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Which Felonies Pose a "Serious Potential Risk of Injury" Under the ACCA Residual Clause?

Evan Tsen Lee
UC Hastings College of the Law, leee@uchastings.edu

Lynn A. Addington

Stephen Rushin

Which Felonies Pose a "Serious Potential Risk of Injury" for Federal Sentencing Purposes?

EVAN TSEN LEE*

Professor, University of California, Hastings College of the Law

LYNN A. ADDINGTON

Associate Professor, American University, School of Public Affairs

STEPHEN D. RUSHIN

Visiting Assistant Professor, University of Illinois College of Law

For some time now, the Supreme Court has struggled to develop a coherent approach to determining which felony convictions qualify under the so-called "residual clause" of the Armed Career Criminal Act (ACCA).[1] Federal prosecutors have charged dozens, perhaps hundreds, of different state felony convictions under the residual clause in order to obtain a mandatory minimum sentence enhancement.[2] Three justices have expressed a sense of hopelessness that the Court will ever develop a satisfactory test for determining which ones qualify. Justices Thomas and Alito have implored Congress to abolish the residual clause and replace it with an exhaustive list of enumerated felonies.[3] Justice Scalia has repeatedly called on the Court to declare the residual clause unconstitutionally vague.[4]

In its most recent decision interpreting the residual clause, *Sykes v. United States,* the Court extensively cited empirical data about the dangerousness of various crimes, including the one at issue there (eluding a police officer in a motor vehicle), as well as two offenses that ACCA explicitly denominates as "violent"—burglary and arson.[5] Although the *Sykes* Court made it clear that "statistics are not dispositive,"[6] it nonetheless embraced an approach that presumptively determines a felony to qualify under the residual clause if it is at least as dangerous as the four felonies explicitly listed in ACCA—burglary, arson, extortion, and use of explosives. Because the statistics on eluding a police officer in a motor vehicle suggested that that offense is at least as dangerous as burglary and arson, and because common sense supported that notion, the Court held that offense to qualify under the residual clause.

Empirical data tend to be more useful for comparison purposes when they spring from a common source and methodology. In *Sykes*, the Court was forced to use data from different studies that apparently used different gathering methods. We have conducted a simple study using an existing data source, the Uniform Crime Reporting Program's (UCR) National Incident-Based Reporting System (NIBRS) to compare the co-occurrence of various offenses and injury.[7] In this article, we present our findings and make some recommendations. We do not claim to have solved the residual clause problem; not nearly enough data are available for comprehensive recommendations. In any event, data in and of themselves are incapable of interpreting a statute. Only judges can do that (authoritatively). Nevertheless, we offer these findings and recommendations in the hope that they will help the interpretive process and spur additional data gathering.

Before discussing our research, however, we briefly review the problem. ACCA is a federal antirecidivism statute authorizing punishment for felons caught in possession of a firearm.[8] If the defendant has fewer than three qualifying prior convictions, he or she may be sentenced to a maximum of ten years in prison.[9] If he has three or more qualifying convictions, he must be sentenced to a minimum of fifteen years.[10]

ACCA divides qualifying prior convictions into two main groups—"serious drug offenses"[11] and "violent felonies."[12] The statute then gives three alternative definitions of violent felonies: (1) those involving force or threat of force; (2) burglary, arson, extortion, or use of explosives; or (3) any other felony that "presents a serious potential risk of physical injury to another."[13] The problem with the third clause, known as the residual clause, is that it begs the question, How much risk is serious? Aside from the potential arbitrariness of judicial specification of risk levels, there is a basic problem of metric. How does a court measure risk?

That, in a nutshell, is the problem. As noted above, the *Sykes* Court has already embraced a solution: supplement common sense about the riskiness of various offenses with empirical data about how often the commission of those offenses is accompanied by actual injuries. Our aim is to help by providing some data drawn from a common source, NIBRS.

I. Methodology and Background on National Incident-Based Reporting System

This study uses data from the Federal Bureau of Investigation's UCR, specifically NIBRS. The UCR is one of two official national measures of crime in the United States and is based on data collected by the FBI from local and state law enforcement agencies. Historically the UCR collected aggregate-level information for eight Part I offenses.[14] With the exception of homicides, these agency-level counts provided no details about any particular crime incident. More recently, the UCR started converting to NIBRS. For purposes of this study, NIBRS has two important features: (1) it expands the UCR data collection from eight offenses to forty-six offenses known to police, and (2) it gathers incident-level details including information regarding the

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offenses, victims, offenders, and arrestees (if any).[15] Of particular interest for the current project is the information gathered on whether the victim suffered any injuries in connection with the criminal incident. It should be noted that NIBRS groups together multiple criminal offenses if they were part of the same criminal incident as determined by the reporting agency. What this study measures, then, is the percentage of incidents involving the stated offense that also involve an injury to any victim.

This study relies on the incident data from the 2010 NIBRS Extract Files, which constitutes one of the most recent years of publicly available data. In 2010, the NIBRS file included 4,998,914 incidents.[16] Of these incidents, 10.5 percent or 526,280 involved an actual injury. For present purposes, to be counted as involving an injury, at least one of the victims involved in the criminal incident must have suffered at least a minor injury.[17] For NIBRS injury coding purposes, homicides by definition are excluded since the victim is dead. For our purposes, all homicides were recoded and designated as involving a "fatal" injury.

