generally being six years older than their victims. The probability of arrest, however, and therefore of conviction, increased significantly as the age of the victim decreased. Furthermore, the probability of arrest also increased significantly as the age of the perpetrator increased. Therefore, the majority of convictions likely involved relatively young victims and relatively old perpetrators. Finally, the great majority of statutory rape crimes are committed by adult males against juvenile females. This is relevant given that self-reporting indicates that relationships between adult males and adolescent girls often involve violence.

Applying these statistics, it appears that the typical instance of statutory rape, where the victim is at the lower end of the age spectrum, involves at least a significant risk of violent or aggressive conduct, as required by Begay. The only remaining consideration then is whether the crime involves the type of purposeful conduct required by Begay.

The strict liability nature of statutory rape crimes complicates the analysis of whether these crimes involve the type of purposeful conduct required by Begay. The physical act involved in the crime is almost certainly undertaken intentionally; however, there is no requirement for intent as to

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132 Id. The six-year median age difference applies to female victims and male offenders. Id. The median age difference between female offenders with male victims was nine years. Id. Most statutory rapes—ninety-nine percent of those with female victims and ninety-four percent of those with male victims—were heteronormative. Id.
133 See id. at 4. Only thirty percent of incidents involving victims seventeen years of age led to an arrest, while fifty percent of incidents involving twelve-year-old victims led to an arrest. Id.
134 See id. Where offenders were between the ages of twelve and fourteen, arrests occurred in only twenty-eight percent of incidents, while incidents involving offenders thirty-five and older involved an arrest forty-six percent of the time. Id. Also, adult arrests cleared thirty-six percent of cases, while juvenile arrests cleared only six percent. Id.
135 See id. at 1. Ninety-five percent of victims are female, and ninety-nine percent of female victim offenders are male. Id.
136 See Denise A. Hines & David Finkelhor, Statutory Sex Crime Relationships Between Juveniles and Adults: A Review of Social Scientific Research, 12 AGGRESSION & VIOLENT BEHAV. 300, 307 (2007) (“These girls had relationships in which they were physically abused, controlled, and manipulated . . . by their adult male boyfriends. . . .”).
the age of the victim.137 As pointed out by the Seventh Circuit in McDonald, the age of the victim is precisely what makes the act illegal.138

If Begay is read to automatically disqualify strict liability crimes, statutory rape cannot be classified as a violent felony, regardless of the level of violence or risk of injury involved in the typical offense. Some support for this interpretation can be garnered from dicta in Begay. The Begay court initiated its analysis of DUI crimes by stating that "statutes that forbid driving under the influence...do not insist on purposeful, violent, and aggressive conduct; rather, they are, or are most nearly comparable to, crimes that impose strict liability...in...which the offender need not have had any criminal intent at all."139 As a counterpoint to this argument, however, Begay reached its "purposeful" requirement by looking at elements common to crimes enumerated in the ACCA's residual clause,140 not all of which require an element of intent. The residual clause enumerates "crimes involving explosives,"141 which would include crimes with a mens rea of negligence and recklessness.142

The Second Circuit's argument in Daye is persuasive. The Second Circuit reasoned that engaging in a sexual act with a minor involves "deliberate and affirmative conduct."143 The crime committed by a perpetrator of statutory rape is intentional—strict liability merely removes the defense of mistake of fact as to the victim's age. The unavailability of the mistake of age defense seems less relevant when the victim is particularly young, or the age difference between the victim and perpetrator is particularly large. At least one of these factors is present in the large majority of statutory rape convictions,144 and therefore in the typical commission of the crime for the purpose of analysis under

137 Some states do allow reasonable mistake of age as a defense to the crime. 6 AM. JUR. 2D Proof of Facts § 63 (2010). Statutes allowing for this defense would presumably be easy to classify as involving the type of purposeful behavior required by Begay.

138 See United States v. McDonald, 592 F.3d 808, 814 (7th Cir. 2010).


140 See id. at 144-45.

141 18 U.S.C. § 924(e).

142 See Begay, 553 U.S. at 152 (Scalia, J., concurring).

143 United States v. Daye, 571 F.3d 225, 233-34 (2d Cir. 2009); see also supra note 70 and accompanying text.

144 See supra notes 132–34 and accompanying text.
the ACCA. Furthermore, approximately twenty-five percent of states in the nation provide a mistake of age defense to statutory rape defendants.\textsuperscript{145}

B. Meeting the Purpose of the ACCA

The purpose of the ACCA is clear—punishing recidivist criminals and incapacitating the most dangerous offenders.\textsuperscript{146} A second purpose, implied by the first, is to protect potential victims of violent crimes. In serving this purpose with respect to statutory rape, statistics profiling offenders are a useful tool. Unfortunately, there are few studies evaluating statutory rape offender statistics.\textsuperscript{147}

