

Note

INTERPRETING *BEGAY* AFTER *SYKES*: WHY RECKLESS OFFENSES SHOULD BE ELIGIBLE TO QUALIFY AS VIOLENT FELONIES UNDER THE ACCA'S RESIDUAL CLAUSE

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ABSTRACT

*Passed as part of the Armed Career Criminal Act, 18 U.S.C. § 924(e) subjects felons in possession of firearms to a strict mandatory minimum sentence if the offenders have three prior state or federal convictions that qualify as serious drug offenses or violent felonies. A crime qualifies as a violent felony under the residual clause, 18 U.S.C. § 924(e)(2)(B)(ii), if it is one of the enumerated offenses of “burglary, arson, or extortion, involves use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another.” Current federal circuit court interpretations of the Supreme Court’s decisions in *Begay v. United States* and *Sykes v. United States* exclude both crimes with lesser mens rea—recklessness or negligence—and strict-liability crimes from qualifying under the residual clause.*

*This Note proposes that some reckless crimes, like drive-by shooting, would qualify if compared to their closest analogs among the enumerated offenses for purposes of determining similarity “in kind,” a requirement under *Sykes* and *Begay*. This proposed solution would bring some reckless offenses within the scope of the residual clause, allowing for increased, though narrow, targeting of the most dangerous felons: the armed career criminals.*

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INTRODUCTION

On October 26, 2005, B.B.¹ stood unsuspectingly in Ezell's Chicken, a restaurant in Seattle, Washington.² Hearing gunshots in the street, she ran behind the counter and looked out the storefront window.³ She had a clear view of the shooter, who stood beneath a hazy light across the street.⁴ As B.B. watched, the shooter pointed his gun in her direction and fired again; this time, one of the bullets missed her by a foot, hitting the register next to her head.⁵ The man who B.B. would later identify as the shooter, M.L., claimed the shooting was gang related and that he was returning fire into a rival gang's car.⁶ Yet according to B.B., whose view of M.L. was "unobstructed," he was not shooting into another car as he claimed—he was deliberately shooting into the building.⁷

The police arrested M.L. later that night.⁸ He subsequently pled guilty to the offense of drive-by shooting in violation of Washington law.⁹ He had two prior state felony convictions: a 2004 conviction for a violation of Washington's Uniform Controlled Substances Act¹⁰ and a 2001 conviction for attempted first-degree robbery.¹¹

M.L. was arrested again in 2012 for violating 18 U.S.C. § 922(g)(1), a federal statute that prohibits convicted felons from

1. The names of the parties involved in this case have been abbreviated to protect their privacy.

2. Certification for Determination of Probable Cause at 1, *Washington v. M.L.*, No. 05-1-12131-5 (Wash. Super. Ct. Dec. 16, 2005). The Certification for Determination of Probable Cause is attached to another court document, Statement of Defendant on Plea of Guilty to Felony Non-Sex Offense (STTDFG), *Washington v. M.L.*, No. 05-1-12131-5 (Wash. Super. Ct. Dec. 16, 2005), Docket No. 19.

3. Certification for Determination of Probable Cause, *supra* note 2, at 1.

4. *Id.*

5. *Id.*

6. *Id.*

7. *Id.*

8. *Id.*

9. Statement of Defendant on Plea of Guilty to Felony Non-Sex Offense (STTDFG), *supra* note 2, at 1. Washington's drive-by shooting provision states that "[a] person is guilty of drive-by shooting when he or she recklessly discharges a firearm . . . in a manner which creates a substantial risk of death or serious physical injury to another person." WASH. REV. CODE ANN. § 9A.36.045(1) (West 2009). The discharge must be "either from a motor vehicle or from the immediate area of a motor vehicle that was used to transport the shooter or the firearm, or both, to the scene of the discharge." *Id.* If the discharge is from a moving vehicle, there is a presumption of recklessness. *Id.* § 9A.36.045(2). The offense is a felony. *Id.* § 9A.36.045(3).

10. WASH. REV. CODE ANN. § 69.50 (West 2007 & Supp. 2013).

11. Complaint for Violation at 1, *United States v. M.L.*, No. 12-00214 (W.D. Wash. Apr. 25, 2012).

possessing firearms.¹² It is one means by which Congress has attempted to exert control over firearm possession by criminals; another is the Armed Career Criminal Act (ACCA).¹³ The ACCA includes the federal equivalent of a three-strikes law,¹⁴ 18 U.S.C. § 924(e): under this provision, a felon in possession of a firearm with three prior convictions for a serious drug offense or a “violent felony” qualifies as an armed career criminal—the eponym of the statute—and receives a mandatory minimum fifteen-year sentence.¹⁵

M.L. is the prototypical armed career criminal,¹⁶ though the law in its current state does not appear to consider him to be one.¹⁷ He would fail to qualify as an armed career criminal under either the statute or its parallel provision in the Sentencing Guidelines¹⁸ because one of his three prior convictions—his 2005 conviction for drive-by shooting¹⁹—would not qualify as a violent felony for purposes of the

12. *Id.* at 2; see 18 U.S.C. § 922(g)(1) (2012) (making it unlawful for any person “who has been convicted in any court of, a crime punishable by imprisonment for a term exceeding one year” to “possess . . . any firearm or ammunition”).

13. Armed Career Criminal Act of 1984 § 1802, 18 U.S.C. § 924(e) (2012).

14. Three-strikes laws are a relatively common antirecidivism device. For an older, but still relevant, discussion of three-strikes laws, see generally Erik G. Luna, Foreword, *Three Strikes in a Nutshell*, 20 T. JEFFERSON L. REV. 1 (1998).

15. 18 U.S.C. § 924(e). Section 924(e)(2)(B) defines a “violent felony” as “any crime punishable by imprisonment for a term exceeding one year” that “has as an element the use, attempted use, or threatened use of physical force against the person of another; or . . . is burglary, arson, or extortion, involves use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another.” *Id.* § 924(e)(2)(B).

16. M.L. was actually charged under § 922(g)(1), not § 924(e), Complaint, *supra* note 11, at 6, and he pled guilty to an entirely different offense, see *infra* note 17. Thus, the following analysis of M.L.’s ineligibility for armed career criminal status under § 924(e) (and the reasons therefor) constitutes my own opinion on the matter, based on Supreme Court and federal circuit court case law.

17. M.L. ultimately pled guilty to violating 26 U.S.C. §§ 5861(h) (2006) and 5871 (2006), which prohibit possession of a firearm with an obliterated serial number. Judgment at 1, *United States v. M.L.*, No. 12-00177 (W.D. Wash. Nov. 1, 2013). He was sentenced to ninety months in prison. *Id.* at 2.

18. The crime-of-violence provision in the Sentencing Guidelines tracks the wording in § 924(e), and courts use the two interchangeably. See, e.g., *James v. United States*, 550 U.S. 192, 206 (2007) (“[T]he Sentencing Guidelines’ career offender enhancement[’s] . . . definition of a predicate ‘crime of violence’ closely tracks ACCA’s definition of ‘violent felony.’”). The only significant difference is the application note accompanying the Sentencing Guidelines provision. The application note defines crime of violence to “include[] murder, manslaughter, kidnapping, aggravated assault, forcible sex offenses, robbery, arson, extortion, extortionate extension of credit, and burglary of a dwelling.” U.S. SENTENCING GUIDELINES MANUAL § 4B1.2 cmt. n.1 (2012).

19. Washington’s drive-by-shooting offense qualifies as a “crime punishable by imprisonment for a term exceeding one year.” See 18 U.S.C. § 924(e)(2)(B). For a first-time

ACCA. Washington's drive-by-shooting statute does not "ha[ve] as an element the use, attempted use, or threatened use of physical force against the person of another" as required by § 924(e)(2)(B)(i), nor is it "burglary, arson, or extortion, [or a crime] involv[ing] use of explosives," the enumerated qualifying offenses under § 924(e)(2)(B)(ii). Consequently, it must be analyzed under the statute's residual clause, which expands the statutory definition of "violent felony" to include crimes "otherwise involv[ing] conduct that presents a serious potential risk of physical injury to another."²⁰

M.L.'s drive-by-shooting conviction would fail to qualify under the statute's residual clause because the federal circuit courts have read a strict mens rea requirement into the statute. Based on the Supreme Court's decisions in *Begay v. United States*²¹ and *Sykes v. United States*,²² such courts have held that only crimes requiring intent or knowledge can qualify as violent felonies under the residual clause.²³ As a result, Washington's drive-by-shooting statute would be ineligible because it requires only a reckless mens rea.²⁴ M.L.'s prior conviction for the drive-by shooting would thus fail to qualify as a violent felony, despite evidence that M.L. discharged his gun intentionally; after all, B.B. told police that M.L. aimed the gun at the storefront window and fired repeatedly.²⁵ M.L. should have been eligible for armed career criminal status based on his prior convictions, but when M.L. was found in possession of a firearm in 2012, he was not charged under § 924(e)—instead, he was charged under § 922(g)(1),²⁶ which carries a lower sentence.²⁷

offender, the standard sentencing range for a drive-by-shooting conviction is fifteen to twenty months. See WASH. REV. CODE ANN. §§ 9.94A.510, 9.94A.515 (West 2010).

20. 18 U.S.C. § 924(e)(2)(B)(ii) (2012).

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

22. *Sykes v. United States*, 131 S. Ct. 2267 (2011).

23. See *infra* Parts I.B.2, I.C.2.

24. See WASH. REV. CODE ANN. § 9A.36.045(1).

25. See Certification for Determination of Probable Cause, *supra* note 2, at 1.

26. Complaint for Violation, *supra* note 11, at 6. Complaints do not tell us, of course, why a criminal was charged under one statute as opposed to another. A discussion of prosecutorial discretion is beyond the scope of this Note, but it is worth noting that a number of factors were likely considered when these charging decisions were made. It is impossible to say that M.L. was not charged under § 924(e) solely because his drive-by-shooting conviction would have failed to qualify as a violent felony under existing case law, though this is likely something prosecutors considered. M.L.'s case is still useful, however, because it serves as an example of an offender who *should* qualify as an armed career criminal but—for whatever reason—was not charged as such.

Individuals like M.L. should be subject to § 924(e)'s enhanced penalties. For a strict mens rea requirement to bar them from qualifying would contravene congressional intent. The ACCA was passed in an effort “to supplement the States’ law enforcement efforts against ‘career’ criminals.”²⁸ Enacted as Section 1802 of the Armed Career Criminal Act of 1984, the provision currently codified as 18 U.S.C. § 924(e) originally mandated minimum sentences of fifteen years for felons found guilty of possessing a firearm, so long as those felons had at least three prior convictions for robbery or burglary.²⁹

The statute went through two revisions. It was recodified as 18 U.S.C. § 924(e) and amended by the Firearms Owners’ Protection Act³⁰ in 1986, then amended five months later by the Anti-Drug Abuse Act of 1986 (ADAA).³¹ The bulk of the amendments, and the only ones relevant to this Note, were made by the ADAA. The ADAA amendments to § 924(e) “expanded the predicate offenses triggering the sentence enhancement from ‘robbery or burglary’ to ‘a violent felony or a serious drug offense,’” “defined the term ‘violent felony’ to include ‘burglary,’” and added the residual clause.³²

Senator Arlen Specter’s introduction of the proposed amendments to the House Subcommittee on Crime encapsulates the

27. Compare 18 U.S.C. § 924(a)(2) (2006) (“Whoever knowingly violates subsection (a)(6), (d), (g), (h), (i), (j), or (o) of section 922 shall be fined as provided in this title, imprisoned not more than 10 years, or both.”), with *id.* § 924(e)(1) (“In the case of a person who violates section 922(g) of this title and has three previous convictions by any court referred to in section 922(g)(1) of this title for a violent felony or a serious drug offense, or both, committed on occasions different from one another, such person shall be fined under this title and imprisoned not less than fifteen years . . .”).

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

29. Armed Career Criminal Act of 1984, Pub. L. No. 98-473, § 1802, 98 Stat. 2185, 2185 (codified as amended at 18 U.S.C. § 924(e) (2012)). Congress chose robbery and burglary as the predicate felonies for two reasons: first, because “a ‘large percentage’ of crimes of theft and violence ‘are committed by a very small percentage of repeat offenders,’ and . . . robbery and burglary are the crimes most frequently committed by these career criminals”; and second, because robbery and burglary are invasive crimes that can quickly cause confrontations to escalate into violence. *Taylor*, 495 U.S. at 581 (quoting H.R. REP. NO. 98-1073, at 1, 3 (1984)); see also S. REP. NO. 98-190, at 4–5 (1983) (noting that “[t]he volume of burglaries is even more dramatic than the number of robberies” and that “[t]he prevalence of robbery and burglary as the most common violent street crimes is undeniable”).

30. Firearms Owners’ Protection Act, Pub. L. No. 99-308, § 104, 100 Stat. 449, 458–59 (1986) (codified as amended at 18 U.S.C. § 924(e)).

31. Anti-Drug Abuse Act of 1986, Pub. L. No. 99-570, § 1402, 100 Stat. 3207, 3207-39 to 3207-40 (codified as amended at 18 U.S.C. § 924(e)).

32. *Taylor*, 495 U.S. at 582, 587.

impetus behind the passage of the § 924(e) ADAA amendments.³³ The enhancement provision, which had been in effect for a year and a half, “ha[d] been successful with the basic classification of robberies and burglaries as the definition for ‘career criminal,’ [but] the time ha[d] come to broaden that definition so that [Congress could] have a greater sweep and more effective use of this important statute.”³⁴ The Supreme Court, analyzing the statute’s legislative history, noted that “[t]he issue under consideration was uniformly referred to as ‘expanding’ the range of predicate offenses.”³⁵

The history behind the ADAA amendments sheds light on the meaning of the residual clause in its current form. The amendments were the result of a compromise between two proposed bills, H.R. 4768 and H.R. 4639, which critics referred to as “too narrow” and “too broad,” respectively.³⁶ The narrower bill, H.R. 4768, excluded property crimes from the list of violent felonies, despite the fact “that some such crimes present a serious risk of harm to persons, and that the career offenders at whom the enhancement provision is aimed often specialize in property crimes.”³⁷ Critics of H.R. 4768 proposed burglary, arson, extortion, and crimes involving the use of explosives as potential property crimes that should be included, noting that “[i]t is these crimes against property—which are inherently dangerous—that we think should be considered as predicate offenses.”³⁸ The broader bill, H.R. 4639, included felonies involving “the use, attempted use, or threatened use of physical force against the person or property of another” and felonies “involv[ing] a substantial risk that physical force against the person or property of another may be used in the course of committing the offense.”³⁹ Such an amendment would have arguably broadened the statute to include almost all

33. See *Armed Career Criminal Legislation: Hearing on H.R. 4639 and H.R. 4768 Before the Subcomm. on Crime of the H. Comm. on the Judiciary*, 99th Cong. 42–47 (1986) [hereinafter *Armed Career Criminal Legislation Hearing*] (statement of Sen. Arlen Specter).