For this project, four main caveats must be considered in relying on NIBRS data. One caveat in analyzing NIBRS data is its limited coverage. NIBRS represents a substantial departure in the UCR's crime data collection for law enforcement agencies and requires a lengthy certification process. As a result, the conversion to NIBRS has been gradual. By 2010, thirty-two states were NIBRS certified. Within these thirty-two states, not all agencies submit data in NIBRS format, as only fifteen states report all their UCR crime data in NIBRS format. NIBRS agencies covered approximately 30 percent of the U.S. population in 2010.[18] Law enforcement agencies that participate in NIBRS tend to represent smaller population areas. In 2010, the Fairfax County (VA) Police Department was the only agency covering a population of more than one million that participated in NIBRS.[19] Because participation in NIBRS is voluntary, NIBRS states and law enforcement agencies do not constitute a representative sample of U.S. law enforcement agencies or states. This nonrepresentativeness of NIBRS suggests exercising caution when interpreting the results and generalizing beyond the NIBRS-participating agencies included in this study.[20]

A second issue concerns the limited list of crimes included in NIBRS. Although NIBRS greatly expands the number of crimes for which the UCR collects data, it does not cover all crimes reported to and known by law enforcement. In particular, NIBRS does not cover many of the offenses often involved for purposes of the residual clause. Notable examples are escape (from prison or from custody)[21] and resisting arrest.[22] A third caveat is that the UCR defines a criminal incident and classifies particular crimes in a way that may differ from prosecutorial decisions. For UCR purposes, a crime incident is "one or more offenses committed by the same offender, or group of offenders acting in concert, at the same time and place."[23] In addition, UCR offenses are classified based on information from the initial police investigation. As a result of both of these data collection practices, some differences may arise between the offenses in the criminal incident initially reported and the charges on which the offender is arrested and ultimately prosecuted.

Finally, the NIBRS definitions of offenses are by design uniform and therefore can be at variance with specific state statutory offenses that superficially go by the same name. Appendix A contains the NIBRS definitions for select offenses.

Notwithstanding these caveats, the present study uses NIBRS because it constitutes the single most comprehensive crime database that collects information on victim injuries.

Table 1. Actual (fatal and non-fatal) injuries reported by any victim in incident

Crimes	Percentage Injured
Murder/Nonnegligent Manslaughter	100.00%
Aggravated Assault	62.84%
Simple Assault	55.00%
Kidnapping/Abduction	41.30%
Robbery	31.71%
Forcible Rape	28.12%
Sexual Assault With An Object	24.40%
Forcible Sodomy	19.66%
Forcible Fondling	9.15%
Weapon Law Violations	5.36%
Extortion/Blackmail	**4.41%**
Bribery	3.71%
Destruction/Damage/Vandalism of Property	2.77%
Purse-snatching	1.71%
Pocket-picking	1.69%
Drug Equipment Violations	1.14%
Arson	**1.11%**
Drug/Narcotic Violations	1.06%
Intimidation	1.05%
Burglary/Breaking and Entering	**1.02%**
Stolen Property Offenses	0.74%
Statutory Rape	0.71%
Pornography/Obscene Material	0.67%
All Other Larceny	0.63%
Assisting or Promoting Prostitution	0.63%
Motor Vehicle Theft	0.49%
Theft From Building	0.49%
Shoplifting	0.39%
Gambling Equipment Violations	0.38%
Welfare Fraud	0.33%
Impersonation	0.28%
Operating/Promoting/Assisting Gambling	0.27%
Prostitution	0.27%
False Pretenses/Swindle/Confidence Game	0.23%
Betting/Wagering	0.17%
Theft From Coin-Operated Machine or Device	0.16%
Incest	0.14%
Counterfeiting/Forgery	0.13%
Embezzlement	0.09%
Theft From Motor Vehicle	0.09%
Credit Card/Automatic Teller Machine Fraud	0.07%
Theft of Motor Vehicle Parts/Accessories	0.06%
Wire Fraud	0.04%

Source: Data from the NIBRS 2010 CODEBOOK, *supra* note 16.

II. Findings

Table 1 summarizes the percentage of incidents involving each specified crime in which a victim reported some type

of physical injury. We have bolded three of the offenses that Congress explicitly listed in 18 U.S.C. § 924(e)(2)(B) as violent crimes. (NIBRS has no easy comparison point for crimes involving the "use of explosives," which is the fourth offense clearly identified by Congress as violent.) Because Congress denominated these offenses as violent, the Court has previously treated them as valuable comparison points when determining which other offenses are sufficiently dangerous to warrant their inclusion in the residual clause.

It is difficult not to notice a clear separation between crimes that necessarily involve nonconsensual touching of victims (or threat thereof) and ones that do not.[24] Assault, kidnapping, robbery, and forcible sex offenses all involve associated injuries in the double digits (except forcible fondling, which is very close). Much of this pattern is likely attributable to the inherent definitions of these crimes and, in turn, the way in which NIBRS information is collected. NIBRS requires injury information to be recorded with respect to every assault, kidnapping/abduction, robbery, forcible rape, forcible sodomy, sexual assault with an object, forcible fondling, and extortion/blackmail.[25] This information must be recorded even if the response is "none" (i.e., no injury occurred). NIBRS requires injury information for these crimes because the NIBRS definitions of these crimes mention injury or risk of injury. The NIBRS definitions of the remaining crimes listed in Table 1 do not mention risk of injury. As such, these offenses are counted as involving an injury only if they co-occur with the offenses listed above, and if there is an actual injury. Such a second offense and injury could occur to the same victim, or to a second victim, involved in the incident. For example, a purse-snatching is counted as involving an injury for purposes of Table 1 if the purse-snatching victim also incurred another offense where injuries are recorded (such as forcible rape) and an actual injury occurred to the purse-snatching/rape victim. Alternatively, another person in the purse-snatching incident could have been the victim of an offense where injuries are recorded and suffered an actual injury (such as an aggravated assault with a broken bone). For the crimes that are not defined as involving a risk of injury, the probability is rather low that they will be counted in Table 1 as involving an injury given the double filter of co-occurrence and actual injury through with they must pass.

Subject to the same observation about the NIBRS method of information collection, it is notable that the ACCA-enumerated offenses (other than use of explosives) are rarely associated with physical injury.[26] Arson and burglary/breaking-and-entering come in around one percent. Extortion comes in significantly higher at 4.41 percent, which may be partly attributable to the fact that NIBRS does collect injury information for this crime. The percentage of victims injured in extortion incidents, though, is low compared to any of the offenses that necessarily involve nonconsensual touching of victims. If the ACCA-enumerated offenses create a risk threshold for other felonies—as precedent has treated them—it is a low threshold indeed.