The few studies that have been performed tend to show that many statutory rape offenders already have criminal backgrounds.\textsuperscript{148} Studies characterizing the fathers of children born to adolescent mothers indicate that older men who seek out adolescent females for relationships are more likely to have prior criminal histories.\textsuperscript{149} Fifty-six percent of persons imprisoned for statutory rape have prior criminal convictions, with thirty-one percent having prior convictions for violent crimes.\textsuperscript{150} Additionally, persons imprisoned for statutory rape are more likely to have past convictions for rape or sexual assault than other sex crime prisoners.\textsuperscript{151}

The high rate of prior violent convictions for statutory rape offenders\textsuperscript{152} makes it likely that they are the types of career offenders the ACCA was designed to target. Further data may be needed regarding recidivism among statutory rape offenders,

\begin{footnotesize}
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\item[\textsuperscript{145}] See Age of Consent Chart for the U.S., http://www.ageofconsent.us (2012).
\item[\textsuperscript{147}] See Hines & Finkelhor, supra note 136, at 308.
\item[\textsuperscript{148}] See id.; see also LAWRENCE A. GREENFELD, U.S. DEPT OF JUSTICE, NO. NCJ-163392, SEX OFFENSES AND OFFENDERS: AN ANALYSIS OF DATA ON RAPE AND SEXUAL ASSAULT 22–23 (1997).
\item[\textsuperscript{149}] See Hines & Finkelhor, supra note 136, at 308.
\item[\textsuperscript{150}] GREENFELD, supra note 147, at 22. Additionally, while those imprisoned for forcible rape were slightly more likely to have any prior convictions, those imprisoned for statutory rape were slightly more likely to have prior convictions for violent crimes. See id. What crimes are considered violent for the purpose of this data set is not defined. See id.
\item[\textsuperscript{151}] Id. Twenty-six percent of those imprisoned for statutory rape had prior convictions for rape or sexual assault, while only ten percent of those imprisoned for forcible rape had similar prior convictions. Id.
\item[\textsuperscript{152}] See supra note 149 and accompanying text.
\end{itemize}
\end{footnotesize}
however, in order to confirm this conclusion. Furthermore, the statistics in question apply only to those offenders who were sentenced to prison. The ACCA makes no distinction between criminals convicted of the same crimes and given different sentences.

C. Policy Concerns

The two groups that would be most affected by the classification of statutory rape as a violent felony are its victims and perpetrators. While there is a strong interest in protecting potential victims, offenders should also be protected from undeservedly long sentences.

The interests of potential statutory rape victims would be best served by providing long sentences to offenders, particularly when those offenders show a trend of repeat violent offenses. Research on the effect of statutory rape on victims of the crime shows that even victims who claim that their sexual encounters were consensual may present negative or neutral responses to their statutory relationships. Additionally, regardless of issues involving consent, statutory relationships present relatively high risks of pregnancy and sexually transmitted diseases.

153 The data does not indicate imprisoned statutory rape offenders' specific past convictions, nor does it indicate their likelihood of re-arrest after release. In general, rape and sexual assault offenders tend to have lower general re-arrest rates than other violent offenders, but a higher re-arrest rate for sexually based offenses. See GREENFELD, supra note 147, at 26–27.

154 See id. at 25–26 (providing statistics for incarcerated offenders).

155 18 U.S.C. § 924(e) (2006). To be a violent felony, the crime must be punishable by at least one year in prison, the offender need not have received a prison sentence, however. Id.

156 The probability of repeat violent offenses is indicated by the large number of statutory rape offenders with prior violent crime convictions. See GREENFELD, supra note 147, at 22. Additionally, those imprisoned for sexually based offenses are far more likely than other violent offenders to have prior sexual offense convictions and be arrested for sexual offenses after release. See id. at 23, 26–27.

157 See Irma T. Elo et al., Adolescent Females: Their Sexual Partners and the Fathers of Their Children, 61 J. MARRIAGE & FAM. 74, 81 (1999) ("[W]omen who experienced first intercourse at a young age or whose first partner was older were more likely to report a lower score on the wantedness scale than women who initiated sexual activity in their late teens or early 20s or whose partners were close to their own age."). Statutory relationships are sexual relationships between adults and minors under the legal age of consent.

