The Expansion of *Leocal*: The Mere Possession of a Pipe Bomb Constitutes a Crime of Violence.

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INTRODUCTION

Recently, the Third Circuit held in *United States v. Hull* that the offense of possessing a pipe bomb,[1] in itself, did not constitute a crime of

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[1] A pipe bomb is "a small, homemade bomb typically contained in a metal pipe." WEBSTER'S COLLEGE DICTIONARY 1007 (2d ed. 2000). Defendant was convicted of violating 18 U.S.C. § 842(p)(2)(A), which defines a pipe bomb as a destructive device, which is further defined in part as "any explosive, incendiary, or poison gas bomb." 18 U.S.C. § 921(a)(4) (2006). The terms "pipe bomb" and "destructive device" are used interchangeably within this comment.

violence.[2] Basing its holding on the definition of a crime of violence pursuant to 18 U.S.C. § 16, the court reasoned that possession alone of a pipe bomb does not create a substantial risk that physical force may be used against another person or another's property.[3] Furthermore, the Third Circuit relied on the Supreme Court's holding that the minimum level of criminal intent for a crime of violence must be greater than negligence.[4] Because possession does not require "active employment" and because there was no substantial risk that physical force might be used against another person or property, the Third Circuit reversed the conviction for this charge.[5]

The core of the Third Circuit's reasoning stemmed from the Supreme Court's holding in *Leocal v. Ashcroft*.[6] That case resolved a previous split among the circuits with respect to the requisite level of culpability needed for a crime of violence.[7] The specific facts of the case concerned serious bodily injuries resulting from driving under the influence of alcohol or other substances (DUI).[8] The Court held that accidents resulting from driving under the influence cannot qualify as crimes of violence as per § 16.[9] Offenses that "either do not have a *mens rea* component or require only a showing of negligence in the operation of a vehicle" do not rise to the level of a crime of violence.[10] In addition, the Court determined that a categorical approach must be applied to properly define such crimes.[11]

While this holding resolved a previous circuit split, it intentionally declined to address the precise threshold of intent needed for a crime of violence.[12] After *Leocal*, negligence is not sufficient, but what about recklessness? In *Hull*, the Third Circuit seems to have given the Supreme Court's refusal much weight by holding that possession of a destructive device does not meet the sufficient level of intent.[13]

This comment disagrees with the Third Circuit and argues that the possession of a pipe bomb, or other similar destructive devices, which

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[2] 456 F.3d 133 (3d Cir. 2006).
[3] *Id.* at 144.
[4] Leocal v. Ashcroft, 543 U.S. 1 (2004).
[5] *Id.* at 6.
[6] *Hull*, 456 F.3d at 138.
[7] *Leocal*, 543 U.S. at 6.
[8] *Id.* at 3.
[9] *Id.* at 13.
[10] *Id.* at 6.
[11] *Id*. at 7.
[12] The Court concluded, "This case does not present us with the question whether a state or federal offense that requires proof of the *reckless* use of force against a person or property of another qualifies as a crime of violence under 18 U.S.C. § 16." *Id*. at 13.
[13] United States v. Hull, 456 F.3d 133, 138 (3d Cir. 2006).

serve neither a legitimate nor a non-violent purpose, qualify as a crime of violence. Crimes of violence under § 16 do not require as much culpability as the Third Circuit majority held.[14] Under *Leocal*, destructive devices, such as pipe bombs, can be neatly classified into their own category, separate from the broader category of "firearms." In this narrow category, the risk of death and destruction inherent in the simple possession of a pipe bomb is, "by its nature," a crime of violence.[15] Section 16 does not require an act of violence before declaring a crime "violent," and *Leocal* does not preclude the *mens rea* of recklessness.

This comment addresses these issues through the following order. Part I provides the various definitions of a "crime of violence" to serve as a backdrop for the reasoning behind the *Hull* and *Leocal* decisions. Such understanding will clarify just how the possession of a pipe bomb can result in a crime of violence within an expanded interpretation of *Leocal*. Part II then extrapolates the smaller category of destructive devices from the larger class of firearms. Not all firearms present either a legitimate or non-violent use; thus, not all firearms should be similarly categorized in a § 16 analysis. It shall be shown that this distinction is consistent with *Leocal's* categorical approach, which in turn would lead the *Hull* Court down an alternate path. Part III contends that recklessness is a sufficient *mens rea* for a crime of violence. After the *Leocal* holding made clear that negligence will not suffice as such, it expressly left open the issue of recklessness. And on the spectrum of culpability, according to the Model Penal Code, recklessness falls closer to intentional acts than does negligence. It follows, then, that recklessness can function as a sufficient *mens rea* for a crime of violence in accordance with *Leocal*. Finally, this comment brings to light the future implications that could result from *Hull's* narrow interpretation of § 16.

I. VARIOUS DEFINITIONS OF A CRIME OF VIOLENCE: *LEOCAL V. ASHCROFT* AND *UNITED STATES V. HULL*

Both § 16 and the Sentencing Guidelines provide a definition of a crime of violence. Depending on the particular language or silence of an offense, either definition could control.[16] The Supreme Court in *Leocal* was faced with silent language from the underlying offense and concluded that § 16's definition of a crime of violence applied.[17] Section 16 requires a higher level of culpability than the Guidelines.[18] The Third

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[14] *Id.* at 144 (Ackerman, J., dissenting).
[15] 18 U.S.C. § 16 (2006).
[16] *Leocal*, 543 U.S. at 6.
[17] *Id.* at 6-7.
[18] *Id.*

Circuit followed in suit and applied § 16's definition in the *Hull* case.[19] A cursory explanation of how these definitions relate helps to explain the result of these particular case decisions.

A. Section 16 as Compared to the Sentencing Guidelines

This comment focuses specifically on 18 U.S.C. § 16, which served as the controlling statute in *Leocal* and *Hull*. Section 16 defines a crime of violence as:

> (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.[20]

Section 16 lies within the Comprehensive Crime Control Act of 1984.[21] With this Act, Congress created the United States Sentencing Commission and gave it the authority to create sentencing guidelines.[22] Congress included instructions for the Commission to follow, one of which included the requirement that repeat offenders of a crime of violence receive greater sentences due to the offenders' recidivism.[23] Because this portion of the Act failed to define the phrase "crime of violence," the Court reasoned that § 16 was intended by Congress to supply the definition.[24] The § 16 definition remained the applicable definition until 1989 when the Sentencing Commission amended the guidelines and altered the definition of a crime of violence to its present form.[25]

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[19] *Hull*, 456 F.3d at 138.

[20] 18 U.S.C. § 16 (2006).

[21] Specifically, § 16 is found in Chapter X of the Comprehensive Crime Control Act of 1984, Pub. L. No. 98-473, 98 Stat. 2136 (1984).

[22] 28 U.S.C. § 994(d) (2006).

[23] 28 U.S.C. § 994(h) (2006) ("The Commission shall assure that the guidelines specify a sentence to a term of imprisonment at or near the maximum term authorized for categories of defendants in which the defendant . . . (1) has been convicted of a felony that is (A) a crime of violence. . . .").

[24] *Id*. According to the legislative history, the definition of crimes of violence contained in § 16 was meant to apply throughout the entire Comprehensive Crime Control Act. *See* Leocal v. Ashcroft, 543 U.S. 1, 6 (2004) (describing the numerous places where the phrase "crime of violence" is used throughout the Comprehensive Crime Control Act).

[25] *See* U.S. SENTENCING GUIDELINES MANUAL § 4B1.2(a) (2006) ("The term 'crime of violence' means any offense under federal or state law, punishable by imprisonment

For the purposes of this comment, the amended definition's most significant aspect is the requisite level of intent. Both the old and new definitions remain consistent with respect to prong one–they both require a purposeful intent to use, attempt, or threaten to use physical force against another person.[26] However, the two definitions part ways in their respective second prongs.[27] Section 16(b) refers to the "use of force," while the guidelines now require "conduct that presents a serious potential risk of physical injury to another person."[28] This distinction changes the level of culpability to a lesser *mens rea* of "pure" recklessness for purposes of the guidelines.[29] Under the guidelines, a crime of violence will include an offense where the offender may lack the intent to use force, but the underlying conduct involves a serious risk of physical injury.[30] A similar crime would not suffice under § 16(b).[31] It is important to understand this background because the underlying statute for a crime of violence may refer to either definition or may remain silent.