One less obvious observation concerns weapons law violations, whose 5.36 percent co-occurrence with injury puts it somewhat in the middle range behind the crimes involving nonconsensual touching and ahead of arson and other crimes with less than one percent of the victims injured. Of course, weapons law violations do not necessarily involve nonconsensual touching of victims. They do tend to co-occur with other dangerous offenses that necessarily involve the use of force. A quick examination of the NIBRS data reveals that indeed, weapons law violations not uncommonly co-occur with such forcible crimes as robbery, simple assault, and aggravated assault.[27] This statement is not true concerning any of the listed offenses with injury percentages lower than weapons law violations.

III. Implications and Analysis

It is fair to say that the Supreme Court and lower federal courts alike have struggled with the application of ACCA's residual clause. These courts have held that a variety of crimes qualify under the residual clause as presenting "a serious potential risk of physical injury to another," including eluding a police officer in a motor vehicle,[28] various sex crimes,[29] kidnapping,[30] some weapons law violations,[31] and many others. Courts have also concluded that some crimes do not qualify under the residual clause, including some nongeneric burglaries,[32] some other weapons law violations,[33] driving under the influence, [34] some criminal conspiracies,[35] and domestic violence,[36] among others.

Courts have not used a single mode of reasoning to determine which felonies warrant inclusion under the residual clause. From its first residual clause case, *James v. United States*,[37] the Supreme Court acknowledged the potential probative value of statistics in applying ACCA's residual clause. There, the Court approvingly cited the United States Sentencing Commission's determination, based on empirical analysis, that criminal attempts should be treated the same as their target offenses for purposes of the "crime of violence" residual clause in the Sentencing Guidelines,[38] which is virtually identical to the violent felony residual clause in ACCA.[39] Notwithstanding this nod in the direction of statistics, the analysis in *James* rested principally on the logical supposition that attempted burglary presented a similar, if not greater, risk of injury than completed burglary. According to the Court, a completed burglary is less likely to result in confrontation with a startled homeowner than an attempted burglary, which always ends in an interception of some sort.[40]

In *Begay v. United States*,[41] the Court used analogical reasoning to find that driving under the influence was too unlike burglary, arson, extortion, or use of explosives. The latter crimes all involve purposeful, violent, or aggressive conduct; drunk driving—a strict liability offense—does

not.[42] The Court did not deny that the felonies enumerated in ACCA set a quantitative point of reference for risk, but it asserted that the enumerated felonies set a qualitative standard as well.

In *Chambers v. United States*,[43] the Court used two forms of reasoning to determine that failure to report to a penal institution did not qualify under the residual clause.[44] As with driving under the influence in *Begay*, the Court in *Chambers* found that failure to report did not involve purposeful, violent, or aggressive conduct. The Court also cited a Sentencing Commission study in which zero out of 160 cases of failure to report involved an injury.[45] The government countered with a study showing three cases of injury arising from failure-to-report incidents, but the Court pointed out that the study cited by the government covered thirty years, whereas the Sentencing Commission study covered only two years.

The Court's opinion in *Sykes* relied more heavily on statistics than any of its three previous residual clause decisions. In *Sykes*, the conviction in question was for fleeing a police officer by way of motor vehicle. The majority emphasized the importance of statistics in "confirming commonsense conclusions" about the dangerousness of a criminal offense.[46] The majority cited statistics from the International Association of Chiefs of Police (IACP) to measure injuries from police pursuits, the Bureau of Justice Statistics (BJS) to measure injuries from burglaries, and the U.S. Fire Administration (USFA) to measure injuries from arson.[47] Using the IACP data, the Court estimated that police pursuits result in approximately 4 injuries per 100 pursuits.[48] By comparison, the BJS estimated that burglaries result in only 3.2 injuries per 100, and the USFA put the injury rate in arson cases at around 3.3 per 100 incidents.[49] Because Congress explicitly identified burglary and arson as inherently dangerous offenses in ACCA, and because the injury frequency of police pursuits was higher than either burglary or arson, the majority found that fleeing a police officer in an automobile was a sufficiently dangerous criminal act to warrant inclusion in the residual clause.[50]

James, *Sykes*, and *Chambers* demonstrate that the Court has turned to some empirical or statistical evidence in interpreting the residual clause. The methodological approach taken by the Court thus far, though, has been somewhat inconsistent and haphazard. The Court has gathered statistical evidence from a range of sources, each using varying methodologies and definitions. Take the statistics on the dangerousness of police pursuits used by the Court in *Sykes*. This evidence came from a 2008 study published by the IACP reporting the results of an annual online survey of around twenty-three police agencies per year between 2001 and 2007.[51] The survey authors warned, as a result, that the data from the survey should not be viewed as a representative sample of American law enforcement agencies.[52] Participation was voluntary.[53] Although this study provides valuable information about the dynamics and differences in police pursuit policies and outcomes throughout the country, the injury frequencies are not presented as nationally representative. The authors of the study themselves warned that pursuit injury data sometimes demonstrate a bias toward pursuits that result in accidents or injuries, meaning that verifiable conclusions cannot be drawn from most samples.[54] Nevertheless, the Court did exactly that in *Sykes*, taking the injury rate from the IACP sample and using it as a comparison point with injury rates from other crimes.

Using multiple, different statistical resources for comparison purposes is problematic for two reasons. First, the injury frequencies derived from each study are not necessarily representative of the actual injury frequencies for those offenses nationwide. The IACP study used in the *Sykes* case illustrates this problem. Although interesting, the sample size of the report raises questions about the representativeness of the sample. The injury rate from the IACP study should be seen as merely a rough approximation using an imperfect data set. Although such an injury statistic is valuable for developing theory, it is not well suited for fine-grained comparison with injury frequencies associated with other crimes. Yet this is exactly how the Court used the IACP study in *Sykes*. Rather than treating the case as a rough approximation of the relative dangerousness of police pursuits, the majority directly compared this injury figure with figures derived from other studies measuring the dangerousness of other offenses. The Court ultimately concluded that the "risk level[s]" of burglaries (3.2 injuries per 100 incidents) and arsons (3.3 injuries per 100 incidents) are "20% lower than . . . vehicle pursuits."[55] This would be a useful comparison if the Court trusted the representativeness and accuracy of each of the studies used to derive these numbers. But given the studies' limitations, such comparisons are questionable.

