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Statutory Rape: A Crime of Violence for Purposes of Immigrant Deportation?

Shani Fregia†

On November 4, 1994 an eighteen-year-old boy and his fifteen-year-old girlfriend of nearly two months engaged in sexual intercourse.¹ The couple undressed themselves and the young man wore a condom.² The sexual act was factually consensual, yet the act fit within the defined terms of statutory rape pursuant to Wisconsin statute § 948.02(2) which makes it a class C felony for someone to have sexual intercourse with a person who has not attained the age of sixteen years.³ On May 4, 1995 the young man was sentenced to five years imprisonment upon a conviction of statutory rape.⁴ On June 18, 1996 the same young man was released on parole only to be served an order from Immigration and Naturalization Services (“INS”) stating that his conviction of statutory rape was classified as a crime of violence making him deportable under the Immigration and Nationality Act (“INA”) §241(a)(2)(A)(iii).⁵

Statutory rape is defined as: “unlawful sexual intercourse with a person under the age of consent (as defined by statute), regardless of whether it is against that person’s will or not.”⁶ Generally, only an adult may be convicted of this crime although in some states the difference in the age of the victim and the perpetrator is the deciding factor.⁷ Because statutory rape is solely contingent upon the victim being under the age of consent,

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¹ Xiong v INS, 173 F3d 601, 603 (7th Cir 1999).
² Id.
³ Wis Stat § 948.02(2) (West 2006).
⁴ Xiong, 173 F3d at 603.
⁵ Id.
⁷ See, for example, Cal Pen Code § 261.5(a)–(c) (West 2000) (noting that difference in age between the victim and the perpetrator can determine whether the crime is punished as a misdemeanor or felony).
whether the perpetrator uses force or the threat of force is irrelevant, making statutory rape a strict liability crime.\textsuperscript{8} It is also irrelevant in assessing the crime of statutory rape whether the victim and the perpetrator have factually consented to engage in sexual conduct because the underage victim is unable to give legal consent.

Title 8 of the United States Code, section 1227(a)(2)(A)(iii), states that "any alien who is convicted of an aggravated felony at any time after admission is deportable." The INA defines an "aggravated felony" as "the murder, rape, or sexual abuse of a minor, [or a] crime of violence (as defined in section 16 of title 18, United States Code, but not including a purely political offense) for which the term of imprisonment [is] at least one year."\textsuperscript{9} Congress described a crime of violence in title 18 USC § 16 as

\begin{quote}
(a) an offense that has as an element the use, attempted use, or threatened use of physical force against the person or property of another, or (b) 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.\textsuperscript{10}
\end{quote}

Currently the circuits are split on whether statutory rape is a crime that inherently has the necessary component, "substantial risk of the use of physical force," that would qualify it as a crime of violence according to the INA and 18 USC § 16. Two primary viewpoints have emerged. The first focuses on the intrinsic nature of the offense rather than on the factual circumstances surrounding any particular violation. This has been termed the "categorical approach"\textsuperscript{11} in determining whether an offense is a crime of violence within the meaning of § 16(b). The second is "modified categorical analysis" which can be characterized as a case-by-case, fact-based approach.

\textsuperscript{8} Black's Law Dictionary 1288 (8th ed 2004). See, for example, Virginia v Black, 538 US 343, 397 (2003) (Thomas dissenting) (stating "a person can be arrested, prosecuted, and convicted for having sex with a minor, without the government ever producing any evidence, let alone proving beyond a reasonable doubt, that a minor did not consent"); Owens v State, 724 A2d 43, 45 (Md 1999), cert denied, (holding statutory rape is a strict liability crime where mistake of age is not a defense to the crime).

\textsuperscript{9} 8 USC § 1101(a)(43)(A),(F).

\textsuperscript{10} 18 USC § 16.

\textsuperscript{11} Aguiar v Gonzales, 438 F3d 86, 89 (1st Cir 2006).
The majority of the circuits have turned to the inherent risk of physical force standard. Most circuits employing this analysis assert that a categorical approach to the crime of statutory rape requires it be viewed as a crime of violence, explaining that there is always a substantial risk that force could be used when an adult attempts to have sexual intercourse with a minor.\textsuperscript{12} The Ninth Circuit has used the categorical approach to come to the alternative conclusion that there is not necessarily an inherent risk that physical force will be used in the crime of statutory rape.\textsuperscript{13}

The modified categorical approach has been employed by the Seventh Circuit. This standard takes into consideration the age of the victim, the age difference between the victim and the perpetrator, and the nature of the sexual activity.\textsuperscript{14} This approach rejects the majority view that a risk of physical force is inherent in the crime of statutory rape and suggests that an individualized determination should be made based upon the unique facts of each case.

Statutory rape is defined by state statute and thus can differ greatly between states. Some of the most noticeable differences are: the defined age of consent and of a minor, what level of offense statutory rape falls under (for example felony or misdemeanor), whether the state characterizes the offense by its own statutory definition as a "crime of violence," and what gender can commit the offense. For example, in California the age of consent is eighteen\textsuperscript{15} and a minor can be charged with statutory rape for engaging in sexual intercourse with another minor.\textsuperscript{16} California law also provides that sexual intercourse with a minor not more

\textsuperscript{12} See id at 86; \textit{Chery v Ashcroft}, 347 F3d 404, 407 (2d Cir 2003) ("This Court follows what has been termed a 'categorical approach' to determine whether an offense is a crime of violence within the meaning of § 16(b)."), \textit{Accord United States v Velasquez-Overa}, 100 F3d 418, 420 (5th Cir 1996); \textit{Ramsey v INS}, 55 F3d 580, 583 (11th Cir 1995); \textit{United States v Bauer}, 990 F2d 373, 375 (8th Cir 1993); \textit{United States v Reyes-Castro}, 13 F3d 377, 379 (10th Cir 1993).

\textsuperscript{13} See \textit{Valencia v Gonzales}, 439 F3d 1046, 1052–53 (9th Cir 2006) ("[A] violation of section 261.5(c) does not, 'by its nature, involve[] a substantial risk that [violent] physical force against the person or property of another may be used in the course of committing the offense.' Accordingly, a violation of 261.5(c) is not categorically a crime of violence under § 16(b.)") (citations omitted).

\textsuperscript{14} See \textit{Xiong}, 173 F3d at 607.

\textsuperscript{15} Cal Pen Code § 261.5 (West 2000).