B. Leocal *Resolves a Previous Circuit Split*

Before *Leocal v. Ashcroft*, a circuit split had existed as to "whether state DUI [driving under the influence] offenses . . . which either do not have a *mens rea* component or require only a showing of negligence in the operation of a vehicle, qualify as a crime of violence."[32] The circuit split resulted from the fact that several states had criminalized a "DUI causing serious bodily injury or death without requiring proof of any

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for a term exceeding one year, that–(1) has as an element the use, attempted use, or threatened use of physical force against the person of another, or (2) is burglary of a dwelling, arson, or extortion, involves use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another.").

[26] "Use of physical force is an intentional act, and therefore the first prong of both definitions requires specific intent to use force." United States v. Parson, 955 F.2d 858, 866 (3d Cir. 1992).

[27] The distinction is so clear that the Fifth Circuit has held that "§ 16 and § 4B1.2(a) are different, and that what qualifies as a crime of violence under one does not necessarily qualify under the other. To the extent that our prior cases have conflated the § 16(b) and § 4B1.2(a)(2) definitions of 'crime of violence,' they are overruled." United States v. Charles, 301 F.3d 309, 312 (5th Cir. 2002).

[28] *Id.* ("[Section] 16(b) focuses on a risk of physical force, whereas § 4B1.2(a)(2) focuses on a risk of physical injury; § 16(b) requires a 'substantial risk,' whereas § 4B1.2(a) requires a 'serious potential risk'; and § 16(b) focuses on the 'nature' of the felony, whereas § 4B1.2(a)(2) focuses on 'conduct.'").

[29] *Parson*, 955 F.2d at 866.

[30] *Id*.

[31] *Id*.

[32] 543 U.S. 1, 6 (2004).

mental state."[33] With respect to defining a crime of violence, the Court in *Leocal* held that where § 16's definition controls, negligence stands as an insufficient level of intent for a crime of violence.[34] In *Leocal*, the petitioner was convicted of driving under the influence of alcohol that caused an accident seriously injuring two people.[35] The applicable statute instructed the courts to apply § 16's definition of a "crime of violence,"[36] and thus, the guideline's definition did not apply in *Leocal*.

The Court held that a categorical approach must be applied in determining whether a crime is a "crime of violence."[37] The language of § 16 speaks to the underlying offense and a categorical approach looks "to the elements and nature of the offense, rather than to the particular facts relating to petitioner's crime."[38] Writing for a unanimous Court, Chief Justice Rehnquist held that such offenses could not qualify as crimes of violence as defined by 18 U.S.C. § 16(a), because the statute requires "a higher *mens rea* than the merely accidental or negligent conduct involved in a DUI offense."[39] The specific language of § 16(a) requires active employment. The Court's previous decision in *Bailey v. United States*[40] defined "use" to mean active employment, which is more than accidental or negligent conduct. Chief Justice Rehnquist stated, "[w]hile one may, in theory, actively employ *something* in an accidental manner, it is much less natural to say that a person actively employs physical force against another person by accident."[41]

With respect to the broader language of § 16(b), the Court concluded that the petitioner's offense did not qualify as a crime of

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[33] *Id.* at 8.

[34] *Id*. at 11.

[35] *Id*. at 3.

[36] "Any alien who is convicted of an aggravated felony . . . is deportable." 8 U.S.C. § 1227(a)(2)(A)(iii) (2006). The statute defines an "aggravated felony" as inclusive of a "crime of violence" defined by 18 U.S.C. § 16. *Id.*

[37] *Leocal*, 543 U.S. at 7.

[38] *Id.* Many cases pre-*Leocal* held that a categorical approach must be applied to analyze a § 16 crime of violence. *See e.g.*, Jobson v. Ashcroft, 326 F.3d 367, 371 (2d Cir. 2003) ("Under a categorical approach, we look to the generic elements of the statutory offense . . . . [This approach is] 'consistent with both precedent and sound policy . . . .' Section 16(b) itself defines a crime of violence 'by its nature' . . . [and] 'compels' a reviewing court to focus 'on the intrinsic nature of the offense rather than on the factual circumstances surrounding any particular violation.'"); United States v. Medina-Anicacio, 325 F.3d 638 (5th Cir. 2003) (applying a categorical approach regardless of the actual underlying facts of the case); United States v. Chapra-Garza, 243 F.3d 921, 924 (5th Cir. 2001) (finding that the language, "by its nature," of § 16(b) compels the court "to employ a categorical approach when determining whether an offense is a crime of violence").

[39] *Leocal*, 543 U.S. at 11.

[40] 516 U.S. 137 (1995).

[41] *Leocal*, 543 U.S. at 9 (emphasis added).

violence because "section 16(b) does not . . . encompass all negligent misconduct . . . [i]t simply covers offenses that naturally involve a person acting in disregard of the risk that physical force might be used against another in committing an offense."[42] The Court concluded that the petitioner could not have committed a crime of violence through his negligent conduct. However, the Court left open the question whether an "offense that requires proof of *reckless* use of force against a person or property of another qualifies as a crime of violence under 18 U.S.C. § 16."[43]

C. The Hull *Case*

The following case was the catalyst for composing this comment. The *Hull* case reasoned that mere possession of a pipe bomb is not a crime of violence.[44] As will follow, this comment attempts to raise the errors from this holding.

1. The Majority Applies § 16 and *Leocal*

That final quote mentioned above from *Leocal* has contributed to inconsistencies among the circuits applying the Court's holding.[45] The Third Circuit's 2006 decision in *Hull v. United States* serves as the starkest example.[46] In a matter of first impression, the Third Circuit applied *Leocal's* categorical approach to a violation of 18 U.S.C. § 842(p), a statute "applied only sparingly across the country."[47] Section 842(p) is another example of a silent statute in that it neither defines "crime of violence" nor specifically refers a court to other provisions.[48] Nevertheless, the court applied § 16's definition and held that simply possessing a pipe bomb was not a crime of violence, because there was not a substantial risk that physical force would be used to carry out the offense of possession.[49]

An understanding of this decision requires a brief overview of the facts. David Wayne Hull was indicted for, *inter alia*, violations of 18

[42] *Id.* at 10.
[43] *Id.* at 13.
[44] Hull v. United States, 456 F.3d 133 (3d. Cir. 2006).
[45] The Third Circuit in *Hull* parted ways from other circuits that held possession of a pipe bomb was a crime of violence. *See* United States v. Jennings, 195 F.3d 795 (5th Cir. 1999); *see also* United States v. Newman, No. 97-1294, 1997 U.S. App. LEXIS 27000 (10th Cir. Oct. 1, 1997).
[46] *Hull*, 456 F.3d 133.
[47] *Id.* at 138.
[48] 18 U.S.C. § 842(p) (2006).
[49] *Hull*, 456 F.3d at 141.