Second, the various quantitative resources that the Court has relied upon in interpreting the residual clause use distinct methodological approaches. In some cases, the statistics that the Court has cited do not actually even measure what the Court apparently intended to quantify. This further makes accurate comparisons of injury frequencies between different resources problematic.

The Court's use of the BJS study in *Sykes* is demonstrative of this problem. In that report, the BJS collected data from the National Crime Victimization Survey (NCVS) on household burglaries.[56] Data from the NCVS comes from a statistically representative survey of Americans about their experience with crime victimization. But the NCVS classifies burglary as a property crime and does not collect data on injury rates.[57] Therefore, that study analyzed the co-occurrence of burglary with other violent crimes, and the subsequent injuries resulting from these violent crimes. The study also focused exclusively on household burglaries.[58] The Court has "held that a defendant can receive an ACCA enhancement for burglary only if he was convicted of a crime having 'the basic elements' of generic burglary—i.e., 'unlawful or unprivileged entry

into, or remaining in, a building or structure, with the intent to commit a crime.'"[59] This means that a burglary might fall under the ACCA for enhancement purposes even if it involves a nonresidential structure. But the Court in *Sykes* used the injury data from household burglaries to conclude that the "approximately 3.7 million burglaries . . . each year in the United States . . . resulted in . . . approximately 118,000 injuries, or 3.2 injuries for every 100 burglaries."[60] The metric used by the Court only measures burglaries of households, not burglaries of any structure. Although the NVCS contains no data on injuries associated with burglaries of other structures, the rate of injury is likely lower than that of household burglaries. After all, the BJS report explicitly identifies a burglar's likelihood of encountering a household member as the source of victimization.[61] Thus the rate of injuries associated with burglaries, as defined by the ACCA, is likely lower than that identified in the BJS report used in the *Sykes* case.

The data we present from NIBRS may represent a methodological approach that remedies many of these concerns. The NIBRS data comes from a large group of police departments—approximately 30 percent of all law enforcement agencies spanning thirty-two states and covering nearly five million separate incidents. NIBRS uses a consistent methodological approach to collect data on many different criminal offenses. This allows for more comparable examination of injury percentages across different offenses. Of course, NIBRS has some limitations as well, as we identified in Part I. Nonetheless, we believe that it can serve as a valuable tool in comparing the relative dangerousness of various offenses.

In its residual clause jurisprudence to date, the Court has tried to compare the dangerousness of crimes explicitly mentioned in the ACCA (burglary, extortion, arson, and use of explosives) with crimes that might fall within the ambit of the residual clause. This approach may well represent sound statutory interpretation. If the Court employs such an approach, however, it makes sense to (1) use a consistent methodology, (2) draw empirical data from a single source when doing comparisons, if possible, and (3) ensure that the definitions of various criminal offenses used in the data source generally map onto the offense definitions used in the relevant case. NIBRS data should not be conclusive in deciding whether a crime "presents a serious potential risk of physical injury to another."[62] That said, the data we present could be a valuable resource in making dangerousness determinations under the residual clause.

IV. Specific Recommendations

A. Assault

Any offense that contains assault as an element should qualify under the residual clause. Even simple assaults are associated with injury 55 percent of the time. It should be noted that the NIBRS definition of simple assault is limited to "an attack,"[63] whereas the American majority rule on assault appears to include attempted batteries and incidents where the victim is merely placed in reasonable apprehension of a battery.[64] Still, it seems very unlikely that use of this expanded definition of "simple assault" would produce a figure below 4 percent.[65] When Table 1 is considered as a whole, it becomes clear that the highest percentage of injuries occur when nonconsensual touching of a victim is involved. In the absence of empirical evidence, at least two circuits have concluded that some assault convictions do not qualify under the residual clause on the ground that they present insufficient risk of injury[66]; we think these decisions should be reconsidered.

B. Weapons Law Violations

All weapons law violations should be regarded as sufficiently risky to be included within the residual clause. At 5.36 percent, a higher percentage of these violations is associated with injury than burglary or arson, and a slightly greater percentage is associated with injury than extortion. However, our conclusion is limited to a *quantitative* comparison of weapons law violations with ACCA-enumerated offenses. Some weapons law violations arguably do not involve "purposeful, violent, or aggressive" conduct, which is the *qualitative* measure dictated by *Begay*. The lower courts are split on whether possession and carrying of firearms convictions fall within the residual clause. Many of the cases concern possession of a sawed-off shotgun, with the majority of circuits holding that it qualifies under the residual clause.[67] Some cases involve carrying a concealed weapon.[68]

C. Statutory Rape

Statutory rape should be regarded as insufficiently risky to be included within the residual clause. At 0.71 percent, it is well below extortion and marginally below burglary and arson. This recommendation would not change existing law, as lower courts have treated statutory rape as falling outside the residual clause.[69] We make no recommendation regarding other child sex offenses where the age threshold is lower than for statutory rape. Although it is true that many child sex offenses can be committed by consensual contact, such as California Penal Code Section 288(a) (lewd and lascivious conduct with a child under 14),[70] we cannot conclude that such offenses necessarily should be regarded as falling outside the residual clause. It seems likely that, the lower the threshold age for the minor, the less probable that there has been willing cooperation in the sexual acts.

D. Nongeneric Burglary

Consider grouping all nongeneric burglaries together as a single category and treating the entire category as not qualifying under the residual clause. NIBRS defines burglary as "[u]nlawful entry into a building or other structure with the intent to commit a felony or a theft."[71] Even limited to structures, the NIBRS version of burglary was

associated with injury in only 1.02 percent of incidents. This was slightly lower than arson, significantly lower than extortion, and almost certainly much lower than use of explosives. When burglary is extended to non-structures, it seems probable that the incidence of injury will be even lower.