\textsuperscript{16} \textit{Michael M. v Superior Court of Sonoma County}, 450 US 464, 474 (1981) (holding California statutory rape laws did not violate the Equal Protection Clause by punishing only the male when both parties were under the age of 18). The Court reasoned that the California statute reasonably reflects the fact that the consequences of sexual intercourse and pregnancy fall more heavily on the female than on the male. Id at 476.
than three years younger than the perpetrator is a misdemeanor whereas intercourse with a minor who is more than three years younger can be classified as a misdemeanor or a felony.\textsuperscript{17} Iowa law specifies that engaging in sexual acts with a person twelve or thirteen years old is against the law, but that sexual acts with a person fourteen or fifteen years old are also unlawful if other factors are present (for example, if the perpetrator and the victim are members of the same household).\textsuperscript{18} Utah law describes a minor as a "child," meaning a person under the age of fourteen.\textsuperscript{19} Florida law outlines statutory rape offenses generally in a statute describing lewd or lascivious offenses committed upon a person less than sixteen years old.\textsuperscript{20}

This comment will suggest a solution for the circuit split that addresses both state statutory rape statutes and 18 USC § 16. Unlike the other circuits employing categorical analysis, the Ninth Circuit has analyzed the issue by taking into account all relevant behavior. This comment will suggest that when analyzing all behavior possible under most statutory rape statutes, categorically the statutes cannot be held to raise a substantial risk that physical force will be used. Part I will look at the court decisions that have created the circuit split. Part II will evaluate the case law and conclude that portions of the Seventh Circuit's analysis and the Ninth Circuit's analysis would provide the best starting point for deciding whether statutory rape as defined by each individual state statute amounts to a crime of violence.

\section{I. Background}

The First, Second, Fifth, Eighth, Tenth, and Eleventh Circuits have decided that sexual contact between a minor and an adult amounts to a "crime of violence."\textsuperscript{21} These circuits have held that even when the conduct is factually consensual there always exist a substantial risk that physical force could be used between a minor and a person of age. In addition these courts have upheld decisions of the Board of Immigration Appeals ("BIA") which finds immigrants deportable as aggravated felons pursuant to INA § 241(a)(2)(A)(iii) due to their statutory rape convictions.

\begin{footnotes}
\item[17] Cal Pen Code § 261.5(b),(c) (West 2000).
\item[18] Iowa Code Ann § 709.4(2)(b),(c)(1) (West 2006).
\item[20] Fla Stat § 800.04 (West 2006).
\item[21] See cases cited in note 12.
\end{footnotes}
The Seventh and Ninth Circuits have taken the view that there are certain circumstances which do not compel the conclusion that a substantial risk of physical force is present and thus the statutory rape charge does not automatically meet the requirements of a § 16(b) crime of violence. Because of the broad scope of § 16(b) and the variation in state statutes it is not at all obvious whether statutory rape should be viewed as a crime of violence or not.

A. Supreme Court Ruling on Crime of Violence

Title 18 USC § 16 was enacted as part of the Comprehensive Crime Control Act of 1984. The United States Supreme Court has stated that this section of the act reformed the federal criminal code and has been incorporated into a variety of statutory provisions. The Supreme Court has not yet defined the exact scope of the definition of crime of violence within the meaning of an aggravated felony for purposes of the INA. The court has however noted in INS v St Cyr, that the § 16(b) definition is broad. In that case the court discussed the practical importance of section 212 of the INA which provides relief through the Attorney General's discretion to waive deportation of criminal immigrants charged with deportable offenses. The court explained that the expansive definition provided by 18 USC § 16 increases the category of aggravated felonies, which enlarges the description of deportable offenses.

In Leocal v Ashcroft, the Supreme Court stated that Congress has given different definitions to the term “crime of violence” in different contexts. In Leocal, the Court decided that...
driving under the influence was not a crime of violence, noting in a footnote that "§ 16(b) plainly does not encompass all offenses which create a 'substantial risk' that injury will result from a person's conduct. The 'substantial risk' in § 16(b) relates to the use of force, not to the possible effect of a person's conduct." The court did say that § 16(b) "requires us to look to the elements and the nature of the conviction, rather than to the particular facts."

In its analysis, the Court gave two examples that may shed light on how statutory rape should be interpreted in light of § 16(b). The court explained a burglary would be covered under § 16(b) because burglary, by its nature, involves a substantial risk that the burglar will use force against a victim in completing the crime. Driving under the influence on the other hand does not include the mens rea element necessary for § 16(b) crime of violence status when merely accidental or negligent conduct is involved. Thus, the court distinguishes risk of injury from risk of use of physical force.

B. Categorical Approach

The majority of circuits hold that statutory rape involves an inherent risk of physical force. Courts offer a variety of rationales for this standard. In Chery v Ashcroft, a thirty-three-year-old man was convicted under Connecticut state law of the statutory rape of a fourteen-year-old girl. The court reasoned that "Chery was removable because his sexual assault conviction constituted an aggravated felony (more specifically, a 'crime of violence') under 8 USC § 1101(a)(43)(F)." The court also concluded that although a conviction may be obtained under § 53a-71 for consensual sexual intercourse and force may not be present in all circumstances, the risk of the use of force is inherent in each of the offenses set forth in the statute. "It

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31 Leocal, 543 US at 10 n 7.
32 Id at 7.
33 Id at 10.
34 Id at 12.
35 See cases cited in note 21.
36 347 F3d 404 (2d Cir 2003).
37 Conn Gen Stat Ann § 53a-71 (statute defining sexual assault in the second degree).
38 347 F3d at 404.
39 Id at 406.
matters not one whit whether the risk ultimately causes actual harm."\(^{40}\)

The Second and Eleventh Circuits have determined that the felony of statutory rape committed under Connecticut and Florida State law, respectively, are crimes of violence even though the statutes allow for conviction where no force is used.\(^{41}\) Looking to the intrinsic nature of the crime the courts reasoned that there is always a risk that force could have been used to carry out the crime if necessary. The case that developed the intrinsic nature analysis, *Dalton v Ashcroft*,\(^{42}\) noted that "[u]nder the language of the statute, a §16(b) ‘crime of violence’ is analyzed ‘by its nature.’"\(^{43}\)

1. Legal versus factual determination.

Continuing in the categorical approach, the Eighth Circuit has held that "[w]hether statutory rape is a violent crime is a legal, rather than factual, determination."\(^{44}\) This suggests that the court should ignore the facts of a specific case and decide the question of whether a crime of violence has been committed upon finding that the risk of violence is present in the statutory definition of the crime.\(^{45}\) The court also concluded that the “term ‘by its nature’ would be rendered superfluous if the sentencing courts were saddled with the task of examining each individual offense.”\(^{46}\) In *United States v Bauer*,\(^{47}\) the term crime of violence was scrutinized for purposes of sentencing, but the court’s focus on the risk of physical force being present provides useful analysis and suggests that they would find statutory rape a crime of violence for deportation purposes which meet the same definition.\(^{48}\)

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\(^{40}\) Id at 408, quoting *United States v Rodriguez*, 979 F2d 138, 141 (8th Cir 1992). See also *Ramsey v INS*, 55 F3d 580, 583 (11th Cir 1995) (court admitting that they only look at the statutory definition of the crime of conviction and not the circumstances of a particular offense).