34. *Id.* at 44.

35. *Taylor*, 495 U.S. at 584.

36. *Id.* at 584–86.

37. *Id.* at 584.

38. *Id.* at 585 (quoting *Armed Career Criminal Legislation Hearing*, *supra* note 33, at 15 (statement of Deputy Att’y Gen. James Knapp)).

39. H.R. 4639, 99th Cong. (1986); S. 2312, 99th Cong. (1986).

felonies without targeting the most dangerous criminals—the statute’s original purpose.⁴⁰

The central issue was whether (and which) property offenses should be included as predicate felonies under the statute.⁴¹ The compromise bill, H.R. 4885, “expan[ded] . . . the predicate offenses to include serious drug trafficking offenses . . . and violent felonies, generally,” along with crimes “that involve conduct that presents a serious potential risk of physical injury to others,” citing burglary, arson, extortion, and crimes involving the use of explosives as examples of the latter.⁴²

In *Taylor v. United States*,⁴³ the Supreme Court also made “[s]ome useful observations” about Congress’s intent in passing the statute.⁴⁴ The Court first emphasized Congress’s decision to target career offenders, explaining that Congress’s “concern was not limited to offenders who had actually been convicted of crimes of violence against persons.”⁴⁵ In particular, the Court focused on the predicate offense of burglary (ostensibly a crime against property), which Congress included “because of its inherent potential for harm to persons.”⁴⁶ It is this “inherent potential for harm to persons” that has informed and guided the Supreme Court’s ACCA jurisprudence.

Lower courts, however, have failed to implement the principles expounded by Congress and honored by the Supreme Court. The problem stems from two Supreme Court decisions, *Begay v. United States* and *Sykes v. United States*, the uncertain contours of which have left federal circuit courts divided. *Begay* introduced a new standard to avoid categorizing the predicate felony at issue in that case—driving under the influence (DUI)—as a violent felony under the residual clause, holding that predicate felonies must be sufficiently “purposeful, violent, and aggressive” to qualify.⁴⁷ After

40. See, e.g., *Taylor*, 495 U.S. at 586 (“[I]t is important to prioritize offenses.” (alteration in original) (quoting *Armed Career Criminal Legislation Hearing*, *supra* note 33, at 11 (statement of Rep. William Hughes))).

41. See *id.* at 587 (“The other major question involved in these hearings was as to what violent felonies involving physical force against *property* should be included in the definition of ‘violent’ felony.” (quoting H.R. REP. NO. 99-849, at 3 (1986)) (quotation mark omitted)).

42. *Id.* (quoting H.R. REP. NO. 99-849, at 3).

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

44. *Id.* at 587.

45. See *id.* at 587–88.

46. See *id.* at 588.

47. See *infra* Part I.B.1.

Begay, circuit courts uniformly assumed that the new test excluded crimes with lesser mens rea—reckless, negligent, or strict-liability crimes—because these crimes could not be “purposeful.”⁴⁸ *Sykes* retreated from *Begay*’s “purposeful, violent, and aggressive” test, focusing instead on the level of risk associated with the crime.⁴⁹ It stated that *Begay*’s test was applicable *only* to crimes with lesser mens rea, which implied that some of these crimes could potentially qualify as violent felonies.⁵⁰ In the wake of the two decisions, it is unclear whether (and how) crimes with lesser mens rea will qualify as violent felonies under the residual clause.⁵¹

In keeping with Congress’s intent and the Supreme Court’s ACCA jurisprudence, this Note argues that at least some reckless crimes, like drive-by shooting,⁵² should be sufficiently “purposeful, violent, and aggressive” under *Begay* to qualify as violent felonies under the residual clause after *Sykes*. Currently, they do not. Line drawing in this area is difficult, but not impossible—few courts would argue, for example, that reckless offenses like vehicular manslaughter or strict-liability offenses like DUI should qualify as violent felonies. Indeed, if courts are willing to recognize that some “reckless” crimes actually require an intentional *act* with recklessness as to the *result*, it becomes possible to create a principled distinction between crimes that should and should not qualify under the residual clause. Crimes that have an intentional act as an element will qualify, but crimes that lack such an element will not.

The Court has already provided a means of making such principled distinctions: current residual-clause doctrine already compares specific state crimes to their closest analogs among the

48. See *infra* Part I.B.2.

49. See *infra* Part I.C.1.

50. See *infra* Part I.C.1. Of course, it seems counterintuitive to suggest that crimes with a lesser mens rea could ever be purposeful, and as Justice Scalia noted in *Begay*, some of the enumerated offenses have a lesser mens rea. See *Begay v. United States*, 553 U.S. 137, 152 (2008) (Scalia, J., concurring) (“And what is more, the Court’s posited purpose is positively contradicted by the fact that one of the enumerated crimes—the unlawful use of explosives—may involve merely negligent or reckless conduct.”).

51. The majority of federal circuit courts have followed *Sykes* in holding that *Begay*’s “purposeful, violent, and aggressive” test applies only to crimes with a lesser mens rea. See *infra* Part I.C.2. It does not appear that these courts have had occasion to decide how, exactly, *Begay*’s test would apply to these crimes after *Sykes*. See *infra* Part I.C.2.

52. This Note uses drive-by shooting as an example of a crime that would qualify as a violent felony under the proposed test. It is not the only crime that would qualify under the new test, however. Broader application of the test is discussed in Part IV.

enumerated offenses to determine whether the state crimes are sufficiently risky to qualify as violent felonies. Nominally reckless felonies could be compared to arson, an enumerated offense that frequently contains reckless elements, to determine whether there is sufficient intent for the crime to qualify as a violent felony. Because the Supreme Court's jurisprudence incorporates the use of the closest-analog test in similar areas, this solution does not require congressional intervention, and the distinction fits squarely within the framework established by the Supreme Court's ACCA decisions.

Part I of this Note examines the Supreme Court's § 924(e) jurisprudence and describes how federal circuit courts apply existing case law to determine whether a given predicate offense will qualify as a violent felony under § 924(e). Part II analyzes and critiques current scholarly approaches to the problems associated with the residual clause. Part III attempts to reconcile the Supreme Court's existing case law, but in particular two of its most recent (and arguably contradictory) decisions, *Begay* and *Sykes*, by advocating for the inclusion of some reckless crimes under the ACCA's residual clause. Part IV provides examples of reckless crimes that would and would not qualify under this Note's proposed regime.

I. THE SUPREME COURT'S § 924(E) JURISPRUDENCE

This Part will discuss existing Supreme Court case law on the ACCA's residual clause, focusing on two of its most recent decisions, *Begay* and *Sykes*, and the federal circuit courts' interpretations of those decisions. When determining whether a felony qualifies under the residual clause, the Supreme Court's jurisprudence has consistently focused on the risk associated with the predicate felony, notwithstanding a slight detour from this approach in *Begay*. *Sykes* returned the Court's focus to the risk associated with the crime, though it retained *Begay*'s "purposeful, violent, and aggressive" test for lesser mens rea crimes.

The Court's current approach to classifying crimes as violent felonies under the residual clause involves three determinations. First, the Court determines whether the predicate felony is a specific-intent crime (intentional or knowing) or a crime with a lesser mens rea (recklessness or negligence) or no mens rea at all (strict-liability crimes). Second, the Court determines whether the predicate felony is sufficiently risky, as measured against its closest analog among the enumerated offenses in § 924(e). Third, for lesser mens rea and strict-

liability crimes only, the Court determines whether the predicate felony is sufficiently similar in kind—sufficiently “purposeful, violent, and aggressive”—to the enumerated offenses generally. At each stage, a categorical approach is applied to determine whether the state statute *categorically* meets these requirements. An alternative approach, the modified categorical approach, applies in limited circumstances but is not the focus of this Note.

A. *Supreme Court Case Law Prior to Begay and Sykes*

Prior to its decisions in *Begay* and *Sykes*, the Supreme Court’s § 924(e) jurisprudence focused on the explanation and application of the Court’s categorical and modified categorical approaches to statutes eligible for violent-felony status. *Taylor v. United States* laid the groundwork for both approaches. The Court applied the categorical approach to the residual clause for the first time, however, in *James v. United States*,⁵³ using the closest-analog method.⁵⁴

Taylor held that courts should look beyond the title of an offense to determine whether a crime qualifies as an enumerated offense under § 924(e), an inquiry it called the categorical approach.⁵⁵ The categorical approach requires two separate but related inquiries. First, a court determines the crime’s generic definition; that is, a court must investigate how the crime is defined in the majority of state criminal statutes. Second, after having derived such a generic definition, a court then evaluates whether the state statute at issue—regardless of the underlying facts that led to the conviction—is sufficiently similar to the generic definition to merit inclusion under § 924(e). Specifically, the Court established this approach in *Taylor* to determine whether the statutory label of, and the conviction for, “burglary” justified sentencing under § 924(e), or whether some additional inquiry was required.⁵⁶

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

54. *See id.* at 202 (employing the categorical approach to “consider whether the *elements of the offense* are of the type that would justify its inclusion within the residual provision, without inquiring into the specific conduct of this particular offender”).

55. *See Taylor v. United States*, 495 U.S. 575, 588–89 (1990) (“[T]he enhancement provision always has embodied a categorical approach to the designation of predicate offenses. . . . Congress intended that the enhancement provision be triggered by crimes having certain specified elements, not by crimes that happened to be labeled ‘robbery’ or ‘burglary’ by the laws of the State of conviction.”).

56. *See id.* at 580 (concluding that § 924(e) was unclear on its face as to whether Congress intended courts to employ state-law definitions of “burglary” or some uniform, generic definition of the term).

First, the Court in *Taylor* concluded that there was, in fact, a generic definition of “burglary” against which state burglary statutes could be measured. Based in part on the statute’s legislative history,⁵⁷ the Court determined that Congress intended courts to use modern, “generic” definitions of crimes “roughly corresponding to the definitions of [the crime] in a majority of the States’ criminal codes.”⁵⁸ Consequently, courts are not to use common-law definitions of crimes, both to prevent defendants from taking advantage of common-law technicalities and to protect defendants from the potential unfairness of variable state-law labeling schemes.⁵⁹ The use of generic definitions also harmonizes with Congress’s prior practice in this area.⁶⁰

Second, the Court in *Taylor* explained the way in which state burglary statutes would be measured against this generic definition. It distinguished between two approaches: the categorical approach, which uses these generic definitions as the standard, and a modified categorical approach, which allows for a more nuanced, fact-intensive inquiry.⁶¹ When comparing state burglary offenses to the generic definition of burglary, the Court held that courts should look to the

57. Prior to the ADAA amendments, § 924(e) included a definition of “burglary” that courts had to apply for sentencing purposes under the statute, which the Court found to be persuasive evidence that such tasks were not to be “left to the vagaries of state law.” *Id.* at 580, 588. The Court determined that “Congress intended that the enhancement provision be triggered by crimes having certain specified elements, not by crimes that happened to be labeled ‘robbery’ or ‘burglary’ by the laws of the State of conviction.” *Id.* at 588–89.

58. *Id.* at 589.

59. *Id.*

60. *See id.* at 591 (noting the fit with Congress’s “general approach of using uniform categorical definitions to identify predicate offenses”).

61. *Id.* at 600. The modified categorical approach is not the focus of this Note, but the Court has described this approach and its application as follows:

When the law under which the defendant has been convicted contains statutory phrases that cover several different generic crimes, some of which require violent force and some of which do not, the ‘modified categorical approach’ that we have approved permits a court to determine which statutory phrase was the basis for the conviction by consulting the trial record—including charging documents, plea agreements, transcripts of plea colloquies, findings of fact and conclusions of law from a bench trial, and jury instructions and verdict forms.

Johnson v. United States, 559 U.S. 133, 144 (2010) (citation omitted).

The Court has not explicitly applied the modified categorical approach to the residual clause, but its case law indicates that it should apply. *See id.* at 145 (declining to analyze the predicate felony under the residual clause because the argument was not preserved). Federal circuit courts have also recognized as much. *See, e.g., United States v. Chitwood*, 676 F.3d 971, 976 (11th Cir. 2012) (“The second way that a crime can come within the residual clause is the modified categorical approach, which can be applied where some, but not all, of the violations of a particular statute will involve the requisite violence.”).

statutory definitions of the offenses and not to the facts of the underlying conviction, a method known as the categorical approach.⁶² The Court in *Taylor* recognized, however, that when a state statute criminalizes conduct more broadly than the generic offense would, a limited inquiry into the facts of the case is allowed; this is known as the modified categorical approach.⁶³ Some scholars have suggested that a broader application of the modified categorical approach could solve many of the residual clause's problems.⁶⁴ This Note focuses on the application of the categorical approach, however.

The categorical approach applies to the residual clause as well as to the enumerated offenses. The Court first applied the categorical approach to § 924(e)'s residual clause in *James v. United States* to determine whether an attempted burglary qualified as a violent felony under that provision.⁶⁵ Because the residual clause implicates crimes involving "conduct that presents a serious potential risk of physical injury to another,"⁶⁶ applying the categorical approach required the Court to determine whether the predicate felony was sufficiently risky as a categorical matter.⁶⁷ The Court looked to the enumerated offenses as a baseline for measuring the sufficiency of the risk of the relevant felony, asking "whether the risk posed by attempted burglary is comparable to that posed by its closest analog among the enumerated offenses," completed burglary.⁶⁸

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

63. The *Taylor* Court held:

This [modified] 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. For example, in a State whose burglary statutes include entry of an automobile as well as a building, if the indictment or information and jury instructions show that the defendant was charged only with a burglary of a building, and that the jury necessarily had to find an entry of a building to convict, then the Government should be allowed to use the conviction for enhancement.