Comparisons with some of the other NIBRS offenses tend to support the notion that burglary of non-structures is less dangerous than burglary of structures. According to the NIBRS data, theft from a motor vehicle was almost never associated with injury (0.09 percent). Theft from a building (which NIBRS essentially defines as theft from within an open-to-the-public building other than a retail store) was associated with injury only half as often as generic burglary (0.49 percent versus 1.02 percent). Theft from coin-operated machine or device—which one might think would provoke violent confrontation at a frequency moderately close to generic burglary—actually was associated with injury only 0.16 percent of the time. As the BJS study of residential burglaries suggests, it seems that there is something especially dangerous about burglaries of dwellings.[72]

If all nongeneric burglary statutes were grouped together into a single category falling outside the residual clause, burglary would become a binary proposition for ACCA purposes. If the statute is generic, the resulting conviction would qualify as "burglary"; if the statute is nongeneric, the resulting conviction would not qualify under any portion of ACCA. This would simplify existing law considerably. The lower courts are currently split on whether nongeneric burglary qualifies under the residual clause.[73]

The nongeneric burglary statutes of four states come up frequently in reported opinions: Ohio, Oregon, California, and Florida. The Ohio and Oregon statutes are nongeneric because they include enclosures that are not fixed structures. The Ohio statute includes "watercraft, aircraft, railroad car[s], truck[s], trailer[s], [and] tent[s]."[74] The Oregon statute includes "any booth, vehicle, boat, aircraft or other structure adapted for overnight accommodation of persons or for carrying on business therein."[75] The California burglary statute is unique in that it essentially treats shoplifting as burglary, a point emphasized by the Court in *Descamps v. United States*.[76] The Florida burglary statute is also unique in that it defines a structure as including the curtilage, which in turn is limited to surrounding area that has been enclosed.[77]

It is doubtful whether burglaries of boats, planes, and other vehicles present as serious a risk of injury as burglaries of structures. The most analogous offense in the NIBRS data, theft from a motor vehicle, was associated with injury in only 0.09 percent of the incidents. With specific respect to the Oregon statute, the mere fact that a vehicle may have been "adapted for overnight accommodation of persons *or* for carrying on business therein" would not seem to make much difference.[78] Generic burglary is already at the bottom of the risk continuum for enumerated offenses. Any further attenuation of the risk would indicate exclusion from the residual clause.

With respect to California, the NIBRS data indicate that shoplifting was associated with injury in 0.39 percent of the incidents. This is less than half the injury frequency for generic burglary. Although we have no data on what percentage of California burglary convictions are for what amounts to shoplifting, the presence of any such convictions attenuates an already low injury frequency for generic burglary.

With respect to the Florida statute, the inclusion of curtilage seems significant. Although it is true that the area must be enclosed to count as curtilage, that still includes garages, sheds, carports, and enclosed storage areas that might be quite distant from living quarters. Thefts from motor vehicles parked at residences would seem to have a similar frequency of injury to burglaries of residential garages and carports. Yet that figure is apparently quite low. Again, considering the already low injury frequency for generic burglary, further decreases in risk should raise red flags regarding residual clause inclusion.

We are mindful that our suggestion regarding nongeneric burglary is in some tension with language in *James*. There, the Court rejected arguments that canons of statutory construction require an interpretation of the residual clause that only allows burglary to qualify under the residual clause if it constitutes generic burglary under *Taylor*.[79] The *James* Court stated that the residual clause may "cover conduct that is outside the strict definition of, but nevertheless similar to, generic burglary."[80] In holding that a conviction under the Florida attempted burglary statute qualified under the residual clause, the Court stated that the risk of injury did not stem primarily from the possibility of confrontation upon a successful break-in. Instead, the risk stems from the possibility that "some innocent party may appear on the scene while the break-in is occurring."[81] That innocent person could be a property owner or law enforcement officer. In the absence of "hard statistics," the Court was unwilling to find that either attempted burglary or nongeneric burglary necessarily fell outside the residual clause.[82] Now, however, in light of NIBRS offenses analogous to nongeneric burglary that carry very low frequencies of injury, this conclusion is ripe for reconsideration.

Appendix A

These definitions, excerpted from the NIBRS 2010 CODEBOOK (*infra* note 16), reflect the offense definitions in use by the FBI during the time frame in which the 2010 NIBRS data relied upon in this study were collected.

Offense Definitions

200 Arson

To unlawfully and intentionally damage, or attempt to damage, any real or personal property by fire or incendiary device.

13A Aggravated Assault
An unlawful attack by one person upon another wherein the offender uses a weapon or displays it in a threatening manner, or the victim suffers obvious severe or aggravated bodily injury involving apparent broken bones, loss of teeth, possible internal injury, severe laceration, or loss of consciousness.

13B Simple Assault
An unlawful physical attack by one person upon another where neither the offender displays a weapon, nor the victim suffers obvious severe or aggravated bodily injury involving apparent broken bones, loss of teeth, possible internal injury, severe laceration, or loss of consciousness.

13C Intimidation
To unlawfully place another person in reasonable fear of bodily harm through the use of threatening words and/or other conduct, but without displaying a weapon or subjecting the victim to actual physical attack.

220 Burglary/Breaking and Entering
The unlawful entry into a building or other structure with the intent to commit a felony or a theft.

35A Drug/Narcotic Violations
The unlawful cultivation, manufacture, distribution, sale, purchase, use, possession, transportation, or importation of any controlled drug or narcotic substance.

35B Drug Equipment Violations
The unlawful cultivation, manufacture, distribution, sale, purchase, use, possession, or transportation of equipment or devices utilized in preparing and/or using drugs or narcotics.

210 Extortion/Blackmail
To unlawfully obtain money, property, or any other thing of value, either tangible or intangible, through the use or threat of force, misuse of authority, threat of criminal prosecution, threat of destruction of reputation or social standing, or through other coercive means.

100 Kidnapping/Abduction
The unlawful seizure, transportation, and/or detention of a person against his/her will or of a minor without the consent of his/her custodial parent(s) or legal guardian.

23A Pocket-picking
The theft of articles from another person's physical possession by stealth where the victim usually does not become immediately aware of the theft.

23B Purse-snatching
The grabbing or snatching of a purse, handbag, etc., from the physical possession of another person.

23C Shoplifting
The theft by someone other than an employee of the victim of goods or merchandise exposed for sale.

23D Theft From Building
A theft from within a building which is either open to the general public or to which the offender has legal access.