\(^{41}\) *Chery*, 347 F3d at 408; *Ramsey*, 55 F3d at 583.

\(^{42}\) 257 F3d 200 (2d Cir 2001).

\(^{43}\) Id at 204.

\(^{44}\) *United States v Bauer*, 990 F2d 373, 374 (8th Cir 1993).

\(^{45}\) Id at 375.

\(^{46}\) Id. See also *Taylor v United States*, 495 US 575, 599 (1990), vacating and remanding 864 F2d 625 (8th Cir 1989) ("Congress did not wish to specify an exact formulation that an offense must meet in order to count as 'burglary' for enhancement purposes.").

\(^{47}\) 990 F2d 373 (8th Cir 1993).

\(^{48}\) Id at 375.
In *United States v Reyes-Castro*, the Tenth Circuit agreed "with the Eighth Circuit that a court must only look to the statutory definition, not the underlying circumstances of the crime." The Tenth Circuit concluded statutory rape was a crime of violence because Utah law recognizes rape as a crime of violence, not because of the required elements of rape, which do not include physical force. Similarly, statutory rape would be considered a crime of violence under 18 USC § 16(b). The court also concluded that because minors cannot legally consent to sexual intercourse with an adult there is a substantial risk that physical force will be used in committing the offense of statutory rape. "A common sense view of the sexual abuse statute, in combination with the legal determination that children are incapable of consent, suggests ... there is always a substantial risk that physical force will be used to ensure the child's compliance." What distinguishes the Tenth Circuit's analysis is its strong reliance on the state court's construction of violent crimes. The court determined that the state courts of Utah already recognize rape and statutory rape as crimes of violence although physical force is not a required element of either of the crimes.

In a case that summarizes the circuit split, the First Circuit chose to follow the majority view with particular emphasis on the Second Circuit's interpretation. In *Aguiar v Gonzales*, the court decided the issue after seven other circuits had already addressed it. It considered the split that emerged among the circuits and the multiple starting points the circuits used to analyze the issue. The court's reasoning for following the majority categorical approach was based on the fact that under the Rhode Island statute a victim cannot legally consent to the prohibited conduct. The court was called on to decide whether sexual penetration involving a person who is eighteen and a person who is one day shy of sixteen involves a substantial risk of the use of physical force. First the court addressed the fact that just because an offense creates a risk of physical injury and can be characterized as a violent felony does not mean that the offense

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49 13 F3d 377 (10th Cir 1993).
50 Id at 379.
51 Id.
53 438 F3d 86 (1st Cir 2006).
necessarily involves a substantial risk of force. This underscored
the reasoning of the Eighth Circuit in *United States v Rodriguez,*\(^5\) noting whether the risk of harm results in actual harm is
irrelevant. The First Circuit then rejected the defendant's argument
that factual consent was given even where legal consent could not be. The court considered the reasoning of the Seventh
and Ninth Circuits but rejected it for three reasons. The court
first suggested that a distinction between factual and legal con-
sent in this context would render the statute's assertion that a
person under the age of sixteen cannot consent meaningless.
Second, the court viewed this distinction as confusing a concern
for the "risk of force" with a concern for the "actual use of force." Finally, the court believed that their conclusion, that statutory
rape falls under § 16(b) as a crime of violence, was reinforced by
the fact that the state statute did not criminalize all sexual con-
duct involving a person under-age (such as two minors having
sex). The court emphasized this point to suggest that the statute
is not in place to keep minors from making bad decisions. Instead
the court concluded "the plain motivation for the statute is the
risk that physical force may be used by the older perpetrator."\(^6\)

2. Inherent risk with young minors.

The Fifth Circuit in *United States v Velasquez-Overa,*\(^5\) explained that there is always the risk that physical force may be
used by a person of age on a minor when engaging in sexual in-
tercourse because the minor lacks the ability to protect him or
herself. "A child has very few, if any, resources to deter the use of
physical force by an adult intent on touching the child. In such
circumstances, there is a significant likelihood that physical force
may be used to perpetrate the crime."\(^5\) The Fifth Circuit also
followed the categorical approach, explaining, "either a crime is
violent 'by its nature' or it is not."\(^5\) Using this reasoning the
court concluded that in any case where a person attempts to
have sex with a minor under the age of fourteen there is a sub-
stantial risk that force will be used to ensure the child's compli-

\(^{53}\) 979 F2d 138, 141 (8th Cir 1992) (concluding that the court's "scrutiny ends upon a
finding that the risk of violence is present").
\(^{54}\) *Aguiar*, 438 F3d at 91.
\(^{55}\) 100 F3d 418 (5th Cir 1996).
\(^{56}\) Id at 422.
\(^{57}\) Id at 420–21.
The court did not provide much detail about the facts of the case and neglected to mention whether the child involved in this instance was under the age of fourteen. In this particular case the defendant had previously been convicted on four separate occasions of indecency with four different child victims. The defendant had also previously been deported and returned to the United States illegally. Despite the lack of discussion of the facts of the case, the Fifth Circuit held that crimes of this type are generally perpetrated by adults who are not only bigger and stronger than the children they abuse, but who also have the ability to coerce these children, adding immensely to the dangerous circumstances under which this type of crime is committed.