Id. at 602.

64. *See infra* Part II.

65. The Court analyzed the attempted-burglary statute at issue under the residual clause because it did "not have 'as an element the use, attempted use, or threatened use of physical force against the person of another.'" *James*, 550 U.S. at 197 (quoting 18 U.S.C. § 924(e)(2)(B)(i) (2000 & Supp. IV)). As *attempted* burglary, the crime did not qualify under the enumerated offense of burglary. *Id.* Thus, the Court analyzed it under the residual clause. *Id.*

66. 18 U.S.C. § 924(e)(2)(B)(ii) (2012).

67. *See James*, 550 U.S. at 201–02 (holding that a crime qualifies under the categorical approach when "the elements of the offense are of the type that would justify its inclusion within the residual provision, without inquiring into the specific conduct of this particular offender").

68. *Id.* at 203.

Additionally, the Court's application in *James* of the categorical approach to the residual clause helped clarify the level of risk required. The Court held that "the proper inquiry is whether the conduct encompassed by the elements of the offense, in the ordinary case, presents a serious potential risk of injury to another."⁶⁹ The Court would next address § 924(e)'s residual clause in *Begay*.

B. Begay and the "Purposeful, Violent, and Aggressive" Test

The question in *Begay v. United States* was whether a DUI conviction constituted a violent felony under the ACCA's residual clause,⁷⁰ accepting the district court's and the affirming circuit court's conclusion that felony DUI "presents a serious potential risk of physical injury to another."⁷¹ After *James*, to qualify as a violent felony under the residual clause, a predicate felony had to be sufficiently risky.⁷² To be sufficiently risky, a predicate felony had to have a level of risk that was comparable to its closest analog among the enumerated offenses.⁷³ *Begay* refined the *James* test, explaining that a predicate felony must be similar to its closest analog in two ways: in degree of risk posed and "in kind."⁷⁴

1. *The Supreme Court's Opinion in Begay.* In clarifying the way in which a predicate felony must be similar to the enumerated offenses to qualify as a violent felony under the residual clause, *Begay* focused on the distinct phrasing of § 924(e)(2)(B)(ii)⁷⁵ in a way that no prior Supreme Court opinion had. The Court found it significant that the residual clause was preceded in the text of the statute by both

69. *Id.* at 208. The Court held that Florida's attempted-burglary statute was sufficiently risky and qualified as a violent felony under the residual clause. *Id.* at 214.

70. Larry Begay pleaded guilty to being a felon in possession of a firearm, in violation of 18 U.S.C. § 922(g)(1), after threatening his sister and aunt with a rifle. *Begay v. United States*, 553 U.S. 137, 140 (2008). The district court held that Begay's three prior felony DUI convictions under New Mexico law qualified as violent felonies under the residual clause because they presented a serious risk of physical injury to others, *United States v. Begay*, 377 F. Supp. 2d 1141, 1145 (D.N.M. 2005); the Tenth Circuit affirmed, *United States v. Begay*, 470 F.3d 964, 977 (10th Cir. 2006), and the Supreme Court granted certiorari, *United States v. Begay*, 551 U.S. 1191 (2007).

71. *Begay*, 553 U.S. at 141.

72. *James*, 550 U.S. at 201–02.

73. *Id.* at 203.

74. *Begay*, 553 U.S. at 143. The "in kind" requirement is discussed at length in Part I.D.

75. Section 924(e)(2)(B)(ii), which includes the residual clause, reads as follows: "[A violent felony] 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 enumerated offenses and the word “otherwise,” reasoning that the “otherwise” term implied that the residual clause refers to crimes that are “similar to the listed examples in some respects but different in others—similar, say, in respect to the degree of risk it produces, but different in respect to the ‘way or manner’ in which it produces that risk.”⁷⁶ Qualifying crimes, the Court held, will be “roughly similar, in kind as well as in degree of risk posed, to the examples themselves.”⁷⁷

First, *Begay* addressed the “in kind” requirement, restricting the number of crimes that could qualify as violent felonies by requiring a predicate felony to be “purposeful, violent, and aggressive” like its closest analog among the enumerated offenses.⁷⁸ Based on the placement of “otherwise” in the statute’s text, the Court determined that the enumerated offenses—burglary, arson, extortion, and crimes involving the use of explosives—“illustrate the *kinds* of crimes that fall within the statute’s scope.”⁷⁹ The inclusion of the enumerated offenses in the statute “indicates that the statute covers only *similar* crimes, rather than *every* crime that ‘presents a serious potential risk of physical injury to another.’”⁸⁰ The enumerated offenses preceding the residual clause thus limit the crimes that can qualify as violent felonies under that clause to crimes that are similar to the enumerated offenses.⁸¹ The Court then announced the means by which lower courts should determine whether a predicate felony is sufficiently similar. Drawing from Judge McConnell’s partial dissent in the Tenth Circuit, the Court held that DUI “differ[ed] from the example crimes . . . in at least one pertinent, and important, respect.”⁸²

76. *Begay*, 553 U.S. at 144 (quoting WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY OF THE ENGLISH LANGUAGE UNABRIDGED 1598 (Philip Babcock Grove ed., 1961)).

77. *Id.* at 143.

78. *Begay* did not explicitly refer to the “purposeful, violent, and aggressive” inquiry as the “in kind” requirement, though it implied as much, as the discussion in this Section suggests. Federal circuit courts have explicitly recognized this inquiry as the “in kind” requirement. *See, e.g., United States v. Chitwood*, 676 F.3d 971, 977 (11th Cir. 2012) (“[T]o be similar *in kind* to those listed crimes—burglary, arson, extortion, and the use of explosives—offenses that were violent crimes under the residual provision must also involve ‘purposeful, violent, and aggressive conduct.’” (emphasis added)).

79. *Begay*, 553 U.S. at 142 (emphasis added).

80. *Id.* (quoting 18 U.S.C. § 924(e)(2)(B)(ii) (2000)).

81. *Id.* at 143.

82. *Id.* at 144.

Unlike the enumerated offenses, it did not “typically involve purposeful, ‘violent,’ and ‘aggressive’ conduct.”⁸³

The Court explained the reasoning behind this new test, focusing on the “purposeful” component. Although the Court did not indicate that one aspect of the test was to be given greater weight than any other,⁸⁴ the cases it cited in support of its new test all emphasized the intentional nature of the enumerated offenses.⁸⁵ The Court justified the *Begay* test generally and the purposeful component in particular when it reasoned that an offender’s prior “purposeful, violent, and aggressive” conduct “makes [it] more likely that an offender, later possessing a gun, will use that gun *deliberately* to harm a victim.”⁸⁶ Additionally, “[c]rimes committed in such a purposeful, violent, and aggressive manner are ‘potentially more dangerous when firearms are involved.’”⁸⁷ It is these crimes, the Court explained, that “are ‘characteristic of the armed career criminal, the eponym of the statute.’”⁸⁸

The Court held that the DUI statute at issue in *Begay* was too dissimilar to the enumerated offenses to qualify under the residual clause. It analogized DUI statutes to strict-liability crimes that do not

83. *Id.* at 144–45 (citing *United States v. Begay*, 470 F.3d 964, 980 (10th Cir. 2006) (McConnell, J., dissenting in part)). The Court later admitted in *Sykes* that “[t]he phrase ‘purposeful, violent, and aggressive’ has no precise textual link to the residual clause,” and it “is an addition to the statutory text.” *Sykes v. United States*, 131 S. Ct. 2267, 2275 (2011).

84. *See Begay*, 553 U.S. at 144–45 (“In our view, DUI differs from the example crimes—burglary, arson, extortion, and crimes involving the use of explosives—in at least one pertinent, and important, respect. The listed crimes all typically involve purposeful, ‘violent,’ and ‘aggressive’ conduct.” (quoting *Begay*, 470 F.3d at 980 (McConnell, J., dissenting in part))).

85. *Begay* cited *Taylor*’s definition of “burglary” as “an unlawful or unprivileged entry into a building or other structure with ‘*intent* to commit a crime,’” *id.* at 145 (emphasis added) (quoting *Taylor v. United States*, 495 U.S. 575, 598 (1990)); the Model Penal Code’s (MPC’s) definition of “arson” as “causing a fire or explosion with ‘the *purpose* of,’ e. g., ‘destroying a building . . . of another’ or ‘damaging any property . . . to collect insurance,’” *id.* (alteration in original) (first emphasis added) (quoting MODEL PENAL CODE § 220.1(1) (1985)); and the MPC’s definition of “extortion” as “‘purposely’ obtaining property of another through threat of, e. g., inflicting ‘bodily injury,’” *id.* (emphasis added) (quoting MODEL PENAL CODE § 223.4); along with the Court’s analysis of “use” in *Leocal v. Ashcroft*, 543 U.S. 1 (2004), in which it noted that “‘use’ . . . most naturally suggests a higher degree of *intent* than negligent or merely accidental conduct’ which fact helps bring it outside the scope of the statutory term ‘crime of violence,’” *Begay*, 553 U.S. at 145 (alteration in original) (emphasis added) (quoting *Leocal*, 543 U.S. at 9). Each of the examples cited by the Court specifically mentions “intent” or “purpose,” whereas violence and aggression are at best implied in the cited examples.

86. *Begay*, 553 U.S. at 145 (emphasis added).

87. *Id.* (quoting *Begay*, 470 F.3d at 980 (McConnell, J., dissenting in part)).

88. *Id.* (quoting *Begay*, 470 F.3d at 980 (McConnell, J., dissenting in part)).

require criminal intent.⁸⁹ To be convicted of a DUI, a driver's conduct need not be purposeful, the Court noted, because DUI offenses only involve negligent or accidental conduct.⁹⁰ For purposes of the ACCA, the Court held, the defendant's past criminal conduct must reveal more than a simple disregard for risk: it needs to demonstrate "an increased likelihood that the offender is the kind of person who might deliberately point the gun and pull the trigger."⁹¹

The Court attempted to provide guidance to the lower courts with examples, though its opinion left the law with uncertain contours. It cited a host of crimes that it believed would be covered, contrary to Congress's intent, if § 924(e)(2)(B)(ii) were read without the "purposeful, violent, and aggressive" requirement, including crimes with a reckless or negligent mens rea.⁹² Despite its reference to the crimes with a mens rea of negligence or recklessness, however, the Court limited its decision to the crime at issue in *Begay*:

Rather, we hold only that, for purposes of the particular statutory provision before us, a prior record of DUI, a strict-liability crime, differs from a prior record of violent and aggressive crimes committed intentionally such as arson, burglary, extortion, or crimes involving the use of explosives. The latter are associated with a likelihood of future violent, aggressive, and purposeful "armed career criminal" behavior in a way that the former are not.⁹³

The lower courts were thus left to apply this new test to determine whether predicate offenses qualified as violent felonies under the residual clause.

2. *The Circuit Courts' Interpretation of Begay.* By limiting its holding to the particular facts at issue in *Begay*, the Supreme Court provided little guidance for the lower courts left to interpret the new "purposeful, violent, and aggressive" test. A standard nonetheless emerged at the circuit level. Circuit court opinions post-*Begay* focused on the purposeful aspect of the test and on whether crimes with a reckless or negligent mens rea could qualify as violent felonies

89. *Id.*

90. *See id.* ("[W]e agree with the Government that a drunk driver may very well drink on purpose. But this Court has said that, unlike the example crimes, the conduct for which the drunk driver is convicted (driving under the influence) need not be purposeful or deliberate.").

91. *Id.* at 146.

92. *See id.* (mentioning reckless pollution, negligent pollution, negligent seamanship, and reckless tampering with consumer products as examples).

93. *Id.* at 148.

after *Begay*. Despite *Begay*'s lack of guidance, the lower courts' reactions were remarkably consistent. Every circuit court to address the issue held that *Begay*'s "purposeful, violent, and aggressive" test categorically excludes strict-liability crimes and crimes with a mens rea of recklessness or negligence.⁹⁴ This is not to say, however, that courts have been eager to accept this state of affairs.⁹⁵

For example, crimes with an *extremely* reckless mens rea may still qualify as violent felonies in the Sixth Circuit after *Begay*. In

94. As the Eighth Circuit noted in *United States v. Ossana*, 638 F.3d 895, (8th Cir. 2011), "The parties have cited, and we have identified, no circuit-level cases post *Begay* in which a court found an offense qualified as a violent felony or crime of violence where the mens rea for the offense was mere recklessness and where there were no further qualifications to suggest purposeful, violent, or aggressive conduct." *Id.* at 901. A survey of the case law bears out *Ossana*'s assertion. See *United States v. Jenkins*, 631 F.3d 680, 685 (4th Cir. 2011) ("[U]nder *Begay* and *Chambers*, the Resisting Arrest Offense is not a 'crime of violence' for purposes of the Career Offender Enhancement only if it can be committed either negligently or recklessly . . ."); *United States v. Holloway*, 630 F.3d 252, 261 (1st Cir. 2011) ("Reckless battery does not typically involve purposeful conduct and thus is not similar in kind to the offenses enumerated within § 924(e)(2)(B)(ii)."); *United States v. Lee*, 612 F.3d 170, 196 (3d Cir. 2010) ("[F]ollowing *Begay*, a conviction for mere recklessness cannot constitute a crime of violence."); *United States v. Coronado*, 603 F.3d 706, 710 (9th Cir. 2010) ("[C]rimes with a mens rea of gross negligence or recklessness do not satisfy *Begay*'s requirement of 'purposeful' conduct."); *United States v. Hughes*, 602 F.3d 669, 677 (5th Cir. 2010) ("Unlike failure to report, escape is typically committed in a purposeful manner, and when these escapes cause injuries, those injuries typically result from intentional action, not negligence or even recklessness."); *United States v. McFalls*, 592 F.3d 707, 716 (6th Cir. 2010) ("[A] crime requiring only recklessness does not qualify."); *United States v. Zuniga*, 553 F.3d 1330, 1334–35 (10th Cir. 2009) ("[T]he *Begay* test specifically requires that the crime in question 'typically' involve purposeful conduct."); *United States v. Smith*, 544 F.3d 781, 786 (7th Cir. 2008) ("[T]hose crimes with a mens rea of negligence or recklessness do not trigger the enhanced penalties mandated by the ACCA."); *United States v. Gray*, 535 F.3d 128, 132 (2d Cir. 2008) ("Despite coming close to crossing the threshold into purposeful conduct, the criminal acts defined by the reckless endangerment statute are not intentional, a distinction stressed by the Supreme Court in *Begay*"). The Eleventh Circuit has not explicitly addressed this issue.