23E Theft From Coin-Operated Machine or Device
A theft from a machine or device that is operated or activated by the use of coins.

23F Theft From Motor Vehicle
The theft of articles from a motor vehicle, locked or unlocked.

240 Motor Vehicle Theft
The theft of a motor vehicle.

120 Robbery
The taking or attempting to take anything of value under confrontational circumstances from the control, custody, or care of another person by force or threat of force or violence and/or by putting the victim in fear of immediate harm.

11A Forcible Rape
The carnal knowledge of a person, forcibly and/or against that person's will; or not forcibly or against the person's will where the victim is incapable of giving consent because of his/her temporary or permanent mental or physical incapacity (or because of his/her youth).

11B Forcible Sodomy
Oral or anal sexual intercourse with another person, forcibly and/or against that person's will; or not forcibly or against the person's will where the victim is incapable of giving consent because of his/her youth or because of his/her temporary or permanent mental or physical incapacity.

11C Sexual Assault With An Object
To use an object or instrument to unlawfully penetrate, however slightly, the genital or anal opening of the body of another person, forcibly and/or against that person's will; or not forcibly or against the person's will where the victim is incapable of giving consent because of his/her youth or because of his/her temporary or permanent mental or physical incapacity.

11D Forcible Fondling
The touching of the private body parts of another person for the purpose of sexual gratification, forcibly and/or against that person's will; or, not forcibly or against the person's will where the victim is incapable of giving consent because of his/her youth or because of his/her temporary or permanent mental incapacity.

36B Statutory Rape

Nonforcible sexual intercourse with a person who is under the statutory age of consent.

520 Weapon Law Violations

The violation of laws or ordinances prohibiting the manufacture, sale, purchase, transportation, possession, concealment, or use of firearms, cutting instruments, explosives, incendiary devices, or other deadly weapons.

Notes

* The authors would like to thank Josh Martin, Kathryn Tague, and Barbara Tolbert for their outstanding research assistance.

1 *See*, *e.g.*, James v. United States, 550 U.S. 192 (2007) (attempted burglary counts as a violent felony for purposes of the residual clause); Begay v. United States, 553 U.S. 137 (2008) (driving while intoxicated does not qualify as a violent felony for residual clause purposes as it is too different from the example crimes listed by Congress in the statute); Chambers v. United States, 555 U.S. 122 (2009) (felonious escape under Illinois law does not count as a violent crime under the residual clause); Sykes v. United States, 564 U.S. __ (2011) (eluding a peace officer in a motor vehicle counts as a violent felony under the residual clause).

2 The Sentencing Guidelines' definition of "crime of violence" almost perfectly parallels the ACCA's definition of "violent crime," and therefore contains a like-worded residual clause. Compare U.S.S.G. 2013 § 4B1.2 with 18 U.S.C. § 924(e)(2)(B).

3 *Chambers*, 555 U.S. at 134 (Alito, J., dissenting) ("At this point, the only tenable, long-term solution is for Congress to formulate a specific list of expressly defined crimes that are deemed to be worthy of ACCA's sentencing enhancement").

4 *Sykes*, 564 U.S. at *1 (Scalia, J., dissenting) ("We should admit that ACCA's residual provision is a drafting failure and declare it void for vagueness"); Derby v. United States, 131 S. Ct. 2858, 2859–60 (2011) (Scalia, J. dissenting from denial of certiorari) (same). We take no position on whether the residual clause is constitutional.

5 *See*, *e.g.*, *Sykes*, 564 U.S. at *8–9 (citing statistics from the International Association of Chiefs of Police, Bureau of Justice Statistics, and U.S. Fire Administration).

6 *Id.* at *8.

7 We use the terms "co-occurrence" or "association" to denote the relevant relationship between a given offense and injury in order to avoid the concept of causation. We do not understand the residual clause to demand a causal connection between an offense and injury, but merely an association.

8 Armed Career Criminal Act, 18 U.S.C. § 924 (1984).

9 18 U.S.C. § 924(a)(2).

10 § 924(e)(1).

11 § 924(e)(2)(A).

12 § 924(e)(2)(B)

13 § 924(e)(2)(B)(ii). It is also worth noting that, at a minimum, a felony must be punishable by at least one year in prison to qualify under ACCA.

14 These eight offenses are: criminal homicide, forcible rape, robbery, aggravated assault, burglary, larceny-theft, motor vehicle theft, and arson. Information is collected on these crimes when they are reported or "known to police." Aggregate information also is collected on nineteen additional crimes (Part II offenses), but only when an arrest is made.

15 For more detailed information about NIBRS, see Lynn A. Addington, *Studying the Crime Problem with NIBRS Data: Current Uses and Future Trends*, *in* Handbook On Crime and Deviance (Marvin D. Krohn et al., eds., 2009); Federal Bureau of Investigation, UNIFORM CRIME REPORTING HANDBOOK, NATIONAL INCIDENT-BASED REPORTING SYSTEM EDITION (1992).

16 The analyses presented do not include negligent manslaughters and justifiable homicides due to their small numbers (n = 203 and 136, respectively) and because of a decision that these offenses did not involve injuries that would be covered by the residual clause. NATIONAL ARCHIVE OF CRIMINAL JUSTICE DATA, INTER-UNIVERSITY CONSORTIUM FOR POLITICAL AND SOCIAL RESEARCH, NATIONAL INCIDENT-BASED REPORTING SYSTEM, 2010: EXTRACT FILES, CODEBOOK, NIBRS Group A Offense Definitions, at 305–7, 309–24, Study ICPSR 33601 (2010) [*hereinafter*, NIBRS 2010 Codebook], *available at* http://www.icpsr.umich.edu/icpsrweb/ICPSR/studies/33601.

17 For certain crimes NIBRS requires completion of injury information, even if the response is "none," meaning no injury occurred. Since this research is interested in actual injuries associated with various crimes, to be counted, a victim in the incident must have at least a minor injury. Available NIBRS injury categories include: none, apparent minor, apparent broken bones, other major injury, possible internal injury, loss of teeth, severe laceration, and unconsciousness.