U.S.C. § 842(p)(2)(A).[50] Section 842(p) makes it "unlawful for any person to teach or demonstrate the making or use of an explosive [or] a destructive device, . . . with the intent that the teaching, demonstration, or information be used for, or in furtherance of, an activity that constitutes a Federal crime of violence."[51] Hull had provided a government informant with information and instructions on how to assemble a pipe bomb.[52] The indictment for his offense stated that the underlying federal crime of violence was "*solely* the 'unlawful possession of a pipe bomb.'"[53] Although § 842(p) does not specifically direct a court to § 16, the Third Circuit nevertheless applied § 16's definition of crime of violence and not the sentencing guidelines.[54]

The Third Circuit limited its analysis to the second prong of § 16, because the "government [did] not allege that possession of a pipe bomb involve[d] the *actual* use of physical force, only that it involve[d] a substantial risk of physical force against another."[55] Thus, the court had only to determine whether simply "possessing" a pipe bomb is an "offense that naturally involves a person acting in disregard of the risk that physical force might be used against another in committing the offense."[56] The court explained that it was irrelevant to inquire whether or not a violent crime will be committed as a result of possession.[57] Instead, the issue was confined to "whether there [was] a risk that in committing the offense of *possession*, force will be used."[58] As instructed by *Leocal*, the Third Circuit applied a categorical approach to the nature of the offense and held that it does not create such a risk.[59]

The court concluded that it was not the possession of a pipe bomb which creates a danger, but rather it is the "use" of that pipe bomb.[60] The

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[50] *Id.* at 137.

[51] 18 U.S.C § 842(p) (2006).

[52] Section 842(p) defines "destructive device," "explosive," and "weapon of mass destruction" by referring to other sections throughout the Code. 18 U.S.C § 842(p) (2006). A pipe bomb neatly falls within the first two categories.

[53] *Hull*, 456 F.3d at 137.

[54] *Id.* at 138. It is not especially clear why the court chose this route. The court states that it was instructed to do so because of *Leocal*. In a footnote in *Leocal*, Chief Justice Rehnquist referred to § 842(p) as a statute that employs a crime of violence. Leocal v. Ashcroft, 543 U.S. 1, 7 n.4 (2004). The government in *Hull* argued to apply the guideline definition, but the Third Circuit stated that *Leocal* "*explicitly* rejected using [the guidelines] to interpret § 16 (and by extension, § 842(p))." *Hull*, 456 F.3d at 141 (citing *Leocal*, 543 U.S. at 10 n.7).

[55] *Hull*, 456 F.3d at 138.

[56] *Id.* (citing *Leocal*, 543 U.S. at 10).

[57] *Hull*, 456 F.3d at 140.

[58] *Id.*

[59] *Id.* at 139.

[60] *Id.*

court applied the definition of "use," as determined by *Bailey* and *Leocal*, which required active employment.[61] This definition is opposed to "possession," which seems to connote an exercise of control or dominion over the object.[62] The court posited that if Hull's indictment had charged him with the use of a pipe bomb, then there would be a risk of physical force being actively employed.[63] "There is no risk that physical force might be used against another to commit the offense of *possession*, regardless of whether pipe bombs have a legitimate purpose or not."[64] Finally, the court reasoned that even though a pipe bomb could unexpectedly detonate, the risk of explosion would not be the result "of any *intentional* use of force."[65]

2. The *Hull* Dissent

Senior District Judge Ackerman, sitting by designation, applied a broader interpretation of § 16(b) and concluded that, because a pipe bomb has no legitimate use, any possession thereof results in a substantial risk of physical force.[66] Judge Ackerman's response did not contradict the holding from *Leocal*, in part, because it did not advocate strict liability.[67] Instead, Judge Ackerman's dissent puts the possession of a pipe bomb into a category of its own; therefore, possession alone was a conscious disregard for the risks inherent in such a destructive device.[68] This level of intent—recklessness—currently remains a possible candidate for a crime of violence under § 16(b).[69]

In reaching this conclusion, Judge Ackerman articulated two main points. First, applying the methods of statutory interpretation, Judge Ackerman concluded that the plain language of § 16(b) does not require the actual use of physical force.[70] Section 16(b) states that a "substantial risk" of physical force "may be used."[71] The qualifying language of "may" negates the requirement of actual physical force.[72] In addition,

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[61] *Id.*
[62] *Id.*
[63] *Id.* at 141.
[64] *Id.* at 139.
[65] *Id.* at 140.
[66] *Id.* at 145 (Ackerman, J., dissenting).
[67] *Id.* at 146-47.
[68] *Id.* at 147.
[69] *See* Leocal v. Ashcroft, 543 U.S. 1, 13 (2004).
[70] *Hull*, 456 F.3d at 144 (Ackerman, J., dissenting); *see also* United States v. Dodge, 846 F. Supp. 181, 183 (D. Conn. 1994) ("Actual use of physical force against another is not an essential element of a 'crime of violence' . . . as evidenced by the use of the conditional term 'may.'" (alteration in original)).
[71] 18 U.S.C. § 16(b) (2006).
[72] *Hull*, 456 F.3d at 144 (Ackerman, J., dissenting).

Judge Ackerman noted that "substantial risk" is a term "difficult to quantify with precision" and as a result, courts should apply "common sense and ordinary usage" to fill in this gap.[73] Under a narrower categorical approach, possessing a pipe bomb, by its nature, has a degree of risk substantial enough to satisfy the definition of a crime of violence.[74] Because the risk of force must be in the nature of the offense, and such a risk is inherent in a pipe bomb, the use of actual force is not required.[75]

Second, Judge Ackerman's dissent identified that § 16(b) requires that this risk arise during "the course of committing the offense."[76] The crime of possession is a continuing offense; the court must look at the full course of possession, not just the initial act of obtaining control.[77] In support of this view, Judge Ackerman deconstructed the phrase "in the course of committing the offense."[78] For example, the dissent stated, "'[c]ommitting' connotes present, continuing action."[79] "'[I]n the course of' suggests, not merely a passing instant, but a continuum of time . . . ."[80] Finally, "the offense" portion of the phrase refers to the entire offense "and not merely a portion or an aspect of a given offense."[81] Collectively, this analysis "requires a court to consider the entire period during which it can be said the offense is being committed";[82] the entire time an individual possesses a pipe bomb.

The dissent also criticized the majority for distorting § 16(b) and applying such a narrow interpretation.[83] Judge Ackerman noted that the majority substituted the phrase "to commit the offense" with "in the course of committing the offense."[84] From that standpoint, it could be conceded that once possession of a bomb was obtained, the crime is completed with no future risks thereafter. However, the dissent strongly disagreed with that interpretation: "The majority considers only the risk incident to effectuating the offense, not the risk that may occur during

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[73] *Id.* ("The "terms 'substantial risk' and 'may' make clear that the actual use of physical force is not a required element of a crime of violence."); *see* United States v. Dillard, 214 F.3d 88 (2d Cir. 2000); *see also* United States v. Jennings, 195 F.3d 795 (5th Cir. 1999); *see also* United States v. Dodge, 846 F. Supp. 181 (D. Conn. 1994).
[74] *Hull*, 456 F.3d at 144 (Ackerman, J., dissenting).
[75] *Id.*
[76] 18 U.S.C. § 16(b) (2006).
[77] *Id.* at 145; *see* discussion *infra* Part II.
[78] *Hull*, 456 F.3d at 145 (Ackerman, J., dissenting).
[79] *Id*.
[80] *Id*.
[81] *Id.*
[82] *Id.*
[83] *Id.*
[84] *Id.*

the continuing offense."[85] The crime of possession is not a simple snap-shot in time and does not cease until possession is relinquished.[86] Thus, Judge Ackerman determined that there is a substantial risk that force may be used at any time a bomb is in possession.[87]

Judge Ackerman concluded his dissent in the same footing as this comment begins: "If the 'mere' possession of a pipe bomb is not a crime of violence, then neither, it would seem, is 'mere' possession of an even more destructive implement."[88] Judge Ackerman could not endorse "such a crabbed interpretation of § 16(b)" that would allow these devices to be dismissed of any substantial risk that physical force may be used.[89] In the course of possessing a pipe bomb, or any similarly categorized destructive device, there is always a substantial risk that physical force may be used, and the plain language of § 16(b) supports such an interpretation.[90]

II. Classifying the Possession of a Pipe Bomb in its Own Category

A distinction exists between the risks of physical force involved in completing the offense of possessing a pipe bomb and the crime of driving under the influence ("DUI") as posed in *Leocal*. By its very nature, a DUI does not create a risk that force will be used; instead, a DUI is negligent conduct, which *Leocal* held cannot be a crime of violence.[91] Because cars naturally have various legitimate uses, there must be some extrinsic intent to use the car in a forceful manner to cause harm to be a crime of violence.[92] In contrast, the offense of possessing a bomb, by its very nature, involves a conscious disregard for the risk of force. This is because there is no legitimate, non-violent purpose for possessing such a bomb. Therefore, an additional desire of intent to cause harm is not needed; it is encapsulated in the nature of possessing the bomb.[93]

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[85] *Id.*

[86] *Id.* at 146.