95. For example, *Covarrubias Teposte v. Holder*, 632 F.3d 1049 (9th Cir. 2010), involved a similar repeat-offender provision in the immigration context, which included in its definition of a crime of violence "any other offense that is a felony and 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," 18 U.S.C. § 16(b) (2006). Though the court held that shooting at an inhabited dwelling or vehicle was not a "crime of violence" under § 16(b), it did so reluctantly. *Covarrubias Teposte*, 632 F.3d at 1055–56. As the court explained,

Shooting a gun in the direction of another person seems like a paradigm of violent action. . . . But our en banc precedent . . . stands in the way of a doctrinal development that would acknowledge the common sense view that shooting at an inhabited structure, whether intentionally or recklessly, is a crime of violence warranting removal under the immigration laws.

Id. at 1056 n.2.

United States v. Meeks,⁹⁶ the Sixth Circuit justified its designation of a wanton-endangerment crime as a violent felony on the grounds that “wanton endangerment involves criminal intent (being aware of and consciously disregarding a substantial and unjustifiable risk).”⁹⁷ Though Meeks’s conviction did not require an intent to cause injury, the Sixth Circuit found that it was still “purposeful, violent, and aggressive,” because Meeks was aware that there was a substantial risk that injury would result from his conduct, and he disregarded that risk.⁹⁸ Nevertheless, after *Begay*, the circuit court consensus was that crimes with a reckless or negligent mens rea and strict-liability crimes should not qualify as violent felonies under § 924(e).

C. *Sykes and Its Qualification of Begay*

Sykes limited *Begay*’s “purposeful, violent, and aggressive” test to strict-liability crimes and crimes with a mens rea of recklessness or negligence.⁹⁹ In *Sykes*, the Supreme Court faced the inevitable result of its decision in *Begay*: the conviction at issue (felony vehicular flight) was a crime that was not “purposeful, violent, and aggressive” on its face, yet it involved inherently criminal conduct and a high potential for serious physical injury.¹⁰⁰ The question in *Sykes* was

96. *United States v. Meeks*, 664 F.3d 1067 (6th Cir. 2012). *Meeks* was decided post-*Sykes*, but the court noted that its decision was merited regardless of whether the test from *Begay* or *Sykes* was used. See *infra* note 98 and accompanying text.

97. *Meeks*, 664 F.3d at 1070–71. In light of courts’ reluctance to bar reckless crimes entirely, see *supra* note 94, it is perhaps significant that the definition the Court used in *Meeks* of the criminal intent required for wanton endangerment sounds very similar to the definition for the mens rea of recklessness, see, e.g., MODEL PENAL CODE § 2.02(2)(c) (1985) (“A person acts recklessly with respect to a material element of an offense when he consciously disregards a substantial and unjustifiable risk that the material element exists or will result from his conduct.”).

98. *Meeks*, 664 F.3d at 1072. The Sixth Circuit found that after *Sykes*, it no longer needed to apply *Begay*’s “purposeful, violent, and aggressive” test, but noted that the inclusion of wanton endangerment as a violent felony was merited based solely on the application of the *Begay* test, as well. See *id.* (“[W]hether we apply a categorical risk analysis in light of *Sykes*, or a modified-categorical approach using the two-step *Begay* inquiry, we are satisfied that Meeks’s prior convictions for first degree wanton endangerment were crimes of violence, and that he was properly sentenced as a career offender under § 4B1.1 of the Sentencing Guidelines.”).

99. *Sykes v. United States*, 131 S. Ct. 2267, 2275–76 (2011).

100. The Court described the facts of Sykes’s felony vehicular-flight conviction as follows:

After observing Sykes driving without using needed headlights, police activated their emergency equipment for a traffic stop. Sykes did not stop. A chase ensued. Sykes wove through traffic, drove on the wrong side of the road and through yards containing bystanders, passed through a fence, and struck the rear of a house. Then he fled on foot. He was found only with the aid of a police dog.

Id. at 2272.

whether an Indiana statute criminalizing knowing or intentional vehicular flight from law enforcement qualifies as a violent felony.¹⁰¹ The Court analyzed the Indiana statute under the residual clause because it did not require as an element the use or the threatened use of physical force against a person under § 924(e)(2)(B)(i), nor was it an enumerated offense under § 924(e)(2)(B)(ii).¹⁰² To resolve the issue, the Court qualified the “purposeful, violent, and aggressive” test it used in *Begay*, apparently limiting that test to crimes with a lesser mens rea and emphasizing instead the risk-based approach it had utilized prior to its decision in *Begay*.

1. *The Supreme Court’s Opinion in Sykes.* *Sykes* provided an important gloss on *Begay*, limiting the application of that decision and its “purposeful, violent, and aggressive” test to strict-liability crimes and crimes with a mens rea of recklessness or negligence.¹⁰³ In its analysis, the Supreme Court in *Sykes* rejected an application of *Begay* to the statute at issue.¹⁰⁴ The defendant argued that Indiana’s felony vehicular-flight statute did not involve “purposeful, violent, and aggressive” conduct as required by *Begay*.¹⁰⁵ The Court disagreed, finding that “*Sykes*, in taking this position, overreads the opinions of this Court.”¹⁰⁶ *Begay* was “[t]he sole decision of this Court concerning the reach of ACCA’s residual clause in which risk was not the dispositive factor.”¹⁰⁷ The difference was in the mens rea.¹⁰⁸ Unlike other crimes the Court had considered under the ACCA, the DUI statute at issue in *Begay* did not involve “a stringent mens rea requirement,”¹⁰⁹ though the Indiana statute at issue in *Sykes* did.¹¹⁰

Because the statute at issue in *Sykes* had a stricter mens rea requirement, the Court declined to apply the *Begay* test to *Sykes*. Instead, it found that the risk levels were sufficient to resolve the

101. *Id.* at 2270. *Sykes*’s previous conviction for fleeing law-enforcement officers was a class D felony because he “use[d] a vehicle to commit the offense.” *Id.* at 2271 (citing IND. CODE § 35-44-3-3 (2004) (repealed 2012)).

102. *Id.* at 2273.

103. *Id.* at 2275–76.

104. *Id.*

105. *Id.* at 2275.

106. *Id.*

107. *Id.*

108. *Id.*

109. *Id.*

110. “Violators [of the Indiana statute] must act ‘knowingly or intentionally.’” *Id.* (citing IND. CODE § 35-44-3-3(a) (2004) (repealed 2012)).

case.¹¹¹ In fact, the Court reasoned, “*Begay* involved a crime akin to strict liability, negligence, and recklessness crimes; and the “purposeful, violent, and aggressive” formulation was used in that case to explain the result.”¹¹² The Court acknowledged the difficulties inherent in a risk-based approach,¹¹³ but found it significant that Congress “stated a normative principle,” rather than simply listing qualifying offenses in the statute.¹¹⁴

This normative principle revolved around risk, and it was on that ground that the Court resolved the issue in *Sykes*. Congress, the Court explained, intended for crimes to qualify under the residual clause when they involved a potential risk of injury similar to that of the enumerated offenses.¹¹⁵ Based on the normative principle that the Court elucidated, it determined that *Sykes*’s conviction for felonious vehicular flight was a violent felony.¹¹⁶ It is only in cases in which the mens rea of the predicate felony is less than intentional or knowing that *Begay*’s “purposeful, violent, and aggressive” test applies.¹¹⁷

2. *Circuit Court Decisions After Sykes*. Post-*Sykes*, circuit courts have split as to whether *Begay* applies to strict-liability crimes and crimes with a mens rea of recklessness or negligence. The majority of circuit courts have determined that the “purposeful, violent, and aggressive” test from *Begay* applies only to crimes of strict liability, negligence, and recklessness, and that otherwise, the level of risk alone is sufficient to determine whether the crime in question

111. *Id.* at 2275–76 (“As between the two inquiries, risk levels provide a categorical and manageable standard that suffices to resolve the case before us.”).

112. *Id.* at 2276. The idea that strict-liability crimes and crimes with a mens rea of recklessness or negligence can be “purposeful” seems counterintuitive. Nor is this concept totally consistent with the closest-analog approach. As Justice Scalia pointed out in *Begay*, some of the enumerated offenses have a lesser mens rea. *See Begay v. United States*, 553 U.S. 137, 152 (2008) (Scalia, J., concurring) (“And what is more, the Court’s posited purpose is positively contradicted by the fact that one of the enumerated crimes—the unlawful use of explosives—may involve merely negligent or reckless conduct.”).

113. *See Sykes*, 131 S. Ct. at 2277 (“ACCA ‘requires judges to make sometimes difficult evaluations of the risks posed by different offenses.’” (quoting *James v. United States*, 550 U.S. 192, 210 n.6 (2007))).

114. *Id.*

115. *Id.*

116. *Id.*

117. *See id.* at 2276 (holding that unlike the DUI statute in *Begay*, “[t]he felony at issue here is not a strict liability, negligence, or recklessness crime and because it is, for the reasons stated and as a categorical matter, similar in risk to the listed crimes,” it qualifies as a violent felony under the residual clause).

qualifies as a violent felony.¹¹⁸ Only one of the circuits in the majority, the Seventh Circuit, has addressed how to apply *Begay*'s test to crimes with a lesser mens rea. The Seventh Circuit seemed to imply in dicta that none of these lesser mens rea crimes could ever qualify as violent felonies under the residual clause, which was what many courts assumed post-*Begay* but pre-*Sykes*, though this approach seems to conflict with the Court's decision in *Sykes*.¹¹⁹

Not all circuit courts have adopted this understanding of *Sykes*, however. A minority of circuit courts have continued to apply *Begay*'s "purposeful, violent, and aggressive" test to crimes with an intentional or knowing mens rea,¹²⁰ even though the Supreme Court's opinion in *Sykes* seems to preclude this possibility.¹²¹

D. Applying § 924(e) to Predicate Felonies Under the Residual Clause

This Section discusses the current approach used to determine whether predicate felonies are violent felonies for purposes of

118. The First, Second, Sixth, Seventh, Eighth, Ninth, Tenth, and Eleventh Circuits form the majority. See *United States v. Spencer*, 724 F.3d 1133, 1139 (9th Cir. 2013); *United States v. Miller*, 721 F.3d 435, 438–39 (7th Cir. 2013); *United States v. Evans*, 699 F.3d 858, 865 (11th Cir. 2012); *Harrington v. United States*, 689 F.3d 124, 136 (2d Cir. 2012); *United States v. Lillard*, 685 F.3d 773, 776 (8th Cir. 2012); *United States v. Grupee*, 682 F.3d 143, 149 (1st Cir. 2012); *United States v. Jones*, 673 F.3d 497, 506 (6th Cir. 2012); *United States v. Smith*, 652 F.3d 1244, 1248 (10th Cir. 2011).

119. The Seventh Circuit appeared to treat *Sykes*'s gloss on *Begay*, see *supra* Part I.C.1, as a mere explanation, stating that "[t]he concerns discussed in *Begay*—that the crime be 'purposeful, violent, and aggressive'—are not present here because, as explained in *Sykes*, those terms simply explained why a crime akin to strict liability, negligence, or recklessness crimes does not fit within the residual clause." *Miller*, 721 F.3d at 439. This does not seem compatible with *Sykes*, which stated that "[i]n many cases the purposeful, violent, and aggressive inquiry will be redundant with the inquiry into risk, for crimes that fall within the former formulation and those that present serious potential risks of physical injury to others tend to be one and the same." *Sykes*, 131 S. Ct. at 2275 (emphasis added). If the inquiry is redundant in "many" cases, it implies that it will not be redundant in all cases, as *Miller* seems to suggest. The Seventh Circuit's opinion was not totally clear, however, because it proceeded to say that it did not "have to go through *Begay*'s 'purposeful, violent, and aggressive' analysis" because the crime required knowledge. *Miller*, 721 F.3d at 439.

120. The Third and Fourth Circuits form the minority. See *United States v. Johnson*, 675 F.3d 1013, 1019 (3d Cir. 2012); *United States v. Vann*, 660 F.3d 771, 780–81 (4th Cir. 2011). The Fifth Circuit has not come to a definitive answer.

121. As discussed above, the Court in *Sykes* stated that when

[t]he felony at issue . . . is not a strict liability, negligence, or recklessness crime and [when] it is, for the reasons stated and as a categorical matter, similar in risk to the listed crimes, it is a crime that "otherwise involves conduct that presents a serious potential risk of physical injury to another."

Sykes, 131 S. Ct. at 2276 (quoting 18 U.S.C. § 924(e)(2)(B)(ii) (2006)). It thus declined to apply *Begay*'s "purposeful, violent, and aggressive" test.

§ 924(e), based on Supreme Court precedent and the majority approach employed by the circuit courts. After a predicate offense satisfies the felony requirement,¹²² a court must decide whether the offense should be analyzed under the residual clause. Assuming that the residual clause applies,¹²³ a court must then determine which of the enumerated offenses is the potential predicate felony's closest analog and whether, as a categorical matter, the potential predicate felony is similar in the degree of risk posed to that of its closest analog among the enumerated offenses. If the crime has a reckless or negligent mens rea, or is a strict-liability crime, a court must also determine whether it is similar in kind to the enumerated offenses, generally—that is, whether it is sufficiently “purposeful, violent, and aggressive.”