18 Justice Research and Statistics Association (JRSA), n.d, "Status of NIBRS in the States," *available at* http://www.jrsa.org/ibrrc/background-status/nibrs_states.shtml.

19 *Id.*

20 *But see* Lynn A. Addington, *Assessing the Extent of Non-Response Bias on NIBRS Estimates of Violent Crime*, 24 J. Contemp. Crim. Justice 32 (2008).

21 *See*, *e.g.*, United States v. Baker, 665 F.3d 51 (2d Cir. 2012); United States v. Chazen, 2012 WL 1033343 (8th Cir. 2012); United States v. Ford, 363 Fed. Appx. 903 (3d Cir. 2010); United States v. Bethea, 603 F.3d 254 (4th Cir. 2010); United States v. Hughes, 602 F.3d 669 (5th Cir. 2010); United States v. Pratt, 568 F.3d 11 (1st Cir. 2009); United States v. Mills, 570 F.3d 508 (2d Cir. 2009); United States v. Lowery, 599 F.Supp.3d 1299 (11th Cir. 2009); United States v. Mathias, 482 F.3d 743 (4th Cir. 2007); United States v. Howard, 216 Fed.Appx. 463 (6th Cir. 2007); United States v. Lancaster, 501 F.3d 673 (6th Cir. 2007); United States v. Darby, 232 Fed.Appx. 917 (11th Cir. 2007); United States v. Jackson, 301 F.3d 59 (2d Cir. 2002); United States v. Franklin, 302 F.3d 722 (7th Cir. 2002); United States v. Houston, 187 F.3d 593 (6th Cir. 1999); United States v. Key, 145 F.3d 1327 (4th Cir. 1998); United States v. Hairston, 71 F.3d 115 (4th Cir. 1995); United States v. Elswick, 2012 WL 542701 (W.D. Va. 2012); United States v. Madera, 521 F.Supp.2d 149 (D. Conn. 2007); United States v. Brooks, 2006 WL 2037429 (D. Me. 2006); United States v. Rivers, 2010 WL 4340974 (D. Vt. 2010) (magistrate judge).

22 *See*, *e.g.*, United States v. Eatman, 460 Fed.Appx. 790 (10th Cir. 2012); United States v. Martin, 442 Fed.Appx. 871 (4th Cir. 2011); United States v. Young, 442 Fed.Appx. 755 (4th Cir. 2011); United States v. Jones, 400 Fed.Appx. 462 (11th Cir. 2010); United States v. Gautier, 590 F.Supp.2d 214 (1st Cir. 2008).

23 NIBRS 2010 CODEBOOK, *supra* note 16.

24 Although statutory rape, rarely associated with physical injury, is nonconsensual in legal contemplation, it is often consensual in everyday terms.

25 It should also be noted that that the listed crimes can appear more than once (so they will appear in their own category/percentage as well as when they co-occur with another crime).

26 It should be remembered that this study does not purport to show what percentage of these crimes independently *cause* injuries, but rather how often incidents involving the commission of these crimes, in total, involve at least one injury to a victim.

[27] Table 2 below uses 2010 NIBRS data and lists the percentage of weapons law violations that co-occur with other offenses that may cause injuries.

Table 2. Co-Occurrence of Weapons Law Violations and Other Offenses

Offense	Percentage of Weapons Law Violations Co-Occurring with Offense
Aggravated Assault	7.33%
Simple Assault	3.27%
Robbery	3.11%
Kidnapping	0.39%
Murder/ Nonnegligent Manslaughter	0.26%
Forcible Rape	0.05%

[28] *Sykes*, 564 U.S. __.

[29] United States v. Mincks, 409 F.3d 898 (8th Cir. 2005) (finding that second-degree statutory rape and sodomy were violent felonies presenting sufficient risk of physical injury because the two parties differed in emotional and physical maturity); United States v. Eastin, 445 F.3d 1019 (8th Cir. 2006) (sexual intercourse with minor daughter was a violent felony).

[30] United States v. Sherbondy, 865 F.2d 996 (9th Cir. 1988).

[31] United States v. Bishop, 453 F.3d 30 (1st Cir. 2006) (possession of a sawed-off shot gun presented a serious risk of physical injury).

[32] That is, burglaries not meeting the generic requirement set forth in *Taylor v. United States*, 495 U.S. 575 (1990). *See, e.g.*, Descamps v. United States, 2276 S. Ct. 133 (June 2013) (California); United States v. Farrell, 672 F.3d 27 (1st Cir. 2012) (Massachussetts); United States v. Lewis, 330 Fed. Appx. 353 (3d Cir. 2009) (Ohio).

[33] United States v. Whitfield, 907 F.2d 798 (8th Cir. 1990) (carrying a concealed weapon does not present a serious risk of physical injury).

[34] *Begay*, note 1, supra.

[35] United States v. King, 979 F.2d 801 (10th Cir. 1992) (upholding a sentence enhancement under the ACCA based on a weapon law violation); *but cf.* United States v. Canon, 993 F.2d 1439 (1993) (finding that possession of a sap, an inherently dangerous firearm similar to a black jack, presents a serious risk of physical injury).

[36] *See* United States v. Lofton, 2012 WL 1357503 (6th Cir. 2012) (Michigan).

[37] *See James*, note 1, *supra*.

[38] U.S.S.G. § 4B1.2.

[39] *James*, 555 U.S. at 206–7.

[40] *Id.* at 203–4.

[41] *See Begay*, note 1, *supra*.

[42] *Id*. at 144–46.

[43] *See Chambers*, note 1, *supra*.

[44] *Id*.

[45] *Id*. at 129, citing U.S. Sentencing Comm'n, *Report on Federal Escape Offenses in Fiscal Years 2006 and 2007*, at 7 (Nov. 2008), *available at* http://www.ussc.gov/Publications/Offense_Types/index.cfm.

[46] *Sykes*, 564 U.S. at *8.

[47] *Id*. at *8–9.

[48] *Id*. at *9.

[49] *Id*.

[50] *Id*.

[51] Cynthia Lum & George Fachner, Int'l Ass'n of Chiefs of Police, Police Pursuits in An Age of Innovation and Reform: the LACP Police Pursuit Database 55 (2008).