[87] *Id.*

[88] *Id.* at 150.

[89] *Id.*

[90] The phrase "may be used" is the critical difference here. Under the categorical approach, the nature of the offense is the possession of a bomb. *Id.* at 145. The possession of a bomb serves only one purpose: to be used against a person or the property of another. *Id.* at 148.

[91] Leocal v. Ashcroft, 543 U.S. 1, 11 (2004).

[92] Lara-Cazares v. Gonzales, 408 F.3d 1217, 1221 (9th Cir. 2005).

[93] *Hull*, 456 F.3d at 147 (Ackerman, J., dissenting).

The majority in *Hull* applied a narrow reading of the *Leocal* case in its interpretation of § 16(b).[94] A broader reading leads to the conclusion that the nature of the offense, possession of a pipe bomb, is a crime of violence, and this characterization is logically consistent with *Leocal*.[95] It seems that the Third Circuit in *Hull* grouped all firearms into one category and then began its analysis. Neither § 16(b) nor *Leocal* specifically require this grouping. The larger category of firearms contains various artillery, which are not inherently dangerous or do not pose substantial risks of force being used to complete the crime of possession. Similarly, as in *Leocal*, driving while intoxicated does not pose a risk that physical force will be used to complete such an offense.[96] In contrast, the possession of a pipe bomb, by its nature, entails this substantial risk of physical force. Because possession of a pipe bomb serves no legitimate, non-violent purpose and because recklessness conduct is not precluded as a level of culpability, this comment argues that mere possession of any destructive device must constitute a crime of violence. To avoid any confusion, this comment first distinguishes "use" from "possession" so as not to conflate the terms as warned by the *Hull* majority.[97]

A. Distinguishing Use from Possession

In *Bailey v. United States*, the Supreme Court distinguished between "possession" and "use."[98] *Bailey* involved both the use and possession of a firearm during a drug exchange.[99] The defendants were charged with using a firearm located in either a footlocker or the trunk of a car.[100] The Court disagreed with the charges and held that the firearms could not have been "used" because they were not actively employed in the commission of the drug trafficking charges.[101] The Court clarified the meaning of "use" as it pertained to the violation of 18 U.S.C. § 924(c)(1).[102] The term "use" requires the need for active employment, while "possession" does not.[103] Justice O'Connor described the paradox

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[94] *Id.* at 145.
[95] *Id.* at 145-46.
[96] Leocal v Ashcroft, 543 U.S. 1, 9 (2004).
[97] *Hull*, 456 F.3d at 140.
[98] 516 U.S. 137 (1995).
[99] *Id.* at 138.
[100] *Id.* at 138-40.
[101] *Id.* at 144.
[102] Section 924(c)(1) defines the offense of using or carrying a firearm during and in relation to any crime of violence or drug trafficking. 18 U.S.C. § 924(c)(1) (2006).
[103] The Court asked, "What must the Government show, beyond mere possession, to establish 'use' for the purposes of [this case]? We conclude that . . . the Government must show active employment . . . ." *Bailey*, 516 U.S. at 144.

with the statement, "I use a gun to protect my home but I never had to use it."[104] This example represents the latter form of "use" that requires active employment of a gun.

It may seem that *Bailey* answers the crime of violence inquiry because "possession" is only the exercise of control over an item and "use" is the active employment of that item. Yet the *Bailey* court did not have the "occasion to consider what sort of conduct involves a substantial risk that physical force may be used against a person or property."[105] In defining possession of a pipe bomb in its own category, it can be seen that this crime does "involve a substantial risk that force against another may be 'actively employed' in the course of committing the offense of possession."[106] Therefore, possessing a pipe bomb does not overstep the boundaries dividing possession from use.

Moreover, in *United States v. Jennings*, the Fifth Circuit addressed the distinction between possession and use in the context of a pipe bomb.[107] *Jennings* dealt with the same issue as *Hull* except that the conviction was based on a violation of § 924(c), the same statute at issue in *Bailey*, which defined "crime of violence" similarly to 18 U.S.C. § 16.[108] The *Jennings* court held that the possession of a pipe bomb did constitute a crime of violence.[109] After applying a categorical approach,[110] as *Leocal* later prescribed,[111] the court explained that a "crime of violence" did not need to actually involve violence, but rather "create a substantial risk of the possible use of force."[112]

In *Hull*, the majority dismissed this argument on the grounds that the *Jennings* Court conflated "use" and "possession" as prohibited by *Leocal*.[113] However, the *Hull* Court was too rushed in reaching this conclusion and analyzed two separate sentences as one: "We hold that

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[104] *Id.* at 143.

[105] *Hull*, 456 F.3d at 149.

[106] *Id.*

[107] 195 F.3d 795 (5th Cir. 1999). This case is pre-*Leocal*; however, it applies the same analysis of a categorical approach and applying language similar to § 16(b)'s definition of a crime of violence.

[108] Section 924(c)(3) defines a crime of violence as one "that by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense." 18 U.S.C. § 924(c)(3) (2006). This language is virtually identical to § 16(b).

[109] *Jennings*, 195 F.3d at 799. "[T]he primary reason that unregistered possession of [pipe bombs] is a crime is the virtual inevitability that such possession will result in violence." *Id.*

[110] *Id.* at 797.

[111] Leocal v. United States, 543 U.S. 1, 7 (2004).

[112] *Jennings*, 195 F.3d at 798 (citing United States v. Greer, 939 F.2d 1076, 1099 (5th Cir. 1991)).

[113] United States v. Hull, 456 F.3d 133, 140 (3d Cir. 2006).

possession of an unregistered pipe bomb, by its very nature, creates a substantial risk of violence," with "[i]n fact, we cannot conceive of any non-violent or lawful uses for a pipe bomb."[114] The latter statement serves only as a subordinate point to emphasize the lack of social purpose. Under this reasoning, conflation does not exist, and the *Jennings* holding should have served as persuasive precedent in this debate.

B. Possession is a Continuing Offense

The strongest support for the argument that the possession of a pipe bomb constitutes a crime of violence stems from possession's nature as a continuing offense. It follows that, because possession presents a substantial risk that force will be used, this risk must be considered present during the entire scope of the possession. This contention helps ascribe possession of a pipe bomb to its own category. Also, this contention does not go against *Bailey*'s distinction between "use" and "possession."[115]

Several pre-*Leocal* decisions consider the full nature of the continuing offense of possession and numerous courts of appeals cases have recognized that certain crimes of possession may qualify as crimes of violence, as this comment immediately discusses. Although the first case, *United States v. Luster*, did not involve a crime of violence under § 16, it accentuates the point that possession is a continuing offense.[116] In *Luster*, a prisoner escaped from prison, and the court defined this conduct as a continuing crime.[117] "Escape is a continuing crime; it does not end when the escapee completes the act of leaving a correctional facility. Rather, the escapee must continue to evade police and avoid capture."[118] The Third Circuit cited its sister circuit case noting that

> an escapee "is likely to possess a variety of supercharged emotions, and in evading those trying to recapture him, may feel threatened by police officers, ordinary citizens, or even fellow escapees. Consequently violence could erupt at any time." Thus, "every escape scenario is a powder keg, which may or may not explode into violence and result in physical injury to someone at