The Fifth Circuit's assertion that crimes involving young children are inherently violent has been adopted by other circuits in similar context. Even courts that are not willing to recognize statutory rape as an inherently violent crime are more willing to call it violent in nature when the sexual act has been committed with a very young child. For example, while the Ninth Circuit has ruled that some instances of statutory rape are not crimes of violence, in United States v Wood, a case discussing the sentencing enhancement associated with a prior conviction for the molestation of a four-year-old, the Ninth Circuit explained that the "threat of violence is implicit in the size, age and authoritative position of the adult in dealing with such a young and helpless child." The court in Wood was deciding whether a sentencing enhancement was appropriate due to a prior conviction under the Washington state law. The Unites States Sentencing Guidelines suggest a crime is violent when a serious risk of physical injury to another is present. This standard is different from a § 16(b) analysis concluding a crime is violent if there is a serious risk of physical force. Thus, although the Ninth Circuit in Wood agrees with the Fifth Circuit's reasoning, they are not ac-

60 Id.
61 Velasquez-Overa, 100 F3d at 419.
62 Id.
63 Id at 422 ("We think it obvious that such crimes typically occur in close quarters, and are generally perpetrated by an adult upon a victim who is not only smaller, weaker, and less experienced, but is also generally susceptible to acceding to the coercive power of adult authority figures.").
64 Valencia, 439 F3d at 1052–53.
65 52 F3d 272 (9th Cir 1995).
66 Id at 274.
3. Full range of conduct.

In *Valencia v Gonzales*,68 the Ninth Circuit realized that it would be “break[ing] new ground” as no previous case had decided the issue with a victim who was between the age of seventeen and eighteen. The Ninth Circuit used the categorical approach as laid out by the Supreme Court in *Taylor v United States*.69 Conduct “qualifies as a crime of violence and hence as an aggravated felony ‘if and only if the full range of conduct covered by it falls within the meaning of that term.’”70 The court also determined that “the physical force” necessary to constitute a crime of violence under 18 USC § 16(b) must be violent in nature.71 Using these two propositions the Ninth Circuit decided that the “full range of conduct” covered under California statutory rape laws by its nature does not involve a substantial risk that physical force will be used.72

In reaching this conclusion, the court compared the charge of statutory rape with that of sexual battery.73 The crime of sexual battery involves unlawful restraint and touching against the victim’s will,74 which by its nature “creat[es] a substantial risk of resistance by the victim and the use of physical force by the perpetrator.”75 In discussing statutory rape the court noted that other circuits have taken a minor’s inability to give legal consent as a means for implying that the sexual intercourse that took place is non-consensual. California law criminalizes sexual intercourse with a minor described as under eighteen or three years younger than the perpetrator if the perpetrator is also under eighteen.76 The court recognized that California law prohibits sexual intercourse with “minors” who are significantly older than minors in other states. “In addition to this factual difference, we

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68 439 F3d at 1046.
71 *Valencia v Gonzales*, 439 F3d 1046, 1049 (9th Cir 2006), citing *Sareang Ye v INS*, 214 F3d 1128, 1133 (9th Cir 2000).
72 *Valencia*, 439 F3d at 1052–53.
73 Id at 1049.
74 Cal Penal Code § 243.4(a) (West 2006) (defining the crime of sexual battery).
75 *Valencia*, 439 F3d at 1049.
76 Cal Penal Code § 261.5 (b), (c).
find the reasoning of the Second and Fifth Circuits somewhat mechanical in equating a victim's legal incapacity to consent with an actual unwillingness to be touched.\textsuperscript{77}

The court continued: "Therefore, while we agree that the 'non-consent of the victim' is the 'touchstone' for § 16(b) analysis, it is the victim's actual non-consent that counts."\textsuperscript{78} In Valencia, the court considered the full range of the conduct proscribed by Cal Penal Code section 261.5(c), including "consensual sexual intercourse between a twenty-one-year-old and a minor one day shy of eighteen . . . fully capable of freely and voluntarily consenting to sexual relations."\textsuperscript{79} The court decided that the minor's inability to give legal consent did not suggest that physical force might be used in committing the offense.\textsuperscript{80}

C. Modified Categorical Approach

The Seventh Circuit, by contrast, held that statutory rape of a fifteen-year-old is not categorically a crime of violence under § 16(b), and employed a modified categorical analysis.\textsuperscript{81} This analysis considers the age of the victim, the age difference between the victim and perpetrator, and the nature of the sexual activity.\textsuperscript{82} In Xiong v INS,\textsuperscript{83} as mentioned in the introduction, the court decided that an eighteen-year-old alien who had factually consensual sex with his fifteen-year-old girlfriend did not commit a crime of violence because the conduct did not involve a substantial risk of the use of force.\textsuperscript{84} In this case an Immigration Judge ("IJ") ruled that Xiong had committed a crime of violence after Xiong admitted to having sex with his fifteen-year-old girlfriend and was sentenced to five years in prison. The IJ's order was to have Xiong deported to Laos. The BIA dismissed Xiong's appeal and entered a final deportation order. What was unique about this case is that pursuant to the Illegal Immigration Re-

\textsuperscript{77} Valencia, 439 F3d at 1050.
\textsuperscript{78} Id at 1051 (emphasis omitted).
\textsuperscript{79} Id at 1052.
\textsuperscript{80} Id at 1055.
\textsuperscript{81} Xiong v INS, 173 F3d 601, 607 (7th Cir 1999).
\textsuperscript{82} Id. See also United States v Shannon, 110 F3d 382, 385 (7th Cir 1997) (en banc) (rejecting the argument, in a case involving USSG § 4B1.2 (rejecting the argument, in a case involving USSG § 4B1.2 that "any felonious sexual act with a minor should be deemed [ ] to involve force, because the minor is incapable of giving legally recognized consent").
\textsuperscript{83} 173 F3d 601 (7th Cir 1999).
\textsuperscript{84} Id at 603, 607.
form and Immigrant Responsibility Act ("IIRIRA")\(^{85}\) "when a final order of deportation is entered after October 30, 1996, 'there shall be no appeal permitted in the case of an alien who is inadmissible or deportable by reason of having committed . . . an aggravated felony.'\(^{86}\) The court of appeals reviewed this case because the question of jurisdiction and the merits turned on whether Xiong had committed an aggravated felony and a crime of violence.\(^{87}\)

In *Xiong* the Seventh Circuit established that "[w]hen the statutory definition of a criminal offense encompasses conduct that does not constitute a crime of violence as well as conduct that does," an IJ "may not simply categorize all conduct covered by the offense as [a] crime of violence."\(^{88}\) The Seventh Circuit's analysis looked to the individualized facts of Xiong's conviction to make a determination. The court concluded that a simple and permissible review of the undisputed facts already on the record would have shown that Xiong's indictment did not permit a determination that his conduct "by its nature" involved a substantial risk of physical force.\(^{89}\) *Xiong* was decided in 1999 before the Supreme Court decided *Leocal*. While the Supreme Court has not spoken directly on statutory rape in the context of § 16(b) they have said crime of violence status is not to be decided on the individualized facts of a petitioner's claim but by the nature of the offense.\(^{90}\) This invalidates the Seventh Circuit's modified categorical approach but does not prevent the court's conclusion that statutory rape is not a crime of violence as will be discussed in the evaluation of the case law section.