158 See Hines & Finkelhor, supra note 136 ("[A]dolescent girls who have older partners begin having sex earlier than their counterparts and have riskier sex in
Young adolescents who engage in voluntary sexual relationships with older partners may not actually be in a position to give meaningful consent.\textsuperscript{159} Young teens are unlikely to know the pregnancy and other risks involved in sexual contact.\textsuperscript{160} Additionally, adolescents may be particularly susceptible to manipulation and coercion by their adult partners, leading to a false perception by the younger partners that it was their uncompelled decision to engage in sexual conduct.\textsuperscript{161} This is supported by evidence that adolescent participants in "voluntary" sexual relationships with older partners are more likely than those with partners close to their own ages to rank their desire for the sexual contact low on a "wantedness scale" despite the purportedly consensual nature of the relationship.\textsuperscript{162}

In addition to issues of meaningful consent, adolescents who engage in sexual relationships with adult partners face serious health, social, and psychological risks.\textsuperscript{163} Adolescent females involved in relationships with adult males are more likely to contract sexually transmitted diseases or become pregnant.\textsuperscript{164} The younger the female at the time of the statutory relationship, the more likely that she will attempt suicide or engage in other self-destructive behaviors.\textsuperscript{165} Even male victims of statutory rape by adult females, who predominantly report their statutory relationships as being positive experiences, show "slightly more psychological, alcohol, and deliberate self-harming behavior problems than men without such experiences."\textsuperscript{166}

While protecting adolescents from adult sexual predators is an important policy goal, perhaps equally important is the protection of non-predatory statutory rape offenders from

\textsuperscript{159} See id. \textit{at} 309 ("[O]nly a small minority of younger adolescents have the knowledge that is necessary to make informed decisions regarding sexual behavior, particularly sexual relationships with adults.").

\textsuperscript{160} See id. ("In one national survey, 13-year-olds did not know the most effective pregnancy prevention method, and only 10% of girls and 7% of boys understood the female fertility cycle and its effects on the likelihood of getting pregnant.").

\textsuperscript{161} See id. \textit{at} 310 (describing the "grooming process" researchers have argued occurs in statutory relationships).

\textsuperscript{162} See Elo et al., \textit{supra} note 156.

\textsuperscript{163} See Hines & Finkelhor, \textit{supra} note 136, at 306–08.

\textsuperscript{164} See id. \textit{at} 307.

\textsuperscript{165} See id. \textit{at} 306.

\textsuperscript{166} \textit{Id.} \textit{at} 308.
undeservedly long sentences. While statistics indicate that the majority of statutory rape convictions involve particularly young victims with significantly older partners, there are cases in which closely aged partners of adolescents are convicted following consensual sexual relationships.

Those involved in consensual relationships are less likely to be arrested for, and therefore convicted of, statutory rape. Additionally, to face ACCA sentence enhancement, a defendant must have had three prior violent felony convictions. These two facts may be enough to protect defendants convicted of statutory rape on the basis of consensual relationships. Allowing judges to look to the ages of victims and offenders, however, would provide additional assurance that defendants would not receive unwarranted sentence enhancements.

The above analysis indicates that a felony conviction for statutory rape, coupled with two other violent felony convictions, would be a good indicator that a defendant is the type of career criminal targeted by the ACCA. Additionally, strong policy interests—protection of adolescents from sexually transmitted diseases, pregnancy, and other negative effects associated with engaging in statutory relationships—favor prevention of statutory rape, and therefore the incapacitation of offenders with long criminal histories including statutory rape. Furthermore, it is likely that most convictions for statutory rape occur in conditions that indicate a high risk of violent and aggressive behavior. Given the strict liability nature of statutory rape laws, and the inability of judges to distinguish convictions based on victims’ ages when applying the categorical approach, it is unlikely that many courts will classify it as a violent felony. This result seems incongruous in light of the dangerous nature of the crime, especially as committed against particularly young victims.

See Troup-Leasure & Snyder, supra note 131, at 3.
See, e.g., COCCA, supra note 117, at 125 (recounting the case of an eighteen-year-old convicted of statutory rape for having a sexual relationship with his fifteen-year-old fiancée).
See Troup-Leasure & Snyder, supra note 131, at 4 (“The probability of arrest was related to the victim-offender relationship. Persons coded as boyfriends and girlfriends were the least likely to be arrested.”)
The categorical approach, while encouraging uniform application, has become overly complex and does not best serve the purpose of the statute. Several courts have applied a modified categorical approach to statutory rape classification under other federal sentence enhancing statutes. These courts look at the age of the victim as a factor for determining whether the conviction should be a predicate crime for sentence enhancement.

This Note recommends an approach that allows classification of statutory rape as a violent felony in circumstances where it carries a high risk of violence. The best way to accomplish this goal would be to allow judges to apply a modified categorical approach. The two factors that best predict whether a statutory rape offender is the type of criminal the ACCA is meant to target are sentencing and the relative and actual ages of the offender and his or her victim at the time of the offense. While courts have not previously looked at past sentences to determine whether convictions should be classified as violent felonies, as discussed above, they have looked at victim’s ages in making such determinations. Age alone may be a sufficient factor for classifying a statutory rape conviction as a violent felony, given the correlation between harsh sentencing and younger victims.