[114] *Jennings*, 195 F.3d at 798.
[115] *Hull*, 456 F.3d at 149 (Ackerman, J., dissenting).
[116] 305 F.3d 199 (3d Cir. 2002).
[117] *Id.* at 202.
[118] *Id.*

> any given time, but which always has the serious potential to do so.[119]

Next, in *United States v. Zidell*, the defendant was charged with drug possession and the intent to distribute while traveling through different states.[120] The court held that, because the possession of drugs is a continuing offense, "'venue is proper in any district along the way.'"[121] Also, in *United States v. Fleischli*, the court held that the "[p]ossession of a firearm is a continuing offense which ceases only when the possession stops."[122] Another court was faced with the issue of constructive possession of a firearm in *United States v. Jones*.[123] That court noted that "possession . . . refer[s] to a course of conduct rather than individual acts of dominion."[124] Thus, "the continuous possession of the same firearm constitutes a single offense."[125] Finally, the dissent in *United States v. Hull* cited to an example where it stated that "'[b]ecause possession is a continuing offense, there is ordinarily no single act which can be used to establish the defendant's guilt. There is, rather, a continuum of time during which the defendant possessed the weapon.'"[126]

When viewing the underlying offense of possession, courts should view the entire crime from acquisition to relinquishment. The *Leocal* holding does not prohibit courts from considering entire course of a continuing offense.[127] When considering the substantial risk of force to be used in possessing a pipe bomb in its own category, there is no reason to conclude that the offense is not a crime of violence.

C. Pipe Bombs versus Other Firearms

Through the analyses of the previous cases, it has been established that the offense of possession is a continuing offense. And when applying *Leocal*, the categorical approach requires an investigative eye into the nature of the offense. Possession of a pipe bomb, or any destructive device for that matter, encompasses a substantial risk that the

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[119] *Id.* (quoting United States v. Gosling, 39 F.3d 1140, 1142 (10th Cir. 1994)). Nothing resembles a "powder keg" ready to explode more than a pipe bomb.

[120] 323 F.3d 412 (6th Cir. 2003).

[121] *Id.* at 422 (quoting United States v. Turner, 936 F.2d 221, 226 (6th Cir. 1991)).

[122] 305 F.3d 643, 658 (7th Cir. 2002) (citing United States v. Ballentine, 4 F.3d 504, 507 (7th Cir. 1993)).

[123] 403 F.3d 604 (8th Cir. 2005).

[124] *Id.* at 606.

[125] *Id.*

[126] 456 F.3d 133, 146 (3d Cir. 2006) (Ackerman, J., dissenting) (citing William Meyerhofer, *Statutory Restrictions on Weapons Possession: Must the Right to Self-Defense Fall Victim?*, 1996 N.Y.U. ANN. SURV. AM. L. 219, 233 (1996)).

[127] *Id.* at 147.

possessor may use force because a there is neither a legitimate nor a non-violent purpose.[128]

In contrast to guns and other common firearms, pipe bombs contain a substantial risk that the possessor may put that bomb to an illegitimate and violent use.[129] Guns and rifles, although violent, still may have many legitimate uses such as hunting, sport, target practice, and self-defense. However, possessing a pipe bomb is both illegal and violent. A pipe bomb has no conceivable non-violent or lawful use.[130] Because the purpose of a pipe bomb cannot fluctuate, it is inherently dangerous and should not be grouped with other firearms.[131]

This distinction is also consistent with the view that Congress and law enforcement agencies have towards other destructive devices similar to pipe bombs. In *United States v. Cruz*,[132] a case involving Molotov cocktails,[133] the court held that this cocktail constituted a destructive device as defined by the Firearms Act, 26 U.S.C. § 5845(f).[134] The court reasoned that because the Firearms Act requires the registration of "objectively destructive devices, devices inherently prone to abuse and for which there are no legitimate industrial uses. The Act thus clearly encompasses Molotov cocktails, since they have no use besides destruction."[135] This reasoning applies, *a fortiori*, to pipe bombs.

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[128] *Id.* at 144.

[129] "It flows inexorably from this conclusion that when a person unlawfully possesses a pipe bomb, there is a substantial risk that he or she may put that pipe bomb to the use for which it was intended: to perpetrate physical force against the person or property of another." *Id.* at 148-49 (Ackerman, J., dissenting).

[130] Courts have held that a pipe bomb has no legitimate use. *See* United States v. Jennings, 195 F.3d 795 (5th Cir. 1999); United States v. Newman, No. 97-1294, 97-1295, 1997 U.S. App. LEXIS 27000 (10th Cir. Oct. 1, 1997); United States v. Cole, No. 93-1344, 1994 U.S. App. LEXIS 3876 (6th Cir. Mar. 1, 1994). Furthermore, pipe bombs are too destructive for any productive use in farming. *See Hull*, 456 F.3d at 148 (Ackerman, J. dissenting).

[131] The use of the term "inherently dangerous" should not suggest that the possessor is strictly liable for a crime of violence. However, in accordance with the Supreme Court's holding in *Leocal*, the possession of this inherently dangerous device is a reckless disregard to the risk inherent in possessing it. *See* United States v. Newman, 125 F.3d 863, 1997 U.S. App. LEXIS 33909 (10th Cir. 1997); United States v. Dodge, 846 F. Supp. 181 (D. Conn. 1994) (holding that pipe bombs are inherently dangerous weapons and, by their very nature, there is a substantial risk that force may be used against another).

[132] 492 F.2d 217 (2d Cir. 1974).

[133] "A 'Molotov cocktail' is defined as a 'crude hand grenade made of a bottle filled with a flammable liquid (as gasoline) and fitted with a wick or saturated rag taped to the bottom and ignited at the moment of hurling.'" *Id.* at 218 n.1 (citing WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1456 (3d ed. 1961)).

[134] *Id.* at 219.

[135] *Id.*

In *United States v. Williams*,[136] the defendant was charged with selling an unregistered firearm.[137] The defendant contested that he was unaware of the fact that the firearm had been converted from a legal, registered, semi-automatic weapon into an unregistered, fully-automatic weapon, which was illegal under the statute.[138] The converted firearm had no external modifications on the weapon to indicate that it needed to be registered.[139] The Sixth Circuit interpreted the statute as requiring that the government prove "[the] defendants knew that a 'firearm' as legislatively defined was being transferred."[140] However, a later Sixth Circuit case involving a pipe bomb departed from this reasoning.[141] A pipe bomb is a device "of a type that would place a person on notice that it is likely to be regulated."[142] "Pipe bombs are inherently dangerous and serve no useful purpose. [Here t]he pipe bomb defendant was accused of possessing had been used to bomb a van and was obviously intended as a weapon and not for sport."[143] The court recognized the distinction between natural risks involved in possessing a pipe bomb versus a firearm that could be put towards legitimate, non-violent uses.[144]

Another case distinguishing the illegitimate and non-violent use of a bomb compared to a gun is *United States v. Drapeau*.[145] This case involved a defendant charged with the unlawful possession and manufacturing of a firebomb.[146] The defendant appealed his conviction on the grounds that there was no victim involved in making a bomb.[147] However, the court disagreed with this position and held that the making and possession of a bomb was a crime of violence, because there are only violent objectives that such a bomb can achieve.[148] Thus, "by its very nature, there is a substantial risk that the bomb would be used against the person or property of another."[149] The court compared possession of a

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[136] 872 F.2d 773 (6th Cir. 1989).
[137] *Id.* at 773.
[138] *Id.* at 774.
[139] *Id.* at 777.
[140] *Id.*
[141] *See* United States v. Cole, No. 93-1344, 1994 U.S. App. LEXIS 3876 (6th Cir. Mar. 1, 1994).
[142] *Id.* at *7.
[143] *Id.* at *8.
[144] *See generally id.* (discussing that distinction).
[145] 188 F.3d 987 (8th Cir. 1999).
[146] *Id.* at 989. A firebomb, also known as an incendiary bomb, is "a bomb that contains an incendiary agent (as jellied gasoline) and is designed to kindle fires at its objective." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1141 (1981).
[147] *Id.* at 990.
[148] *Id.*
[149] *Id.* The court was in the realm of the sentencing guidelines in this particular analysis. However, the risk of force still applies within § 16(b).

bomb with a felon in possession of a firearm: "being a felon-in-possession of a firearm focuses on society's determination that certain individuals—felons—are unqualified to possess firearms, even for lawful purposes. The offense of unlawfully making a bomb, however, focuses on the inherent dangerousness of, and lack of a legitimate purpose for, the bomb itself."[150]

The previous case notes an important distinction between possessing a destructive device and being a felon in possession of a firearm. This comment proposes that under the categorical approach of possessing a pipe bomb, there is no legitimate or non-violent purpose of a pipe bomb; thus, the mere possession of a pipe bomb is a crime of violence. This contention is consistent with the distinction that a felon in possession of a gun is not always an offense that, by its nature, produces a substantial risk that physical force may be used. Since a gun has legitimate purposes, courts have to analyze the particular facts of the crime charged to determine the use being put forth rather than applying a categorical approach.