**II. EVALUATION OF THE CASE LAW**

This section will first address the problems that arise from the majority circuits' overly cautious categorical approach. It will

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86 *Xiong*, 173 F3d at 604, quoting 8 USC § 1101 (2000). See also id, quoting *Yang v INS*, 109 F3d 1185, 1192 (7th Cir 1997) ("When judicial review depends on a particular fact or legal conclusion, then a court may determine whether that condition exists.").
87 Id at 604.
88 Id at 605.
89 Compare *Valencia v Gonzales*, 439 F3d 1046, 1054 (9th Cir 2006) (Court declined to take age of the perpetrator into account because it was not reflected in the charging documents, noting that the court was confined to the records of the convicting court.).
then discuss the benefits and shortcomings of the modified categorical approach, and finally suggest an alternative solution.

A. Erring on the Side of Caution: Problems of the Majority Categorical Approach

This section will examine some of the potential problems with the majority circuit’s analysis. It will address why the definition of statutory rape does not suggest there can be one consistent nature of the crime; why a minor’s inability to give legal consent should not serve as a proxy for determining whether a risk of physical force exist; and why the reasons behind having statutory rape laws do not lead to the conclusion that the laws were designed to deter force from adult perpetrators.

1. One nature of the crime.

Finding a substantial risk that force will be used in all cases of statutory rape equates the intrinsic nature of “rape” with that of “statutory rape.” Statutory rape is a strict liability crime. It can be committed without the mens rea required of rape and usually the statute defines the act of statutory rape differently than that of rape.\(^9\) Most rape statutes contain the phrase (or something similar) “against the will of the victim.”\(^9\) Statutory rape does not require that the sexual act happen against the will of the victim only that the victim is not of age to make the informed decision to consent. Because of this, it has been acknowledged that statutory rape can happen without any risk or threatened use of force, as in \(Xiong\).\(^9\) Aside from claiming that sexual intercourse did not transpire there is no defense to statutory rape. Because a strict liability crime can happen under so many different circumstances, even accidentally or without knowledge, it seems rash to say that all instances of statutory rape carry an inherent risk of the use of physical force.

The majority circuits argue that the fact that § 16(b) alludes to the “nature of the crime” requires that each crime be interpreted to have one consistent nature. But this is too narrow of a view of statutory rape for two reasons. First, the differences in

\(^9\) See, for example, Fla Stat § 800.04(3) (West 2006) (noting that “the perpetrator’s ignorance of the victim’s age, the victim’s misrepresentation of his or her age, or the perpetrators bona fide belief of the victim’s age cannot be raised as a defense”).

\(^9\) See note 6.

\(^9\) Consider \(Xiong v INS\), 173 F3d 601, 605 (7th Cir 1999).
the scenarios contemplated in a single statutory rape law make finding one nature of the crime a forced analysis. For example, some statutory rape statutes are broad and diverse enough to encompass a situation where a forty-two-year-old has sex with a fourteen-year-old\(^9\) as well as a situation where a twenty-one-year-old has sex with a minor between the ages of seventeen and eighteen.\(^5\) The majority approach would not differentiate in its treatment of these offenses. The controlling statutes make both situations the same crime, yet the facts show that these are very different situations and the nature of these offenses are in fact different. In one instance you have a factually consensual sexual relationship between a young adult and a minor about to reach the age of majority. The other instance more easily demonstrates a situation that the statute seeks to prevent: an older adult having sex with a young minor.

Secondly, although one of these situations is easier to pinpoint as undesirable, neither actually shows the offense carries nor does not carry an inherent risk of physical force. Statutory rape statutes do not require that any force be threatened or used at all.\(^6\) In making the determination of whether the risk of force is apparent, some courts, such as the Fifth Circuit in Velasquez-Overa, have held that the person of age usually is much larger and could overpower the minor if necessary to complete the crime.\(^7\) While this may be true in some or most instances, it unfairly treats the cases where these determinations of size and age are clearly untrue (where the perpetrator and victim are equally situated in strength and/or close in age). The problem with finding one nature of the crime is that it assumes the statute provides for a unified nature of the offense and this is not always possible.\(^8\)

2. Creating a proxy for physical force.

The circuits that find the risk of violence inherent in statutory rape base their analysis on the fact that a minor, who is

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\(^9\) Chery v Ashcroft, 347 F3d 404, 404 (2d Cir 2003). See also Conn Gen Stat Ann § 53a-71.
\(^5\) Cal Penal Code § 261.5.
\(^6\) See note 6.
\(^7\) United States v Velasquez-Overa, 100 F3d 418, 422 (5th Cir 1996) (“A child has very few, if any, resources to deter the use of physical force by an adult intent on touching the child. In such circumstances, there is a significant likelihood that physical force may be used to perpetuate the crime.”).
\(^8\) Xiong, 173 F3d at 605 (noting that a criminal offense can encompasses conduct that does not constitute a crime of violence as well as conduct that does).
supposed to be protected by the statute, cannot legally give con-
sent. The inability to give consent, however, is not directly re-
lated to a risk of physical force being used against the minor.99
When statutory rape occurs, sexual contact has been illegally
imposed, but this does not mean it was physically forced or that a
substantial risk of force is apparent. In the majority of cases the
courts have taken consent (a minor’s inability to give it) as a
proxy for risk of physical force. For example, the First Circuit in
Aguiar states,

[a] common sense view of the sexual abuse statute, in
combination with the legal determination that children
are incapable of consent, suggests that when a [person at
least eighteen] attempts to sexually [penetrate] a child
[between the ages of fourteen and sixteen], there will al-
ways be a substantial risk that physical force will be
used.100

When ignoring the particular circumstances of an event one
can see why this proxy is sensible. The courts may be naturally
following a line of reasoning that says if consent is not given then
non-consent was expressed; taken a step further, non-consent is
equated with protest.