When determining whether a crime is sufficiently similar in terms of risk to the enumerated offenses of burglary, arson, extortion, and crimes involving the use of explosives, it must be compared to its closest analog among those offenses.¹²⁴ Though the Supreme Court has not clearly articulated how lower courts should select the closest analog from among the enumerated offenses, the Court has considered the defendant's mens rea and the way in which the potential risk of injury is created. For example, *Sykes* compared the predicate felony—vehicular flight—to both arson and burglary.¹²⁵ Comparing felonious vehicular flight to arson, the Court noted that the mens rea of a criminal who flees and consequently creates a substantial risk of injury was similar to that of a criminal who engages “in arson, which also entails *intentional* release of a destructive force dangerous to others.”¹²⁶ When comparing felonious vehicular flight to burglary, the Court emphasized the way in which the risk was created: burglary and vehicular flight are similarly dangerous because each

122. See 18 U.S.C. § 924(e)(2)(B) (2012) (“[T]he term ‘violent felony’ means any crime punishable by imprisonment for a term exceeding one year . . .”).

123. The residual clause applies when a predicate felony does not “ha[ve] as an element the use, attempted use, or threatened use of physical force against the person of another” as required by § 924(e)(2)(B)(i), and is not “burglary, arson, or extortion, [or a crime] involv[ing] use of explosives,” the enumerated qualifying offenses under § 924(e)(2)(B)(ii).

124. The Supreme Court has justified the closest-analog test on the grounds that “[t]he specific offenses enumerated in clause (ii) provide one baseline from which to measure whether other similar conduct ‘otherwise . . . presents a serious potential risk of physical injury.’” *James v. United States*, 550 U.S. 192, 203 (2006) (quoting 18 U.S.C. § 924(e)(2)(B)(ii) (2000 & Supp. IV)).

125. *Sykes*, 131 S. Ct. at 2273.

126. *Id.* (emphasis added).

can end in confrontation, and like burglary, vehicular flight endangers both property and persons.¹²⁷

Once a court has determined which enumerated offense is the closest analog to the crime in question, it must determine whether the crime is “roughly similar, in kind as well as in degree of risk posed,” to the analog offense (to evaluate similarity in risk) and to the enumerated offenses generally (to evaluate similarity in kind), applying the categorical approach to both inquiries.¹²⁸ Under the categorical approach, “[a] trial court [must] look only to the fact of conviction and the statutory definition of the prior offense.”¹²⁹ It may not look to the facts underlying the conviction.¹³⁰ Instead, a court must determine “whether the *elements of the offense* are of the type that would justify its inclusion . . . without inquiring into the specific conduct of this particular offender.”¹³¹ A court is not prohibited, however, from looking beyond the statutory text when interpreting the *law*; a court may consider authoritative state-court interpretation of the relevant state statute.¹³²

First, a court must determine that the predicate offense is sufficiently similar in terms of the degree of risk posed.¹³³ When applying the categorical approach to measure the risk associated with the crime at issue, the question is “whether the conduct encompassed by the elements of the offense, *in the ordinary case*, presents a serious potential risk of injury to another.”¹³⁴ The degree of risk posed by the

127. *Id.* at 2273–74.

128. *Begay v. United States*, 553 U.S. 137, 143 (2008).

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

130. *Id.* However, when the relevant state statute uses statutory language encompassing several different qualifying generic offenses under § 924(e), courts may apply the modified categorical approach, discussed briefly above. *See supra* note 61.

131. *James v. United States*, 550 U.S. 192, 202 (2006).

132. *See id.* at 202–03 (applying the categorical approach to state courts’ interpretations of an attempted-burglary statute).

133. *Begay*, 553 U.S. at 143. *Begay* listed the “in kind” requirement first. However, the Court’s subsequent case law has placed a much greater weight on the “degree of risk” requirement. Because *Sykes* implicitly recognized that the inquiry into risk is the primary inquiry and should be addressed first, this Note addresses it first as well. *See Sykes v. United States*, 131 S. Ct. 2267, 2275 (2011) (noting that the *Begay* test is an addition, and “[i]n many cases the purposeful, violent, and aggressive inquiry will be redundant with the inquiry into risk”).

134. *James*, 550 U.S. at 208 (emphasis added). As the Court noted, “One can always hypothesize unusual cases in which even a prototypically violent crime might not present a genuine risk of injury . . . [b]ut that does not mean that the offenses of attempted murder or extortion are *categorically* nonviolent.” *Id.* (emphasis added).

crime in question must be “comparable to that posed by its closest analog among the enumerated offenses”;¹³⁵ that is, the crime must be as risky as or riskier than its analog.¹³⁶ A court may use statistical evidence presented by the parties to determine whether the degree of risk posed is sufficiently similar.¹³⁷ A court is not required to use statistics in reaching a conclusion, however.¹³⁸

Second, the crime must be sufficiently similar in kind to the enumerated offenses generally.¹³⁹ Prior to *Sykes*, courts applied *Begay*’s “purposeful, violent, and aggressive” test to determine whether the predicate offense was sufficiently similar in kind to the enumerated offenses.¹⁴⁰ It is unclear after *Sykes* whether the “in kind” requirement applies to all potential predicate felonies, or only those with a mens rea of recklessness or negligence, or strict-liability crimes, though the Court seemed to say as much¹⁴¹ and this is the majority practice.¹⁴² Some circuit courts, however, have continued to apply the “purposeful, violent, and aggressive” test to crimes with a mens rea of intent or knowledge even after *Sykes*.¹⁴³

Thus, the majority of circuit courts will hold that an intentional or knowing crime qualifies under the residual clause if it is roughly

135. *Id.* at 203. *Begay* used slightly different language—“roughly similar” instead of “comparable”—but the test appears to be the same. *See Begay*, 553 U.S. at 143.

136. *See, e.g., Sykes*, 131 S. Ct. at 2274 (“Risk of violence is inherent to vehicle flight. Between the confrontations that initiate and terminate the incident, the intervening pursuit creates high risks of crashes. It presents more certain risk as a categorical matter than burglary.”).

137. *See, e.g., id.* (“Although statistics are not dispositive, here they confirm the commonsense conclusion that Indiana’s vehicular flight crime is a violent felony. . . . [C]hase-related crashes kill more than 100 nonsuspects every year. Injury rates are much higher. Studies show that between 18% and 41% of chases involve crashes, which always carry a risk of injury, and that between 4% and 17% of all chases end in injury.” (citation omitted)).

138. *See, e.g., James*, 550 U.S. at 204 (reasoning without using statistical evidence that attempted burglary may be even riskier than burglary, because it implies an attempt thwarted by confrontation).

139. *Begay*, 553 U.S. at 143. Though the inquiry into risk compares the crime in question to its closest analog among the enumerated offenses, the “in kind” inquiry compares the crime in question to the enumerated offenses generally. *See id.* at 144–45 (“In our view, DUI differs from the example crimes—burglary, arson, extortion, and crimes involving the use of explosives—in at least one pertinent, and important, respect. The listed crimes all typically involve purposeful, ‘violent,’ and ‘aggressive’ conduct.” (quoting *United States v. Begay*, 470 F.3d 964, 980 (10th Cir. 2006) (McConnell, J., dissenting in part))).

140. *See id.* at 144–45.

141. *See supra* Part I.C.

142. *See supra* note 118.

143. *See supra* note 120.

similar in the degree of risk posed. The minority will require that the crime be roughly similar in kind as well. If an intentional or knowing crime meets both criteria, then, it will certainly qualify as a violent felony under the residual clause of § 924(e). It is unclear how, or whether, crimes with a mens rea of recklessness or negligence, or strict-liability crimes, would qualify.¹⁴⁴

II. CURRENT SCHOLARLY APPROACHES TO THE RESIDUAL CLAUSE AND THEIR DEFICIENCIES

A number of articles have proposed solutions to the problems created by the ACCA—particularly by the residual clause.¹⁴⁵ These articles fall generally into four categories: (1) scholarship that advocates congressional action—amendment—as the solution to the problems posed by the residual clause; (2) scholarship that would hold the residual clause void for vagueness or otherwise abolish it; (3) scholarship suggesting novel interpretations of the statute; and (4) scholarship suggesting novel interpretations or applications of existing case law as a solution to the problem. Each of the proposed solutions, however, relies on action by a third party (either the Court or Congress) and is thus of limited use to lower courts applying *Sykes* and *Begay* on the ground.

First, some scholars advocate congressional amendment as a solution to the problems posed by § 924(e)'s residual clause. This amendment scholarship stresses the need for uniformity among the circuits, arguing that without reliable application of the ACCA across jurisdictions, Congress's intent in passing the statute will be

144. For an example of one court's attempt to address this issue, see *supra* note 119 and accompanying text.

145. These perceived problems are varied. Some authors believe that the residual clause is overinclusive, see, e.g., Brett T. Runyon, Comment, *ACCA Residual Clause: Strike Four? The Court's Missed Opportunity To Create a Workable Residual Clause Violent Felony Test*, 51 WASHBURN L.J. 447, 448 (2012) (arguing for adding an additional requirement that all residual clause violent felonies must be property crimes, which would necessarily decrease the number of qualifying crimes), underinclusive, see, e.g., Jeffrey C. Bright, *Violent Felonies Under the Residual Clause of the Armed Career Criminal Act: Whether Carrying a Concealed Handgun Without a Permit Should Be Considered a Violent Felony*, 48 DUQ. L. REV. 601, 603 (2010) (arguing that illegally carrying a concealed handgun should be a violent felony under the ACCA), or both, see, e.g., James G. Levine, Note, *The Armed Career Criminal Act and the U.S. Sentencing Guidelines: Moving Toward Consistency*, 46 HARV. J. ON LEGIS. 537, 538 (2009) (arguing that the ACCA is "both overinclusive and underinclusive").

frustrated.¹⁴⁶ Some scholars suggest congressional amendments that would add to the enumerated offenses.¹⁴⁷ In other instances, the amendment recommended is simply an adoption of the crime-of-violence application note,¹⁴⁸ which lists specific offenses that would qualify as crimes of violence under the Sentencing Guidelines provision.¹⁴⁹ Others suggest an amendment that would qualify crimes as violent felonies or serious drug offenses based on the length of the sentence actually imposed, as opposed to the maximum possible sentence.¹⁵⁰

Congress has had numerous opportunities to amend the ACCA, yet has declined to substantively amend the residual clause.¹⁵¹ It seems unlikely that Congress will intercede and resolve the debate any time soon. Scholarly articles and commentaries that suggest amendment as a solution ignore the practical reality: that Congress is unlikely to amend the ACCA in the near future. Although interesting in theory, these proposals do not provide guidance for lower courts and attorneys trying to apply the residual clause as it stands.

Second, a number of commentators believe that the residual clause should be held void for vagueness and the provision abolished.¹⁵² Justice Scalia said as much in his dissenting opinion in

146. Bright, *supra* note 145, at 633 (“Without an amendment to the ACCA, different states’ arbitrary punishment of a crime will result in different outcomes under the ACCA.”).

147. See Jonathan Remy Nash, *The Supreme Court and the Regulation of Risk in Criminal Law Enforcement*, 92 B.U. L. REV. 171, 219 (2012) (“Congress could list additional crimes that per se qualify as predicate crimes.”); see also Bright, *supra* note 145, at 635 (proposing an amendment to the violent-felony definition that would add “a special exception for concealed handgun statutes in that they need not be punishable by a term exceeding one year”).

148. For a discussion of the application note, see *supra* note 18.

149. See Nash, *supra* note 147, at 218–19 (“One might consider simply having Congress implement the ACCA as part of (or at least similarly to) the Sentencing Guidelines and delegate to the Sentencing Commission responsibility for defining the relevant parameters.”); see also Levine, *supra* note 145, at 567 (“The Sentencing Guidelines provide an excellent model upon which to base [ACCA] reforms, because the Guidelines are promulgated and updated by an expert congressionally-appointed commission statutorily bound to promote the purposes of sentencing that Congress has set forth . . .”). The application note to the Sentencing Guidelines is discussed above. See *supra* note 18.

150. Ethan Davis, Comment, *The Sentence Imposed Versus the Statutory Maximum: Repairing the Armed Career Criminal Act*, 118 YALE L.J. 369, 370 (2008).

151. This could be due to congressional inertia, or it could simply reflect Congress’s tacit approval of the Court’s ACCA jurisprudence up to this point. Whatever the reason, § 924(e)(2)(B)(ii) has remained essentially unchanged since the ADAA amendments. See *supra* notes 30–32 and accompanying text.

152. See, e.g., Hayley A. Montgomery, Comment, *Remedying the Armed Career Criminal Act’s Ailing Residual Provision*, 33 SEATTLE U. L. REV. 715, 736 (2010) (noting, as one of a number of possibilities, that “the Court could acknowledge the statute as constitutionally

Sykes.¹⁵³ Yet, as the *Sykes* majority noted, the residual clause states an intelligible principle and, though it may be difficult to apply, “it is within congressional power to enact.”¹⁵⁴ Given the ramifications of invalidation and the Court’s express reluctance to do so in *Sykes*, it seems unlikely that the Court will take such drastic action. Whether or not it does, such a “solution” still relies on the Court to act.

Third, some commentators have suggested a novel interpretation of the statute itself as an answer to the problems posed by the residual clause. One student note focuses on the “felony” component of § 924(e),¹⁵⁵ which requires that a predicate felony be a “crime punishable by imprisonment for a term exceeding one year.”¹⁵⁶ It argues that application of the ACCA (including the residual clause) would become more consistent if courts used a uniform standard for the felony component of § 924(e), “discount[ing] any sentencing enhancements previously applied to prior convictions.”¹⁵⁷ The Court’s jurisprudence has ignored the felony element of the provision entirely, however, making lower courts less likely to implement such a solution.

Finally, the majority of the scholarly work addressing the ACCA’s residual provision requires dramatic intervention on behalf of the Court through novel interpretations of the statute or existing case law. At least two scholars would require that crimes falling under the residual clause be property crimes like the enumerated offenses.¹⁵⁸

unintelligible and hold it void for vagueness”); Mark Morgan, Note, Rising from the Ashes, but Not High Enough: *Sykes*’ Clear-but-Failed Remedy for the Vague Residual Clause of the Armed Career Criminal Act 24 (Dec. 31, 2011) (unpublished manuscript), available at <http://ssrn.com/abstract=2010105> (“The clarity provided in *Sykes* does not change the ambiguity and vagueness inherent in the language of the residual clause, which is why the best solution for the clause is announcing it invalid for vagueness.”).