In *United States v. Lane*,[151] the Seventh Circuit addressed the issue of a felon in possession of a gun and whether or not this was a crime of violence. The court recognized that the circuits have split on this issue.[152] The Seventh Circuit decided that this was not a crime of violence because there are legitimate and non-violent uses for guns.[153] The court reasoned that there are some firearms with no legitimate purposes, such as sawed-off shotguns and pipe bombs.[154] However, the defendant in this case was in possession of a firearm with a legitimate purpose.[155] "[E]x-felons have the same motives as lawful possessors of firearms to possess a firearm–self-defense, hunting, gun collecting, and target practice."[156] Possession of a firearm such as these may result in the individual

> committing another, and violent, offense, such as robbing a bank at gunpoint, but that doesn't make the possession offense violent.

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[150] *Id.* at 990 n.4 (citing United States v. Baeza-Suchil, 52 F.3d 898, 900 (10th Cir. 1995)). It may be argued that this case is distinguishable from *Hull*, because it involved making a bomb rather than the sole possession of the bomb. However, that argument would be too narrow. In addition to a charge of possession, Hull was also charged with teaching and demonstrating how to *make* a pipe bomb. *Hull*, 456 F.3d at 135.

[151] 252 F.3d 905 (7th Cir. 2001).

[152] *Id.* at 906.

[153] *Id.* Defendant here was charged with a statute defining a crime of violence that, "by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense." 18 U.S.C. § 3156(a)(4)(B) (2006). This statutory language serves the same purpose as § 16(b).

[154] *Id.* at 907.

[155] *Id.*

[156] *Lane*, 252 F.3d at 906.

> Otherwise . . . driving a car without a license is a crime of violence because people who commit that offense are likely to drive when drunk, or to speed, or drive recklessly or to attempt evade arrest. A crime that increases the likelihood of a crime of violence need not itself be a crime of violence.[157]

It is this further classification within the larger category of firearms that supports the assertion that pipe bombs, too, should be a sub-category of firearms.

A similar situation arose in *United States v. Bowers*.[158] The defendant was charged with being a felon in possession of a firearm under 18 U.S.C. § 3142(g), (f)(1)(A).[159] "A felon in possession has committed a crime of violence only if the nature of that offense is such that there is a 'substantial risk' that he will use 'physical force' against another 'in the course of his possession of the weapon."[160] This similarity in language to § 16 required the court to proceed in a categorical approach to the nature of the crime, not based on the particular facts. The court held that a felon in possession of a firearm did not create a substantial risk of physical force because the gun could be used for legitimate purposes.[161] "A substantial risk 'means a direct relationship between the offense and a risk of violence.'"[162] The possession of a firearm could occur in non-violent circumstances.[163] Once again, this sort of possession is distinguishable from possessing a pipe bomb, because no realistic situation exists where the possession of a pipe bomb could take place in non-violent circumstances.[164]

One should also consider the notion that pipe bombs and firearms are regarded as the favorite weapon of terrorists.[165] Recently, these devices have evolved into larger car bombs and truck bombs, which no

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[157] *Id.* at 907.

[158] 432 F.3d 518 (3d Cir. 2005).

[159] *Id.* at 520. Section 3142 defines a crime of violence by reference to 18 U.S.C. § 3156, which has language that is virtually identical to § 16(b). 18 U.S.C. § 3142 (2006).

[160] *Bowers*, 432 F.3d at 519.

[161] *Id.* at 521.

[162] *Id.* (quoting United States v. Singleton, 182 F.3d 7, 14 (D.C. Cir. 1999)).

[163] *Id.*

[164] It seems reasonable to suggest that courts finding a felon in possession of a legitimate but violent firearm not to be a crime of violence would consider a felon in possession of a pipe bomb to be a crime of violence.

[165] "In the past, we taught our agents and local law enforcement personnel that the favorite weapons of the terrorist were pipe bombs and firearms." Patrick J. Daly, Assistant Special Agent in Charge, Chicago Div., FBI, Testimony before the H. Comm. on Governmental Reform, Subcomm. on Gov't Efficiency, Fin. Mgmt., and Intergovernmental Relations: "Counterterrorism" (July 2, 2002), *available at* http://www.fbi.gov/congress/congress02/daly07022002.htm (last visited Apr. 17, 2007).

longer need a pipe to contain the explosives.[166] Under *Hull*, the possession of a truck bomb or even a nuclear bomb would not be a crime of violence because, apparently, there is no risk that force would be used against another person.

III. RECKLESSNESS AS A SUFFICIENT *MENS REA* FOR CRIMES OF VIOLENCE

This Part proposes that a *mens rea* of reckless conduct should suffice as a minimum level of intent for a crime of violence. As the Supreme Court stated in *Leocal*, "[t]his case does not present us with the question whether a state or federal offense that requires proof of the *reckless* use of force against a person or property of another qualifies as a crime of violence under 18 U.S.C. § 16."[167] In *Leocal*, the Court specifically stated that negligence or accidental conduct will not adequately meet the conditions of § 16, but left open the question as to recklessness.[168] The Court further specified that § 16(b) "covers offenses that naturally involve a person acting in disregard of the risk that physical force might be used against another in committing an offense."[169] This opening has resulted in a split among the circuits with respect to whether recklessness is a sufficient level of culpability to constitute a crime of violence.

When faced with this issue, the *Hull* majority determined that the offense of possessing a pipe bomb did not require any force to complete the crime; one can obtain the bomb and then simply discard or dispose of it.[170] However, this interpretation restricts the court from considering the natural risks inherent in the offense of possessing a bomb that a categorical approach requires.[171] The mere possession of a device with a capability for a high degree of destruction is a reckless disregard of the

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[166] *Id.*

[167] Leocal v. Ashcroft, 543 U.S. 1, 13 (2004).

[168] *Id.* at 9, 10 ("The key phrase in § 16(a)–the 'use . . . of physical force against the person or property of another'–most naturally suggests a higher degree of intent than negligent or merely accidental conduct." "[Section] 16(b) does not thereby encompass all negligent misconduct . . . .").

[169] *Id.* at 10. The court clarified that the disregard to risk is not "the general conduct" of the person, but that force "might be required in committing a crime." *Id.*

[170] United States v. Hull, 456 F.3d 133, 140-41 (3d Cir. 2006).

[171] The accidental detonation of the bomb would not suffice under *Leocal*. There must be, throughout the possession, a conscious disregard of the risk of force. If one recklessly handled a bomb while possessing it, they would not be "actively employing" the bomb, but certainly it can be said that the individual was consciously disregarding the risk of force. This would be enough of a level of intent to be a crime of violence. Furthermore, should courts separate the offense of making a bomb versus possessing it? If one was reckless in manufacturing the bomb, would that be enough for a crime of violence, but mere reckless possession not be so? This comment says no.

risk that force may be used. Because the *mens rea* of recklessness is enough to qualify for a crime of violence, the possession of a pipe bomb should be a crime of violence.