While this line of reasoning is easy enough to follow, it
proves factually untrue in many instances of statutory rape. The
inability to consent does not mean that a minor always protests;
it simply means the state does not recognize the minor’s ability
to act on his or her own behalf. This legal fiction101 creates a gray
area between consent and non-consent that only the Seventh and
Ninth Circuits have been willing to address.102 To determine
what to do in this gray area the Ninth circuit took into account
all acts that could be committed under the statute before decid-
ing if they all inherently posed a risk of physical force. The Sev-
enth Circuit looked to the facts of the case at hand to decide
whether the individual crime posed a risk of physical force. The

99 See Valencia v Gonzales, 439 F3d 1046, 1046 (9th Cir 2006).
100 438 F3d at 91, quoting Reyes-Castro, 13 F3d at 379.
101 Aguiar v Gonzales, 438 F3d 86, 91 n 9 (1st Cir 2006) (noting that it may be unfair
to deport a person for an act committed while they are young and under circumstances
that amount to a legal fiction but that this determination was left to the Rhode Island
legislature).
102 See United States v Kozminski, 487 US 931, 967 n 1 (1988) (Stevens concurring)
(stating questions concerning a victim’s age and vulnerability are best resolved on a case-
by-case basis because an unambiguous legal rule produces much uncertainty).
minority circuits decided that when the variance in age of the perpetrator and victim is close, and factual consent is present, the minor's inability to consent demonstrates little to nothing about the risk of physical force being used. Categorically saying that a risk of physical force is inherent in statutory rape is the more sweeping way to penalize the offense. Being over-inclusive on this matter may seem desirable when dealing with the deportation of immigrants who have not respected the laws of this nation and who have shown themselves to possibly be a threat to society. Yet, treating all statutory rape offenses in this manner ignores the meaningful variations that exist between cases.

3. Why we have statutory rape laws.

The First Circuit in Aguiar suggested that by not criminalizing situations where minors have sex with each other the statute stands to protect minors against force that might be used by an adult as opposed to protecting them generally from making bad decisions. A historical analysis of why statutory rape laws were implemented will help in examining the court’s analysis.

Statutory rape laws were originally part of the common law America adopted from England. The age of consent was initially ten, but was gradually raised by individual states to eighteen and in some states twenty-one. Although great disparity still exists, the age of consent in statutory rape laws today ranges from fourteen to eighteen. Originally the laws were gender specific, only criminalizing sexual acts with female victims. This has lead many commentators to believe the primary motivation for criminalizing the behavior was to promote female

103 Aguiar v Gonzales, 438 F3d 86, 91 n 8 (1st Cir 2006).
106 See, for example, Ark Code Ann § 5-14-103(3)(A) (2006) (setting the age of consent at fourteen); Cal Penal Code § 261.5(a) (West 2000) (defining a minor as a person under the age of eighteen); Idaho Code Ann § 18-6101 (2006) (defining rape as sexual intercourse "[w]here the female is under the age of eighteen (18) years"). Consider Catherine L. Carpenter, The Constitutionality of Strict Liability in Sex Offender Registration, 86 BU L Rev 295, 311–12 (2006) (highlighting "the disparity of legislative thought as to the appropriate age of consent" between the states).
chastity and prevent teenage out-of-wedlock pregnancies.\(^{107}\) Some commentators suggest other social policy reasons for outlawing sex with minors such as “social disapproval of certain forms of exploitation,” and preserving the innocence of youth.\(^{108}\) In *State v Munz*,\(^{109}\) the court asserted “venereal disease, damage to reproductive organs, the lack of considered consent, heightened vulnerability to physical and psychological harm, [and] lack of mature judgment” as additional reasons for the state’s interests in managing the welfare of minors.\(^{110}\) Despite the underlying historical purpose of creating statutory rape laws, all but one state have adopted gender neutral language.\(^{111}\)

Another evolution in the law of statutory rape that commentators have noticed is the decriminalization of peer-on-peer underage sex.\(^{112}\) Whether this is because more Americans report having their first sexual experiences as minors, or because of the “dawning recognition that the threat of criminal prosecution was

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108 See Olsen, 63 Tex L Rev at 401 (cited in note 105); Carpenter, 86 BU L Rev at 309 (cited in note 106) (“Statutory rape is an anomaly[. h]istorically devised to protect the innocence of youth . . . .”).


110 Id at 585.

111 See Carpenter, 86 BU L Rev at 313 (cited in note 106). Carpenter discusses the Idaho Code, which defines statutory rape “as the penetration, however slight, of the oral, anal or vaginal opening with the perpetrator’s penis accomplished with a female.” Idaho Code Ann § 18-6101 (2006). But see Eidson, 27 UCLA L Rev at 761 (cited in note 104) (“The preferred rationale for protecting only females and punishing only males has evolved from early exaltation of female chastity and the special need to protect the ‘weaker sex’ to more recent arguments that gender-based statutory rape laws are appropriate because of the unique physical characteristics of females.”) (citations omitted).

112 See Carpenter, 86 BU L Rev at 313 (cited in note 106) (stating that the recent decriminalization of peer-on-peer underage sexual activity has reshaped the contours of statutory rape).
not a realistic deterrent to peer-on-peer high school sexual activity" is unknown. Many states have lowered or eliminated penalties associated with peer-on-peer statutory rape. Statutory rape statutes may not criminalize sex between two minors because it would be difficult to decide who was the perpetrator and who was the victim. It would be presumptuous to suggest that in every circumstance the male pressured the female even if the consequences lie more heavily with the female participant. In an instance where both actors are minors there is no equitable way to chastise one minor's judgment without holding him or her to a higher standard than the other. The First Circuit's analysis overreaches in concluding that the elimination of one type of sexual act (peer-on-peer) from the statute suggests that the statute is most concerned with protecting minors from the physical force of adults. Other reasons that are arguably equally salient remain for keeping statutory rape in effect, such as preventing the exploitation of minors at the hands of adults.

B. Pros and Cons of the Modified Categorical Approach

The most notable benefit of the modified categorical approach is its willingness to look at the facts of an individual's case before determining the nature of the individual's offense. In contrast to the categorical approach, this gives courts the opportunity to consider the circumstances and each defendant as an individual. This is not possible when courts lump substantively different situations together. In essence, this approach promotes the notion that each case should be tried on the facts. The modified categorical approach suggests that each statutory rape case must be analyzed individually to determine if it was a crime of violence. While this fact-based approach may carry the burden of more administrative costs, it would provide each defendant with an application of the law to the circumstances under which the defendant was acting. This would prevent ludicrous outcomes such as an eighteen-year-old being eligible for deportation for having sex with his sixteen- or seventeen-year-old girlfriend.