153. See *Sykes v. United States*, 131 S. Ct. 2267, 2284 (2011) (Scalia, J., dissenting). Justice Scalia has grown increasingly frustrated with the Court’s attempts to clarify the “Delphic residual clause,” and in *Sykes* he declared that “[w]e should admit that ACCA’s residual provision is a drafting failure and declare it void for vagueness.” *Id.* Justice Scalia elaborated on how to fix this constitutional defect, stating that “I do not think it would be a radical step—indeed, I think it would be highly responsible—to limit ACCA to the named violent crimes. Congress can quickly add what it wishes.” *Id.* at 2288.

154. *Id.* at 2277 (majority opinion).

155. See generally Krystle Lamprecht, Comment, *Formal, Categorical, but Incomplete: The Need for a New Standard in Evaluating Prior Convictions Under the Armed Career Criminal Act*, 98 J. CRIM. L. & CRIMINOLOGY 1407 (2008).

156. 18 U.S.C. § 924(e)(2)(B) (2012).

157. Lamprecht, *supra* note 155, at 1409.

158. See Runyon, *supra* note 145, at 448 (“The Court [in *Sykes*] should have also added the requirement that all residual clause violent felonies must be property crimes like the four

After *Sykes* that position is in conflict with the Court's case law, because felonious vehicular flight is not a property crime.¹⁵⁹ Other approaches would alter the parameters of the modified categorical approach by either expanding¹⁶⁰ or contracting¹⁶¹ its scope. Expanding the scope of the modified categorical approach, which requires a limited inquiry into the facts of a case,¹⁶² would place a heavy burden on judges—the Court itself has said that “the practical difficulties and potential unfairness of a factual approach are daunting”¹⁶³—and increase the subjectivity of the process with all that entails for defendants, both good and bad.¹⁶⁴ The latter would make it difficult, if

enumerated felonies that immediately precede the residual clause.”); Thomas O. Powell, *The Armed Career Criminal Act—Proposing a New Test To Resolve Difficulties in Applying the Act's Ambiguous Residual Clause 5* (March 2009) (unpublished manuscript), available at http://works.bepress.com/thomas_powell/1 (advocating a three-part test requiring that “(1) [t]he crime must be generally accepted as a crime against property[;] (2) [t]he crime must not have been committed recklessly or negligently; and (3) [t]he crime must have made physical confrontation with someone other than a police officer reasonably foreseeable”).

159. The Indiana resisting-arrest statute at issue in *Sykes* did not address property damage, see IND. CODE § 35-44-3-3 (2004) (repealed 2012), yet the Court found that *Sykes*'s felonious vehicular flight qualified as a violent felony under the ACCA's residual clause anyway. *Sykes*, 131 S. Ct. at 2277.

160. See Amanda J. Schackart, Comment, *Finding Intent Without Mens Rea: A Modified Categorical Approach to Sentencing Under the United States Sentencing Guidelines*, 5 SEVENTH CIRCUIT REV. 71, 95 (2009) (“[J]udges should be allowed more discretion to look at the record and determine whether the conduct at issue demonstrates that the defendant intended to act in a violent and aggressive manner.”).

161. See David C. Holman, *Violent Crimes and Known Associates: The Residual Clause of the Armed Career Criminal Act*, 43 CONN. L. REV. 209, 215 (2010) (arguing, in part, that “courts should strictly follow the categorical approach and apply the residual clause to only those crimes with elements that require the underlying conduct be violent while excluding those crimes with elements that do not require violence or any mens rea”).

162. See *supra* note 61.

163. *Taylor v. United States*, 495 U.S. 575, 601 (1990).

164. Consider M.L.'s case. One commentator argues that courts should have more discretion to consult the record. See *supra* note 160 and accompanying text. Imagine if a court were allowed to consult M.L.'s Certification for Determination of Probable Cause, or if M.L.'s drive-by-shooting charge were to go to trial and the information were elicited there. If a court were to try to incorporate the information contained in that document into its analysis, it would raise a number of complex questions that the court would be forced to answer to properly sentence M.L. For example, would it help or hurt M.L.'s case that he fired from the street, as opposed to being in a vehicle? See Certification for Determination of Probable Cause, *supra* note 2. How much weight should a court put on B.B.'s statement that M.L. aimed the gun at the restaurant before shooting? See *id.* What about M.L.'s statement that he was shooting at rival gang members, which seems to contradict B.B.'s statement? See *id.* Courts can certainly answer these questions; the real issue is whether they should *have* to answer them, and whether requiring them to do so is a wise use of judicial resources.

not impossible, for judges to analyze some statutes under the Court's existing ACCA jurisprudence.¹⁶⁵

In short, all of the proposed solutions to the problems caused by the ACCA's residual clause suffer from the same flaw: they rely on a third party—either Congress or the Court—to resolve the issue. Neither is likely to do so.¹⁶⁶ And as this Part has discussed, many of the proposed solutions, even if implemented by Congress or the Court, would not resolve the underlying issues with the residual clause. This Note next provides lower courts with an interpretation of the Court's existing case law that resolves many of the issues surrounding the residual clause while remaining faithful to the Court's opinions.

III. RECONCILING SYKES WITH BEGAY: A NEW UNDERSTANDING OF THE ACCA'S RESIDUAL CLAUSE

After the Supreme Court's decision in *Sykes*, it seems clear that lower courts no longer need to apply *Begay's* “purposeful, violent, and aggressive” test to crimes with a mens rea of intent or knowledge. Now, the *Begay* test applies only to strict-liability crimes and crimes with a mens rea of negligence or recklessness.¹⁶⁷ The Court's abrupt change in tack has created a host of new problems, which this Note attempts to resolve.

165. For an example of a problematic statute, consider the Massachusetts statute at issue in *United States v. Holloway*, which “encompasses three types of battery: (1) harmful battery; (2) offensive battery; and (3) reckless battery.” *United States v. Holloway*, 630 F.3d 252, 257 (1st Cir. 2011) (citing MASS. GEN. LAWS ch. 265, § 13A (2002)).

166. Congress's inaction in regards to the residual clause is discussed in this Part of the Note. *See supra* note 151 and accompanying text. As for the Court, though Justice Scalia quipped in his dissent in *Sykes* that “[w]e try to include an ACCA residual-clause case in about every second or third volume of the United States Reports,” *see Sykes v. United States*, 131 S. Ct. 2267, 2284 (2011) (Scalia, J., dissenting), the Court has been reluctant to provide broad, generally applicable language to guide the lower courts. Rather, its decisions are often limited to the particular predicate offense in any given case—in *Begay*, for instance, the Court limited its holding to “the particular statutory provision before [it],” *Begay v. United States*, 553 U.S. 137, 148 (2008)—and any broader application of the principles embodied in the Court's opinions is due to the lower courts' interpretations of those cases. For circuit courts' interpretations of *Begay*, *see supra* note 94.

167. *See supra* Part I.C. Of course, a minority of circuit courts continue to apply *Begay's* “purposeful, violent, and aggressive” test to specific intent crimes. *See supra* note 120 and accompanying text. This interpretation seems in conflict with *Sykes*, however. *See Sykes*, 131 S. Ct. at 2276 (“*Begay* involved a crime akin to strict liability, negligence, and recklessness crimes; and the purposeful, violent, and aggressive formulation was used in that case to explain the result.”).

After *Sykes*, it is unclear how exactly the *Begay* test should be applied to crimes with a lesser mens rea. Before the Court decided *Sykes*, it was logical for the lower courts to assume that the purposeful prong barred crimes with no mens rea, and crimes with mens rea requirements of negligence or recklessness, from qualifying as predicate felonies under the residual clause.¹⁶⁸ Once the Court limited the *Begay* test to crimes with a lesser mens rea, however, the lower courts' prior interpretations of *Begay* became more problematic. If the purposeful prong categorically bars these lesser mens rea crimes, as most circuit courts thought it did pre-*Sykes*,¹⁶⁹ then the Court's decision to apply the *Begay* test to these crimes is indefensible. The Court should have stated that the *Begay* test bars crimes with a reckless or negligent mens rea, or strict-liability crimes, from qualifying as violent felonies under the ACCA if it meant for the circuit courts' pre-*Sykes* interpretation to hold.

The Court can, and should, resolve this issue. But until it does, the existing Court case law can be used to create a workable test for lesser mens rea crimes that are otherwise eligible for violent-felony status under the residual clause. Currently, the Court uses the closest analog among the enumerated offenses as a baseline for comparing degrees of risk. By slightly extending the use of the closest-analog test within the ACCA framework to include "in kind" comparisons, however, courts can have a principled means of distinguishing between lesser mens rea crimes that should and should not qualify as violent felonies under the residual clause.

Courts could thus use the closest analog as a baseline for comparisons in kind, in addition to comparisons of the degree of risk posed.¹⁷⁰ Instead of determining whether a predicate offense is sufficiently similar in kind to the enumerated offenses as a group—that is, instead of determining whether the offense is "purposeful, violent, and aggressive"—courts would determine whether the offense is sufficiently similar in kind to its closest analog among the enumerated offenses.¹⁷¹ The inquiry under this new test would proceed as follows: First, is the predicate offense sufficiently

168. See *supra* Part I.B.2.

169. See *supra* note 94.

170. Of course, a crime must still be sufficiently risky to qualify as a violent felony, particularly in light of *Sykes*, and nothing in this Part purports to alter the risk analysis.

171. Courts must already determine the closest analog for purposes of the risk analysis, so at least in this respect, the proposed test would put no undue burden on them.

purposeful, in the way that its closest analog is purposeful? Second, is the predicate offense sufficiently violent, in the way that its closest analog is violent? And third, is the predicate offense sufficiently aggressive, in the way that its closest analog is aggressive?

This Part contains four sections. Part III.A selects and examines arson as the closest analog to the lesser mens rea crimes among the enumerated offenses. The sections that follow use drive-by shooting as defined by Washington law¹⁷² as a hypothetical predicate felony to conduct the “purposeful, violent, and aggressive” analysis with arson as the closest analog.¹⁷³ Part III.B compares drive-by shooting to arson in terms of purposefulness. Part III.C compares drive-by shooting to arson in terms of violence. Finally, Part III.D compares drive-by shooting to arson in terms of aggression.

A. Arson as an Analogous Enumerated Offense

Arson is the enumerated offense best suited to act as the closest analog for crimes with a reckless mens rea. As Justice Scalia noted in his *Begay* concurrence, not all of the enumerated offenses require intent; crimes involving the use of explosives may require only a reckless mens rea (or even a negligent mens rea or strict liability), which is seemingly at odds with the “purposeful, violent, and aggressive” test that the majority set forth in that opinion.¹⁷⁴ The same is arguably true of arson. First- and second-degree arson statutes tend to involve a reckless mens rea in some capacity, and lesser degrees of arson with a purely reckless mens rea may still be punishable by over a year in prison as required by § 924(e)(2)(B).¹⁷⁵ Thus, either arson or crimes involving the use of explosives could serve as the closest

172. Washington’s law is used as the hypothetical predicate felony in keeping with this Note’s use of M.L., whose crimes were committed in Washington, as an example of a potential armed career criminal.

173. Drive-by shooting is used here as an example, but the test proposed by this Note would bring a number of other reckless crimes within the ambit of § 924(e). *See infra* Part IV.

174. *See Begay v. United States*, 553 U.S. 137, 152 (2008) (Scalia, J., concurring) (“And what is more, the Court’s posited purpose is positively contradicted by the fact that one of the enumerated crimes—the unlawful use of explosives—may involve merely negligent or reckless conduct.”).

175. For an example of a felony arson statute requiring only a reckless mens rea, see N.M. STAT. ANN. § 30-17-5(G) (Supp. 2013) (describing “[n]egligent arson” as “recklessly starting a fire or causing an explosion . . . and thereby directly: (1) causing the death or bodily injury of another person; or (2) damaging or destroying a building or occupied structure of another person”). “Negligent arson” in New Mexico is a fourth degree felony, *id.* § 30-17-5(H), for which the basic sentence is eighteen months, *id.* § 31-18-15(A)(10) (2010).

analog for purposes of this Note. Because crimes involving the use of explosives are relatively unique,¹⁷⁶ arson is the best candidate for a closest analog to reckless crimes.

First, under *Taylor*, it is necessary to determine what constitutes “generic” arson by looking at how the offense is defined in the majority of state criminal codes.¹⁷⁷ The Court has considered majority state practice,¹⁷⁸ the Model Penal Code (MPC),¹⁷⁹ and reputable secondary sources¹⁸⁰ when making this determination. The Supreme Court has treated majority state practice as the definitive factor,¹⁸¹ however, and this Note does the same, though the MPC is also briefly discussed.

The majority of states’ first- and second-degree arson statutes require intent or knowledge as to the act and a reckless mens rea as to the result,¹⁸² either explicitly¹⁸³ or implicitly,¹⁸⁴ though a substantial

176. For example, crimes involving the use of explosives may be associated with terrorism in ways that the other enumerated offenses are not, due to their potential to cause massive casualties in ways the others cannot.

177. See *Taylor v. United States*, 495 U.S. 575, 598 (1990) (performing a similar assessment for the enumerated offense of burglary).

178. See *id.* (“We believe that Congress meant by ‘burglary’ the generic sense in which the term is now used in the criminal codes of most States.”).