[52] *Id*. at 3.

[53] *Id*.

[54] *Id*. at 55.

[55] *Sykes*, 564 U.S. at *9.

[56] Shannan Catalano, Bureau of Justice Statistics, Victimization During Household Burglary 1 (2010).

[57] *Id*.

[58] *Id*.

[59] Descamps v. United States, 133 S. Ct. 2276, 2284 (2013); *see also* Taylor v. United States, 495 U.S. 575, 599 (1990).

[60] *Sykes*, 564 U.S. at *9.

[61] Catalano, *supra* note 56, at 1 (isolating injuries to those that happen when burglar encounters household member).

[62] 18 U.S.C. § 924(e)(2)(B)(ii).

[63] See Appendix A. If the perpetrator merely placed the victim in apprehension of an imminent battery with no "attack," NIBRS would record it as "intimidation." *Id.*

[64] According to Wayne R. Lafave, Criminal Law 867 (5th ed., 2010), the modern American rule on criminal assault is a jumble. A few jurisdictions define it as an attempted battery; a few define it as placing another in reasonable apprehension of a battery, and more frequently jurisdictions define it as either. Many other jurisdictions have no assault statute or have a statute that defines assault in the way that was traditionally defined as "battery."

[65] We approximated what this injury percentage might look like by combining incidents involving simple assault with those involving intimidation. We found that 41.9 percent of the combined simple assault and intimidation incidents involved a victim who sustained an actual injury. This percentage is well above the 4 percent cut-off established by extortion.

[66] *See, e.g.*, United States v. Hampton, 675 F.3d 720 (7th Cir. 2012) (the portion of Illinois statute defining assault as physical contact of an insulting or provoking nature did not qualify); United States v. Royal, __ F.3d __ (4th Cir., Oct. 1, 2013) (Maryland second-degree assault statute reaches "any unlawful touching, whether violent or nonviolent and no matter how slight," and therefore is not categorically violent); United States v. Carthorne, 726 F.3d 503 (4th Cir. 2013) (Virginia statute defining assault and battery on a police officer did not qualify because the physical contact element could be satisfied "in a relatively inconsequential manner"); United States v. Alston, 611 F.3d 219 (4th Cir. 2010) (Maryland assault conviction did not qualify because the definition of assault was linked to battery, which in turn did not necessarily require violent contact). Some post-*Begay* circuit decisions have found assault convictions not to qualify under the residual clause because they were based on the portion of a divisible statute criminalizing *reckless* assault. *See, e.g.*, United States v. Holloway, 630 F.3d 252 (1st Cir. 2011); United States v. McMurray, 653 F.3d 367 (6th Cir. 2011). *Cf.* United States v. Lofton, 2012 WL 1357503 (6th Cir. 2012) (domestic violence conviction does not qualify under residual clause). We do not here take a position on whether the Court should adhere to the *Begay* requirement that a felony must be "purposeful, aggressive, and violent" to qualify under the residual clause, or on how *Begay* should be interpreted in the assault context.

[67] *See, e.g.*, United States v. Fortes, 141 F.3d 1 (1st Cir. 1998) (possession of sawed-off shotgun falls within ACCA residual clause); United States v. Johnson, 246 F.3d 330 (4th Cir. 2001) (same); United States v. Serna, 309 F.3d 859 (5th Cir. 2002) (possession of sawed-off shotgun falls within U.S. Sentencing Guidelines residual clause); United States v. Brazeau, 237 F.3d 842 (7th Cir. 2001) (same); United States v. Childs, 403 F.3d 970 (8th Cir. 2005) (same); United States v. Hayes, 7 F.3d 144 (9th Cir. 1993) (same); *but see* United States v. Amos, 501 F.3d 524 (6th Cir. 2007) (possession of a sawed-off shotgun falls outside residual clause); United

States v. McGill, 618 F.3d 1273 (11th Cir. 2010) (possession of short-barreled shotgun outside residual clause).

[68] *See, e.g.*, United States v. Flores, 477 F. 3d 431 (6th Cir. 2007) (carrying a concealed weapon falls outside the residual clause); McCarty v. United States, 2009 WL 1456386 (M.D. Fla. 2009) (carrying concealed firearm falls outside the residual clause).

[69] *See, e.g.*, United States v. Thornton, 554 F.3d 443 (4th Cir. 2009).

[70] "Except as provided in subdivision (i), any person who willfully and lewdly commits any lewd or lascivious act, including any of the acts constituting other crimes provided for in Part 1, upon or with the body, or any part or member thereof, of a child who is under the age of 14 years, with the intent of arousing, appealing to, or gratifying the lust, passions, or sexual desires of that person or the child, is guilty of a felony and shall be punished by imprisonment in the state prison for three, six, or eight years."

[71] *See* Appendix A.

[72] *See supra* note 51 and accompanying text.

[73] *See, e.g.*, United States v. Pakala, 568 F.3d 47 (1st Cir. 2009) (3d degree burglary under Florida law qualifies); United States v. Ramirez, 2007 WL 4571143 (D. Me. 2007) (same); United States v. Holycross, 333 Fed.Appx. 81 (6th Cir. 2009) (burglary under Ohio Rev. Code Ann. § 2911.12(A) qualifies); United States v. Leasure, 455 Fed.Appx. 564 (6th Cir. 2010) (burglary under Ohio Rev. Code Ann. § 2911.12(A)(4) qualifies); United States v. Mayer, 530 F.3d 1099 (9th Cir. 2008) (1st degree burglary in Oregon qualifies); *but see* United States v. Lewis, 330 Fed.Appx. 353 (3d Cir. 2009) (burglary under Ohio Rev. Code Ann. § 2911.12(A)(1) does not qualify).

[74] Ohio Rev. Code Ann. § 2909.01.

[75] Ore. Rev. Stat. § 164.205(1).

[76] *See Descamps*, note 32, *supra*.

[77] *James*, 550 U.S. at 213.

[78] Italics added.

[79] *Taylor*, 495 U.S. 575 at 599.

[80] *James*, 550 U.S. at 212.

[81] *Id.* at 204.

[82] *Id.* at 210.