In attempting to decide each case on its own facts, the fact-based approach is susceptible to wildly different outcomes given similar situations. The use of judicial discretion will open the door to abuse of the criminal justice system and, in attempting to achieve fairness for each individual, could actually have the op-

\[113\text{ Id.}\]
posite effect. While this concern is legitimate, the question boils down to which approach presents more bias and potential for unfair implementation. This is answered largely by what one believes about judicial discretion and the ability of judges to analyze facts consistently and objectively. It is possible that in exercising discretion each judge could decide each case “correctly” and in the best interests of all parties involved as well as society. There are legal situations where we allow for judicial discretion through the use of standards because we value the individualized attention and expertise the judges can provide. Standards are used to assess issues ranging from child custody disputes to the fair use practices of copyright law.\textsuperscript{114}

Statutory rape presents a unique problem that is not present in other strict liability offenses. For example, the traffic violation of speeding is a strict liability crime. As a rule, if one is caught speeding an officer issues a ticket and usually does not care about individual circumstances because promoting the safety of the road is the primary objective. While an analogy to statutory rape can be made, it is lacking because statutory rape is a strict liability offense that one can commit without knowing it. The comparison is also flawed because statutory rape carries an additional stigma and in some jurisdictions the perpetrator must register as a sex offender.\textsuperscript{115} In addition, statutory rape generally carries a higher penalty than other strict liability crimes.\textsuperscript{116} For example, Iowa’s statutory rape statute requires a minimum punishment of five years imprisonment and the maximum penalty is life.\textsuperscript{117} In California, the crime can be charged as a misdemeanor or a felony.\textsuperscript{118} The discretion that has already been placed in the

\begin{footnotesize}
\footnotesize\textsuperscript{114} Consider Lauren R. Calia, Jael E. Polnac, and Samantha Rosenberg, Survey, Family Law, 52 Md L Rev 718, 728 (1993) (discussing the use of standards in child support cases); 17 USC § 107 (2006) (statute explaining the factors to be considered in deciding the issue of fair use in copyright law).


\footnotesuperscript{116} Cal Bus & Prof Code § 25658 (2006) (states that sell alcohol to a person under the age of twenty-one is a misdemeanor; a perpetrator may be fined $250 or subject to twenty-four to thirty-two hours of community service with higher penalties for subsequent violations). Consider Cal Veh Code § 22350 (2006) (Fines are assessed for speeding violations.); Cal Veh Code § 13352 (2006) (DUI convictions result in a suspension of the perpetrator’s license for at least 6 months.).

\footnotesuperscript{117} Iowa Code § 709.4 (2006) (Sexual abuse in the third degree is a class “C” felony.).

\footnotesuperscript{118} Cal Penal Code §261.5(a)–(c) (West 2000).
\end{footnotesize}
hands of states to penalize statutory rape in such divergent fashions bolsters the position that judges should be allowed to use discretion in deciding these cases in an attempt to balance or offset inter-state inconsistencies. In the immigration law context such large differences in sentencing and level of offense impact whether an immigrant is deported or not—something that arguably should be consistent across state lines.

In a related analysis, Julie Anne Rah discusses the inconsistencies of immigration law with respect to Felony DWI charges. She comments on how lack of uniformity in the law presents an unfair standard for immigrants to live up to. While giving discretion to judges has the potential to be abused, it also provides them with room to maneuver in instances where a blanket rule would provide an unjust outcome.

While the modified categorical approach’s willingness to look to individualized facts is tempting, it cannot be reconciled with the Supreme Court’s analysis in *Leocal*. The court in *Leocal* said that the language of § 16(b) “requires us to look to the elements and the nature of the offense of conviction, rather than to the particular facts relating to petitioner’s crime.” For this reason this analysis should not be followed. Although the Seventh Circuit’s reasoning is preempted by the Supreme Court’s directive that a § 16(b) analysis looks to the nature of the offense, the Seventh Circuit’s conclusion is not completely barred. If looking at one specific set of facts (such as those in *Xiong*) encompassed in the definition of statutory rape does not rise to the level of a crime of violence then the offense is not inherently a violent one. If the courts truly do look to the nature of all behavior implied by statute, they will find that statutory rape statutes are generally too broad to present honestly a substantial risk that physical force will be used. When the statute requires neither intent to commit the act nor protest from the victim, no risk of any particular type of behavior is inherent in the crime.

C. An Alternative Approach

Proponents of the majority’s categorical analysis may suggest that a rule getting rid of anyone who does not follow the law exactly is a cautious and desirable approach because the offense

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of statutory rape is a serious one. While this is true it is important to remember that statutory rape has the potential to carry an extra penalty for immigrants whether they knowingly engage in the conduct or not: deportation. If statutory rape laws are in place to deter such behavior one should have to know that one is committing the offense. If criminal punishment is to automatically follow the crime of statutory rape we should remember that immigrants face the possibility of overpaying by additionally losing their legal status in the United States. Because of this heightened penalty, perhaps their cases deserve cautious analysis. One way to address both issues—(1) whether statutory rape occurred; and (2) whether it was a crime of violence—is to truly address the issues independently, paying particularly close attention to the controlling statute for each issue.

Whether statutory rape occurred is a question that can be answered in any state simply by noting the age of the alleged victim and perpetrator. If it is determined that an immigrant has violated the statute, he or she should receive the same punishment a citizen would receive.