179. See *id.* at 598 n.8 (citing the MPC definition of “burglary”).

180. See *id.* at 598 (citing 2 WAYNE LAFAYE & AUSTIN SCOTT, SUBSTANTIVE CRIMINAL LAW 466 (1986)).

181. See *id.*

182. Twenty-nine states’ first- or second-degree arson statutes implicate a reckless (or negligent) mens rea. See, e.g., HAW. REV. STAT. ANN. § 708-8252(1) (LexisNexis 2007) (“A person commits the offense of arson in the second degree if the person intentionally or knowingly sets fire to or causes to be burned property and . . . [r]ecklessly places another person in danger of death or bodily injury . . .”); see also ALA. CODE § 13A-7-41(a) (LexisNexis 2005) (first-degree arson); ALASKA STAT. § 11.46.400(a) (2012) (first-degree arson); ARIZ. REV. STAT. ANN. §§ 13-1701, -1704 (2010) (arson); ARK. CODE ANN. § 5-38-301(a)(1)(C) (2006) (arson with negligent risk of death or serious injury); CONN. GEN. STAT. ANN. § 53a-111(a)(1) (West 2012) (first-degree arson); DEL. CODE ANN. tit. 11, § 803(2) (2007) (first-degree arson); FLA. STAT. § 806.01(1)(c) (West 2007) (first-degree arson); GA. CODE ANN. § 16-7-60(a)(5) (2011) (first-degree arson); IDAHO CODE ANN. § 18-802(3) (2004) (first-degree arson); 720 ILL. COMP. STAT. ANN. 5/20-1.1(a)(1) (West 2003 & Supp. 2013) (aggravated arson); IOWA CODE ANN. §§ 712.1-2 (West 2013) (first-degree arson); KY. REV. STAT. ANN. § 513.020(1)(a) (West 2006) (first-degree arson); LA. REV. STAT. ANN. § 14:51 (2007) (aggravated arson); ME. REV. STAT. tit. 17-A, § 802(1)(B)(2) (2006) (arson); MINN. STAT. ANN. § 609.561(2) (West 2009) (first-degree arson); MO. ANN. STAT. § 569.040.1(1) (West 1999 & Supp. 2013) (aggravated arson); NEB. REV. STAT. ANN. § 28-502(1) (LexisNexis 2009 & Supp. 2012) (first-degree arson); N.H. REV. STAT. ANN. § 634:1(I), (III)(b) (LexisNexis 2007) (arson); N.J. STAT. ANN. § 2C:17-1(b)(1) (West 2005) (arson); N.Y. PENAL LAW § 150.15 (McKinney 2009) (second-degree arson); N.D. CENT. CODE § 12.1-21-02 (2012) (endangering by fire or explosion); OHIO REV. CODE ANN. § 2909.02(A)(1) (West 2006) (aggravated arson); OR. REV. STAT.

minority requires only an intentional or knowing act.¹⁸⁵ Hawaii's second-degree arson statute is a good example of the majority model:

- (1) A person commits the offense of arson in the second degree if the person intentionally or knowingly sets fire to or causes to be burned property and:
 - (a) Recklessly places another person in danger of death or bodily injury; or
 - (b) Knowingly or recklessly damages the property of another, without the other's consent, in an amount exceeding \$1,500.
- (2) Arson in the second degree is a class B felony.¹⁸⁶

§ 164.325(1)(a)(B) (2011) (first-degree arson); 18 PA. CONS. STAT. ANN. § 3301(a)(1)(i) (2000) (arson); R.I. GEN. LAWS § 11-4-2 (2002) (first-degree arson); TEX. PENAL CODE ANN. § 28.02(a)(2)(F) (West 2011) (arson); WASH. REV. CODE ANN. § 9A.48.020(1)(a) (West 2009) (first-degree arson); WYO. STAT. ANN. § 6-3-101(c) (2013) (aggravated arson). Though not counted in this category, at least one state has a felony arson provision similar, in terms of mens rea, to those discussed in this Note, but is not first- or second-degree arson, which is what this Note examines. *See* S.D. CODIFIED LAWS § 22-33-9.3(1) (2006) (“Any person who intentionally starts a fire or causes an explosion, whether on his or her own property or another’s, and thereby recklessly . . . [p]laces another person in danger of death or serious bodily injury . . . is guilty of reckless burning or exploding. Reckless burning or exploding is a Class 4 felony.”).

183. *See, e.g.*, OR. REV. STAT. § 164.325(1) (“A person commits the crime of arson in the first degree if . . . [b]y starting a fire or causing an explosion, the person intentionally damages . . . [a]ny property, whether the property of the person or the property of another person, and such act recklessly places another person in danger of physical injury or protected property of another in danger of damage . . .”).

184. *See, e.g.*, ARIZ. REV. STAT. ANN. §§ 13-1701, -1704 (criminalizing knowing arson of an occupied structure in § 13-1704, in which “occupied structure” is defined in § 13-1701 based on the likelihood of people being near or inside the structure).

185. The other twenty-one states have first- or second-degree arson statutes that require only an intentional or knowing act. *See, e.g.*, MD. CODE ANN., CRIM. LAW § 6-102(a) (LexisNexis 2012) (“A person may not willfully and maliciously set fire to or burn . . . a dwelling; or . . . a structure in or on which an individual who is not a participant is present.”); *see also* CAL. PENAL CODE § 451 (West 2010) (arson); COLO. REV. STAT. § 18-4-102(1) (2013) (first-degree arson); IND. CODE ANN. § 35-43-1-1(a) (LexisNexis 2009) (arson); KAN. STAT. ANN. §§ 21-5812(a)(1), (b)(1) (Supp. 2012) (arson, aggravated arson); MASS. ANN. LAWS ch. 266, § 1 (LexisNexis 2010) (burning dwelling houses); MICH. COMP. LAWS ANN. § 750.72 (West 2004 & Supp. 2013) (first-degree arson); MISS. CODE ANN. § 97-17-1(1) (2006) (first-degree arson); MONT. CODE ANN. § 45-6-103(1) (2011) (arson); NEV. REV. STAT. ANN. § 205.010 (LexisNexis 2012) (first-degree arson); N.M. STAT. ANN. § 30-17-5(A)(1) (Supp. 2013) (arson); N.C. GEN. STAT. § 14-58 (2011) (arson); OKLA. STAT. ANN. tit. 21, § 1401 (West 2002) (first-degree arson); S.C. CODE ANN. § 16-11-110(B) (2001) (second-degree arson); S.D. CODIFIED LAWS § 22-33-9.1 (2006) (first-degree arson); TENN. CODE ANN. § 39-14-301(a) (2010) (arson); UTAH CODE ANN. § 76-6-103 (2012) (aggravated arson); VT. STAT. ANN. tit. 13, § 502 (2009) (first-degree arson); VA. CODE ANN. § 18.2-77(A) (2009) (burning dwelling house); W. VA. CODE ANN. § 61-3-1(a) (LexisNexis 2010) (first-degree arson); WIS. STAT. ANN. § 943.02(1)(a) (West 2005) (arson of buildings).

186. HAW. REV. STAT. § 708-8252.

Hawaii's second-degree arson offense¹⁸⁷ is an example of the state majority version of generic arson: intent or knowledge as to the precipitating act—setting the fire—and recklessness as to the risk of danger to others. It can thus be considered a “generic” arson statute for purposes of this Note.

The MPC, the second source mentioned in *Taylor*, has provisions that are similar to the state majority and minority models. It does not assign degrees to its arson offenses. MPC sections 220.1(1)¹⁸⁸ and 220.1(2) are similar to the state minority and majority models, respectively. MPC section 220.1(2), which is similar to the state majority model, provides:

- (2) Reckless Burning or Exploding. A person commits a felony of the third degree if he purposely starts a fire or causes an explosion, whether on his own property or another's, and thereby recklessly:
- (a) places another person in danger of death or bodily injury; or
 - (b) places a building or occupied structure of another in danger of damage or destruction.¹⁸⁹

Like the state majority model, MPC section 220.1(2) requires intent or knowledge as to the precipitating act—“start[ing] a fire or caus[ing] an explosion”—but only recklessness as to the risk of danger to others.

Thus, it seems firmly established that the majority-model arson statute, which features such a dual mens rea requirement and is most similar to crimes like drive-by shooting, qualifies as a generic arson statute. With this in mind, the next three Sections apply the “in kind” test to drive-by shooting using, as its closest analog, arson with a dual mens rea requirement.

187. Alaska's state code serves as an example of a similar arson provision in the first degree. See ALASKA STAT. § 11.46.400(a) (“A person commits the crime of arson in the first degree if the person intentionally damages any property by starting a fire or causing an explosion and by that act recklessly places another person in danger of serious physical injury.”). The difference between the two is that Hawaii's statute is satisfied by intent *or* knowledge as to the precipitating act, whereas Alaska's requires intent.

188. Section 220.1(1) is similar to the state minority model, and provides that a person is guilty of arson, a second-degree felony, when “he starts a fire or causes an explosion with the purpose of: (a) destroying a building or occupied structure of another; or (b) destroying or damaging any property, whether his own or another's, to collect insurance for such loss.” MODEL PENAL CODE § 220.1(1) (1985).

189. *Id.* § 220.1(2).

B. Drive-By Shooting Is Similarly Purposeful to Arson

Under the regime proposed by this Note, the drive-by-shooting offense¹⁹⁰ must be purposeful like its closest analog among the enumerated offenses, arson. Like setting a fire, shooting a gun involves a calculated, intentional act that often entails a subsidiary mens rea regarding the risk to others associated with the intentional act. The “reckless[] discharge[] [of] a firearm . . . in a manner which creates a substantial risk of death or serious physical injury to another person,”¹⁹¹ therefore, seems sufficiently purposeful when compared to its closest analog among the enumerated offenses, arson.

United States v. Alexander,¹⁹² an Eleventh Circuit decision post-*Begay* but pre-*Sykes*, shows how a reckless crime may still be sufficiently purposeful under *Begay*. The Court in *Alexander* analyzed a Florida statute criminalizing the willful discharge of a firearm from a vehicle under the Sentencing Guideline’s crime-of-violence provision.¹⁹³ The Eleventh Circuit determined that violation of the Florida statute required deliberate discharge of a weapon from a vehicle when another person was within one-thousand feet of the shooter, although the weapon did not need to be aimed at that person.¹⁹⁴ Under these circumstances, “there is a strong chance that, intentionally or not, some other person will be struck by a bullet,”¹⁹⁵ and the court held that the crime was sufficiently “purposeful, violent, and aggressive” to qualify as a violent felony under the residual clause.¹⁹⁶ The shooter’s conduct—firing a weapon under

190. Parts III.B, III.C, and III.D use Washington’s drive-by-shooting statute as a template. The statute and its application to one criminal in particular are discussed in the Introduction. *See supra* notes 20–27 and accompanying text.

191. WASH. REV. CODE ANN. § 9A.36.045(1) (West 2009).

192. *United States v. Alexander*, 609 F.3d 1250 (11th Cir. 2010).

193. *Id.* at 1256.

194. *Id.* The Eleventh Circuit relied on the Florida Supreme Court’s interpretation of the relevant statute: “[T]he Florida Supreme Court has stated that shooting from a vehicle in violation of section 790.15(2) requires proof of two elements: (1) the defendant knowingly and willfully discharged a firearm from a vehicle; and (2) the discharge occurred within 1,000 feet of any person.” *Id.* (quotation marks and alterations omitted).

195. *Id.* at 1257.

196. *Id.* at 1258–59. Though the Eleventh Circuit’s decision was made relatively simple, as far as the purposefulness prong goes, because Florida state courts read a knowing or willful discharge requirement into the statute, *see supra* note 194 and accompanying text, it still serves as an example of the way in which courts could analyze crimes like drive-by shooting that involve the intentional or knowing discharge of a firearm with recklessness as to the results.

circumstances in which a person could easily be hit—was impliedly reckless, but the action itself—the firing of the gun—was deliberate.

Thus, crimes like drive-by shooting should be sufficiently “purposeful” to qualify as violent felonies under the residual clause. Such a flexible understanding of “purposeful” may cause lower courts to fear that a host of reckless crimes will qualify under this interpretation of the purposeful prong of the *Begay* test. However, there are further limits on which crimes can qualify as violent felonies: in addition to being purposeful, the crime must also be sufficiently violent¹⁹⁷ and aggressive¹⁹⁸ to qualify as a violent felony under the residual clause.

C. *Drive-By Shooting Is Just As Violent as, if Not More Violent than, Arson*

Second, drive-by shooting under Washington law must be sufficiently similar in terms of violence to its closest analog among the enumerated offenses, arson. Although courts have rarely addressed what makes a crime sufficiently violent under *Begay*, there is at least one decision on point. In *United States v. Woods*,¹⁹⁹ the Seventh Circuit equated the violence prong of *Begay* with an inquiry into risk.²⁰⁰ *Woods* treated risk of physical injury to another as a proxy for violence. Though this exercise may be redundant with a court’s general inquiry into risk, it seems appropriate in light of the renewed emphasis the Supreme Court has placed on risk after *Sykes*. The question, then, is whether drive-by shooting is roughly as risky as its closest analog among the enumerated offenses, arson.

Arson itself is not particularly risky, and the risk caused by drive-by shooting is almost certainly comparable. Although arson can be devastating to individual property owners, arson itself is not particularly risky in terms of human casualties. As Justice Thomas noted in his *Sykes* concurrence, “[T]he injury rate for burglary and arson is around 3 injuries per 100 crimes, or less,” whereas for vehicle pursuits, for example, the “injury rate is just over 4 injuries per 100

197. See *infra* Part III.C.

198. See *infra* Part III.D.

199. *United States v. Woods*, 576 F.3d 400 (7th Cir. 2009).

200. See *id.* at 407–08 (“The Supreme Court [has] recently addressed the issue of violence, for these [ACCA] purposes. As it had already noted in *James*, the offense must in the ordinary run of cases describe behavior that poses a sufficiently great risk of physical injury to another before it will satisfy the ACCA or § 4B1.1.”).

chases, excluding injuries to the perpetrator.”²⁰¹ Justice Thomas relied on these statistics to reach his conclusion that in the ordinary case, intentional flight in a vehicle may be riskier than arson and burglary.²⁰²

Similarly, drive-by shooting is much riskier (and thus more violent) than arson in the ordinary case. The Eleventh Circuit’s decision in *Alexander*,²⁰³ came to the conclusion that discharging a firearm in a public place was sufficiently risky based on an intuitive analysis²⁰⁴ of the conduct underlying the statute:

The firing of a weapon poses a risk that a bystander will be injured by a stray bullet. The range of even a small handgun exceeds the range of sight of the person firing the gun. . . . [T]here is a risk that the bullet will stray from its target and injure another person. This risk increases substantially when the firearm is discharged from a vehicle. Not only is the shooter’s range of vision diminished, but vehicles are commonly located on roads and parking areas, which are often adjacent to inhabited buildings and populated by drivers of other vehicles, their passengers, and pedestrians.²⁰⁵

Thus, drive-by shooting is sufficiently risky, or violent, to qualify as a violent felony under the test used in *Begay*.