Our criminal justice system generally defines criminal culpability by two components: the *mens rea*—the mental function of the crime—and the *actus reus*—the physical portion of the crime.[172] "In relatively rare circumstances, a person is not guilty of an offense unless he performs a voluntary act that causes social harm with a *mens rea*, a guilty mind."[173] With respect to the *mens rea* component, there are two approaches courts may apply in determining the required guilty mind necessary for a particular crime: the common law approach and its distinction between general and specific intent, and the Model Penal Code's approach, which has five levels of culpability.[174] Where a statute has not defined the specific mental requirement, judicial bodies are in the position to determine the level of culpability required by the legislation.[175] For example, in the language of § 16, the term "used" suggests a minimum threshold of culpability. Therefore, crimes based upon strict liability and negligence will not qualify as crimes of violence.[176]

Most jurisdictions apply the common law system, which consists of general intent, specific intent, and strict liability.[177] First and foremost, strict liability is not an option for a crime of violence as per *Leocal*.[178] For a crime of violence, general and specific intent remain as options. However, these terms do not have specific definitions. General intent commonly refers to the intent to commit the underlying act.[179] With such a loose definition, judges have more room to "flex" the definition of general intent.[180] General intent includes offenses arising from negligence and recklessness.[181] On the other hand, specific intent is

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[172] JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW 115 (3d ed. 2001) ("*Actus non facit reum nisi mens sit rea*, or 'an act doesn't make [a person] guilty, unless the mind be guilty.'").

[173] *Id.*

[174] Robert Batey, *Judicial Exploitation of* Mens Rea *Confusion, at Common Law and Under the Model Penal Code*, 18 GA. ST. U. L. REV. 341, 341 (2001).

[175] *Id.* at 343.

[176] Leocal v. Ashcroft, 543 U.S. 1, 9 (2004); *see In re* Hernandez-Villalobos, No. A92-924-547, 2005 WL 1104592 (B.I.A. Jan. 27, 2005) ("According to . . . [*Leocal*], a crime of violence under 18 U.S.C. §§ 16(a) and 16(b) must involve a higher degree of intent than negligent or merely accidental conduct.").

[177] Batey, *supra* note 174.

[178] *Leocal*, 543 U.S. at 6. Because negligence is an insufficient *mens rea*, it is implicit that strict liability, which does not require a *mens rea*, is also insufficient.

[179] DRESSLER, *supra* note 172, at 136.

[180] Batey, *supra* note 174, at 366.

[181] DRESSLER, *supra* note 172, at 136.

typically the intent as it is written into the statute; the *mens rea* is easily recognizable.[182] Where the legislature has not stated any explicit level of intent, the courts "generally presume that proof only of 'general' rather than 'specific' intent is required."[183]

When determining the level of intent for possessing a pipe bomb under the common law approach, courts would reach a dead end. The intent needed to possess a pipe bomb is specific intent as defined in a particular statute.[184] However, taking a broader view of the crime of possession, it may also be construed as a crime of general intent because the individual has the mindset to possess a bomb simply to achieve its sole purpose of destruction. While support for this position is limited, this possession can be analogized to the possession of a large quantity of illegal drugs. When an individual is caught in this situation, the law may presume that there was an intent to distribute the drugs.[185] This conduct parallels the possession of a bomb; therefore, courts should apply the presumption that the offender will detonate the bomb, the bomb's sole purpose. Viewing possession of a pipe bomb as a general intent crime with the *mens rea* to achieve the purpose of a bomb, the reckless conduct of possessing the bomb remains a candidate for a crime of violence.[186]

As noticeable from the convoluted argument above, the general/specific intent dichotomy is not very workable.[187] The Model Penal Code attempted to simplify the common law methodology by creating five levels of culpability: purpose, knowledge, recklessness, negligence, and strict liability.[188] This comment deals with the faint distinction between negligence and recklessness.

The Code provides definitions for negligence and recklessness.[189] The Code defines "negligence" as when an actor *fails* to recognize a substantial risk of injury to result from the action, and that such actor

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[182] A common example of specific intent is the crime of larceny, which requires, as an element, the intent to permanently deprive the other person of his property. DRESSLER, *supra* note 172, at 136.

[183] Batey, *supra* note 174, at 353 (quoting United States v. Francis, 164 F.3d 120, 121 (2d Cir. 1999)).

[184] *See* 18 U.S.C. § 842(p) (2006).

[185] "Intent to distribute may be inferred from the possession of a quantity of drugs too large to be used by the defendant alone." United States v. Kates, 174 F.3d 580, 582 (5th Cir. 1999).

[186] *Id.*

[187] "[C]ourts['] us[e of] the common law mens rea methodology does not paint a pretty picture, at least not in a governmental system where a purported commitment to the principle of legality requires that the legislature define criminal laws in advance of their enforcement." Batey, *supra* note 174, at 400.

[188] MODEL PENAL CODE § 2.02(2)(c)-(d) (Official Draft and Revised Comments 1985).

[189] *Id.* § 2.02(2).

should have been aware of such risk.[190] In contrast, the definition of "recklessness" includes actions where an actor *was aware* of such a risk and chose to disregard it.[191] The similarity between these two categories has made it difficult for courts to distinguish between them.[192] However close in degree they may be, it is this slight difference in the degree of culpability that separates this *mens rea*.

Although a crime of violence may not have a *mens rea* of negligence, crimes of violence are severe enough that a *mens rea* of recklessness should suffice. Furthermore, the possession of a pipe bomb is an act that has no legitimate or nonviolent purpose.[193] Possessing a bomb is not simply failing to perceive a risk. Rather, it is the conscious disregard of a substantial risk that force will be used against another.[194] Referring to the previous interpretation that actual use is not required by § 16, this conscious disregard creates such a substantial risk that force may be used simply by possessing a bomb.[195]

"[W]hen interpreting a statute that is silent with regard to culpability, courts employing the Model Penal Code's *mens rea* methodology should read in a minimum requirement of recklessness"[196] In *Park v. INS*, the defendant was convicted of involuntary manslaughter.[197] The defendant pled guilty to beating a woman to death in a self-performed exorcism.[198] As a result of her alien status, the defendant was subject to deportation resulting from her conviction of an aggravated

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[190] *Id.* § 2.02(2)(d).

> A person acts negligently with respect to a material element of an offense when he should be aware of a substantial and unjustifiable risk that the material element exists or will result from his conduct. The risk must be of such a nature and degree that the actor's failure to perceive it, considering the nature and purpose of his conduct and the circumstances known to him, involve a gross deviation from the standard of care that a reasonable person would observe in the actor's situation.

Id.

[191] *Id.* § 2.02(2)(c).

> A person acts recklessly with respect to a material element of an offense when he consciously disregards a substantial and unjustifiable risk that the material element exists or will result from his conduct. The risk must be of such a nature and degree that, considering the nature and purpose of the actor's conduct and the circumstances known to him, its disregard involves a gross deviation from the standard of conduct that a law-abiding person would observe in the actor's situation.

Id.

[192] Batey, *supra* note 174, at 360-80.

[193] United States v. Hull, 456 F.3d 133, 148 (3d Cir. 2006) (Ackerman, J. dissenting).

[194] United States v. Jennings, 195 F.3d 795, 798 (5th Cir. 1999).

[195] *Hull*, 456 F.3d at 144 (Ackerman, J. dissenting).

[196] Batey, *supra* note 174, at 403.

[197] 252 F.3d 1018 (9th Cir. 2001).