Whether a crime of violence has occurred requires careful analysis of § 16(b). It is important to keep in mind the reason the courts have been referred to 18 USC § 16 for a definition of crime of violence. Title 18 USC § 16(b) was enacted as part of the Comprehensive Crime Control Act of 1984. There is legislative history that suggests the INA incorporates this provision for a definition of "crime of violence" to provide a mechanism to rid the United States of immigrants who have proven they pose a violent threat to society.121

The Supreme Court's mandate in Leocal was that § 16(b) analysis requires looking to the elements and nature of the crime rather than to the individual facts.122 The Ninth Circuit is the only circuit that effectively did this. In Valencia the court looked to the full range of conduct possible under the controlling statute. In doing so they noticed situations that did not suggest an inherent risk of physical force might be used to perpetrate the act and thus did not find statutory rape to be a § 16(b) crime of violence.123 The other circuits employing categorical analysis do

121 See Rah, 70 Fordham L Rev at 2116 (cited in note 119) (highlighting Congress's dramatic expansion of crimes that could result in deportation after immigration and crime levels began rising in the 1980s).
122 Leocal, 543 US at 7.
123 Valencia v Gonzales, 439 F3d 1046, 1052 (9th Cir 2006).
not purport to have taken into consideration all of the elements and possible natures of the crime when deciding if the risk of force was present. The Fifth Circuit claims that a crime cannot encompass violent and non-violent offenses. The Eleventh Circuit recognized that a violation of the statute may exist without physical force but still categorically says that the risk of physical force is present in the crime. The Second circuit claims "cases can be imagined where a defendant's conduct does not create a genuine probability that force will be used, but the risk of force remains inherent in the offense." To say that it is possible to commit a crime without the risk of physical force but then insist that the risk of physical force is an inherent element of that crime is contradictory. Implying that a categorical analysis of the crime suggests such an outcome is a misuse of the words "inherent" and "categorical."

The majority of courts that use the inherent risk analysis would most likely analogize the risk of physical force being used in the crime of statutory rape to that of burglary as the Supreme Court discussed in *Leocal*. This comparison is not appropriate because the crime of burglary requires a specific intent whereas statutory rape does not. When one intends to burglarize, he or she is aware that force may be necessary to commit the crime of breaking into the dwelling of another with the intent to commit a crime therein. On the other hand, when one commits statutory rape, as the Ninth Circuit noted in *Valencia*, there may be no risk of physical force if the act is being done with the factual consent of the minor. The Supreme Court said in *Leocal* that the focus should be on whether the risk of physical force is inherent in the crime, not on whether injury will result from the crime.

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124 United States v Velasquez-Overa, 100 F3d 418, 420–21 (5th Cir 1996) ("[E]ither a crime is violent 'by its nature' or not.").
125 Ramsey v INS, 55 F3d 580, 583 (11th Cir 1995) ("Although a violation of [the statute] might be accomplished without the use of physical force, we conclude that the offense is a felony which involves a substantial risk that physical force may be used against the victim in the course of committing the offense.").
126 Chery v Ashcroft, 347 F3d 404, 408 (2d Cir 2003) (noting example of seventeen-year-old male having consensual sex with fifteen-year-old girlfriend does not pose a risk of actual force but is still in violation of Connecticut statute).
127 Webster's Third International Dictionary 352, 1163 (1986) (defining categorical as: "absolute, unqualified" and inherent as: "involved in the constitution or essential character of something: belonging by nature or habit: intrinsic").
128 Consider Model Pen Code §221.1.
129 See Valencia, 439 F3d at 1053.
130 Leocal, 543 US at 10.
While it is somewhat easier to argue that there is a risk of injury to a minor when an adult has sexual intercourse with her, the court suggests risk of injury is distinguishable from the use of physical force. We cannot say that physical force will never be used when committing statutory rape, but we should be hesitant to conclude that the crime, as defined by statute, involves a substantial risk of physical force, just as the Supreme Court recognized that the crime of driving while under the influence does not inherently run the risk of involving physical force.

A critical point of analysis employed by both the Seventh and Ninth Circuits would establish a line of reasoning that simplifies the court’s duty as well as holds them to the standard provided in *Leocal*. The Seventh Circuit asks the question of whether the statute encompasses conduct that does and does not constitute a crime of violence.\(^1\) If the statute encompasses both types of conduct then a categorical analysis would suggest that the crime could not inherently present a risk that physical force might be used. Similarly, the Ninth Circuit’s analysis takes into consideration the full range of conduct possible under the statute. If any conduct within that range does not create an inherent risk of physical force, then categorical analysis suggests the statute does not categorically define a crime of violence. As summarized by the majority circuits’ explanations above there is often some behavior criminalized by statute that does not present a risk of physical force. Although it may seem odd to have to consider conduct that has not happened in the particular case at hand, but that could possibly happen within the definition of the statutory rape statute, this step is required in deciding whether the nature of the crime has as an element the substantial risk of physical force.

Utilizing these portions of the Seventh and Ninth Circuits’ analysis will not change the position of all of the majority courts, it will simply unify the standard to which the crime of statutory rape is held. It would probably penalize (by deportation) statutory rape where the statute specifies that the age of the perpetrator is well above that of the victim (in other words where the full range of conduct specified by statute presents a risk of physical force being used). The analysis would probably not lead to deportation where the statute encompasses a wide range of acts. For example, in *Valencia*, a forty-two-year-old was not held to be

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\(^1\) *Xiong v INS*, 173 F3d 601, 607 (7th Cir 1999). See also *United States v Shannon*, 110 F3d 382, 387 (7th Cir 1997) (en banc).
a violent felon under § 16(b)'s definition of crime of violence because the California statute\textsuperscript{132} encompasses conduct where a twenty-one-year-old can be charged with statutory rape for having sex with a seventeen-year-old.\textsuperscript{133} In that situation the court concluded that persons seventeen years of age can factually consent, meaning that not all circumstances would present a risk of physical force. This analysis may seem too sweeping in the opposite direction of the majority categorical approach, but because of what is at stake once it has been decided someone has committed a crime of violence the more cautious approach in handing out this label is warranted.

CONCLUSION

Statutory rape is a serious offense, but this does not automatically qualify it as a crime of violence as defined by federal law.\textsuperscript{134} This comment seeks to shed light on the intention of the INA when it references § 16(b). An argument of statutory interpretation could be made on either side of this issue. The statute could be read strictly, paying particular attention to punctuation. The phrase could also be read in light of the overall meaning of the statute, or to uphold congressional intent. This comment chooses to follow the latter approach in an attempt to provide immigration law with a standard that is workable as well as equitable in light of the congressional intent behind § 16(b) and the Supreme Court's previous rulings regarding other § 16(b) crimes of violence.

The categorical analysis applied by the majority circuits seeks to find an easy answer to a difficult and complicated question. It lumps all statutory rape offenses together by hiding behind the § 16(b) phrase "by its nature" without considering the entire nature of the statutory offense. This approach could potentially over-penalize some persons guilty of statutory rape. The courts should employ the categorical approach but in doing so should follow the Ninth Circuit, taking into consideration the full range of conduct contemplated by the statute.

\textsuperscript{132} Cal Penal Code § 261.5.
\textsuperscript{133} Valencia, 439 F3d at 1052.
\textsuperscript{134} See 18 USC § 16.