D. Drive-by Shooting Is Similarly Aggressive to Arson

Third, drive-by shooting must be aggressive, just as arson, its closest analog among the enumerated offenses, is aggressive. Lower courts have assumed that the aggressiveness prong refers to the defendant’s underlying motive or mental state: in *United States v. Templeton*,²⁰⁶ for example, the Seventh Circuit found the aggressiveness prong unsatisfied, because “[a]lthough the [walkaway escape] statute does require intent, the required mental state is only intent to be free of custody, not intent to injure or threaten anyone.”²⁰⁷ Put differently, “Aggressive, violent acts are ‘aimed at

201. *Sykes v. United States*, 131 S. Ct. 2267, 2280 (2011) (Thomas, J., concurring in the judgment).

202. *Id.*

203. For discussion of *Alexander*, see *supra* Part III.B.

204. As discussed above, statistical evidence may be useful in determining whether a crime is sufficiently risky, but it is not required. See *supra* note 138 and accompanying text.

205. *United States v. Alexander*, 609 F.3d 1250, 1257 (11th Cir. 2011).

206. *United States v. Templeton*, 543 F.3d 378 (7th Cir. 2008).

207. *Id.* at 383.

other persons or property where persons might be located and thereby injured,”²⁰⁸ and “[t]hey involve overt, active conduct that results in harm to a person or property.”²⁰⁹

Arson—drive-by shooting’s closest analog among the enumerated offenses—is sufficiently aggressive, though most likely less aggressive than drive-by shooting. It is difficult to characterize the intent of a typical arsonist, and the arsonist need not intend to injure anyone.²¹⁰ Nonetheless, arson is typically directed at property where people are likely to be,²¹¹ and first- and second-degree arson, as discussed in Part III.A, would always seem to “involve overt, active conduct that results in harm to a person or property.”²¹²

Drive-by shooting meets all the same criteria as arson, and more. Although one could argue that a drive-by-shooting offender may not intend “to injure or threaten anyone”²¹³ in the commission of the crime, this is typically an offender’s intent. By the terms of the statute,²¹⁴ it seems apparent that drive-by shooting must be “aimed at other persons or property where persons might be located and thereby injured”²¹⁵ in the ordinary case, or else it is unlikely it would cause the requisite “serious potential risk of physical injury to another.”²¹⁶ It follows that drive-by shooting is sufficiently aggressive.

Thus, under the new test, drive-by shooting would qualify as a violent felony under the ACCA’s residual clause because it is sufficiently “purposeful, violent, and aggressive” in the same way that its closest analog among the enumerated offenses, arson, is “purposeful, violent, and aggressive.”

208. *United States v. Vanhook*, 640 F.3d 706, 714 (6th Cir. 2011) (quoting *United States v. Archer*, 531 F.3d 1347, 1351 (11th Cir. 2008)).

209. *Id.* at 714–15 (quoting *United States v. Polk*, 577 F.3d 515, 519 (3d Cir. 2009)).

210. It seems equally likely that an arsonist might intend to damage property, either for his own sake or in an attempt to defraud insurers, and many state codes anticipate as much. *See, e.g.*, COLO. REV. STAT. § 18-4-104(1) (2013) (“A person who, by means of fire or explosives, intentionally damages any property with intent to defraud commits third degree arson.”).

211. For a more detailed discussion of arson provisions, see *supra* Part III.A.

212. *Polk*, 577 F.3d at 519.

213. *United States v. Templeton*, 543 F.3d 378, 383 (7th Cir. 2008).

214. Washington’s statute states that “[a] person is guilty of drive-by shooting when he or she recklessly discharges a firearm . . . in a manner which creates a substantial risk of death or serious physical injury to another person.” WASH. REV. CODE ANN. § 9A.36.045(1) (West 2009).

215. *United States v. Archer*, 531 F.3d 1347, 1351 (11th Cir. 2008).

216. *Polk*, 577 F.3d at 519.

IV. APPLYING A REVISED *SYKES*–*BEGAY* FRAMEWORK

This Part discusses the application of the new regime to example statutes drawn directly from the cases discussed in this Note. Some problematic statutes would be brought within the scope of the residual clause by applying the “in kind” comparison to a predicate felony’s closest analog among the enumerated offenses, whereas others would remain outside its scope consistent with the Supreme Court’s ACCA jurisprudence. Part IV.A discusses examples of statutes that would be brought within the scope of the residual clause, and Part IV.B discusses examples of those predicate felonies that would remain outside its ambit.

A. *Problematic Statutes That the New Regime Would Bring Within the Scope of the Residual Clause*

The regime proposed by this Note would have the largest effect on gun crimes. For the reasons discussed in Part III, all crimes involving the reckless discharge of a gun would be sufficiently purposeful, which would significantly expand the range of qualifying predicate offenses in this category.²¹⁷ This is entirely in accord with the purpose of § 924(e), which was passed to deter *armed* career criminals.²¹⁸

For offenses involving other types of weapons or dangerous conduct, it may be unclear whether the purposefulness requirement is satisfied. Consider the involuntary-manslaughter statute at issue in *Woods*²¹⁹ or the reckless-endangerment statute from *Gray*.²²⁰ Courts would need to use state case law and the modified categorical approach to determine whether these crimes are sufficiently purposeful and aggressive. As courts already employ these methods

217. Of course, these crimes would still need to satisfy the violence and aggressiveness requirements.

218. See *supra* notes 28–46 and accompanying text.

219. See *United States v. Woods*, 576 F.3d 400, 402 (7th Cir. 2009) (discussing the defendant’s conviction for violation of Illinois’s involuntary manslaughter statute); see also 720 ILL. COMP. STAT. 5/9-3 (Supp. 2013) (“A person who unintentionally kills an individual without lawful justification commits involuntary manslaughter if his acts whether lawful or unlawful which cause the death are such as are likely to cause death or great bodily harm to some individual, and he performs them recklessly . . .”).

220. See *United States v. Gray*, 535 F.3d 128, 131 (2d Cir. 2008) (discussing the defendant’s conviction for violation of New York’s reckless endangerment statute); see also N.Y. PENAL LAW § 120.25 (McKinney 2009) (“A person is guilty of reckless endangerment in the first degree when, under circumstances evincing a depraved indifference to human life, he recklessly engages in conduct which creates a grave risk of death to another person.”).

to clarify vague statutes, however, the proposed test would not impose a significant additional burden on courts.

B. Statutes That Would Remain Outside the Scope of the Residual Clause Under the New Regime, Consistent with the Supreme Court's ACCA Jurisprudence

The proposed regime comports with the Supreme Court's ACCA jurisprudence by excluding from the clause's scope statutes that the Court has rejected as candidates for violent-felony status. For example, neither DUI statutes nor the reckless and negligent crimes cited in *Begay* as examples of potential violent felonies would qualify under the new regime. Finally, some gun crimes would still fail to qualify. Each of these examples is analyzed in turn.

First, DUI offenses—the impetus behind the Court's decision in *Begay*—would still fail to qualify as violent felonies under the test proposed by this Note.²²¹ The New Mexico statute at issue in *Begay* made it “unlawful for a person who is under the influence of intoxicating liquor to drive a vehicle within this state.”²²² Though the offense is sufficiently violent,²²³ it is neither sufficiently purposeful nor aggressive. Its closest analog, arson, generally requires a reckless mens rea at minimum, and the New Mexico statute, applying the categorical approach, appears to be a strict-liability offense. Although arson is sufficiently aggressive because it is typically aimed at places where people are usually located, DUI is not “aimed” in any sense of the word.²²⁴

221. In *Begay*, the Court assumed that DUI offenses were sufficiently risky. See *Begay v. United States*, 553 U.S. 137, 141 (2008) (“[W]e assume that the lower courts were right in concluding that DUI involves conduct that presents a serious potential risk of physical injury to another.” (quotation marks omitted)). This Note assumes the same.

222. N.M. STAT. ANN. § 66-8-102(A) (2004).

223. Violence is measured by risk under the regime proposed by this Note, an approach that the Court found sufficient in *Begay*. See *supra* notes 200–05.

224. New Mexico's aggravated-DUI offense would also fail to qualify as a violent felony. The statute states that “[a]ggravated driving under the influence of intoxicating liquor or drugs consists of . . . causing bodily injury to a human being as a result of the unlawful operation of a motor vehicle while driving under the influence of intoxicating liquor or drugs.” N.M. STAT. ANN. § 66-8-102(D) (Supp. 2013). The statute founders on the purposefulness prong, of course, but it also fails under the aggressiveness prong. Though a person has been injured by definition, a DUI offender's conduct still cannot be “aimed” at the victim.

Second, the crimes cited by *Begay*—negligent²²⁵ and reckless polluting,²²⁶ reckless tampering with consumer products,²²⁷ and the negligence of seamen²²⁸—as examples of potential, but unsuitable, candidates for violent-felony status if reckless or negligent crimes were included under the statute, would remain outside the scope of the residual clause under the regime proposed by this Note.²²⁹ The negligent crimes (negligent polluting and negligent seamanship) would not be sufficiently purposeful.²³⁰ The reckless crimes are more difficult, though reckless polluting is unlikely to qualify as violent or aggressive, and may not be sufficiently purposeful either.²³¹ It is possible to imagine scenarios in which a reckless polluter could meet these criteria, but under the categorical approach, “the proper inquiry is whether the conduct encompassed by the elements of the offense, in the *ordinary case*,” is sufficient.²³²

Reckless tampering with consumer products would also fail, though it comes the closest to qualifying under the new regime. Tampering as described in the statute appears to be an intentional

225. See 33 U.S.C. § 1319(c)(1)(B) (2006) (“Any person who . . . negligently introduces into a sewer system or into a publicly owned treatment works any pollutant or hazardous substance which such person knew or reasonably should have known could cause personal injury or property damage . . . shall be punished . . .”).

226. See ARK. CODE ANN. § 8-4-103(a)(2)(A)(ii) (2006) (“It shall be unlawful for a person to . . . recklessly cause pollution of the waters or air of the state in a manner not otherwise permitted by law and thereby create a substantial likelihood of adversely affecting human health, animal or plant life, or property.”).

227. See 18 U.S.C. § 1365(a) (“Whoever, with reckless disregard for the risk that another person will be placed in danger of death or bodily injury and under circumstances manifesting extreme indifference to such risk, tampers with any consumer product that affects interstate or foreign commerce, or the labeling of, or container for, any such product, or attempts to do so, shall [be guilty of a crime].”).

228. See 18 U.S.C. § 1115 (“Every captain, engineer, pilot, or other person employed on any steamboat or vessel, by whose misconduct, negligence, or inattention to his duties on such vessel the life of any person is destroyed, and every owner, charterer, inspector, or other public officer, through whose fraud, neglect, connivance, misconduct, or violation of law the life of any person is destroyed, shall be fined under this title or imprisoned not more than ten years, or both.”).

229. *Begay v. United States*, 553 U.S. 137, 146–47 (2008).

230. Although an argument could potentially be made for the inclusion of negligent offenses under the residual clause, this Note does not go so far. For a discussion of the purposefulness requirement and this Note’s interpretation of it, see *supra* Parts III.A–B.

231. It is unclear from the face of Arkansas’s reckless-pollution statute whether the pollution itself must be intentional. Based solely on the statutory language, it seems that an egregious accident or mistake could theoretically qualify.

232. *James v. United States*, 550 U.S. 192, 208 (2007) (emphasis added).

act,²³³ so the reckless component presumably applies to the results of the act and not to the act itself, as with arson and drive-by-shooting offenses. It may be sufficiently violent, depending on the circumstances, but it is insufficiently aggressive. There is no reason to suspect from the text of the statute that the offender has “aimed” any injury at a person or a place where a person is located. As with reckless pollution, it is always possible to imagine an egregious violation that could arguably qualify, but the categorical approach focuses on violations in the ordinary case.²³⁴

Finally, though the regime proposed by this Note would allow more gun crimes to qualify as violent felonies, some gun crimes would still fail to qualify. For example, the statute at issue in *United States v. Coronado*²³⁵ stated that “any person who willfully discharges a firearm in a grossly negligent manner which could result in injury or death to a person is guilty of a public offense.”²³⁶ Gross negligence is not sufficiently purposeful when comparing the offense to its closest analog, arson, and this offense would fail to qualify as a violent felony.

CONCLUSION

After *Sykes* was decided, the Eleventh Circuit declared that “the ever-shifting sands of the residual clause [have] shifted again.”²³⁷ The residual clause has always posed problems for the lower courts, but interpreting the provision has become increasingly difficult in light of the Supreme Court’s decisions in *Sykes* and *Begay*. Courts have relied on *Begay*’s “purposeful” component to exclude crimes with a reckless mens rea, which contravenes congressional intent. Congress’s primary concern has been the potential for harm to persons,²³⁸ and it defies logic to think that Congress would have wanted dangerous crimes like drive-by shooting to fall outside the scope of the residual clause.

The new regime proposed by this Note realizes both Congress’s intent and the Court’s existing ACCA jurisprudence. By applying

233. See *supra* note 227 and accompanying text. The parts of the statute that discuss reckless behavior are governed by the prepositional phrase “with,” and the clause itself is closed off by a comma before the offensive act (tampering) is described. Presumably, then, the tampering in the statute is not reckless but intentional.

234. See *supra* note 232.

235. *United States v. Coronado*, 603 F.3d 706 (9th Cir. 2010).

236. CAL. PENAL CODE § 246.3(a) (West 2008).

237. *United States v. Chitwood*, 676 F.3d 971, 978 (11th Cir. 2012).

238. See *supra* notes 23–40 and accompanying text.

Begay's "purposeful, violent, and aggressive" test to reckless felonies using the felonies' closest analogs among the enumerated offenses as baselines, courts can allow a limited number of reckless crimes to qualify while still respecting the boundaries set by the Court in *Sykes*. In doing so, courts can better satisfy the ACCA's purpose: increased, though narrow, targeting of the most dangerous felons—individuals like M.L.—the armed career criminals.