[198] *Id.* at 1020.

felony.[199] The underlying statute defined one example of an aggravated felony as a crime of violence defined by § 16.[200] The defendant appealed the removal proceedings arguing that with a *mens rea* of recklessness, involuntary manslaughter could not stand for a crime of violence.[201] The Ninth Circuit disagreed.[202] Based on binding prior precedent, the court declared that involuntary manslaughter was a crime of violence.[203] Reckless conduct was sufficient for a crime of violence.[204] The *Park* decision was later reaffirmed in *United States v. Ceron-Sanchez*.[205] There, the Ninth Circuit held that an aggravated-assault conviction based on reckless conduct did qualify as a crime of violence under both prongs of § 16.[206] Furthermore, in *United States v. Trinidad-Aquino*,[207] the court once again confirmed that "recklessness is a sufficient *mens rea* for a crime of violence."[208] The court stated that

> *Park*'s assertion "that an intentional use of physical force is not required" is perfectly compatible with our analysis–the "crime of violence" definitions do not require an intentional use of force, but they do require a volitional act. To use the language of *mens rea*, the crime need not be committed purposefully or knowingly, but it must be committed at least recklessly.[209]

This reasoning was also the holding in *United States v. Hernandez-Castellanos*.[210] In that case, the court agreed with its previous rulings, but further stressed that "[f]or a crime based on recklessness to be a crime of violence under § 16(b), the crime must require recklessness as to, or conscious disregard of, a risk that physical force will be used against another, not merely the risk that another might be injured."[211]

These cases exemplify that if recklessness is the base level of intent under a statute, then *Leocal* will not preclude them from qualifying as a crime of violence. The methodology employed by these cases is still viable, even if some of the holdings may have been overruled, because recklessness has not been foreclosed by the Supreme Court. Referring

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[199] The INS brought this action pursuant to section 241(a)(2)(A)(iii) of the Immigration and Nationality Act. *Id.*
[200] *Id.* at 1021.
[201] *Id.* at 1020.
[202] *Id.*
[203] *See* United States v. Springfield, 829 F.2d 860, 863 (9th Cir. 1987).
[204] *Park*, 252 F.3d at 1025.
[205] 222 F.3d 1169 (9th Cir. 2000).
[206] *Id.* at 1173.
[207] 259 F.3d 1140 (9th Cir. 2001).
[208] *Id.* at 1146 (quoting *Park*, 252 F.3d at 1024).
[209] *Id.* (citation omitted).
[210] 287 F.3d 876 (9th Cir. 2002).
[211] *Id.* at 881.

back to the issue in this comment, the lack of any non-violent or legitimate use of a pipe bomb creates a risk that force will be used against another. This risk is then consciously disregarded when possessing the bomb. Therefore, the reckless conduct of possessing a bomb should suffice as a crime of violence.

The dissent in *United States v. Medina-Anicacio* also supports the argument that reckless conduct may suffice as a level of intent for a crime of violence.[212] The dissent in *Medina-Anicacio* applied a similar line of reasoning to the dissent in *Hull*. In *Medina-Anicacio*, the defendant was an illegal immigrant who had been previously convicted of possessing a deadly weapon (an adjustable dagger).[213] For the purposes of the immigration removal, the majority held that this possession was not a crime of violence.[214] However, the dissent raised numerous arguments against this holding. First, "the only purpose of possessing a concealed dagger is the application of 'physical force . . . against the person of another' when the need arises."[215] This offense, by its nature, involves a substantial risk of force and should qualify as a crime of violence under § 16(b).[216] Second, the possession of a concealed dagger "involves *more* than simple recklessness: it requires [that] the offender 'knowing and intentionally' carry the concealed dagger."[217] Third, as with the possession of a pipe bomb, the dissent reasoned that the "unlawful possession of a dangerous weapon is an ongoing course of conduct," which remains ongoing until possession ceases.[218] "Thus an individual continues to commit the offense as long as he holds onto the weapon . . . [resulting in] a substantial, continuing risk that offender will" use physical force.[219] The dissent concluded by noting that "one who commits the concealed dagger offense by 'knowingly and intentionally' carrying a concealed dagger is being more than reckless regarding the probability that he will intentionally use physical force in the course of his possession of the dagger."[220]

The dissent's reasoning should be applied to cases involving the possession of a pipe bomb. A pipe bomb, like a dagger, is a violent instrument with no other purpose than to be forcefully used against another. This danger can be contrasted to a non-violent instrument, such

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[212] 325 F.3d 638, 648-49 (5th Cir. 2003) (Garza, J., dissenting).
[213] *Id.* at 641.
[214] *Id.* at 648-49.
[215] *Id.* at 649 (Garza, J., dissenting) (quoting 18 U.S.C. § 16(b)).
[216] *Id.*
[217] *Id.*
[218] *Id.* at 650.
[219] *Id.*
[220] *Id.* at 651 n.13.

as the vehicle in *Leocal*, to emphasize the point that the possession of an item with strictly violent and illegitimate attributes is a conscious disregard to a substantial risk of force. Finally, it is argued that the majority's opinion in *Medina-Anicacio* is inconsistent with plain language of § 16(b). "It is unrealistic to conclude . . . that carrying a dagger [or possessing a pipe bomb] does not 'involve[] a substantial risk that physical force . . . may be used."[221] The possession of a pipe bomb, by its very nature, creates this reckless disregard to such a substantial risk.[222]

CONCLUSION: RAMIFICATIONS AND PRECEDENT FROM THE *HULL* CASE

Simply because the possession of a bomb is distinguishable from using a bomb does not remove the substantial risk of physical force inherent in possessing a bomb. It appears that the *Hull* court reached its decision based on a technicality within the indictment that failed to state Hull would "use" the bomb.[223] However, stretching this reasoning to its logical extreme will result in regrettable conclusions. In one extreme example, a court would have to decline to hold the mere possession of an atomic bomb as a crime of violence. The holder(s) would simply argue, "Hey, I wasn't using it. I was just holding on to it." One can possess a bomb and store it in their residence and then argue that these facts do not satisfy the "use" requirement. Or, an individual can possess a bomb by strapping it to his or her chest, covering it with an overcoat, and walk into a building. Depending on the snap-shot of time, instead of the continuing offense, the culprit could claim that there was no use of the bomb since he or she was only in possession of it. Under the Third Circuit's current interpretation, neither of these scenarios would constitute as a crime of violence. Much violence results from car bombs

[221] *Id.* at 652.

[222] Some courts do not consider reckless conduct a sufficient *mens rea* for a crime of violence. *See, e.g.*, Tran v. Gonzalez, 414 F.3d 464, 464, 472 (3d Cir. 2005) (holding that "reckless burning or exploding" did not constitute a crime of violence under § 16); Jobson v. Ashcroft, 326 F.3d 367, 373 (2d Cir. 2003) ("The risk of serious physical injury concerns the likely effect of the defendant's conduct, but the risk in section 16(b) concerns the defendant's likely use of violent force as a means to an end."); United States v. Rutherford, 54 F.3d 370, 374 (7th Cir. 1995) (holding that recklessness conduct does not qualify as "use" of force).

[223] "In contrast, had Hull been charged in the indictment with *using* a pipe bomb, then commission of such an offense would 'involve[] a substantial risk that physical force against the person or property of another may be used in the course of committing' *that* offense." United States v. Hull, 456 F.3d 133, 139 (3d Cir. 2006). The *Hull* Court could have reached the alternative conclusion even with the indictment's wording by categorizing destructive devices separately.

and suicide bombers. Qualifying possession as a crime of violence serves as one more tool for defending national security.

If the defendant accidentally tripped and detonated the bomb, courts would fail to term this action a crime of violence, because this conduct is negligent conduct as per *Leocal*. However, by classifying the bomb in a category with other objects having no legitimate or non-violent purpose, a court could permissibly convict the defendant in this situation for a crime of violence. This would be consistent with *Leocal* and also support the reckless conduct as the minimum level of intent. In the international struggle against terrorism and other national threats (nations possessing nuclear weapons and weapons of mass destruction, but not actually "using" them), the expansion of crimes of violence to include reckless conduct is imperative. A crime of violence incorporates a much harsher penalty with the intention that this will both specifically and generally deter these crimes.