Allowing courts to look to statutory rape victims’ ages when applying the ACCA would require only a very limited fact finding.

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173 For instance, restricting courts to viewing only the elements of the statute under which the defendant was convicted, or alternatively the typical instance of the crime, prevents courts from enhancing the sentences of defendants who commit typically non-violent crimes in particularly violent manners.

174 See, e.g., United States v. Sawyers, 409 F.3d 732, 740, 742 (6th Cir. 2005) (applying a modified categorical approach to a Tennessee statutory rape law that applied to 16 and 17 year old victims); United States v. Sacko, 247 F.3d 21, 23 (1st Cir. 2001) (allowing a sentencing court to look to charging documents or jury instructions to determine the age of a Rhode Island statutory rape victim); United States v. Thomas, 159 F.3d 296, 299–300 (7th Cir. 1998) (supporting a modified categorical approach that allowed consideration of the victim’s age under an Illinois statutory rape law).

175 See Sawyers, 409 F.3d at 740–42; Sacko, 247 F.3d at 23–24; Thomas, 159 F.3d at 298–300.

176 See supra note 132 and accompanying text.
effort, while both significantly furthering the purpose of the statute and protecting those statutory rape offenders whose crimes should not be classified as violent felonies.

The federal statutory rape law could provide a guideline for determining which previous statutory rape convictions warrant sentence enhancement under the ACCA. This law sets the age of consent at sixteen, and has a four year age gap provision. Using these criteria, judges evaluating past convictions could look to charging instruments, guilty pleas, or findings of fact, and apply sentence enhancement in cases where the victim was under the age of sixteen and at least four years younger than the perpetrator.

Consider this hypothetical: John was convicted of being a felon in possession of a firearm, pursuant to 18 U.S.C. § 922(g). The government is seeking to enhance his sentence under the ACCA based on three prior convictions: two for burglary and one for statutory rape. John’s burglary convictions are enumerated crimes under the ACCA, so his sentence enhancement hinges on the statutory rape conviction. John plead guilty to statutory rape under an Idaho law that prohibits sexual intercourse between a man eighteen or older and a female under the age of sixteen after he was arrested for having a sexual relationship with a fifteen-year-old girl. John was eighteen years old at the time. Applying this Note’s recommendation, the sentencing judge would look John’s guilty plea and find that his conviction does not qualify as a predicate offense under the ACCA. Even though John’s victim was under the age of sixteen, he was not four or more years older than her, as would be required by the

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177 18 U.S.C. § 2243(a) (2006 & Supp. I). This law applies “in the special maritime and territorial jurisdiction of the United States or in a Federal prison, or in any prison, institution, or facility in which persons are held in custody by direction of or pursuant to a contract or agreement with the head of any Federal department or agency.” Id.


179 IDAHO CODE ANN. § 18-6101 (West 2011). Most rape statutes no longer make distinctions based on gender. See COCCA, supra note 116, at 73–74. However, Idaho defines rape as “penetration, however slight, of the oral, anal or vaginal opening with the perpetrator’s penis accomplished with a female,” when at least one of eight listed circumstances apply. IDAHO CODE ANN. § 18-6101. Two of these listed circumstances describe statutory rape crimes; one with an age of consent of sixteen and a two year age gap provision, and one with an age of consent of eighteen and a three year age gap provision. Id.
Federal statutory rape law. Alternatively, under the same approach, John's crime would qualify as a violent felony had his victim been only thirteen or fourteen years old.

**CONCLUSION**

The ACCA attempts to incapacitate violent career criminals by requiring mandatory minimum sentences for offenders with three prior violent felony convictions. The categorical approach to violent felony classification requires that courts base their determinations on the typical instance of a crime, rather than on the facts behind the prior convictions. Alternatively, a modified categorical approach allows courts to look beyond the fact of conviction when different behaviors are criminalized under the same statute.

The differences between statutory rape laws, and the range of behaviors to which they can be applied have led to inconsistent holdings on whether or not they qualify as violent felonies for the purpose of ACCA sentence enhancement. Such inconsistencies likely result in undeservedly long sentences for some offenders and failure to punish others who the ACCA attempts to target.

By applying a modified categorical approach, judges can more accurately determine which past statutory rape convictions warrant ACCA sentence enhancement. Looking to both the victim's age and the age difference between the victim and defendant provides a realistic method of determining whether the conviction should constitute a violent felony for sentence enhancement purposes. This method also resolves the unequal application of the law that results from categorical classification of the crime.
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I certify that all information furnished on this form is true and complete. I understand that anyone who furnishes false or misleading information on this form or who omits material or information requested on this form may be subject to criminal sanctions (including fines and imprisonment) and/or civil sanctions (including civil penalties).

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